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,
Hon. SAMUEL WELLS.
} Justices.

A TABLE

OF

CASES REPORTED

IN THIS VOLUME.

ERRATA.

Page 22, line 18 of the abstract, before the words "is not erroneous" insert "they would find a conversion."

Page 379, last line, the figures 10, 11, 12, should read 9, 10, 11.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF CUMBERLAND,

ARGUED APRIL TERM, 1848.

JAMES C. HILL *versus* JEREMIAH BAKER *& al.*

All the owners of the milldam complained of, should be joined in a complaint to obtain damages by the flowing of the land of the complainant by such dam, under the provisions of Rev. Stat. c. 126. And if they are not all joined, the complaint will be dismissed, if the nonjoinder be pleaded in abatement.

A COMPLAINT, signed by James C. Hill, of which the following is a copy, was filed, and notice ordered thereon.

"STATE OF MAINE.

"Cumberland ss. At the Western District Court, begun and held at Portland, within and for said county of Cumberland, on the third Tuesday of June, being the fifteenth day of said month, Anno Domini, 1847, by the Hon. Daniel Goodenow, Judge: —

"The petition of James C. Hill of North Yarmouth, in the county of Cumberland, merchant, showing and praying that a summons may issue in due form of law to Jeremiah Baker and Silvanus Blanchard, of said North Yarmouth, yeomen, for that said complainant, at said North Yarmouth, on the 10th day of February, in the year 1844, and long before and ever since was and is seized in his demesne as of fee, and actually possessed

of a certain piece of meadow land, situate in said North Yarmouth, and containing four acres more or less, bounded as follows, to wit: — northerly by the county road, leading from Pownal to Portland, easterly and southerly by Royall's river and land of Thomas Pratt and Nathaniel G. Marston. But the respondents being tenants in common of a certain grist-mill, erected on their land below said meadow, on said Royall's river, for the purpose of raising a suitable head of water to operate said mill, have ever since said tenth day of February, maintained and kept up and still continue to keep up and maintain a high dam extending from the western shore of said river, into and across the same, and by means thereof have caused the water of said river to overflow and drown the complainant's land aforesaid, whereby said meadow has been rendered useless, and the complainant has been greatly impeded in his operations in widening and deepening a certain ancient channel through said meadow, called the Forge Stream.

"Wherefore the said James C. Hill prays that proper notice may issue, and the respondents be held to answer to the complainant according to the statute, in such case made and provided.

"Dated at North Yarmouth, this tenth day of February, in the year eighteen hundred and forty-seven."

Baker and Blanchard entered their appearance in Court, and filed a plea of which a copy follows: —

"The said Jeremiah Baker and Silvanus Blanchard come, &c., when, &c., and pray judgment of the complaint aforesaid, and say, that they are part owners of the dam mentioned in the complaint aforesaid, and of the grist mill therein described, as tenants in common with one Benjamin Mitchell and one Samuel P. Baker, who are also part owners of the same, and that the injury complained of in the plaintiff's complaint, if any, was caused by the dam erected by the respondents jointly with the said Benjamin Mitchell and said Samuel P. Baker, and for which the said Mitchell and Baker are jointly responsible with the respondents; and this they are ready to verify. Wherefore because the said Benjamin Mitchell and

Samuel P. Baker are not named in said complaint, the said Jeremiah Baker and Silvanus Blanchard pray that the same may be quashed and for their costs.

"By their attorney, Philip Eastman."

To this plea the complainant demurred generally; and the respondents joined in demurrer.

The case was argued in writing.

B. Freeman for the complainant.

The question raised by the pleadings in this case is, whether in the process given by the 126th chap. Rev. Stat. for the ascertainment of damages by flowage, the complainant is bound to join all the owners of the mill, for the use of which the head of water causing the injury was raised.

For the true interpretation of all statutes, four things are to be considered: — What was the common law before the act: — What was the mischief to be remedied: — What remedy the legislature has provided to cure the defects, and the true reason of the remedy. 1 Kent, 464.

At common law, any person might erect and maintain a water mill on his own land and raise a head of water for working it; but if he thereby injured the land of another, the injured party might recover his damages by an action in form *ex delicto*. And if the injury was caused by the joint act of several individuals, the injured party had his election, to sue all or some of the parties jointly, or one of them separately, because a tort is in its nature the separate act of each individual. 1 Chitty's Plead. 86, 87.

The mischief to be remedied, was doubtless the multiplicity of suits to which the owners of mills were subjected for the recovery of damages, incident to raising a suitable head of water for working them. The statute remedies the mischief by substituting for the process at common law, the process therein provided, which allows the owner or occupant of the mill to pay to the owner of the land flowed, the estimated yearly damages, and takes from the land owner, his action at common law. The true reason of the remedy may be found in the fact that the statute encourages the erection of mills by re-

lieving their owners from frequent suits, without abridging the land owner's remedy for injuries sustained thereby. The several liability of the joint owners of mills was not the mischief to be remedied; and it cannot be presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely required. 1 Kent, 464.

The statute extends its protection to mill owners on certain conditions. It does not lessen the obligation of individuals so to use their own as not to injure another, but allows an act to be done, which is in its nature a tort, under certain conditions and regulations, subject to which it may well be denominated a regulated tort; and when done by several persons jointly should be regarded in practice, as it is in its nature, several as well as joint. It might be premised of the process by statute, that it should be as certain in practice as the process at common law for which it is substituted. And had it required the complainant to join all the owners of the mill complained of, in the preliminary process for the ascertainment of his damages, it might well have been objected to as a hardship upon both parties, subjecting the respondents to unnecessary cost, and taking from the complainant a common law right, highly beneficial to him, and in no way injurious to the respondents. If it was the intention of the legislature to make mill owners jointly and not severally liable to be complained of, why was the injured party allowed to complain of the occupants? No argument can be raised against the several liability of the owners, that may not be urged with more force against the liability of the occupant. It is just therefore to infer, that if the occupant who may, or may not be an owner, can be made a respondent in this process, those who confess themselves in the pleadings, to be owners, may be held to answer. The fact that the respondents are tenants in common of the mill, with others not joined in the complaint, does not, in this case, affect the rights of the complainant. He has still his election to complain of one, some, or all of the owners. 14 Johns. 426.

The 7th section of the act in question provides, that a copy

of the complaint shall be served on the person complained of, &c. The 9th sec. says, the owner or occupant may appear and plead, &c., and the words, owner or occupant, are uniformly used to designate the party complained of. There is nothing in the language of the statute to warrant the inference, that all the owners must be made respondents. And in view of the facts that they were severally liable at common law; that their several liability was not the mischief which the statute seeks to remedy; that the statute regulations do not change the nature of the act complained of; that no unnecessary innovation upon the common law can be presumed; and that the innovation contended for, is not only unnecessary, but injurious to both parties; it is difficult to perceive on what grounds it can be maintained, that the respondents in this complaint, who acknowledge their ownership, should not be held to answer.

Eastman, for the respondents.

This complaint is made against Jeremiah Baker and Silvanus Blanchard, as tenants in common of a grist mill and dam.

The counsel for the complainant says, that, at common law, if a mill owner, by his dam, overflows and injures the land of another, the injured party might recover his damages by an action, in form *ex delicto*. And if there were several mill owners, he had his election, to sue all, or any one or more of them, jointly or separately; and that the mischief, to be remedied, was, the multiplicity of suits, to which the owners of mills were subjected, for recovery of damages; that the remedy provided by the statute was, the substitution of the process by complaint, for the suit at common law; and that, the true reason of the remedy was, the encouragement of mills. All this we admit. But when he says, the *several liability* of the joint owners of mills was not a mischief to be remedied, we dissent from his opinion. The preamble to the colonial act of 1714, c. 111, recites generally, that it was intended for the "prevention of controversies and lawsuits for the future," in relation to damages by flowing. The preamble to stat. 1796, c. 74, recites, that "the erection and support of mills, to accommodate the in-

habitants of the several parts of the State, ought not to be discouraged by many doubts and disputes." In *Stowell* v. *Flagg*, 11 Mass. R. 364, the court say, the statute was "made expressly to relieve mill owners from the difficulties and disputes they were before subject to; there can be no doubt of the intention of the legislature to take away the common law action, which might be renewed for every new injury; and so, burthen the owner of a mill with continual lawsuits and expenses." A principal object of the statute, then, was to prevent a multiplicity of lawsuits. But the counsel for the complainant says, it was only intended to prevent the multiplicity, by succession, for successive injuries; and not a multiplicity of suits for the same injury, if there should chance to be a multiplicity of owners, causing the injury.

In the present case, there are four owners. The counsel for the complainant says, he has the right to file a separate complaint against each. Here, then, are four separate and distinct complaints. Upon each complaint, a separate committee is appointed. Each committee goes out separately, and makes its several estimate of the damages, and makes return thereof into Court; and judgment is rendered upon each. Thus, we have a fourfold assessment and recovery of the damages for past injuries, with a bill of costs to each, aggravated by the heavy expenses of the view, with four distinct appraisals of the yearly damages, to serve as the basis of future claims. Perhaps no two estimates will be alike. If so, which shall be taken? Or, shall the owners be compelled to pay the aggregate of the whole? Or, will the Court assess the average of the several estimates? On the principle contended for, by the complainant, if there be fifty, or a hundred owners of a mill, each one would be liable to a separate complaint, with all these absurd consequences.

At common law, not only the owners of the dam, but all those employed as laborers, or otherwise, in erecting or maintaining the dam, were liable to separate suits; but the statute remedy lies only against the owners or occupants. Here, then, is another innovation upon the course of the common law.

The position assumed by the counsel for the complainant, that the statute was made to prevent the multiplicity of suits, will be most effectually sustained, and with the least injury, and with the greatest benefit, to all, by the construction contended for by us.

But, the prevention of a multiplicity of suits, by substituting the process by complaint, was not the only object of the statute. By the common law, such a dam was a nuisance, which the owner of the land flowed, might cause to be abated; or, which he might tear away, without process of law; so that, even a submission to a multiplicity of suits would not enable the mill owner to sustain his dam. And, one prominen tobject of the statute was, to give to the mill owner an indefeasible right, to maintain his dam, notwithstanding it might overflow and injure the land of others. The Provincial act of 1714, after a preamble, reciting, "Whereas, it hath been found by experience, that, when some persons in the Province have been at great cost and expenses for building of mills serviceable for the public good and benefit of the town, or considerable neighborhood, in or near to which they have been erected," and have been subjected to lawsuits, in consequence of flowing lands of other persons, it is enacted, that the owner or owners of such mills "shall have free liberty to continue and improve such pond, for their best advantage, without molestation." The act then provides for the appraisal and payment of the damages, in manner similar to our present statute.

So, the act of 1796, c. 74, after reciting, "Whereas the erection and support of mills, to accommodate the inhabitants of the several parts of the State, ought not to be discouraged by many doubts and disputes," provides, that "it shall be lawful for the owner or occupant of a mill, the dam of which flows the land of other persons, "to continue the same head of water to his best advantage, in the manner, and on the terms hereinafter mentioned." And the act then provides for the appraisal and payment of damages, as under the present statute.

Our Revised Statutes, c. 126, § 1, say, "Any man may erect

and maintain a water mill, and a dam to raise water for working it, upon and across any stream, that is not navigable, upon the terms and conditions, and subject to the regulations hereinafter expressed."

In *Tinkham* v. *Arnold*, 3 Greenl. 120, the court speak of this privilege of flowing, as, a "license given by law," "a license given by the statute," and say, "where a man has a legal right, which is disclosed to the court, he shall not be received to say, he holds by wrong." The same idea is brought to view, in *Hathorne* v. *Stinson*, 3 Fairf. 183.

The counsel for the complainant says, the statute "allows an act to be done, which is, in its nature, a tort, under certain conditions and restrictions; subject to which it may well be denominated a regulated tort. And when done by several persons, jointly, it should be regarded, in practice, as well the several act of each individual, as the joint act of all." His inference from this position is, that the several remedy remains, under the statute, as in all cases of tort, at common law, against each of the tort-feasors.

But we deny the correctness of his position. We say, that, at common law, a mill owner, flowing the land of another, by means of his dam, was guilty of a wrong; but, under the statute, the same act becomes a matter of right. Its legal nature is changed. The statute gives him "free liberty." He has as perfect authority, so far as the act itself is concerned, to flow the land of another, as to flow his own. His obligation to pay the damages, does not affect the question of mere right. *Charles* v. *Monson & Brimfield Manuf. Co.*, 17 Pick. 70. The statute expressly takes away the right to sue at common law, and the substituted process does not in any degree partake of the nature of a remedy for a tort.

By Rev. Stat. c. 126, § 20, after an appraisal of the damages by a committee on a complaint, debt or assumpsit is prescribed as the action to enforce payment of the yearly damages. This circumstance clearly indicates the legal character of the act. Under the statute, that which before was a tort, becomes a contract. The law says, you have the right

to flow your neighbor's land; but, in the exercise of that right, you impliedly promise to pay him the damage he sustains. The performance of that promise is to be enforced, in the first instance, by complaint, and a committee to estimate the amount — and, subsequently, by action of assumpsit. Instead, therefore, of being a "regulated tort," it becomes a statute contract, and, to be enforced, under rules adapted to other contracts.

That the statute did take from the complainant a common law right is freely conceded. It was the express design of the statute to abridge the "common law right" to harass the mill owner with a multiplicity of suits; but, it substitutes a mode of redress, plain and simple, by which he can obtain full indemnity, with much greater certainty, than by suit at common law; and, by which he can have the whole matter settled and put to rest, as to past, present, and future damages, at a single trial. He has also ample security for payment, in the lien, which the statute gives him, upon the mill and dam. We do not perceive any hardship in this. He may, at his election, commence his process against "the occupant," as such — the man, who is openly and visibly in possession; or, against the owner, if but one, or against all the owners, if there be several; and it will be sustained. In either case, the lien is his security for payment. In what respect, does he lose "a common law right, highly beneficial?"

In all other cases, it is regarded as a fundamental maxim in the administration of justice, that no adjudication shall be made, upon a person's rights, without notice, and an opportunity to be heard. *Gordon* v. *Hobart & al.* 2 Sumner, 407.

That the rights of all the mill owners are involved in the adjudication, even where the complaint is prosecuted only against one part owner, is obvious.

By § 19, of the statute, a lien is given to the complainant on the mill, mill dam, appurtenances, and lands, for the amount, which he may recover. By § 20, he may maintain an action of debt or assumpsit, based upon the adjudication, against the person who shall own or occupy the mill when he shall bring

such action. In such action against all the owners, the adjudication, as to the yearly damages, is conclusive, and cannot be impeached, though the original complaint was only against one. By § 21, having obtained judgment, whether on the original complaint, or in such subsequent action for the yearly damages, he may levy his execution upon the mill and premises, so subject to the lien, and sell it at auction. *Lowell* v. *Shaw*, 15 Maine R. 242; *Jones* v. *Pierce*, 16 Maine R. 411.

The counsel for the complainant, in support of his position, cites *Low* v. *Munford*, 14 Johns. 426. That was not a complaint under the statute, but an action at common law, for flowing, in form *ex delicto*, as for a tort. It was decided upon common law principles, perfectly familiar — and, being a case entirely different from the present, can have no influence in the decision of the present question. It is not disputed, that at common law, an action could have been maintained against any one or more, without joining the whole.

In cases of flowage, under the statute, the mere act of flowing will not sustain the complaint; — it must appear, that there is actual damage, which the mill owners ought to pay; — and it is for this neglect to pay — an omission — a *non feasance*, in regard to a duty imposed by the statute — a duty, arising out of the joint ownership of the dam — and the joint act of the owners, in building the dam, that the complaint can be sustained. The duty of paying, implied and imposed by the statute, is equally incumbent upon all, and it would seem that all ought to be joined in the complaint.

In *Converse* v. *Simmes*, 10 Mass. R. 377, the court distinctly recognize the right of an owner of part of a mill, to have his partners joined in a complaint for flowing; and strongly intimate, that the non-joinder may be taken advantage of, in abatement.

If the principle contended for by the counsel for the complainant be correct, it would involve many unequal and unjust, not to say, absurd, consequences: Thus — in case of a complaint, and judgment, against one of several owners, as in the present case, if he were compelled to pay the whole damage,

the statute gives him no authority to call upon the others, to pay their proportion. Whereas, if it were a joint judgment against all, and payment was enforced against one, he could call upon the others for contribution.

So, a part of the mill owners might induce the owner of the land to prefer his complaint against the other owners alone, and so compel them to pay the whole damages without the power of calling upon them to contribute.

So, in case of a complaint against a single owner, he might consent to an assessment of damages enormously high, with a secret understanding, that it should be enforced only against his co-tenants; and the lien upon the mill would enable the complainant to enforce payment against them.

So, under the provisions of § 31, one part owner might agree as to the amount of the damages to be paid; and, if the principle contended for by the complainant's counsel be correct, all the other mill owners will be bound by it.

Freeman, in reply, among other things, said, that the mill owner virtually disseizes the land owner. It may be that he can plead a statute in justification. But he can plead in bar to the land owner's process, that he disseized him not alone, but jointly with others. The owner of the land is not bound to know by how many his rights have been invaded.

The right to file a separate process against each of the co-tenants of a mill is not contended for. The position is, that the complainant, for the purpose of obtaining commissioners to estimate his damages, has a right to pray the court to issue a summons to any one or more of the owners or occupants of the mill complained of, "so describing the land and stating the damage, that the record of the case may show with sufficient certainty the matter that shall have been heard and determined therein." And if more than one complaint should be filed for the same cause of action, the ninth section of the statute allows the respondent to plead in bar to the same.

It was the design of the legislature to grant to mill owners the privilege of keeping up their dams, whenever in the judgment of the commissioners the injury to the lands flowed should

be so small in comparison to the benefit resulting to the mill owners from keeping up the head of water to the height causing the flowage, that the granting of this license should on the whole be deemed "serviceable for the public good." But this must depend upon the circumstances of each case. The mill owner must take the right to flow the land of others subject to the provisions and conditions of the statute.

The process lies against an occupant of a mill, who is not an owner, and all the difficulties, and more, would then exist, which have been urged for the respondents, when the process has been brought against a part owner. The rights of the mill owners are determined by such process against the occupant. And when the process is against an occupant or part owner, either may call on the owners, or other part owners, of the mill for their respective proportions of the damages. And was so holden by the Court in the case of *Lowell* v. *Shaw*, cited for the respondents. The statute does not require, or imply, that the process should be brought against all the cotenants of the mill and dam causing the flowage.

The opinion of the Court was drawn up by

WHITMAN C. J. This is an application under the Rev. Stat. c. 126. The respondents plead in abatement, that there are other owners, of the mill dam complained of, who are not named in the application; and to this the applicant demurs. The truth of the allegation in the plea, that there were other owners of the dam not named in the application, is, therefore admitted. And the question from thence arising, is, was it essential that the other owners should have been joined with the respondents in the application.

In an action at common law, for injuries arising from the reflux of waters, occasioned by the erection of mill dams, such a plea could not be sustained. But by the statute the action at common law, except under particular circumstances, is abolished. There is now no remedy for an individual, so injured, except it be under the statute, or when mill owners fail to comply with its provisions. The mill owners, in the first

instance, are empowered to flow the lands of others. Any restriction or regulation of the flowage must be obtained on application of the party injured. The mill owners, therefore, in flowing the lands of others, are not originally tort feasors. The process authorized against them is not as tort feasors, but is rather in the nature of a bill in equity, to obtain redress for the injury occasioned by the flowage; and to obtain that, which is in effect an injunction against an unreasonable exercise of the right of flowage. It is manifest in such case, that all the parties in interest should be before the court. The statute seems clearly to contemplate that such should be the case. The rights of all those interested in the dam are to be affected. The applicant is to have a lien, from the time of his application, upon the dam, mill and privileges (§ 19) for his damages. The restrictions upon flowage are to affect all the owners alike. It would be impracticable to regulate it otherwise. If judgment be obtained, in a suit, and execution be thereon issued, for the damages awarded (§ 21) it may be levied upon the whole of the dam, mill and privilege by a sale at auction. It is one of the first principles in administering justice, that the rights of no one shall be affected without an opportunity to be heard in his defence. All the owners of the mill and dam, therefore, should be before the court, before any proceeding should be had against them.

It is true that it may be difficult in some instances, to ascertain who the owners of a mill privilege are. But this is a difficulty similar to what occurs in actions of assumpsit at common law, in many cases, the inconvenience in which has been provided against recently by statute; and the legislature may see fit to apply a similar remedy in cases of flowage.

Plea in abatement adjudged good—

Application dismissed.

Elizabeth Scott *versus* Luke Perkins.

It is not necessary, that the caption of a deposition should specify the kind of action in reference to which it was taken.

Where the testator, by will provided, that "my will is, that all my property, real and personal, in the town of M. and the income of the same be given to my wife, E. S. to be used and disposed of by her for her convenience and comfort during her life," and that as to what "may remain after the decease of my wife, E. S. distribution be equally made to them (his children) who survive," and the legal representatives of such as have deceased; it was holden by the Court, that E. S. had the power to sell and dispose of such personal estate.

In an action of trover for the conversion of sheep, an instruction to the jury by the presiding Judge of the District Court, "that if they were satisfied that the defendant was aware of the wrong of S. and undertook to aid him to secrete the sheep, and keep them from the true owner; or if they were satisfied, that the defendant had been indemnified before the suit was commenced for withholding the sheep from the true owner, and preventing her from enjoying her property; or that he confederated with P. & S. for that purpose, and that he did withhold the sheep," is not erroneous.

Exceptions from the Western District Court, Goodenow J. presiding.

Trover for ten sheep. The general issue was pleaded and joined. Much testimony appeared in the exceptions respecting the property in the sheep and the conversion thereof by the defendant.

The questions of law arising in the case will be sufficiently understood from the requests for instruction, the instructions given, and the opinion of this Court.

The plaintiff contended that the will gave an absolute title to the widow to all the personal estate of said Jonathan Scott, that was located in the town of Minot, unless said estate should be necessary for the payment of debts, expenses of administration, &c., that if the will did not give an absolute title, it gave a life estate with power in the widow to dispose of the same or any part thereof, that might be necessary for her comfort and convenience; the defendant contended that the will gave the widow no more than a life estate. The plaintiff contended that if the will gave no more than a life estate in

the sheep, still there was no remainder in them at the death of the widow, because the facts show that the widow outlived all the sheep; but the court instructed the jury, that the will gave to the widow, power to sell them absolutely, if it became necessary for her to do it for her comfort and convenience, but that if it was not necessary for her to do so, to make herself comfortable and supply her necessities, she would have no right to dispose of them or give them away without such necessity, and the whole evidence was before the jury, and they could decide whether there was or was not, a valuable consideration for said bill of sale.

The plaintiff contended, that the evidence showed that Elizabeth had been in possession of all the sheep on the farm for nearly four years, and dealing in them and selling them, and purchasing, after the purchase from her mother, and that possession was *prima facie* evidence of property, and could not be controlled except by proof that some one of the sheep sold to Perkins, was the same sheep that Elizabeth purchased of her mother; which the evidence did not show, and which was highly improbable. And the defendant contended that the plaintiff must not only prove ownership, but a right to immediate possession at the time of the demand, and that as Benjamin, the administrator, had delivered them to the defendant, and as the administrator had inventoried the sheep, as a part of the estate of Jonathan Scott, he was *prima facie* the owner, and rightfully in possession, and that Elizabeth Scott had no right of possession when the demand was made. But the Court declined to give either of these instructions, but instructed the jury, that if Elizabeth Scott had satisfied them by the evidence in the case, that it was necessary for the widow to dispose of the sheep and other articles in the bill of sale named, for her comfort and convenience, and if they should be satisfied that the plaintiff had paid a full, *bona fide*, and meritorious consideration therefor, towards the comfortable support of the widow, they should render their verdict for the plaintiff if they were also satisfied that the defendant had converted the sheep to his own use; but otherwise they should give it for the defendant.

Upon the point of conversion, the plaintiff contended that if the jury should be satisfied that the defendant purchased the sheep; or that he claimed the full ownership of them in exclusion of the plaintiff, or if he sold them to Benjamin Scott, or if he delivered them to Benjamin Scott, knowing him to be irresponsible after the plaintiff had forbidden him to do so, either of those facts would furnish sufficient evidence for a conversion, or if he should peremptorily refuse to give them up on demand, or if he should refuse in a qualified manner and then should not deliver them up in a reasonable time, and that if the demand was as early as the tenth of May, the date of the letter produced, or even if the demand was as early as the 12th or 14th, or even the 16th of May, the defendant made himself liable for his conversion by his delay, inasmuch as there is no proof that he made any question of the plaintiff's title, or that he ever delivered the sheep to the plaintiff, although the parties all lived in the vicinity.

The defendant contended as matter of law, that the evidence did not show any conversion to the defendant's use, as the sheep were delivered to him by Benjamin Scott, the administrator, a person entitled to them against the plaintiff, and that a refusal to deliver them to the plaintiff, if the defendant had no reason to know or believe that the plaintiff was the owner, was no evidence of conversion. But the Court declined to give the instructions as desired by the plaintiff on this point, but did instruct the jury that ordinarily, evidence of demand of property and refusal to deliver the same to the true owner was sufficient evidence of a conversion, but not in all cases, and if the person in possession express doubt whether the claimant is the true owner, and ask for delay to satisfy himself, such request is reasonable and will not furnish conclusive evidence of a conversion; that a purchase of property of itself is not conclusive evidence of a conversion, for a man may innocently and honestly purchase property of a thief, and in such case, if the purchaser, on demand being made of the property, desire time to satisfy himself whether the claimant is the true owner, such request is reasonable, and a refusal to de-

liver immediately in such case, accompanied by such request, would not be sufficient evidence of a conversion; that in this case, the demand made by Mr. Woodman, in the letter produced, was not sufficient; but the demand made by the plaintiff personally, if the jury believed Mr. Noyes, was sufficiently specific; that if the jury believed that the sheep got among those of the defendant by accident, and that he merely suffered them to remain, because they were mixed, and to accommodate Mr. Scott, because it was inconvenient parting them, the defendant was not obliged to go and hunt them up; that on the other hand, if the action had been against Benjamin Scott, there would be sufficient evidence of a conversion, and if the jury are satisfied, that the defendant was aware of the wrong of Scott, and undertook to aid him to secrete the sheep and keep them from the true owner, or if they were satisfied that the defendant had been indemnified before the suit was commenced, for withholding the sheep from the true owner, and preventing her from enjoying her property, or that he confederated with Samuel Pool and Benjamin Scott for that purpose, and that he did withhold the sheep, then they should find the fact of conversion against the defendant. And if they were satisfied upon these principles as to both points, that the sheep were the property of the plaintiff, and that the defendant converted them to his own use, they should find a verdict for the plaintiff, but if they were not satisfied on both these points, they should render their verdict for the defendant.

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

A copy follows of the part of the will of Jonathan Scott, referred to in the requests for instruction, and in the rulings and instructions of the District Judge: —

"Respecting my wordly estate, I will and bequeath as follows: —

"*Imprimis.* After all my just debts and the necessary charges of my funeral, according to the direction of my friends and family, are paid by my executrix to be hereinafter named, my will is, that all my property, real and personal, in the town

of Minot, and the income of the same, be given to my affectionate wife, Elizabeth Scott, to be used and disposed of by her for her convenience and comfort, during her life.

"*Item.* Respecting the ten children of mine, which lived to adult years, my wish is to make them all equal in the shares to be possessed by each of my estate, and that the real estate belonging to me in Yarmouth, Province of Nova Scotia, both upland and salt marsh, be valued with my estate in Minot, that may remain after the decease of my wife Elizabeth, and distribution be equally made to them who survive, and the children lawfully begotten or born by those deceased, making suitable allowance for what the six eldest may have already received, either in having their time given them before they were free, or in goods and estate already advanced to them.

"*Item.* It is my will that my daughters, Elizabeth and Mary, so long as they remain unmarried, should have a home in my dwellinghouse in Minot, to use and enjoy the same for their own convenience, whenever and so long as they choose."

The arguments were in writing.

Fessenden, Deblois & Fessenden, for the defendant.

1. The Court ought not to have admitted the deposition of Stephen Curtis, being objected to, as the caption of the deposition did not state the cause in which the deposition was to be used. Sec. 17, chap. 133, Rev. Stat. It is there provided the caption shall state the cause and the names of the parties, thereto.

The meaning of cause, is that it shall state the species or kind of action, so that it shall appear, whether the case is assumpsit, or tort, or in equity, or a real action.

The requisitions of the law must be complied with strictly or they cannot be used in evidence. *Bradstreet* v. *Baldwin*, 11 Mass. R. 229; *Winoskie Turnpike Co.* 8 Vermont R. 404.

Neither is it of any importance, that the deposition was used at a former trial. That would not preclude us from objecting when we discovered the error.

2. There was no conversion. The will of Jonathan Scott

gave his widow only a life estate in the sheep and other personal property, to use and enjoy during her life, and at her death said personal property was to be divided equally among his ten children. The conveyance therefore by the widow, during her life, to her daughter, passed nothing to said daughter; certainly nothing beyond the life of the widow.

By this will Elizabeth, the wife, was to use and dispose of the income of said personal property, but the personal property was to remain to be divided as after provided, at her death.

First. This is the only fair import of the language used by the testator. The income is specially provided for, showing that the property was to remain entire and an income derived from it.

Again, the testator provides for the destribution of this property by division after the death of the widow. *Field* v. *Hitchcock*, 17 Pick. 182; *Learned* v. *Bridge*, 17 Pick. 339; *Homer* v. *Shelton, Ex'or*, 2 Metc. 194; *Smith* v. *Bell*, 6 Peters, 68; *Bradley* v. *Wescott*, 13 Ves. 445.

3. The evidence of the plaintiff does not show any conversion. The testimony of Noyes and Benjamin Scott, relied on for that purpose, does not show it.

4. If the widow of the testator could convey an absolute property in the sheep to other persons she could not to the daughter, because the daughter, Elizabeth, was bound to render her services gratuitously, if she accepted the provision made for her under the will.

The will says, "It is my will that my daughters, Elizabeth and Mary, so long as they remain unmarried, should have a home in my dwellinghouse in Minot, and enjoy the same for their own convenience, whenever, and so long as they choose."

The intention of the testator, undoubtedly was, and the Court will decide it right and proper, that if Elizabeth lived with her mother, she should render what services she rendered gratuitously.

This was the understanding of Elizabeth Scott. She, at the time the property was appraised, after the death of Elizabeth

Scott, the mother, gave up a part of the flock and consented to their appraisal.

5. Supposing the sheep to be the plaintiffs' the evidence does not show a proper demand, nor a conversion.

First. The letter B, delivered by Elizabeth Scott, was a request, for the defendant to deliver the sheep to Benjamin Scott.

Second. The demand of Elizabeth Scott, as testified to by Peter Noyes, was not accompanied by any claim of ownership in the sheep, and the defendant therefore was under no obligation to give them up to a person who merely demanded them, without asserting such a claim of ownership.

Third. Besides, he told them to look the sheep up if they wanted them, and did not forbid or prevent the taking of them. The ruling of the Court, therefore, that, if the jury believed Peter Noyes, the demand was sufficiently specific, was erroneous.

6. The ruling of the Court is wrong again in this, that he instructed the jury, "that if they were satisfied, that the defendant was aware of the wrong of Scott, and undertook to aid him to secrete the sheep, and keep them from the owner, they should find the conversion against the owner."

The objection to this ruling is, that there is no evidence to justify the Court in stating this, because there is no evidence showing that he either knew of any wrong of Scott, or aided in secreting the sheep. And that the mere aiding in secreting the sheep, and keeping them from the true owner, would not be a conversion without a demand and refusal, which the Court did not add to this instruction.

7. The instruction of the Court, "if the defendant confederated with Samuel Pool and Benjamin Scott, for the purpose of withholding the sheep from the plaintiff, was a conversion," is erroneous; because the Court did not instruct the jury at the same time, that there must be also a demand and refusal. Besides — without which such acts and doings would not sustain an action of trover, especially if the defendant had no knowledge of the plaintiff's ownership.

7. The instruction of the Court to the jury, that if they were satisfied that the defendant had been indemnified, before

the suit was commenced, for withholding the sheep from the true owner, and preventing her from enjoying her property, they should find the fact of conversion against the defendant, was erroneous in this, that the being indemnified before the suit was commenced, could have no influence upon rendering the withholding a conversion ; but would have had, perhaps, if the defendant had been indemnified, at the time of withholding the sheep, if there had been evidence of it, and the jury believed it, and also the withholding the sheep for that reason. But the substance of the above ruling is, that the mere withholding the sheep from the owner, was a conversion, without a demand for them. The Court should have charged, if the jury believed the defendant was indemnified at the time he withheld the sheep from the true owner, and withheld it on that ground and for that reason, it would be a conversion, if a demand had been made for the sheep.

J. C. Woodman, for the plaintiff.

1. Were the depositions admissible ?

They are objected to on the strength of Rev. Stat. c. 133, § 17, because it is not stated in the caption that they were to be used in an action of the case.

The cause is stated. There was but one action on the docket between these parties in this Court, or in any court so far as appears. The names of the parties are stated, the court and the term, all correctly, and that the defendant was notified and did attend.

If there had been two actions between the same parties, one in a plea of the case and the other replevin in the same court, in order that the cause be distinctly certified and made known in the caption, it might have been necessary to say, it was in a plea of the case. But the cause is stated sufficiently, by stating the names of the parties and the court and term of the court.

It is stated that the defendant was legally notified. It must have been for this case as there was no other. He would not have attended, if it had not been a legal notice for this case.

Having had legal notice and attended and cross-examined the witnesses, he has forfeited all right to object to the testimony for a formal objection. The end of the statute has been answered. *Berry* v. *Stinson*, 23 Maine R. 140.

A party who is present at the taking of a deposition cannot object to the want of notice. *Talbot* v. *Bradford*, 2 Bibb, 316.

A deposition is admissible in evidence, although the record does not find that notice was given to the adverse party, if such party cross-examined the witness. *Rogers* v. *Wilson*, Minor's Rep. 407; Bray. 77; 7 Wheat. 453; 3 Bibb. 230.

The foregoing authorities show, that the caption is sufficiently certain, and if not, that it is made sufficiently certain, by the other facts in the case. They further show, that any insufficiency has been waived by the cross-examination, and the former use of the deposition, and so that the objection could not be made at the time it was, but came too late.

2. The defendant contends the sheep are his, and that the ruling of the Judge was erroneous as to the property.

The rule is, that where the use of things is given, which are necessarily consumed by the use, the gift is absolute, unless a portion of the property should happen to remain, and be in a condition to be distinguishable at the death of the first taker. *Merrill* v. *Emery*, 10 Pick. 512; *Dorr* v. *Wainwright*, 13 Pick. 330.

This is applicable to the sheep. They perish with the using in a few years. All of them would probably have died, and probably did die or were killed in 5 or 6 years, and certainly in 10 or 12 years, if they were all lambs at the death of the testator.

3. Can the verdict be sustained on the ruling of the Judge. He ruled that the widow by the terms of the will had a right to dispose of the property, if it was necessary for her comfort and convenience. And ruled that the will did not give an absolute right to the property.

It is not necessary for me to maintain the position, that the

will gave the property absolutely to the widow, though it strongly impresses me, that is the meaning of the will.

In the construction of the will, it is necessary to give effect to all the words.

Not only "the income" is given, but "all the testator's property, real and personal, in the town of Minot." It is not given for life merely, "but to be used and disposed of." It is not given, to be disposed of in case of necessity for her support, but "to be disposed of for her comfort and convenience during her life;" that is, to be disposed of for her comfort and convenience while she lives. The words during her life, as I read the will, is not immediately connected with "disposed of," but with "her comfort and convenience." Comfort means "ease from care." The whole means that she should relieve herself from care, and find her comfort while she lived. The power of disposition is not limited to a life estate, for on that supposition, all the words except income are unnecessary. She was not confined at all in the power of disposition like many cases in the books, but had the whole power of disposal of the income and the estate too.

And the phrase below, "and that the real estate belonging to me in Yarmouth, Province Nova Scotia, both upland and salt marsh, be valued with my estate in Minot, that may remain after the decease of my wife, Elizabeth Scott," implies that the widow had full power to dispose of the property and carried with it an absolute estate in fee. This clause in the will only serves to explain the former clause, giving full power to the widow. For this clause is void, so far as it may be considered as creating any devise or legacy. If there was any property on which it could operate, it purports to give as the law would give it, and is therefore void. *Parsons & ux* v. *Winslow*, 6 Mass. R. 169; *Ramsdell* v. *Ramsdell*, 21 Maine R. 296; *Pickering* v. *Langdon*, 22 Maine R. 426; *Burbank* v. *Whitney*, 24 Pick. 154; Cruise's Digest, 4 vol. Title 38, chap. 13, § 5, 6, 7; 2 Story's Com. on Eq. § 1070; *Harris* v. *Knapp*, 21 Pick. 416.

4. Was the charge unfair upon the defendant in relation to

conversion? It appears to me that he went the whole figure for the defendant.

The purchase of a horse is itself a wrong, and no previous demand is necessary, to maintain replevin against the purchaser. *Galvin* v. *Bacon*, 2 Fairf. 30; *Parsons* v. *Webb*, 8 Greenl. 38; *McCombie* v. *Davis*, 6 East, 540.

The sale of the property was held a conversion. *White* v. *Phelps*, 12 N. H. Rep. 385.

Where one who had purchased goods of a person who had no right to sell, upon a demand by the owner, said he should not deliver them up at present, having bought them of the vendor, supposing them to be his, and afterwards held the goods for the space of seven days without offering to return them, held that this was sufficient evidence of a conversion. *Sargeant & al.* v. *Gile & al.* 12 N. H. Rep. 331.

The defendant, if he could have required any time, could only have required a reasonable time, and that time he had, but never has offered to return the sheep.

5. As to the conversion. The jury have found the conversion. The only question is, whether the ruling was correct, or whether the case shows sufficient evidence to sustain the verdict on other grounds.

First. The defendant contends the demand, as testified to by Mr. Noyes, was not accompanied by any claim of ownership. But this point is not raised in the case. The defendant did not request the Court to instruct that the plaintiff should have stated her ownership.

Second. It is said that the defendant told the plaintiff, to look them up, &c. this is mere evidence, and was all before the jury.

Third. That the ruling of the Court was wrong, that if they believed Peter Noyes, the demand was sufficiently specific. The demand was sufficiently specific. The ruling was altogether too cautious, and against the plaintiff.

Fourth. The next objection to the ruling, is, that if the jury were satisfied that the defendant was aware of the wrong of Scott, and undertook to aid him to secrete the sheep and keep them from the true owner, and that he did withhold the sheep,

then they should find the fact of conversion. Can there be any doubt of that? Benjamin Scott went in the night and took the sheep. If the defendant undertook to aid him to secrete them and did withhold the sheep, he became a participator in the wrong. All are principals in trespass.

Fifth. The defendant objects to the instruction, which the Judge gave, that if the jury were satisfied, that the defendant had been indemnified, before the suit was commenced, for withholding the sheep from the true owner and preventing her from enjoying her property, or if they were satisfied, that he confederated with Samuel Pool and Benjamin Scott for that purpose, and that he did withhold the sheep, then they should find the conversion. This is objected to, because the Court did not instruct the jury at the same time, that there must be a demand and refusal besides.

Can there be a doubt, that if the defendant and two others, or one other, entered into a confederacy to wrong the defendant out of the sheep, and that he withheld them, it would be a conversion?

The word withheld, implies a demand. The instruction, therefore, means, if the defendant refused to give up the sheep on demand.

The opinion of the Court was drawn up by

WHITMAN C. J. — The first ground of exception is to the admission of the deposition of Stephen Curtiss. It is insisted that it is not in conformity to the statute, c. 133, § 17, inasmuch as the caption does not specify the kind of action in reference to which it was taken. The statute provides, that it shall state "the cause in which the deposition is to be used." It is argued that the word "cause" means "kind," and, therefore, the kind of action should be named. If such was the intention of the Legislature it is not easy to perceive why it should not have expressed itself in more appropriate terms for the purpose. The word "cause" is applicable to every species of action. It is a general term. The intention doubtless was, that the adverse party should be apprised of the particular

action in which a deposition might be intended to be used. This would be as effectually done by naming the parties and the court where the action was pending, if no other action was there pending between the same parties, as if the kind of action were named. If two actions were pending in the same court, between the same parties, something more might be necessary to designate the one in which the deposition was intended to be used; and if the two actions so pending were of the same kind, something more still might be requisite to point out to the adverse party the "cause" in which it might be intended to be used. In this case it is not pretended that the plaintiff had any other cause pending against the defendant; and the naming of the parties, and the court in which it was pending, clearly enough indicated to the defendant the "cause" in which it was to be used.

The next ground of exception is in reference to the proof of property in the plaintiff. There can be no doubt, if Elizabeth Scott, the mother of the plaintiff, owned the sheep in question, or was invested with power by the last will of her deceased husband, Jonathan Scott, to make sale of them, that, by her bill of sale to the plaintiff, she became the owner of them.

Jonathan Scott bequeathed all his property, real and personal, in the town of Minot, and the income of the same, to his widow, to be used and disposed of by her, for her convenience and comfort, during life. The words "use and dispose of" are supposed, in the argument for the defendant, to refer to the income only, and not to the estate, either real or personal. But it is difficult to perceive, if such were the case, why the words "during her life" should not immediately have succeeded the word 'Minot.' That would have given her all that, upon the supposed construction, she could have had. Again, — it cannot be doubted, that the testator intended she should have, not only the income of the estate in Minot, but also the actual occupation, and of course the use, of it. It could not have been expected by him, that the identical sheep left by him could exist many years. The income of them

would consist of the increase, in a great measure, while the original stock, according to the course in such cases, would be perishing. After the lapse of over twenty years, which transpired after the death of the testator, and before the bill of sale to the plaintiff, none of the original stock could have remained. Again, — the words "estate" and "income" are coupled together; and the words "to be used and disposed of," following in close connection, in grammatical construction refer as much to estate as to income. Again, — the estate in Minot, that may remain after the decease of his widow, he willed should be distributed. If he had not contemplated that she should dispose of it, as occasion might require, would he have so expressed his intention? On the whole we cannot consider the construction contended for as well founded. If the widow received any sheep under the will, which does not seem to be clearly proved; and if the increase of them would not actually belong to her as part of the income, we cannot doubt that it must have been the intention of the testator to allow her to dispose of them whenever her comfort and convenience might require that she should do so.

There is, as was argued at the bar, much similitude between this case and that of *Harris* v. *Knap*, 21 Pick. 416. In that case the bequest was to the daughter "for her use and disposal during her life;" and what should remain to others. The Court held that she had power to dispose of the estate; and thereby to lessen the residuum. The language of the testator in the case here was at least as cogent, giving the power of disposal, as in that. Here the bequest was of the estate and income to be disposed of for her comfort and convenience during life; and the jury, under the instruction received from the Court, have found that it was necessary for her comfort and convenience that she should sell the sheep, as she did, to the plaintiff. And thus under any aspect of the case, whether the sheep were the widow's as being the increase of, and therefore, the income of sheep derived from the estate, of the testator; or were her own, independent of any connection with any such bequest; or to be considered as part of the

estate bequeathed, the sale by her to the plaintiff makes the proof of property in her complete.

The next question is, was there a conversion by the defendant? As to this the Judge directed the jury, if they believed the testimony of the witness, Noyes, the demand of the sheep, before action brought, was sufficiently specific; and we concur in that opinion. The defendant could not have misunderstood the object of the plaintiff; and his conversation with her shows he did not misunderstand it. The Judge instructed the jury further, that, if they "were satisfied that the defendant was aware of the wrong of Scott (the witness,) and undertook to aid him to secrete the sheep, and keep them from the true owner; or if they were satisfied, that the defendant had been indemnified before the suit was commenced for withholding the sheep from the true owner, and preventing her from enjoying her property; or that he confederated with Samuel Pool and Benjamin Scott for that purpose, and that he did withhold the sheep, then they should find the fact of conversion by the defendant." Here were three hypotheses. If establishing either of them would not amount to a conversion, the exceptions must prevail; for the jury may have found the insufficient one to be true. But we think each of them would amount to a conversion. It is immaterial, therefore, which, if either of them, was established. The principal question made in argument by the defendant's counsel is, did the Judge do right in supposing, that the evidence was such as to authorize the jury to consider and to find affirmatively in reference to them. If there was evidence which might fairly tend to establish those facts, the Judge could not well refuse to put the cause to them for their consideration as to its effect, though in his judgment it might not have been entirely sufficient for the purpose.

Now, was there evidence of that character? According to the testimony of Noyes, the defendant claimed to have made an absolute purchase of the sheep of Benjamin Scott; and admitted that he at first objected to the purchase, because he knew there was difficulty between Benjamin and the plaintiff, his sister, "about the property on the old farm." But on

being assured by Benjamin, that he had a perfect right to sell them, he bought them of him, and gave his note for the price. George Ellis, who seems to have been present, testified that the defendant bought the sheep of Benjamin, who assured the defendant that he had a right to sell them as administrator of his father's estate, the defendant at first having expressed some fears that there would be trouble about it. Here was evidence, to some extent at least, tending to show that the defendant was not unapprised, that there was a controversy between the plaintiff and her brother about the property. At the trial, the defendant introduced Benjamin as a witness, who swore that he did not consider himself as having sold the sheep to the defendant, but that he merely left them with him, and took a memorandum, which he produced, in the following words: — "Received of Benjamin Scott ten sheep at $16,50," the language of which is sufficiently inexplicit and equivocal, perhaps, to be used as evidence of a sale or not, as might suit the convenience of the parties. And Benjamin testifies, that several weeks after he had so left the sheep, on receiving a message from the defendant that they had been demanded of him by the plaintiff, he took them from him. And Benjamin further testified, that Samuel Pool had agreed to indemnify the defendant for the damages and costs in this suit, and that it was understood between him and Pool that he (Benjamin) was to indemnify Pool.

Thus, the conduct of the defendant, at the time of the demand made by the plaintiff; the evidence derived from his declarations at that time of an absolute sale to him; his proof, by Benjamin, that there was no intended sale; the equivocal writing given by him to Benjamin; his indemnity procured by Benjamin from Pool; his acknowledgment, that he knew there was difficulty between Benjamin and the plaintiff concerning the property on the old place; his fears, showing that he knew the sheep came from there; all these circumstances taken together, might well be regarded by the Judge as tending to show collusion between the defendant and others to baffle the endeavors of the plaintiff in attempting to regain her property.

The jury therefore may be regarded as having found property in the plaintiff, and a conversion of it by the defendant, upon evidence legitimately submitted to them for the purpose; and the exceptions are overruled.

WILLIAM BROWN *versus* DANIEL BURNHAM.

A deposition taken in conformity to the provisions of Stat. 1842, c. 1, may be used at the trial, at any time during the pendency of the suit, if it does not appear, that the witness was then within thirty miles of the place of trial, and able to attend Court; although he had once returned to the place of trial, after the taking of the deposition and before the trial.

In such case, if the adverse party would prevent the using of the deposition, the burden of proof is on him, to make it appear, not only that the cause of taking, no longer exists, but also that the witness, is within thirty miles of the place of trial and able to attend the trial in person.

DURING the time this action was pending in the District Court, the plaintiff obtained from the Court, a commission to take the deposition of Nathan Howe, to be used in the case. The cause of taking the deposition, certified in the caption, was, because "the said Nathan is about to go more than sixty miles from said Portland, before the next session of said Court, and not to return in season to attend the same." The deposition was taken in Portland, Dec. 30, 1845. At that time and until after the trial in this Court, in November, 1847, Nathan Howe resided at Cherryfield, more than sixty miles from Portland, but his family remained in Portland. It was proved, that in July, 1847, Howe was in Portland, and that, during the week preceding the sitting of this Court, in November, 1847, he was seen in Cherryfield.

The plaintiff, at the trial in this Court, WHITMAN C. J. presiding, offered to read this deposition, as evidence. The counsel for the defendant objected to the admissibility of the deposition under such circumstances. The presiding Judge overruled the objection, and permitted the deposition to be

read. A verdict having been returned in favor of the plaintiff, the defendant filed exceptions to such ruling.

Howard & Shepley, for the defendant, contended, that the deposition was erroneously admitted in evidence, because the cause of the taking, the only reason which could ever have authorized it, had ceased to exist before it was offered at the trial. The case shows, that the deponent had returned to Portland, before the Court was holden, and then his testimony could have been obtained, by summoning and calling him as a witness, and in that way only. If he again left Portland, and gave new cause for taking it, his deposition should have been again taken; and it is immaterial in this respect, whether he went again to Cherryfield or went out of the State in an opposite direction. The statute under which this deposition was taken, stat. 1842, c. 1, seems to have been made for one particular case, and could never have been intended to dispense with the personal presence of the witness, when the deponent had returned.

C. S. Daveis, for the plantiff, said that the statute was remedial and beneficial, and should, therefore, receive a liberal construction. When a deposition is once legally taken and filed in Court, there is a vested right in each party to use it. The old principle of the common law, that the witness must be present, is but an apparition. The presence of the witness is no better than his deposition, when taken with notice.

By the provisions of the Rev. Stat. c. 133, a deposition, when once legally taken, may be used for the trial of the action, during the pendency of the suit, instead of the testimony of the witness. The permission to take the deposition was a judicial act, and is conclusive, that there was sufficient cause for the taking. As there was good cause for taking the deposition, and as the witness did not return until after the first Court, our right to use the deposition in any stage of the cause became perfect.

But even if this construction be not correct, the deposition may be used, when the witness is away more than sixty miles, at the time of the trial.

It was contended, that from the peculiar phraseology of the statute, this construction was the true one; that the deposition may be used, although the witness returns ever so often, if he is not actually there at the time of the trial.

The opinion of the Court was by

SHEPLEY J. — The question presented is, whether the deposition of Nathan Howe, was properly received as testimony in the case. It was taken in accordance with the provisions of the act approved on February 12, 1842, which provides, that depositions may be taken, "when the deponent is about to go, before the session of the Court, more than sixty miles from the place of trial of the action, in which the deposition is to be used, and not return in season to attend the same."

The deponent's family resided in Portland, the place of trial; he was doing business in the town of Cherryfield, but was in Portland during the latter part of the month of July, or the former part of the month of August, 1847. His deposition was taken early in the year 1845, placed on file and received as testimony on trial of the action, during the session of this Court, in the month of November, 1847.

The act of February 12, 1842, provides for the cases, in which such depositions may be taken for use, by reference to the Revised Statutes, c. 133, § 1. If their use be not also regulated by that chapter, no rule to govern the use of them will be found; none to prescribe the form of caption; to compel the witness to attend and give his testimony; to regulate objections to the competency of the witness, or to the questions proposed; to provide for the manner in which such depositions are to be sealed, directed to the tribunal, and preserved until opened by its order. It could not have been the intention of the legislature, to leave all these matters without regulation. The act was intended to be supplementary to the Revised Statutes, although it is not declared to be so. Being thus regarded, the right of use under any circumstances will be determined. There are several cases named in the fourth section of that chapter, in which depositions are allowed to be taken,

for temporary causes ; such as sickness or infirmity, absence from the State, and when the deponent is about to go out of the State, by sea or land, before the session of the court, without expecting to return in season to attend the trial. In these cases the statute determines, whether the deposition may be used, when the cause for which it was taken, has ceased to exist. The nineteenth section provides, that it shall not be used, if the adverse party shall make it appear, that the cause for taking it no longer exists, but that the deponent is within thirty miles of the place of trial, and able to attend the trial in person. The burden of proof is thus placed upon the adverse party, not only to show, that the cause for taking no longer exists, but to show, that the witness is within thirty miles, and able to attend the trial, if he would prevent the use of a deposition, taken for sufficient cause.

In this case it did appear, that the cause for which the deposition had been taken, had ceased to exist, but it did not appear, that the witness was then within thirty miles of the place of trial, and able to attend. The deposition was therefore correctly admitted, and the exceptions are overruled.

DAVID MORTON *versus* HORATIO SOUTHGATE.

As a court of equity, this Court has power to compel the execution of a trust, whenever equity may require it. But in the case of testamentary trusts, the action of the Court, by the statute, (c. 111, § 12) is to be "subject to any provisions contained in the will;" and it is forbidden to "restrain the exercise of any powers, given by the terms of the will."

Where, by the will, a discretion and option is given, to be exercised according to the judgment of the trustee, and such is the plain intention of the testator, it is very doubtful whether the Court can substitute its own judgment for that of the trustee. But if the Court has power to interfere, the proof, to overrule the discretion of the trustee, should be of the fullest and clearest character.

BILL IN EQUITY. The case was heard on bill, answer and proof.

It appeared, that Reuben Morton, father of the complainant,

by a codicil to his last will and testament, made a provision for him, wherein it said: — "I give, bequeath and devise to my friend, Albert Newhall, Esq. in trust, and in case of his declining, I give, bequeath and devise to such trustee, as may be hereafter appointed by any Judge of Probate for said county, in trust, with power to said Newhall, or any trustee to be appointed," certain estate. The testator directed the manner in which the estate should be managed, and what benefit the said David should receive from it. Then followed this clause: —

"And, whenever said trustee shall become perfectly satisfied, that it will be for the best interest and advantage and happiness of said David, to be put into the uncontroled possession of the share herein given, bequeathed and devised in trust for the use of the said David, then said trustee, in that case, is hereby authorized and directed, to convey and transfer the same to the said David, to hold to him and his heirs and assigns."

Mr. Newhall relinquished the trust, and Mr. Southgate, the defendant, was appointed by the Judge of Probate to be trustee. The bill alleges, that the capacity, character and condition of said David have so changed since the decease of his father, that no reason now exists, why the conveyance and transfer of the property, should not be made to him by the trustee; and that the trustee, though requested so to do, unreasonably refuses to make the conveyance and transfer; and prays the Court to decree, that the trustee should make the conveyance and transfer of the estate, to the complainant.

The trustee, in his answer, describes the property, states the income from it, avers that he is ready and willing to make the conveyance and transfer, if the Court shall so order, and says, that "considering the circumstances of his present situation and family, and his former habits and mental organization, the respondent entertains the most serious apprehensions, that placing so large an amount of property, as constituted the trust fund, at said David's absolute disposal and control, might lead to the great injury, if not destruction of said David and his family, instead of its being for the best interest, advantage and happiness of the said David." He therefore declines to make the conveyance and transfer, until the Court shall so direct.

The testimony introduced, will be sufficiently understood from the opinion of the Court.

The case was argued mainly on the facts in evidence, relating to the former and present capacity, habits and state of mind of the complainant, by

Deblois and *O. G. Fessenden*, for the complainant — and by *Preble & Son* for the defendant.

As matter of law, the counsel for the complainant contended, that the power granted to the respondent, under the will, is not a mere trust, but a power which the trustee is bound to execute; and, if the trustee does not discharge the duty imposed, a court of equity will compel him to do it, or do it for him. 8 Vesey, 380, 573; 4 Kent, 311; Madd. Ch. Pr. 558, 562, 564 and 569.

Trusts of this kind are exclusively under the direction of a court of equity. 2 Story's Eq. § 1058, 1060, 1061 and 1062; Fonbl. Eq. 198; 2 Vern. 513.

For the trustee, it was said, that it would not be denied, that the Court had supervisory power, to protect the complainant against oppression by the trustee. But not the slightest pretence of this is found in the case.

Whether the property shall be delivered over to the uncontroled disposition and management of the complainant, or not, is made to depend, by the terms of the will, solely upon the good judgment and sound discretion of the trustee, and not upon the opinion of such men, as the complainant chooses to rely upon as witnesses, or even upon the opinion of the Court.

The opinion of the Court was drawn up by

WELLS J. — The defendant was appointed trustee, by the judge of probate, acting in conformity to the will of Reuben Morton.

The plaintiff prays the Court, to direct the trustee, to convey the property, held in trust, to him, the *cestui que trust.*

There is no doubt, that a court of equity has power, to compel the execution of a trust, whenever equity may require it;

and whenever a trustee neglects to act, in obedience to the requirements of the trust, the Court may discharge him, and appoint another. And this Court as a court of equity, may hear and determine all cases of trust. Rev. Stat. chap. 96, § 10. But in cases of testamentary trusts, the action of the Court is to be "subject to any provisions contained in the will," and it is forbidden to "restrain the exercise of any powers, given by the terms of the will." Rev. Stat. chap. 111, § 12.

Where, by the will, a discretion and option is given, to be exercised according to the judgment of the trustee, and such is the plain intention of the testator, it is very doubtful, whether the Court can substitute its own judgment, for that of the trustee. It is not within the power of the Court, to say, that the will of the testator is unwise, and make a new one. The bounty of the testator is to be enjoyed in the manner, which he has prescribed.

The trustee, in the present case, is authorized and directed to convey the property to the plaintiff, whenever he "shall become *perfectly satisfied*, that it will be for the best interest and advantage and happiness of said David," &c.

The trustee is not directed to act, in conformity to the judgment of others, however sound and enlightened, but according to his own. If his own comes in conflict with that of others, he is not bound to yield it up, upon the happening of such a diversity.

Although the devise, in the present case, is clearly a trust, with power to determine when the trust shall cease, and does not involve the inquiry, as to the difference between a power and a trust, yet some light may be obtained by the aid of decisions, on that subject. In Story's Eq. Juris. § 1070, it is said, whenever a clear discretion and choice to act, or not to act, is given, courts of equity will not create a trust, from words of recommendation. In the nature of things there is a wide distinction between a power and trust. In the former, the party may, or may not, act in his discretion. In the latter, the trust will be executed, notwithstanding his omission to act.

The defendant holds the property for the benefit of the plaintiff, but it is left to his discretion, as to the time, when the trust shall be terminated, by a transfer of the property. The defendant has the power to determine, when that event shall take place, a power expressly given, not overshadowed by a single doubt. The testator contemplated a time, when the property should be transferred, but the proper time involves a matter of judgment, confided solely to the trustee. But if the Court possessed the power, to direct a transfer, the exercise of it could only be justified, where the transfer was delayed, for reasons clearly unsubstantial and unjustifiable. The proof, to overrule the discretion, should be of the fullest and clearest character. No doubt the deponents, who have testified to the ability of the plaintiff, to manage his property, have given their testimony honestly, but they do not appear to have had the fullest means of testing his ability and capacity, to take care of property, to any great extent. Taking the whole testimony together, it is not so convincing, as to induce the Court, even if it had authority to act, to direct the trustee, to convey the property to the plaintiff.

CORNELIUS BRAMHALL *& al. versus* GEORGE W. SEAVEY *& al.*

The certificate required by Rev. Stat. c. 148, § 2, to authorize the arrest of the debtor, is defective, unless it states not only, that the debtor "is about to depart and reside beyond the limits of this State, with property or means, exceeding the amount required for his own immediate support," but also, that he is about "to take with him, property or means as aforesaid."

To authorize an arrest under the provisions of that statute, the affidavit required by the second section thereof, must be made before a justice of the peace, deriving his power to act, under the authority of *this State*, or the arrest will be considered as made without authority of law; and a bond given to procure a release from such arrest, will be illegal and void. An affidavit made before a justice of the peace of another State, is not sufficient.

DEBT upon a bond, dated July 13, 1846, given by Seavey, as principal, and the other defendants, as his sureties, to procure

the release of Seavey from arrest on a writ in favor of the plaintiffs against him, with the usual condition of such bond.

The writ on which Seavey was arrested, was an action of assumpsit against him in favor of the present plaintiffs, Bramhall, Fairbanks and Reed, described in the writ as all of Boston, in the county of Suffolk and State of Massachusetts. The writ was originally against Sherburne and Seavey, and Sherburne's name was stricken out by leave of court. The defendants were described as of Portland in the county of Cumberland. For the purpose of authorizing the arrest of Seavey, an indorsement was made on the back of the writ, of which a copy follows.

"COMMONWEALTH OF MASSACHUSETTS.

"SUFFOLK COUNTY, ss. Boston, July 11th, 1846. Personally appeared I, William N. Fairbanks of Boston, aforesaid, Merchant, and one of the partners in the firm and copartnership of Bramhall, Fairbanks & Co. of said Boston, composed of Cornelius Bramhall, William N. Fairbanks, and Franklin D. Reed, and makes oath, that he has good reason to believe and does believe, that George W. Seavey, late a partner in a firm, in said Boston, styled Sherburne & Seavey, composed of one George W. Sherburne and said Seavey, now commorant at Portland, in the county of Cumberland and State of Maine, is about to depart, and reside beyond the limits of the said State of Maine, with property or means, exceeding the amount required for his own immediate support. And the said Wm. N. Fairbanks, further makes oath, that the said Sherburne & Seavey in their said copartnership capacity, are indebted to the said Bramhall, Fairbanks & Co. in the full sum of three hundred eighty-four dollars twelve cents, agreeably to a note of hand, by said Sherburne & Seavey signed, of date, June 4th, 1846, which note is due the said Bramhall, Fairbanks & Co., and unpaid.

"Sworn to before me, Stephen Fairbanks, Justice of the Peace, for said County of Suffolk."

It did not appear, that any other oath was made for the purpose of procuring the arrest.

Seavey was arrested on this writ by a deputy sheriff of the county of Cumberland, and to procure his release, gave the bond in suit.

The plaintiffs entered their action, recovered judgment against Seavey, and seasonably delivered their execution to an officer. No attempt was made to show performance of the condition of the bond.

The parties agreed to submit the action to the decision of the Court, and that a nonsuit or default might be entered.

Sweat, for the defendants, contended that the arrest of Seavey upon the writ was illegal, and that therefore, the bond given to procure his release, was given under duress, and entirely void. No arrest can be made in an action upon a contract, unless the oath be first made, according to the provisions of the Rev. Stat. c. 148, § 2. To justify the arrest, there should have been an oath taken before a justice of the peace of this State, and certified upon the process. When such language is used, "before a justice of the peace," in the statutes, a magistrate within the State is always intended. 1 Mass. R. 59; 4 Mass. R. 641; Rev. Stat. c. 116; 2 U. S. Dig. 89.

Augustine Haines, for the plaintiffs, contended that the oath was properly administered by a justice of the peace, in Massachusetts. The statute is expressed in plain and general language, that *any* justice of the peace may administer the oath. A man may as well be a justice of the peace, if he lives in Boston, as if living in Portland. As it is necessary that there should be an oath, that the debt is due, it follows, that unless it can be taken out of the State, it would become necessary for the plaintiff to come to the place where the arrest is made. This could not have been intended. The oath is equally binding, whether taken within or without the State. It appears by the provisions of c. 133, authorizing depositions to be taken by justices of the peace out of the State, that when any justice of the peace is mentioned, justices out of the State may act.

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

SHEPLEY J. — This suit is upon a bond, executed to relieve the principal, from an arrest on mesne process. Debtors by contract are liable to be arrested on such process in this State, only upon affidavit made by the creditor, his agent or attorney, before a justice of the peace, to be certified on the process, that he has reason to believe and does believe, that such debtor is about to depart and reside beyond the limits of the State, with property or means exceeding the amount required for his own immediate support, and to take with him property or means as aforesaid, and that the demand in the process, or the principal part thereof, amounting to at least ten dollars, is due to him.

The affidavit upon the writ, by virtue of which the principal was arrested, is defective by omitting to state, that the debtor was about "to take with him property or means as aforesaid;" that is, property or means, exceeding the amount required for his own immediate support. Rev. Stat. c. 148, § 2. The word "with," used in the following extract, from the statute, "when he is about to depart, and reside beyond the limits of this State, with property or means," must have been used in the sense of having or owning property or means, and not as indicating, that he was about to take his property with him, beyond the limits of the State. This is apparent from the subsequent provision in the same section, requiring, that the oath should state, not only, that he had property or means, but also, that he was about to take such property or means with him, beyond the limits of the State. It does not appear to have been the intention of the Legislature, that such a debtor, having property and being about to depart and reside without the limits of the State, should be liable to arrest on mesne process, if he did not take his property or means with him, but left it within the State and subject to legal process.

The affidavit appears to have been made in the County of Suffolk, and Commonwealth of Massachusetts, before a person,

who signs the certificate, and indicates the capacity in which he acted, by the words "justice of the peace for said County of Suffolk." The statute requires, that the oath should be made "before a justice of the peace." The question arises, whether such language can be considered as conferring any authority upon officers or persons not recognized by the laws of this State, as holding the office of justice of the peace?

All legislation is obligatory only within the limits of the sovereignty, by which it is enacted. This is a position equally consonant to reason, and established upon authority. *Bank of Augusta* v. *Earle*, 13 Peters, 519; *Miller* v. *Ewer*, 27 Maine R. 509. No legislative body can be presumed therefore, to intend by the use of language without limitation, to bind or to confer any authority upon persons not within its jurisdiction. By the use of the terms, executors, administrators and guardians, in the framing of statutes, those persons only can be intended, who are recognized by the laws of the state as clothed with such capacity. So also by the use of the terms, judges of probate, registers of probate, clerks of courts, county commissioners, and justices of the peace, those persons only, who bear that official capacity by the laws of this State, can be intended, although there may be official persons with like designations in other States. One sovereignty may by its enactments, expressly authorize individuals, or those bearing a certain official character and designated by their official titles, residing within the limits of another sovereignty, to do certain acts, and may make those acts effectual within its own sovereignty.

Examples of such legislation will be found in the Revised Statutes of this State, in c. 133, § 14 and 22, authorizing a justice of the peace or notary public to take depositions out of the State, to be used in the tribunals within it. And in c. 91, § 17, authorizing the acknowledgment of deeds to be taken out of the State, by certain official persons, and making them effectual within the State. It is only, when the legislation of the State expressly or by necessary implication, grants the authority, that persons bearing without the limits of this State, an official character, can perform any official act, to be effect-

ual by the laws of this State. Justices of the peace in another State, can derive no power from the laws of the State, where they reside, to perform any official act to be operative in this State.

The case of *Omealy* v. *Newell,* 8 East, 364, is not opposed to these positions. It appears from that case, that the justices of the courts of king's bench and common pleas, according to the course and practice of those courts, had been long accustomed to make orders, that certain debtors should be held to bail for certain amounts. That for this purpose they had received affidavits made before magistrates residing in foreign countries ; and verified as to the signature of the foreign magistrate as his authority to administer the oath by an affidavit made in England. The court decided, that this practice existing without any statute provisions, was not prohibited by the statute 12 Geo. I. c. 29, which required that the plaintiff should in certain cases, make an affidavit before a judge or commissioner, to authorize him to cause his debtor to be arrested. The case does not decide, that an affidavit required by statute could be effectual, if made before a foreign magistrate. The reverse is fairly to be inferred. The practice of the courts, founded, as Lord Ellenborough states, upon any such medium of evidence or information, as the courts might judge to be reasonable, did not sanction such a proceeding, without having an accompanying affidavit made in England, which upon being found to be false, might be a foundation for the punishment of the guilty party.

If the affidavit made upon the writ, by virtue of which the principal in this bond was arrested, should be proved to be false, the person who made it without the jurisdiction of this State, and before a magistrate residing there, could not be punished by the laws of this State.

The arrest of the principal must therefore, be considered as made without the affidavit required by the statute, and without the authority of law. The arrest being unlawful, the bond executed to obtain his release, must be considered as obtained by duress, and no action can be maintained upon it. *White-*

field v. *Longfellow*, 13 Maine R. 146; *Commonwealth* v. *Canada*, 13 Pick. 86; *Woolley* v. *Escudier*, 2 Moore and Scott, 392.

According to an agreement of the parties, a nonsuit is to be entered.

LEVI BLANCHARD & *al. versus* JOSHUA WAITE.

A contract of insurance is completed, when there is an assent to the terms of it, by the parties, upon a valuable consideration. Neither the giving the premium note, nor the reception of the policy by the insured, are prerequisites to its consummation.

One part owner of a vessel, has no authority, as such, to procure insurance thereon, for the other owners. And where several owners claim payment for a loss, where the insurance was procured by one, it is incumbent on them to show his authority at the time, or a subsequent ratification of his acts by them.

ASSUMPSIT on a contract of insurance. Plea the general issue.

The parties agree upon the following statement of facts, and report:—

"A voluntary association of underwriters, of whom the defendant was one, was organized, and commenced taking risks in Portland, in June, 1839. It was on an alleged contract with this company, that the case arose. John W. Smith was a director of the company, and president of the board. He was also the secretary and treasurer of the company.

"The following were articles of the constitution and by-laws of the company.

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

each had placed his own signature to the policy, in proportion to the stock held by each member.

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

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

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

"The company, on the commencement of their business, inserted an advertisement in the city papers, in the following terms: —

"'NOTICE.—*The Portland Marine Insurance Company*, a voluntary association formed for the purpose of *Marine Insurance*, is now organized and ready to receive proposals for insurance on vessels and merchandize on board the same, not exceeding two thousand dollars on any one risk.

"'Office in the *Mariners' Church Building*, west end, up stairs. John W. Smith, President of

"'Portland, June 20. the Board of Directors.'"

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

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

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

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

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

"The company kept a proposition book, or book of applications for insurance, and a duplicate book.

"It is further agreed, that John Yeaton was director for the week, when Loring, one of the plaintiffs, applied for insurance on the schooner Oxford, of which they were sole owners. Smith, the president and secretary, consulted with Yeaton on the application. Yeaton knew Loring, and knew the vessel. Smith had done business with Loring, at the Custom House. They agreed to take $2000, at ten per cent., for one year, commencing on the 25th of October, 1839, lost or not lost. The application was on the 5th of November. After the consultation with Yeaton, Smith informed Loring, that they had agreed to take the vessel, and Loring then signed the terms on the proposition book. No objection was made at the time, either by Yeaton or Smith, to Loring's want of authority to effect insurance for the owners. Afterwards, on the same day, Smith informed Yeaton, that he had taken the Oxford. After signing the proposition book, Loring went away. Nothing was said at that time respecting a premium note. Subsequently, Smith filled out and executed a policy, and recorded it on the duplicate book. Four or five days after, Loring came to the office, and inquired for the policy, and was told that it was ready. Smith then filled up a joint note for the premium, Loring said, he had not authority to sign the note for the other owners, and left the policy, saying he would take the note out to North Yarmouth, and get it signed, and return it in a few days, and took the note. About the 6th of December, Smith met Loring on the wharf, and requested him to go up to the office, and settle that business, meaning to give the note, &c. Loring replied, he would call another time. The loss became known in Portland, December 9th. On the 11th of December, Loring called at the office, mentioned the loss, offered the note, and requested the policy. Smith objected, and on the same day, was directed by the directors, not to deliver it. Loring, on the same day, made a formal demand of the policy, and tendered the note, signed by the four plaintiffs. Smith asked, why the thing had not been completed

before? Loring replied, that it was not convenient to get the names before, and thought it hard, the company should object, as he could not often meet the owners, except when they met on the Sabbath for worship.

"The note was of the following tenor: —

"*Portland Marine Insurance Company.*

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

"For value received, we promise to pay the treasurer of the Portland Marine Insurance Company, or order, two hundred and one dollars,—— cents, at either of the Banks in this City, in 14 months, with interest after.

"$201 "Thaxter Prince,

"Attest." "Paul Prince,

"Levi Blanchard,

"J. G. Loring."

"On the same 11th day of December, Smith made a private memorandum, relating to the affair, but before that day, he had made no memorandum or entries, other than the regular papers and entries relating to the insurance. Before hearing of the loss, he had not in any manner canceled or altered any of the papers or records of the transaction, but after the news of the loss arrived, he did make some such entries or cancelling marks on the papers.

"It is further agreed, if evidence to that effect is legally admissible, that the custom is uniform with other insurance offices and agencies in Portland, to keep proposition books, where applicants sign the proposition book, and then leave the office, considering themselves insured, the contract being regarded as finished at the time of signing the book. That as soon as convenient, the policy and note are made out. That very often premium notes lie in insurance offices, unsigned until they are due, and often till after the risk is terminated; that cases have occurred in Portland, where the papers were not exchanged before losses happened, but the contracts were held good.

"It is further agreed (as stated by two witnesses, not members of the company) that they had several times effected insurance with this company. The contract in each case was

negotiated and concluded in the same manner as the witnesses had always done business at other offices. The party applying signed the proposition book, setting out the subject matter, rate, time, &c. Smith then said, "the insurance was complete," or "the vessel was then at the risk of office," and that the insured might call when it was convenient, and take the policy. The same method of proceeding was agreed to have been practised, in cases of insurance effected with this company, by one who was a director in the company.

"Loring had been a ship owner for 15 or 20 years. Thaxter Prince and Levi Blanchard, two others of the plaintiffs, were old shipmasters. Loring was always the managing owner of the "Oxford," from whom the masters received all their orders and to whom they uniformly made all their remittances.

"It is further agreed, that the plaintiffs were the sole owners (each being a part owner) of the vessel, on the 25th day of October, above referred to, and thence until the 3d day of December following, when she was totally lost, and that she was seaworthy and well found, equipped and manned for the voyage, on which the loss occurred. In addition to the demand made by Loring, for the policy, on the 11th day of December, as above stated, the usual preliminary proofs were presented to the directors of the company, on the 14th day of December, 1839, and adjustment refused by them. The policy used by the company provided, that "loss shall be paid in 60 days after proof and adjustment thereof.

"Upon the foregoing agreed statement of facts, the Court are to be at liberty to render judgment upon nonsuit or default; and if for the plaintiffs, for such amount as the legal principles applicable to the case may authorize; and to make such inferences as a jury might make from the facts agreed.

"P. Barnes, for plaintiffs.

"Augustine Haines, att'y for defendant."

The case argued upon the merits, in *Loring* v. *Proctor*, 26 Maine R. 18, involved the same legal questions, as in the present case, although the decision rested mainly on other grounds. The arguments were by the same counsel, and did

not vary essentially in the two cases. By referring to the arguments in that case, the points made in the present, will be sufficiently understood.

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

Augustine Haines, for the defendant.

The opinion of the Court was by

WELLS J. This action is assumpsit on a contract of insurance, and is submitted to the Court upon a statement of facts, with authority to make such inferences, from the facts, as a jury would be at liberty to do.

The application for the insurance, upon the schooner Oxford, was made by Loring, one of the plaintiffs, on the fifth of Nov. 1839, and was then accepted, the company agreeing to take $2000, at ten per cent. for one year, from Oct. 25, 1839, lost and not lost. He signed the terms on the proposition book, which was kept by the officers of a voluntary association, of which the defendant was a member, and which contained a description of the subject matter of insurance, the rate, time, &c. After signing the proposition book, Loring went away. Nothing was then said about a premium note. Subsequently a policy was duly executed and recorded. Four or five days afterwards, Loring came to the office, and inquired for the policy, and was informed, that it was ready. Gen. Smith, who was president and a director, and also acted as secretary and treasurer of the company, then filled up a joint note for the premium. Loring said, "he had not authority to sign the note for the other owners," and left the policy, saying, he would take the note, and get it signed, and return it in a few days. He took the note. On the sixth of December, Smith met Loring on the wharf, and requested him to go to the office and settle the business, meaning, to give the note, &c. Loring replied, he would call another time. The loss became known in Portland on the ninth of December, and on the eleventh of the same month, Loring called at the office, mentioned the loss, offered the note, and requested the policy. But the note was not received, nor the policy delivered. The note bore date

Oct. 25, 1839, the time when it was agreed the risk should commence, and was signed by all the plaintiffs.

It appears, by the evidence, that in other cases, insurance had been effected with this company, in a similar manner; the applicant having signed the proposition book. Smith would then say, the insurance is complete, or the vessel is at the risk of the office, and the insured might call when it was convenient and take the policy. It is admitted the plaintiffs were the owners, when the application was made, and continued to be so, on the third day of December, when the loss happened.

A contract of insurance is completed, when there is an assent to the terms of it, by the parties, upon a valuable consideration. Neither the giving the premium note, nor the reception of the policy by the insured, are prerequisites to its consummation. In the case of *Warren* v. *Ocean Ins. Co.*, 16 Maine R. 439, where liberty to deviate was indorsed upon the policy, the insured gave no premium note, and took from the company no evidence of the contract. But the plaintiff recovered. The course of business, testified to by the secretary of that company, probably prevails in most, if not all, insurance companies. He said it was customary, to leave policies in the office, until the notes were nearly matured, before the assured came in, to take the policies and sign the notes. If the applicant was satisfied with the terms, upon which the president was willing to take the risk, the agreement was entered upon the proposal book, and signed by the applicant, and the risk was then considered as taken, and the policy made out afterwards. Usually when the assured took the policy, he signed the note.

Where the agent of the assured agreed for a policy, and for a note to be given with security for the premium, and left the office before the policy was filled up, but it was filled up a few hours afterwards, and he was so informed; and before it was delivered or called for, intelligence of a loss was received, Mr. Justice Washington held, that the contract was completed. 1 Phil. on Insurance, 9, where reference is made to *Kohne* v. *Ins. Co. of N. A.* 1 Wash. C. C. R. 93.

In the case of *Perkins* v. *Washington Ins. Co.*, 6 Johns. Chan. R. 485, the premium was paid to a person, residing in Georgia, alleged by the plaintiff, to be the agent of the company; but a loss happened, before the reception of the premium by the company in New York. Chancellor Kent was of opinion, that the person, receiving the premium, had not sufficient authority to bind the company, and that the proposal had not been accepted. The case was carried to the Supreme Court of Errors, and the judgment of the chancellor was reversed. The court were unanimously of opinion, that the plaintiff was entitled to recover. 4 Cowen, 645. The agent was considered as having authority to complete the contract of insurance, and that the company was bound by the reception of the premium, by the agent. In the case of *Thayer* v. *Middlesex Ins. Co.* 10 Pick. 326, the contract of insurance was not considered as completed, because the papers, signed by the plaintiff, remained in the hands of his agent, until after the loss.

No copy has been furnished to us, of what was signed by Loring, but we understand from what facts are submitted, that he made himself liable for the premium, so that it could have been recovered of him.

We find then in the case, the terms of the insurance reduced to writing, in a book kept by the insurers for that purpose, and signed by one of the insured for the whole, a policy made and recorded, and ready for delivery before the loss. Was the contract at that time completed? Here was a union of minds upon the contract, and the insurers had legal power to enforce the payment of the premium, against Loring.

But it is contended, that the subsequent facts impair the force of this conclusion. A few days after signing the proposition book, Loring called for the policy, and was told it was ready. A joint note for the premium, was then made. Loring said he had not authority to sign the note for the other owners and left the policy, saying he would get it signed, and return it in a few days. The inference, drawn from his declaration, that he had not authority to sign the note, is, that he had no

authority to procure the insurance for the other owners. But he did not say so. It might be, that he considered himself as fully authorized to procure the insurance for them, but that such an authority would not embrace the power of signing their names to a note. But we can only conjecture what were his views — they form no basis for our decision.

One part owner of a vessel has no authority, as such, to procure insurance for the other owners. It is incumbent on the plaintiffs to show an authority, on the part of Loring, to procure the insurance for the other owners or a subsequent ratification. *Foster* v. *U. S. Ins. Co.*, 11 Pick. 85; *Finney* v. *Fairhaven Ins. Co.* 5 Metc. 192.

In the case last cited, one part owner procured the insurance for himself and the other owners, without their previous authority, but the bringing of an action on the policy, in their names, was held to be a ratification of his act. There was a mutuality in the contract, because the part owner, who effected the insurance, was liable for the premium. The case and the authorities bearing upon it, were very fully considered. If the insurers had brought an action against the plaintiffs, for the premium, no loss happening, and had failed of recovery, because Loring acted without authority, they would have then had a perfect right of action against him. No question was made about his authority, and it does not appear, but that he was in fact authorized. The company did not ask for any thing more than his individual responsibility; with that they remained satisfied, and it was only when he called for the policy, that the joint note was presented, for signature.

The note was signed by all the plaintiffs, but not presented at the office, until after the loss. This act, together with the commencement of the suit, must be considered a ratification of what Loring did, in procuring the insurance. Story on Agency, § 248; 3 Kent's Com. 261.

Guided by the authorities, to which we have referred, and the principles applicable to contracts of insurance, it is our conclusion, that the plaintiffs are entitled to recover.

It is agreed, that the defendant is liable for one twentieth

part of the risk, and that the preliminary proofs were presented to the directors of the company, on the 14th of Dec. 1839; and an adjustment refused. The policies, used by the company, contained a provision, that losses should be paid in sixty days, after proof and adjustment thereof. A refusal to make an adjustment, when it ought to have been done, is to be viewed in the same manner, and to have the same effect, as if it had been completed.

The defendant's proportion of the damages is one hundred dollars, from which should be deducted one twentieth part of the premium, and the balance, with interest from the thirteenth of February, 1840, will be the amount, for which the defendant is liable. By the agreement of the parties, a default is to be entered.

INHABITANTS OF NEW GLOUCESTER *versus* CLARK BRIDGHAM.

In an action of debt, brought on the stat. of 1846, c. 205, in the name of the inhabitants of a town against an individual, to recover a penalty for selling spirituous liquors, without licence, the indorsement of the names of the selectmen, and of the town treasurer and town clerk, upon the back of the writ, as approving the commencement of the suit, and their personal presence at the trial, were held to be sufficient authority to the attorney, to prosecute the suit.

Where the declaration, in such case, alleges, that the selling took place on the twenty-fifth day of December, in a certain year, and "on divers other days, from said 25th day of December and the first day of June following, and only one act of selling is proved, not on the 25th of December, the declaration is sufficiently specific as to time. It is irregular to insert the words following the first day mentioned, but those words are unimportant; and it is not necessary, that the act proved should be on the precise day alleged.

And if the declaration alleges, that the defendant "did sell a quantity of spirituous liquors, to wit: one glass of rum, one glass of wine, one glass of brandy, one glass of gin, and one glass of spirituous liquors, or a part of which was spirituous, to certain persons unknown," and the selling, proved, is of one glass of gin, to a certain person named, an objection on this ground, can be taken advantage of only on demurrer to the declaration.

Where the statute provides, that the penalty to be recovered shall be from one to twenty dollars, and the parties agree, that the jury shall ascertain the

amount to be recovered, and the presiding Judge admits evidence, with a view only to enhance the penalty to be recovered, the defendant objecting thereto, of selling at other times than the one relied upon, the defendant cannot be considered as aggrieved by the admission of such evidence.

On the cross examination of a witness, introduced by the defendant, the presiding Judge, in the exercise of a sound discretion, may rightly permit an inquiry of the witness for his reasons why he did certain acts, to test the accuracy of the recollection of the witness, or to affect his credibility, although it may have no direct tendency to support or disprove the issue.

Where the declaration alleges that the plaintiffs, being the inhabitants of a town, "prosecute this action by" certain persons named, one of the persons so named does not thereby become a party to the suit, and is not in consequence thereof rendered incompetent as a witness. And even if he were to be considered a party, he is still made a competent witness in such case by stat. 1846, c. 205, § 6.

The declarations of the defendant, that he had kept and would keep spirituous liquors for sale, although they did not immediately accompany the act of selling as proved, are admissible in evidence on the trial of such action.

It is sufficient, if the evidence will warrant the jury in finding that the defendant actually sold spirituous liquors as alleged, although disguises might have been put in practice to make it seem otherwise.

THIS case came before this Court on exceptions to the rulings and instructions of the Judge of the Western District Court, GOODENOW J. presiding. A copy of the exceptions follows: —

"This was an action of debt to recover the statute penalty for selling a glass of spirituous liquors contrary to the provisions of the act of 1846, chap. 205. The writ makes part of the case.

"The defendant renewed a motion made by him in writing, before the justice at the time of the entry of the action, which motion makes part of the case, and was overruled by the justice before the cause proceeded under the general issue to trial. The defendant moved *ore tenus* in this Court to dismiss the writ. 1. Because no specific time is alleged in the declaration, when the alleged offence was committed. 2. Because there is no specific allegation, in the declaration, as to what particular article was sold by defendant in violation of law. 3. Because the writ upon its face is defective and bad and the

action improperly brought. All which motions, were overruled by the Judge. The cause then proceeded to trial under the general issue, which had been pleaded and joined by the plaintiffs, before the justice who tried the cause, after said written motion was overruled by him.

"The plaintiffs then offered evidence tending to prove that defendant sold to one Gibbs, one glass of gin, and received pay therefor of said Gibbs. The defendant offered evidence coming from said Gibbs, tending to rebut this evidence, and show, that defendant received no pay.

"The plaintiffs, with a view to the amount of penalty to be recovered as damages, offered evidence to prove that defendant, at a prior time, had sold other spirituous liquor to the witness, which, though objected to by defendant, the Court admitted as applicable to the damages.

"The said Gibbs, called as a witness by the defendant, testified to various facts, tending to contradict a witness, called by the plaintiffs, particularly, that he never paid for any liquor drank by him, at the house of the defendant. On being cross-examined, he admitted that he had repeatedly drank liquor at defendant's house, and that he was in the habit of going there, to get meals of victuals, while his wife boarded at another house, in the same village, and that he paid for such meals. The plaintiffs, then asked the reasons why, he went to defendant's house, to take his meals, and at other times, while his wife was boarding at another house, in the same village. The plaintiffs were also permitted by the Court, though objected to by defendant, to prove other acts of drinking liquor at various times.

"The plantiffs introduced Thomas Johnson, as a witness, to whom the defendant objected as inadmissible, because it appeared by the writ, that, if not a party to the suit, he was interested in it, but the Court admitted him.

"The plaintiffs offered to prove that defendant, in a discussion with the witness on the subject of temperance, in February or March, 1847, said he had always kept liquor in his house, since he kept public house and always should, and if he had

a mind, to have liquor from Portland by hogsheads, and sell it to his customers, it was nobody's business, which the Judge permitted them to do, against the defendant's objection. The defendant contended, that this action could not be maintained without proof of authority, to commence it, by a vote of the town at a legal town meeting, but the Court ruled otherwise.

"The Judge was requested by the defendant, to instruct the jury, that it was necessary for the plaintiffs, in order to entitle them to recover, to prove not only a delivery, and drinking of spirituous liquor, but that the defendant received pay for the same, in order to constitute a sale, and that proof, that defendant, on request of any person, delivered such liquor to him, to be drank, without paying for it, would not constitute a sale, as the law would raise no implied promise on the part of the person receiving and drinking it, to pay for it, and therefore it would not be in law, a sale. But did instruct them, substantially as follows, that it was not necessary to constitute a sale, that the liquor should be paid for, at the time it was drank, or that it should have been paid for, at the time the suit was commenced, but that it was a sale if credit was given, or it was understood by both parties that it should be paid for, or allowed in the settlement for meals furnished, or for any other article sold. That it would not follow in all cases that where one called on the other for spirit, and had it, that the law implied a promise to pay for it, where there was great intimacy between the parties, as in the case of brothers, &c., but ordinarily where one person called on another for an article of value, and received it, the law would imply a promise to pay for it. And it was for them to determine, whether there were any facts or circumstances in this case, to exempt it from the common principle.

"They were also instructed that the plaintiffs must be confined to one case of selling, and that was the selling to Gibbs, they having selected that case, and unless that was proved to their satisfaction, the plaintiffs could not recover. The other evidence tending to prove sales, was admitted in reference to the amount of penalty, which should be adjudged, if any thing,

against the defendant, and this was referred to the consideration of the jury, by consent of both parties. The jury returned a verdict for the plaintiffs. To the foregoing rulings and instructions of the Judge, the defendant excepts, and prays that his exceptions may be allowed and signed.

"By R. A. L. Codman, his attorney."

The following is a copy of the declaration in the writ: —

"Then and there to answer unto the inhabitants of New Gloucester, in said county of Cumberland, "who prosecute this action by David Allen, Moses Witham and Otis C. Gross, their selectmen, and Thomas Johnson, their clerk, and Joseph Raynes, their treasurer, in a plea of debt. For, that the said Clark Bridgham, on the twenty-fifth day of December last past, and divers other days from said twenty-fifth day of December, and the first day of June instant, at said New Gloucester, not being duly authorized or licensed to be a seller of wine, brandy, rum, or other strong liquors, did sell a quantity of spirituous liquors, the same not having been imported into the United States from any foreign port or place, and being in less quantity than the revenue laws of the United States prescribe for the importation thereof into this country, to wit, one glass of rum, one glass of wine, one glass of brandy, and one glass of gin, and one glass of spirituous liquors, or a part of which was spirituous, to certain persons unknown, against the peace of the State, and contrary to the statute in such cases made and provided, whereby said Bridgham has forfeited, not less than one dollar nor more than twenty dollars, and by force of the statute aforesaid, an action hath accrued to said inhabitants to demand and receive of said Bridgham not less than one dollar nor more than twenty dollars, to be disposed of according to law."

On the back of the writ was an indorsement, in these words.

"We, the undersigned, approve the commencement of this suit.

"David Allen,
"Joseph Raynes,
"Thomas Johnson,
"Otis C. Gross,
"Moses Witham."

The writ was dated June 8, 1847.

A copy of the motion, to which reference is made in the exceptions, with the order of the justice thereon, follows: —

"June 26, 1847. The Inhabitants of New Gloucester *versus* Clark Bridgham.

"Before William Burns, Esq.

"And now at the opening of the Court, the said Clark Bridgham comes into Court and calls for the plaintiff's appearance in this case, to be accounted for and explained according to law. "By his counsel,

David Dunn."

"I decide that the plaintiffs do appear according to law, as the whole board of licensing authority named in the writ, together with Wm. Bradbury, Esq. their attorney, are present.

"Wm. Burns, justice of the peace.

W. & F. Bradbury for the plaintiffs.

Codman & Dunn for the defendant.

The opinion of the Court was by

WHITMAN C. J. — This is an action of debt, against the defendant, to recover of him a penalty for selling spirituous liquors, without license. It is averred in the declaration, that, on the first day of December, 1846, and between that day and the first day of June, 1847, the defendant sold glasses of spirituous liquors, viz. rum, gin, brandy, wine, and mixed liquors, &c., to divers persons unknown. The action was originated before a justice of the peace, before whom the defendant "called for the plaintiffs' appearance," which was overruled. Whereupon the general issue was pleaded, and the cause then proceeded to trial; and was brought into the district court, by appeal, where the call for the plaintiff's appearance was again made and overruled; and this forms one ground of exception to the decisions in that court. What idea the defendant's counsel had in this call, is not understood. The plaintiffs were then regularly in court. If any agent or attorney had appeared for the plaintiffs, his right to do so might have been questioned; and the court might have been called upon to determine

whether such agent or attorney was properly authorized to appear in the suit. And this may have been what the counsel was aiming at. Corporations aggregate, must ordinarily prosecute and defend at law, by their agents or attorneys.

Questions of this kind are referable to the sound discretion of the courts, who must determine when it is reasonable to consider an action as commenced and prosecuted by a suitable authorization. A vote of a corporation authorizing some one in its behalf to prosecute, may, generally, be necessary; but there are many cases, in which no such special authority is necessary. Overseers of the poor would be admitted, in behalf of their towns, to appear and prosecute or defend suits, in reference to claims for the support of paupers; and treasurers of our towns would be allowed to maintain suits for demands due by note, payable to their towns; and so would officers of any corporation be considered authorized to prosecute in reference to matters particularly under their care and superintendence. The selectmen of our towns, it is believed, have not unfrequently been allowed to appear in courts, and to prosecute and defend as agents for their towns. Whenever the court sees reason to believe, that, those prosecuting in behalf of a corporation, have a general superintendence over the subject matter in litigation, they will allow them to appear and prosecute, without any special vote for the purpose.

In this case, the selectmen of the plaintiffs, their clerk and treasurer, must be regarded as having authorized this suit. They have signified their approbation of it by their indorsement of the writ. The plaintiffs have an interest in the subject matter of it; and their selectmen, treasurer and clerk constitute the licensing board, and have sanctioned the prosecution; and may well be considered as the agents of their town, to see that the law in this particular, shall not be violated with impunity; and that its interest should not be neglected or overlooked. The district court, therefore, did not err in overruling the motion.

The next ground of exception is, that the time when the selling took place, is not properly alleged. The allegation

is, that it was on a certain day in December, 1846. This is sufficiently specific as to time. A further selling is alleged between that time and the first day of June following, which is irregular, but unimportant, and may be regarded as surplusage. Only one act was proved or found by the jury; and that may well stand, as having been found to have been on said first day of December; for it is not important that the act proved should be on the precise day alleged.

It is next insisted, that there is no averment as to what particular articles were sold; but the allegations as to this matter are in accordance with precedents heretofore in use; and as particular and certain, as the nature of the case would ordinarily admit of. They are, that the defendant, on the day named, sold spirituous liquors, viz: one glass of each kind, naming them. What is meant by a glass of spirit, cannot be very unintelligible, to dealers in that article; and our statute of *jeofails* requires only that the averments should be such as that the accusation may be intelligible. This and the preceding objection should come before us, if at all, upon demurrer to the declaration.

The Judge at the trial admitted evidence of selling at times other than the one relied upon, which was introduced by way of aggravation, with a view to enhance the penalty to be recovered, which the statute provides shall be from one to twenty dollars, it having been agreed by the parties, that the jury should ascertain the amount to be recovered. Under such circumstances the proof, so admitted, can form no just ground of complaint on the part of the defendant. Besides, in argument it was stated, and not controverted, that the jury returned their verdict for a penalty of but one dollar, the least that is authorized by statute for a single instance of selling. The defendant, therefore, was not aggrieved by the admission of proof of selling in more than one instance.

An exception was taken to the permission, by the court, on cross-examination of a witness, introduced by the defendant, to inquire of him for his reasons, why he did certain acts, to which he had testified on his examination in chief. But the

court might, in the exercise of a sound discretion, permit such a cross-examination. Such inquiries may be allowed oftentimes, although they may have no direct tendency to support or disprove the issue, in order to test the accuracy of the recollection of an adversary's witness, or to affect his credibility. In giving his reasons for doing the act, he might render it incredible that he should have done it. In this very instance, the witness had testified to his having been in the habit of getting meals at the defendant's, accompanied with a supply of ardent spirit, for which he paid nothing, otherwise than as he paid for his meals, at the same time that his wife took her meals at another place in the same village, in which the defendant lived. It might well be inquired of him, whether he did not so take his meals for the purpose of being supplied with intoxicating drinks; and, then, whether the defendant did not so understand it; and hence to have it inferred, that this was a mere subterfuge to avoid the appearance of selling liquor unlawfully.

It was objected that one Johnson should not have been admitted as a witness. His name, among others, was improvidently introduced into the writ, as being one by whom the plaintiffs sued. There was no reason why he should have been so named. No judgment can be rendered in his favor in the case, nor against him. He cannot be regarded as a party, or as having any other interest than that which pertains to him as an inhabitant of the plaintiff town; and as such he is made a competent witness by Rev. Stat. c. 115, § 75. But if he could be regarded as otherwise a plaintiff, the statute of 1846, c. 205, § 6, has made him a competent witness.

A further objection was made, that the declarations of the defendant should not have been allowed to be introduced, that he had kept and would keep spirituous liquors for sale, as such declarations did not immediately accompany the act of selling as proved. But declarations of defendants, tending to show their having formed determinations to commit crimes, are always admissible against them, when accused of committing the same.

The exception, as to the supposed want of proof of facts necessary to constitute a sale, is not sustainable. There was evidence from which the jury were warranted in finding, that the defendant actually sold spirituous liquor, as alleged, notwithstanding the disguises put in practice to make it seem otherwise. *Exceptions overruled.*

PETER FRANCIS *versus* ALBERT WOOD.

In an action on the case, claiming damages against the present defendant for the rescue of a debtor of the plaintiff from an officer, when arrested on a writ in favor of the present plaintiff against such debtor; *the return of the officer*, on such writ, that he had arrested the body of the debtor and that he was rescued from his custody by the present defendant, is not conclusive evidence of the facts stated in the return, on the trial of the present action.

THIS case came before the Court on exceptions to the ruling and instructions of GOODENOW District Judge, of which exceptions a copy follows: —

"Cumberland, ss., District Court,
Western District, March Term, 1848.

"This was an action on the case against defendant charging him with the rescue of John Seymour. The writ, return and pleadings are made a part of the case, also an original writ of attachment and capias *v.* said John Seymour in favor of Francis with the officer's return thereon, with the affidavit attached thereto. Plaintiff introduced said writ and officer's return in evidence, and also the evidence of the judgment rendered against said Seymour on default in said action. Plaintiff rested his case, and contended that the officer's return was conclusive evidence of the rescue, against this defendant. (1. The court overruled this, and ruled that the defendant might introduce testimony to disprove the officer's return, it being only *prima facie* evidence of that fact.) Testimony was then introduced on both sides, respecting the question of the rescue. Stephen O. Danielson, called by the plaintiff, among other

things, testified, that he went on board the schooner commanded by the defendant and arrested the said Seymour, he being one of the crew, who was pointed out to him by plaintiff as John Seymour, and while he had his hand upon him, the captain ordered Seymour to go forward and help hoist up one of the sails, and that Seymour broke away from him; that he commanded the captain to assist him, and that the captain said he should have nothing to do with it, that he had his vessel to take care of, and when the officer told him he should hold him responsible, if he carried Seymour off in his vessel, the captain replied, that he knew as much about the law as Danielson did. Seymour was arrested, about the time the vessel was getting under way. The evidence was conflicting upon the point whether she had in fact begun to cast off from the wharf, when Danielson went on board and arrested said Seymour, some witnesses testifying that she had, and Danielson and others denying it. Testimony was then introduced by the defendant conflicting with that of Mr. Danielson and tending to prove that the defendant had no agency in the alleged rescue. The counsel for the defendant objected to the writ against John Seymour, as giving no authority to arrest Daniel Seymour, and proved that the person arrested, was sometimes called and known as Daniel Seymour, and defendant's counsel contended, that there was no evidence that Daniel Seymour was the same person as John Seymour, and that the subsequent service of the same writ by attachment, &c., negatived the allegation of a previous arrest; but these objections were not sustained by the court. It was also contended that the facts stated by Danielson, did not, if all true, constitute a rescue, that there was no resistance, and no aid furnished Seymour, to escape. (2. The judge instructed the jury, that the law must have a reasonable construction, and that it would not require one man to make a great sacrifice in order to enable another to realize a small benefit, and that if the defendant was about getting his vessel to sea, when the officer came on board with a civil process, it was not his duty to suspend his operations, if he would thereby be in hazard of losing the benefit of the tide, or a fav-

orable wind, or of coming in contact with other vessels near him, but that he would have a right to go on in the same way as if Danielson had not come on board.) But that the defendant was not entitled to make haste to put his vessel to sea, in order to defeat the arrest. The jury returned a verdict of not guilty. And in answer to a question put to the foreman, he said, the jury found the defendant did not hurry his vessel to sea, in consequence of the arrest of Seymour.

The ruling of the Judge, that said return was not conclusive evidence of a rescue, included in brackets and marked 1, and also to that part of the instructions of the Judge, marked 2, and included in brackets, the defendant excepts, and prays that his exceptions may be allowed and signed.

"A. W. and J. M. True, plaintiff's attornies."

The return of the officer, was in these words :—

"Cumberland ss. Portland, Sept. 15, 1846.

"Pursuant to the within precept, I arrested the body of the within named John Seymour, and he, the said Seymour, was subsequently wrested from me by Captain Albert Wood, master of the schooner James, and by him carried to sea in said schooner, and afterwards, to wit, on the same day, I attached a chip as the property of the within named defendant, and left a summons at his last and usual place of abode, for his appearance at court. S. O. Danielson, Constable of Portland."

There was but one count in the declaration, and the plaintiff's only allegations, respecting the acts of the defendant in making the rescue, were in these words : —

"By virtue of which writ, the said Danielson before the time appointed for the return of said writ, to wit, on the fifteenth day of September, aforesaid, at said Portland, took and arrested the said Seymour by his body, and had him in his custody for the cause in said writ mentioned ; nevertheless, the said Wood, well knowing the premises, but contriving to injure the plaintiff and deprive him of the means of recovering his said debt, on said fifteenth day of September, rescued the said Seymour from and out of the custody of said Danielson, and caused the said Seymour to escape and go at large out of the custody of the said Danielson wheresoever he would."

A. W. & J. M. True, for the plaintiff, contended, that the return of the officer was conclusive evidence of the facts therein stated. 4 Bac. Abr. 399, 404; Tit. Resc. Cro. Jac. 419, 486; Cro. Eliz. 815; Com. Dig. Ret. G. and Resc. B. 2, 4; 2 Dane, 645; Yelv. 34; 5 Mass. R. 517; 9 Mass. R. 99; 11 Mass. R. 165; 17 Mass. R. 601; 1 N. H. Rep. 68; 8 N. H. Rep. 546; 23 Maine R. 489; 3 Fairf. 417; 7 Greenl. 14; 10 Mass. R. 207; 2 Pick. 310. These facts set forth, show a rescue, and therefore it was proved. If we find the officer returns a rescue, we cannot have a remedy against him. His return is conclusive, and prevents our recovering against him. Cro. Jac. 419, 486.

We contend also, that the instructions of the Judge on the second point made in the exceptions, were also erroneous. No actual force is necessary to constitute a rescue. The setting at liberty of a person legally arrested, is sufficient. Taking the man arrested to sea, was as much a rescue, as if he had used force. Com. Dig. Resc. A. Salk. 79; Co Lit. 160 (b.)

When the authority of the law stepped in, and the defendant was commanded by the officer to assist in securing the prisoner, he was bound to obey, and had no right to go to sea. The instruction on this point was erroneous.

Howard and *Shepley*, for the defendant.

The principal question in this case is, whether the return of the constable on the plaintiff's writ, against one Seymour, is conclusive in this action. The general rule is, that the return of an officer is not conclusive, unless between parties, and those claiming under them. In the present case, the defendant was not a party to the suit, and was in no way connected with it, nor in any manner claims under either party. We will trouble the court with the citation of but two cases on this point. *Brown* v. *Davis*, 9 N. H. Rep. 76, and *Bott* v. *Burnell*, 11 Mass. R. 163.

The case of a rescue is no exception to the general rule. The English cases cited for that purpose only show, that the return by an officer of a rescue is conclusive, for the single purpose of issuing an attachment for bringing the alleged of-

fender before the court, for resisting its process. In the case cited for the plaintiff, from New Hampshire, the question was merely, whether the officer was correctly admitted as a witness, and the case itself shows, that a part of those charged with the rescue were acquitted, and part held, which could not be, if the return was conclusive.

The jury have found, that the defendant did not hurry his vessel to sea, in consequence of the arrest of Seymour. The remarks of the district Judge, in this respect, are believed to be correct. But whether they are so or not, is but an opinion on an abstract proposition, and cannot furnish any cause for a new trial, however erroneous. 16 Conn. R. 433. They could do the plaintiff no injury.

Under the circumstances of this case, the defendant was not bound to stop his vessel from going to sea, for the purpose of being a constable's assistant, in attempting to arrest a poor sailor, for a debt of fifteen dollars. The defendant is sued only for committing a rescue, and it is therefore needless to inquire, whether he did or did not improperly decline to act, as constable's assistant in this matter. It would not be contended, that the officer's return would be conclusive as to that; and should a suit be brought for that cause, the defendant will be ready to take care of himself.

On April 20, 1849, SHEPLEY C. J. stated that there had unfortunately, been a division in opinion between the different members of the court, in this case. He read the following opinion.

SHEPLEY J. — This is an action on the case, brought to recover damages, for an alleged rescue of one John Seymour from the custody of an officer.

The first question presented by the bill of exceptions is, whether the return of the officer be conclusive upon the defendant.

It may be difficult to reconcile all the decisions respecting the conclusive character of the returns made by officers, upon

precepts. There can be no doubt, that such returns are conclusive upon certain persons, and for certain purposes, while they are not conclusive upon other persons, or for other purposes. If there be difficulty, it consists in making the proper distinctions, that some rule may be established, by the application of which, each case, as it arises, may be decided. The return of an officer, of his proceedings on the levy of an execution upon lands, was held in the case of *Bott* v. *Burnell*, 11 Mass. R. 163, to be conclusive between the debtor and creditor and all persons claiming under them respectively. But not to be conclusive upon one, not a party to the execution or judgment, and not claiming by a privity of title. In the case of *Brown* v. *Davis*, 9 N. H. Rep. 76, many of the cases were examined by PARKER C. J., who stated the general principle to be derived from the greater portion of them to be, "that between the parties to a suit, and those claiming under them as privies, and all others whose rights and liabilities are dependent upon the suit, as bail and indorsers, the return of the sheriff, of matters material to be returned, is so far conclusive evidence, that it cannot be contradicted for the purpose of invalidating the sheriff's proceedings, or defeating any right acquired under them. But such return is not conclusive as to third persons, whose interests are not connected with the suit, but may be affected by the proceedings of the sheriff; nor as to collateral facts or matters, not necessary or proper to be returned." The application of this rule would decide, that the return of the officer in the present case, was not conclusive upon the defendant. And yet the return of an officer, of a rescue, has often been held not to be traversable. It was stated by the clerks of the Queen's bench, in Lady Russell and Wood's case, Cro. Eliz. 781, that the course of the court had always been, to reject such traverses. The same doctrine is asserted in *Rex* v. *Minifry*, Strange, 642; in Tracy's case, 12 Mod. 556, and in *Rex* v. *Elkins*, 4 Burr. 2129.

It happens not very unfrequently, that language is used by courts of justice, appropriate to exhibit a correct rule for judgment, upon the subject or question then under consideration

which would not be correct as applied to another subject. Hence the rule that such language, though general, is limited by the subject, to which it was applied. Thus limited it is perceived to be appropriate, and finds its explanation. By the ancient English practice, one who had been returned by an officer as guilty of a rescue, was considered to be guilty of a contempt of the court, to which the precept was returnable. An attachment issued in the name of the king, to bring him before the court to be punished for it; and the court refused to inquire, whether the return of the officer were true or not, holding the return for this purpose not to be traversable, and leaving the person fined, to his remedy against the officer, if he had made a false return. The person charged with a rescue, might afterward be indicted and punished, if found to be guilty of a rescue of one guilty of a criminal offence. Or might be liable in civil cases, to him, who had been injured by the rescue of one from the custody of an officer, holding him by virtue of mesne process. No ancient case has been cited or found, which decides that an officer's return of a rescue would be conclusive against the person, upon trial of an indictment or action upon the case. On the contrary an indictment must allege, that the act was done forcibly and against the will of the officer, who held the person rescued, in custody; and these allegations must be proved. *Burridge's case*, 3 P. Wms. 483; *Gyfford* v. *Woodgate*, 11 East, 297; Roscoe's Cr. Ev. 879.

It would indeed be an extraordinary position, and one utterly inadmissible by our fundamental law, that a person could be convicted and punished for a crime, upon the return of an officer, without opportunity to confront or cross-examine him on oath, or to disprove the truth of his official declaration or testimony. That would be little less extraordinary, which should assert, that the property of a person might be taken from him, under color of a trial in a civil action, without any opportunity to controvert or disprove the testimony, introduced against him.

The case of *Hodges* v. *Marks*, Cro. Jac. 485, was an action on the case, for a rescue on mesne process; not guilty was

pleaded, and upon testimony introduced, the jury found a special verdict, setting forth all the attending circumstances, exhibiting the manner in which the person was arrested, and that he was rescued. This would have been quite unnecessary if the return of the officer had been considered conclusive.

The case of *Kent* v. *Elwis*, Cro. Jac. 241, was a writ of error brought in the Exchequer chamber, to reverse a judgment recovered in a like action. One of the errors alleged was, that the rescue was declared to be made from the deputy of the bailiff of the franchise, whereas it ought to have been from the bailiff himself, or from the sheriff. The answer was "*Sed non allocatur*; for there is diversity between this case, which is an action upon his case, wherein he shall shew the truth as *in rei veritate* it is, and not as it is upon the return of rescues or indictments, which say, that it was done to the sheriff or bailiff himself."

In the case of *Wilson* v. *Gary*, 6 Mod. 211, it was not only held to be necessary by Holt C. J. to prove the manner and circumstances of the arrest, but the person alleged to have been rescued, was admitted as a witness for the defendant, to repel the charge made against him.

There is a remark made in the case of *Buckminster* v. *Applebee*, 8 N. H. Rep. 546, relied upon by the counsel for the plaintiff, which states, "the return so far as it goes, is conclusive evidence of the rescue." This was probably made, without noticing the difference in effect of such a return upon a hearing for a contempt, and upon the trial of an action upon the case; and it is not in conformity to the rule subsequently laid down in the case of *Brown* v. *Davis*.

Another question is presented upon the instructions, respecting the duty of the defendant, as master of a vessel to suspend his operations, when about to proceed to sea, if he would avoid the charge of being guilty of a rescue. The instructions were in substance, that it was not his duty to do so.

The law imposes upon those in no way connected with a civil process or its service, no obligation to aid in its service,

further than to abstain from all attempts to molest or obstruct the officer, and to assist him, when properly called upon to do so. The defendant was not called upon to answer for a refusal to assist the officer. The instructions could have had no reference to such a case, but to the case of one charged with a rescue, which must be forcibly made and be so alleged. *Fermor* v. *Phillips*, Holt, 537.

One, who proceeds with his ordinary business, without interfering in any manner with the proceedings of an officer employed in the service of civil process, cannot be considered as making or as attempting to make rescue of a person from the custody of such officer. The declaration contains but one count, and that is for a rescue. The bill of exceptions states, that it was an action, "charging him with the rescue of John Seymour." The plaintiff at first rested his case upon the return of the officer, as conclusive proof of a rescue. That position having been overruled, "testimony was then introduced on both sides, respecting the question of the rescue."

In the defence it was contended, that the facts stated by the officer "did not, if all true, constitute a rescue." Upon a case thus presented, the instructions were given. No other cause of action or of complaint was presented to the court for its instructions to the jury. It would be quite erroneous, to apply those instructions respecting a rescue, to some other cause of action, or to an inquiry, whether the defendant conducted correctly and legally in every respect, in which his conduct might be viewed. No such question or inquiry was presented by the declaration and subsequent proceedings. The only question presented to the court for consideration, was whether the defendant had been guilty of a rescue; and any remark made, having no application to that issue, would be of no importance. The question now presented to this Court is, whether the instructions as applicable to the alleged rescue only, were erroneous. Not whether they would be, if applied to some other inquiry or cause of action. Nor can it be correct to assume, that the testimony of the officer presented correctly the con-

duct of the defendant, and then to proceed to determine therefrom, that he conducted in an unlawful manner, for the case finds, that testimony was introduced in defence, "conflicting with that" of the officer "and tending to prove that the defendant had no agency in the alleged rescue."

It will be unnecessary to depart from the case, to determine the respective duties of officers having precepts, and of masters of vessels, when they come in conflict, for a cause of complaint of a different character from that of a rescue, before they are regularly presented. *Exceptions not sustained.*

TENNEY J. concurred in this opinion.

WHITMAN, late Chief Justice, concurred with SHEPLEY and TENNEY Justices, on the first point,— that the return of the officer was not conclusive,— but did not concur in the residue of the opinion.

The following opinion was read by

WELLS J. —The officer, who made the arrest, states, in his testimony, that he went on board the schooner, commanded by the defendant, and arrested Seymour, one of the crew, and while he had his hand upon Seymour, the defendant ordered him to go forward, and help hoist one of the sails, and that Seymour broke away from the officer, who commanded the defendant to assist him; that the defendant said, "he should have nothing to do with it, that he had his vessel to take care of," and when the officer told him, he should hold him responsible, if he carried Seymour off in his vessel, the defendant replied, that he knew as much law, as the officer did.

Although there was testimony, conflicting with that of the officer, yet the instructions must have reference to the evidence, upon the hypothesis, that the jury might find it to be, as the plaintiff contended it was.

Seymour was arrested, about the time the vessel was getting under way.

The instructions to the jury, were made, in reference to the material facts, which were submitted for their determination.

The Judge told the jury, what the defendant might do, in

certain contingencies, in reference to the management of his vessel, when the arrest was made, "*but that he would have a right to go on, in the same way, as if Danielson, the officer, had not come on board.*"

The jury must have understood by this language, that in the whole management of the vessel, and the control of the crew, for that purpose, the defendant was not bound to alter his conduct, but might proceed in such manner, as he thought, the situation and condition of his vessel would require, irrespective of the presence of the officer.

The defendant would consequently be at liberty, to command one of his men, who might be under arrest, to attend to any duty on board the vessel. And there would be but little doubt that the seaman would act in obedience to his command, and by violence, release himself from the officer. Although the defendant might not use any actual force, by which rescues are ordinarily accomplished, the relation existing between the master and the seaman, is of such a character, that the command of the former would probably excite the latter, to the exercise of all his physical power, to effect his escape. Surrounded by his shipmates, acting in conformity to the master's orders, he would be encouraged to violate the law, and prevent the service of legal process. The master would thus as effectually aid in the rescue, as if he personally removed the hand of the officer, from the prisoner, and must be considered as uniting with the seaman, in the rescue, made by him. But the declaration not only alleges a rescue, by the defendant, it also declares, that he caused Seymour "to escape and go at large."

If the master of a vessel, can be permitted to conduct in the same manner, when an officer is on board of it, with a lawful precept, and has actually made an arrest of one of his crew, as if the officer were not present, it may be very difficult in such cases, to execute either civil or criminal process. Under the instruction, given in the present case, the master might weigh anchor, while the officer was on board, and before he could have a reasonable time, to remove his prisoner,

compel him to relinquish the discharge of his official duty, or subject himself to the necessity of being carried to sea.

It is said, one cannot be guilty of a rescue, by the use of words only; such doctrine is true, when applied to animals, that are not influenced by language. But when an action is produced by words, and by the presence and countenance of the speaker, they are in substance equal to the amount of force requisite, to create such an action.

But if the defendant was not guilty, technically, of a rescue, as the declaration not only embraces that, but also contains the allegation of causing an escape, if the seaman was under arrest, as the testimony tends to show, when the defendant, with a full knowledge of it, ordered him to attend upon his duties, on board the vessel, and he thereupon broke away from the officer, who was unable to detain him, the defendant appears to have been guilty of causing him to escape and go at large. And the instructions must be taken, in reference to the declaration in the writ, as well as the evidence. Upon the part of the case under consideration, they were not given, at the request of the plaintiff, but in answer to that of the defendant, and if prejudicial to the rights of the plaintiff, they furnish just ground of exception.

From the view, taken by me, of the case, it is unnecessary to express any opinion, upon the effect of the officer's return, as in my judgment, a new trial ought to be granted, because the instructions, which have been mentioned, were erroneous.

DEXTER BREWER *versus* NATHANIEL THOMES.

The Rev. Stat. c. 146, § 25, does not make the twenty years a bar, but creates a presumption of payment. It is like the common law provision, presuming a bond to be paid, after a lapse of twenty years, and may be rebutted. Testimony, therefore, tending to rebut the presumption is admissible in evidence.

Where there appeared in evidence, — the poverty of the debtor, — a demand of payment, by the creditor, — and an answer by the debtor, to the demand, "that he would come up soon, and do something about it," — *it was holden by the Court*, that this was sufficient evidence, to repel the presumption of payment, arising from a lapse of time, of more than twenty years.

DEBT on a judgment, in favor of the plaintiff and his deceased partner, against the defendant, recovered at the court of common pleas for the county of Cumberland, at June Term, 1825, for $68,52, debt, and $16,79, costs of suit. The writ was dated June 1, 1846.

The case came before the Court on a statement of facts by the parties, wherein certain testimony was set forth, and objections to portions of it on the part of the defendant.

One witness, a son of the plaintiff, testified, that "about thirteen years ago I was riding into the city with my father, and he saw Mr. Nathaniel Thomes, and he wished Thomes to call on him and settle an execution, which he had held so long against him. The precise answer which Thomes gave I cannot give. The purport of it was, that he would come up soon, and do something about it." The witness also stated, that he called at the house of Thomes, but did not see him, and that a daughter of the defendant made a reply similar to what her father had before said. To this the defendant objected.

The plaintiff introduced other testimony tending to show, that from the knowledge the witnesses had personally, and also from the statements of others, Thomes had been poor and unable to pay demands against him from the time of the recovery of the judgment, until the time of the commencement of the suit. The defendant objected to the admission of any evidence

of the declarations of others, and of all parol evidence whatever.

The defendant pleaded the general issue, a special plea of payment and satisfaction, and the statute of limitations, that the cause of action did not accrue within twenty years.

The parties agreed, that upon the statement of facts, or so much thereof as may be legally admissible in evidence, the court might draw such inferences as a jury might be authorized to draw, and render judgment upon nonsuit or default, according to law.

Codman, for the plaintiff, said that the defence rested upon presumption of payment by lapse of twenty years. This presumption may be rebutted by evidence. Rev. Stat. c. 146, § 25, is only in affirmance of the common law, and the rules of the common law must govern. The court in Massachusetts, with respect to a similar statute, so decided, and that the presumption might be rebutted by any evidence going to show, that the debt remained unpaid. *Denny* v. *Eddy*, 22 Pick. 533. This differs from the general statute of limitation, which creates a bar, unless a new promise is proved, and in writing.

The conversation stated by the plaintiff's son, between the plaintiff and defendant, is sufficient to rebut the presumption, and throw the burden of proof on the defendant to show payment. 8 Pick. 187; 16 Wend. 425; 3 Dane, c. 94, article 3.

He also contended, that the proof of inability on the part of the defendant to pay, was sufficient to rebut the presumption of payment.

W. P. Fessenden, for the defendant, said that the true question here was, whether the statute cited meant any thing, or not. The statute, he contended, amounted to this — that the lapse of twenty years is to be considered as evidence of payment, and changes the burden of proof to the other side, to show, that the debt has not been paid.

There must be shown a promise to pay, or a recognition of

the debt, or that the parties had been so situated, that there had been during the time, no opportunity to make payment.

He contended, that the conversation with plaintiff's daughter, and the declarations of others, were clearly inadmissible. He also insisted, that the evidence of poverty was inadmissible, and had no tendency to prove the issue. It would preclude a poor man from having any benefit from the statute.

The other evidence does not show either a promise to pay, or a recognition of the debt; and therefore, does not show, that the debt remained unpaid.

The opinion of the Court was drawn up by

WELLS J. — This is an action of debt, brought upon a judgment, by the plaintiff, as surviving partner. The judgment was rendered on the third Tuesday of June, 1825. The writ bears date June 1, 1846.

The defence is the presumption of payment, arising from the lapse of more than twenty years, since the rendition of the judgment.

The parties agree, that the Court may decide the case upon the evidence.

It appears from the evidence, that the defendant, in consequence of his poverty, existing nearly all of the time, since the judgment was rendered, has been unable to pay the debt, and by the deposition of the plaintiff's son, that about thirteen years ago, the defendant, being called on by the plaintiff, to "settle that old execution, which he had held so long against him," replied, "he would come up soon and do something about it." The precise answer made, could not be stated by the deponent, but he gives the purport of it. The residue of the testimony adds nothing material, to what has been already stated. By Rev. Stat. c. 146, § 25, a judgment "shall be presumed to be paid and satisfied, at the expiration of twenty years after any duty or obligation, accrued by virtue of such judgment," &c.

The act does not make the twenty years a bar, by limitation, but creates a presumption of payment. It is like the common

law provision, presuming a bond to be paid after the lapse of twenty years.

The statute furnishes a presumption of payment, commencing at a fixed and certain time.

Evidence is presumptive, when the fact itself is not proved by direct testimony, but it is to be inferred from circumstances, which necessarily or usually attend such facts. And a presumption can only be relied on, until the contrary is actually proved. 1 Phil. on Ev. 117. In *Denny* v. *Eddy*, 22 Pick. 533, it is decided, in the construction of a statute, similar to ours, that presumption of payment may be rebutted.

If the legislature had intended the presumption should stand, uncontrolled by evidence, it would have fixed an absolute bar of twenty years, by way of limitation, as it has done by § 11, of the same chapter, in relation to actions on contracts, not limited by any of the other foregoing sections, or any other law of the State.

Testimony then, tending to rebut the presumption, is admissible in evidence. But it may be difficult to find any judicial decision, which points out, with precision, the effect to be given to any one piece of evidence, entitled to consideration, in repelling a presumption. For such evidence must be weighed by a jury, and the law cannot furnish any balance, by which to test its weight. It is a part of their duty, to determine it, for themselves.

In *Fladong* v. *Winter*, 19 Vesey, 196, Lord Eldon says, "taking this to be a case for the presumption, it may be met by evidence to satisfy a jury, that the debtor had not the *opportunity or means* of paying. The latter, I take to be the principle of *Wynne* v. *Waring*," which was a case, cited at the bar, as having been previously decided.

In *Hillary* v. *Waller*, 12 Vesey, 266, Lord Erskine says, upon twenty years, the presumption of payment will hold, "unless *insolvency, or a state approaching it*, can be shown, or that the party was a near relation, or the absence of the party having a right to the money, or something which repels the presumption, that a man is always ready to enjoy what is his own.

In *Oswald* v. *Leigh*, 1 D. & E. 148, Buller Justice says, "with regard to the rule of twenty years, where *no demand has been made* during that time, that it is only a circumstance for the jury to find presumption upon, and is in itself no legal bar." Again he says, that "this doctrine of twenty years presumption was first taken up by Lord Hale." In this he was followed by Lord Holt, who held, "that if a bond be of twenty years standing, *and no demand proved thereon*, or good cause of so long forbearance shown, on *solvit ad diem*, he should intend it paid."

In *Clark* v. *Hopkins*, 7 Johns. R. 555, it is said by the court, that it has been decided, that after eighteen or twenty years, a bond will be presumed to have been paid. The obligee ought to show *a demand* of payment, and an *acknowledgment* of the debt, within that time, to rebut this presumption.

Where the mortgagee has never entered into possession of the mortgaged premises, twenty years *without any demand*, or any interest having been paid, has always been deemed a sufficient length of time to warrant the presumption of satisfaction. *Jackson* v. *Wood*, 12 Johns. R. 242; *Giles* v. *Barremore*, 5 Johns. Chan. R. 545. *Howland* v. *Shurtleff*, 2 Metc. 26, establishes a similar principle.

In *McLellan* v. *Crofton*, 6 Greenl. 334, the instruction given to the jury was, that mere poverty did not rebut the presumption, but that the debtor's absence from the country, during the twenty years, was sufficient for that purpose. The presumption having been rebutted by absence, it was not material to inquire, whether the instruction as to the poverty of the debtor was correct. Both facts existed, and the court cite authorities, to show that poverty and absence from the State, did repel the presumption.

Insanity and poverty, poverty and absence from the State a number of years, are circumstances, repelling the presumption. 3 Dane, c. 94, art. 3. Such circumstances are evidence, to be submitted to a jury.

In the present case, there are three circumstances, tending to repel the presumption, established by the statute.

1. The poverty of the debtor.
2. A demand of payment.
3. The answer made to the demand.

The question is not, whether either of these circumstances *alone* is sufficient to remove the defence, but, sitting as a jury, ought we to be satisfied upon them all, that the presumption is repelled. Although if the case were presented to a jury, and only one of these circumstances existed, there could be no legal ground for refusing to allow it to be laid before them for their consideration.

It is true that a poor man may pay a small debt, but the improbability, that he has paid it, increases in proportion to the magnitude of the debt, and the extremity of his poverty.

A demand of payment may be made, when the debt has actually been paid, but a reply, that the debt had been paid, would impair the force of the demand. In the cases which have been cited, much stress is laid upon the want of a demand, in creating the presumption. If it could spring up, through the want of a demand, surely it might be repelled by making one. The presumption seems to have its origin in the dormant state, and want of vigilance on the part of the creditor. The expression used in 4 Bur. 1963, "bonds, which have lain dormant, are presumed to be satisfied, after twenty years," and similar expressions in other cases, indicate a want of activity on the part of the creditor, as giving rise to the idea of payment. When a debt is due, it accords with ordinary experience, that the creditor will exert himself to collect it; if he remits all efforts for twenty years, the inference arises, that the debt is not due, that it has been paid, or that certain equities exist between him and the debtor, precluding a collection of it. A demand is evidence, the effect of it to be determined by the jury.

When the defendant was called upon to settle the execution he did not deny the existence of the debt, but promised to do something about it. He employed the usual language of procrastination; the fair import of it is, that he is a debtor, and that he will soon do something to discharge his debt. Here

then is an implied admission of an obligation to do something, manifested by a promise. From the promise to do something, it is to be inferred, that the person making the promise, is bound to do it. Although the meaning of the defendant may be considered obscure, and not clear and positive, yet he does not deny the debt, but declares his disposition to act in relation to it. His answer is responsive to the request, to settle the execution.

Taking all the circumstances together, the mind is impressed with a satisfactory belief, that the debt is due, and that the presumption of payment, is repelled by the evidence. Such, we believe, ought to be the verdict of a jury upon these facts, and in our opinion, the defendant must be defaulted.

ROBERT LEIGHTON *versus* SAMPSON REED *& al.*

Where an attachment was made on mesne process, the action entered in Court at the regular term, defaulted, judgment entered up and execution issued; and where at the next succeeding term of the Court, "on motion of the plaintiff, it was ordered by the Court, that the judgment and execution aforesaid be annulled, and that the execution aforesaid be returned into the clerk's office; and the action was thereupon brought forward to" that term, — *It was holden,* that the attachment was dissolved, and that another attachment, made after the time when the first suit was brought forward, and before the time of the last judgment, had the priority.

WRIT OF ENTRY. Both parties claimed under Robert Leighton, Sen'r.

The demandant claimed title by virtue of an attachment, judgment and levy. His attachment was made on the ninth day of April, 1846; judgment was rendered in his favor at June Term, of the District Court, 1846; and his execution was duly levied within thirty days of the judgment, and recorded within three months.

The tenants attached the premises on February 28, 1845, entered their action at March Term, 1845, produced a regular copy of a judgment in the same suit at March Term, 1846, of the district court, levied their execution within thirty days on the same premises, and duly recorded the levy.

It was contended for the demandant, that the attachment of the tenants had been dissolved, and had ceased to exist, at the time he made his attachment, and that therefore, he had the priority of title. It appeared that the defendants' action was defaulted at June Term, 1845, judgment was entered up as of that term, and an execution was taken out. This execution, however, was not enforced, and at the next October Term of the district court, "on motion of the plaintiffs, it was ordered by the Court, that the execution and judgment aforesaid, be annulled, and that the execution aforesaid, be returned into the Clerk's office. And the action was thereupon brought forward to said October Term, and from thence continued until" the next March Term, when judgment was rendered, and the levy made as above stated. The book of records show all these proceedings.

Fox, for the demandant, contended that the tenants had lost their attachment by taking their judgment at June Term, 1845. The proceedings at the October Term following, could not revive and restore the attachment, when once lost. 4 Mass. R. 100; 3 Fairf. 241; 9 Mass. R. 265; 23 Pick. 465.

Augustine Haines, for the tenants, said, that if the demandant had made his attachment between June and October Terms, there would have been more ground, perhaps, for his claim of priority. But our rights were fully restored by the judgment of Court, before any one interposed. The judgment rendered by mistake at June Term, 1845, was annulled, and was as if it had never existed. This is the only final judgment in the action, and the record must conclude the tenant, from saying, that any judgment had been before rendered in that action.

The opinion of the Court was drawn up by

WELLS J. — In this action, "the Court is to render judgment according to the legal rights of the parties." The demandant commenced an action against one Robert Leighton, April 9, 1846, and on the same day, caused the demanded premises to be attached, judgment was rendered in the action,

and an execution issued, and within thirty days from the rendition of the judgment, the execution was levied on the demanded premises, the levy having been made July 14, 1846.

The tenants commenced an action against the same Robert Leighton, Feb. 27, 1845, and on the next day, caused the demanded premises to be attached; their action was entered at the June term, 1845, of the district court, in this county, when it was defaulted, judgment rendered, and an execution issued July 5, 1845.

At the ensuing October term of the district court, on the motion of the plaintiffs in that action, it was ordered by the court, that the execution and judgment be annulled, and that the execution be returned into the clerk's office, and the action was brought forward to the October term, and continued for judgment to the March term, 1846, of the same court, at which time judgment was rendered, an execution issued, and was levied on the demanded premises, April 17, 1846.

The tenants' attachment was prior to that of the demandant, and must prevail, unless it was dissolved by a neglect to make a levy, within thirty days, after the rendition of the first judgment.

The Rev. Stat. c. 114, § 35, among other things, provides that no real estate shall be held by virtue of an attachment, longer than thirty days, next after the day on which final judgment was rendered in the suit, in which the same was attached, to be taken in execution. The final judgment, mentioned in the statute, probably means one, from which no appeal is taken. Such a judgment is final upon the matters in controversy, if litigated, and also upon default. The judgment, at June term, 1845, has all the characteristics of a final judgment, and although a subsequent one was obtained, the declaring, that the first should be annulled, could not change the legal nature and consequences of it, as existing at the time when it was rendered. Both may be final in themselves of the matters in controversy. But the first, being a final one, the levy should be made in conformity to the statute, within thirty days from that time.

The Rev. Stat. c. 114, § 94, provides, that the final judgment, mentioned in the thirty-fifth and thirty-sixth sections, shall be construed to be, that which is rendered in the original action, and not such as may be rendered on review or a writ of error.

The second judgment, in the present case, is in the nature of a review of the first, and the section last cited shows the intention of the Legislature, to limit the lien to thirty days after the first judgment, from which no appeal is taken.

Suydam v. *Huggeford*, 23 Pick. 465, is a very strong case in favor of the demandant, and no reasonable objections can be made to the principles contained in it.

If by obtaining a second judgment, the dissolution of attachments may be prevented, the rights of parties will be rendered uncertain and insecure.

It is true, that the demandant attached the premises, after the tenant's action had been brought forward, and execution had issued on the second judgment. The record exhibits the first judgment, as complete and finished; no one could know by examining it, that any subsequent proceedings had taken place, and it does not appear, that the demandant had any knowledge beyond it. But if he had possessed a full knowledge of all the proceedings, when his attachment was made, he had a right to regard the first judgment as a final one, and the attachment was dissolved. The tenants having lost the lien, once secured by their attachment, it is immaterial at what time the demandant's attachment took place, provided it was made before the levy of the tenants.

In the case before cited, it is said, "if one loses a priority once acquired, by any want of regularity, or legal diligence in his proceedings, it is a case where no equitable principles can afford relief."

The court being of opinion, that the attachment, made upon the writ of the tenants, was dissolved, by the omission to levy their execution, within thirty days after the rendition of the first judgment, it becomes unnecessary to consider the other question raised by the demandant.

According to the agreement, the tenants should be defaulted, and the demandant recover the premises and costs.

RANDOLPH A. L. CODMAN *& al. versus* ALVIN ARMSTRONG.

In an action by two counsellors and attorneys, as partners, they cannot change the appropriation of money paid to them after the partnership existed, and credited at the time on the partnership account, after the lapse of years, to an appropriation to the payment of a prior claim of one of the partners, rendered in the same suit.

When a case comes before the Court, on exceptions to the rulings or instructions of the Judge presiding at the trial, the Court must consider them to be correctly presented by the bill of exceptions; and must give effect to the plain and obvious meaning of the language used.

The law having been stated to the jury for their guidance, they may in all cases judge of the reasonableness of charges made in an account. When there is proof of an agreed price or compensation, or of an usage which might affect it, or from which an agreement might be inferred, it would not be correct to authorize them to judge of the reasonableness of the charges, irrespective of such agreement or usage.

When a usage, which may affect the rights of the parties, is presented by the testimony, it becomes the duty of the Court to determine whether, if proved to the satisfaction of the jury, it be reasonable and operative.

THIS was an action on account annexed, with the usual money counts. The general issue was pleaded.

The exceptions state, that, on the trial, it became necessary to prove, on the part of the plaintiffs, an usage and rule of the bar, for the County of Cumberland, for attorneys to charge in addition to their usual term and arguing fees, the bill of costs, for travel, attendance, &c, exclusive of the witnesses' fees and other disbursements made by the party, to their client, when they prevailed, and to give credit for the same, when collected by, or paid to, them; and the defendant's counsel proposed to submit the reasonableness of this usage and rule to the jury, to which the plaintiffs objected. WHITMAN C. J. presiding at the trial, overruled the objection, and permitted the defendant to introduce evidence on this point, and to argue it to the jury. The three first items in the account annexed, amounting to

$12,00, and also the costs for travel and attendance, taxed at Oct. term, 1836, and March and June terms, 1837, amounting to $19,05, accrued to R. A. L. Codman, one of the plaintiffs, before he entered into co-partnership with Edward Fox, the other plaintiff; and the defendant contended that these items should be stricken from the plaintiffs' account, and the Judge so ruled; whereupon the plaintiffs requested the Judge to rule that an item of credit of $27,24, appearing on the account annexed, which it was proved was cash paid to said Codman, for costs which the plaintiff, in the original suit, Savage Manufacturing Company against the defendant, at Oct. term, 1837, had to pay, as costs for that term, in order to obtain a continuance of their action to March term, 1838, should be allowed in offset of said Codman's individual charges for the terms previous to the co-partnership of the plaintiffs, the defendant being then indebted to the plaintiffs in the sum of $10,82 only. There was no evidence that the defendant had ever given any directions to either of the plaintiffs, whether said sum should be credited to the account of said Codman or to the account of the plaintiffs. But the Judge ruled, that said charges should be stricken from the plaintiffs' account, but that said credit should be allowed the defendant, toward the plaintiffs' demand against him. The existence of the usage and rule aforesaid from the earliest practice of the oldest members of the Cumberland bar, was fully proved at the trial, by the testimony of several members of the Cumberland bar, by the records of said bar, and by the printed rules of the Cumberland bar, containing the rule in question, one of which, it was proved, was posted up conspicuously in the office of the said Codman and the plaintiffs, long before and after the commencement and final determination and during the pendency of the action for services and fees, in which the plaintiffs' present action was commenced.

The Judge instructed the jury among other things, that whether such usage and rule were reasonable or not, the jury must judge, from the evidence and circumstances of the case, as they were in all cases, the judges of the reasonableness of

charges made in an account; that it was for the jury to judge, whether the defendant had knowledge of this usage and rule, or otherwise he would not be bound by it; that the claim set up was to him something of a novelty; that if the charges were an ample remuneration for the plaintiffs' services, the jury would judge whether the plaintiffs were entitled to the taxable costs; but that the jury would judge from all the evidence and circumstances of the case, as to the reasonableness of the plaintiffs' claim, as it respected a reasonable compensation for their services; that as to the defendant's having notice of the usage and rule set up, the jury would judge, whether, from the facts proved, that this rule was conspicuously posted up in the plaintiffs' office, and that defendant, was in their office from time to time during the pendency of his case, they would feel at liberty to infer, that defendant had knowledge of said rule, and would judge whether, if they went into a lawyer's office they would be likely to be looking round to see what was posted up on the walls. The Judge also instructed the jury that if they found the usage and rule reasonable, the plaintiffs could not recover the costs of Oct. term, 1836, March and June terms, 1837, amounting to $19,05, and which were included in the plaintiffs' charge of $84,10; and that the plaintiffs were not at liberty to strike the same item from their credit of $181, although included therein.

The jury returned a verdict for defendant, and thereupon the plaintiffs excepted to the rulings and instructions of the presiding Judge.

No copy of the bill of costs, or of any paper referred to in the exceptions, came into the hands of the reporter.

Deblois and *Codman*, for the plaintiffs, argued in support of these points:—

1. The instruction by the presiding Judge, that the jury were to decide as to the reasonableness of the usage proved, was erroneous. Whether the usage does, or does not exist, as matter of fact, is for the decision of the jury. But whether the usage is reasonable or not, is for the decision of the Court. *Bodfish* v. *Fox*, 23 Maine R. 90.

2. The ruling, as to striking out the charges without also striking out the credit, was erroneous. 1 Pick. 332; 10 Pick. 129; 20 Pick. 339; 14 East, 239; 2 Esp. R. 666.

3. The remark of the Judge, "that the claim set up was to him something of a novelty," was calculated to prejudice the plaintiffs, and to throw an improper discredit upon the claim. Such remarks afford sufficient cause for setting aside the verdict. 15 Mass. R. 367. Of the same character was the remark of the Judge respecting the notice posted up in the office of the plaintiffs.

S. May argued for the defendant, contending among other things: —

That the plaintiffs, having made specific charges for all their services, can recover no more. If they can recover more than they charge, it must be entirely on the ground of usage.

The usage set up is an unreasonable one. Whether the question was for the decision of the Court or jury, it is enough that it was decided rightly. 6 Metc. 393; 10 Mass. R. 26; 14 Mass. R. 488; 2 Sumn. 568.

This usage, if binding under any circumstances, could have no effect here, because there was no evidence whatever, that the defendant had any knowledge of it. It could be no part of the contract, when the defendant did not know of its existence. 23 Maine R. 90; 3 Greenl. 276.

But in truth and in fact, no such instructions were ever given. The reasonableness of the charges, not the reasonableness of the usage, was submitted to the jury.

The counsel for the defendant, contended also, that it was apparent upon the papers, that after making the deductions required by law, from the plaintiffs' account, the balance was against them, even allowing their own principles in all other respects to prevail.

If the plaintiffs had a right to appropriate the money paid to the separate account of Mr. Codman, they did not exercise it; and after the lapse of so many years, they cannot change the appropriation to the payment of the partnership account, once made to the separate account of the senior partner. Chitty on Con. 281; 25 Maine R. 29; 9 Wheat. 720.

The opinion of the Court, WELLS J. having been of counsel for the defendant, and taking no part in the decision, and WHITMAN C. J. dissenting, was drawn up by

SHEPLEY J. — The plaintiffs as counsellors and attorneys were employed by the defendant in the defence of a suit against him, prosecuted by the Savage Manufacturing Company. The defendant prevailed in that suit. This suit has been commenced to recover a balance alleged to be due to the plaintiffs, who have in addition to the usual fees, charged the items for travel and attendance, taxed for the defendant in the bill of costs, which he recovered against that company.

It is admitted, that these plaintiffs cannot recover for the items of charge, which accrued to Codman before he became a partner of Fox unless they can be considered to have paid Codman for those services. There is no item of charge in their account for money paid to him; no proof is presented, that any thing has been paid to him; and no proof, that the defendant has or would have assented to any such payment. Neither the account as presented, nor the proof exhibited, would authorize a recovery for those items.

The sum of $27,24, paid by the company to Codman, was for costs accruing to the defendant at the term of the Court holden in the month of October, 1837, after the plaintiffs had become partners, and while they were acting as attorneys for the defendant. It is immaterial to which partner a payment is made. A payment made to either partner is a payment to the partnership, if made with reference to business within the scope of the partnership, as this appears to have been. It might have been competent for Codman, by virtue of his previous employment, to have appropriated so much of it to his own use as would have paid his previous charges made on account of the same suit. This he does not appear to have done. On the contrary it appears to have been credited to the defendant by the partnership. That appropriation after the lapse of ten years could not be changed since the commencement of the suit. The instructions and directions upon this point were correct.

The plaintiffs claimed to recover for the items taxed in the bill of costs according to a usage alleged to exist in the county of Cumberland authorizing such charges.

The bill of exceptions states, that "the defendant's counsel proposed to submit the reasonableness of this usage and rule to the jury, to which the plaintiffs objected, but the Judge overruled the objection, and permitted the defendant to introduce evidence on this point, and to argue it to the jury." The counsel for the defendant insists, that he did not offer any such testimony; that none was in fact introduced; and that he did not propose to introduce any; and that the exceptions must have been inadvertently allowed. That the instructions and rulings on this point should receive a construction in conformity, to what he alleges, that they were, contending that they only submitted the reasonableness of the charges and of the compensation to the consideration of the jury. The Court must consider them to be correctly presented by the bill of exceptions; and must give effect to the plain and obvious meaning of the language used. Being thus considered, much of the language used might properly receive such a construction. There is however a portion of it, which will not admit it. In addition to that already noticed, it is stated, that "the Judge instructed the jury among other things, that whether such usage and rule were reasonable or not, the jury must judge from the evidence and circumstances of the case, as they were in all cases the judges of the reasonableness of charges made in an account." The effect of the latter clause is only to assign the reason for authorizing the jury to judge "whether such usage and rule were reasonable or not." It did not withdraw the consideration and decision of its reasonableness from the jury. The law having been stated to the jury for their guidance, they may in all cases judge of the reasonableness of charges made in an account. When there is proof of an agreed price or compensation, or of an usage which might affect it, or from which an agreement might be inferred, it would not be correct to authorize them to judge of the reasonableness of charges irrespective of such usage or

agreement. When a usage, which may affect the rights of the parties, is presented by the testimony, it becomes the duty of the Court to determine, whether, if proved to the satisfaction of the jury, it be reasonable and operative. ***Bodfish*** v. ***Fox***, 23 Maine R. 90.

In such case the counsel for the defendant insists, that the verdict for the defendant should not be disturbed, because, as he alleges, it appears, that the plaintiffs not being entitled to recover for the items of charge accruing before they became partners, and being obliged to admit the credit made for the amount paid since that time, can recover nothing, if they are entitled to receive compensation according to the usage. This would seem to be the result, if they cannot by virtue of a previous demand for payment, recover for interest accruing on their account before the commencement of the suit. There is no proof of such a demand, the bill of exceptions does not purport to exhibit all the testimony. When there has been an erroneous trial, the party aggrieved cannot be deprived of an opportunity to present his case anew, unless it be made fully to appear, that he could not derive a benefit from it.

Exceptions sustained, and new trial granted.

BARZILLAI HOWARD *versus* JOHN GROVER.

A new trial will not be granted, merely because the party has newly discovered the evidence, to prove a certain fact, unknown to him at the trial, if by the use of ordinary diligence he could have ascertained the fact before the trial.

A surgeon is not liable for a want of the highest degree of skill in the performance of an operation in the line of his duty; but only for the want of ordinary skill, and for the want of ordinary care and ordinary judgment.

THIS was an action of the case, against the defendant for alleged malpractice as a surgeon, and was tried upon the plea of the general issue, WHITMAN C. J. presiding, at the November term, of this Court, 1847. The jury returned a verdict in favor of the plaintiff, and assessed the damages at $2025.

The defendant moved for a new trial, because the damages were excessive, and because the verdict was against the evidence.

The defendant afterwards filed another motion to have the verdict set aside, because he had, since the verdict was rendered, discovered new and important evidence, the existence of which was unknown to him at the time of the trial, to wit, that the *periosteum* would reproduce itself.

The testimony given at the trial, was all reported, and certified to be a true report, by the presiding Judge. Affidavits to prove the facts alleged in the second motion were produced.

These motions were argued by

Codman, for the defendant; — and by

Howard & Shepley, for the plaintiff.

The counsel for the defendant, cited Rev. Stat. c. 123, § 1; 17 Pick. 471; 12 Johns. R. 234; 3 Pick. 385; 4 T. R. 687; 5 Taunt. 280.

For the plaintiff, were cited the following. 17 Maine R. 247; Cowp. 230; 2 Wils. 244; 4 T. R. 687, cited for defendant; 3 Pick. 113 and 379; 7 Pick. 85; 9 Johns. 45; 9 Wend. 470; 16 Maine R. 187; 22 Maine R. 252.

The opinion of the Court, SHEPLEY J. concurring only in the result, was drawn up by

WELLS J. — This case was tried at the November term, 1847, and a verdict was rendered for the plaintiff for $2025. The defendant was charged with malpractice, as a surgeon. And he moves for a new trial because of the discovery of new evidence, and of excessive damages.

The gentlemen by whose testimony, the alleged newly discovered facts can be shown, all resided in Portland, where the trial was had. No measures were taken to procure their attendance. By the use of ordinary diligence, the defendant could have ascertained the facts, to which they are able to testify. If his knowledge of surgery was less extensive than theirs, by

inquiry of them, the information, which they possessed, could have been obtained. If any witness had stated that the *periosteum* had not the power of reproduction, although no such evidence appears in the abstract, furnished to us, information on this subject could have been presented by consulting works on surgery, or the gentleman by whom it now appears, such an error could be corrected.

Parties are expected to exercise due diligence, in preparing their causes and in producing testimony, and the omission to do so, does not lay the foundation for a new trial.

There is nothing in this part of the case, which would authorize us in disturbing the verdict.

Are the damages excessive, to such a degree, as to require the interference of the Court?

It is always a delicate undertaking, to set aside a verdict on account of excess of damages, especially in cases, where the rules by which they are to be measured, are vague and uncertain. The power to do it, is recognized in many cases, to some of which we refer. *Chambers* v. *Caulfield*, 6 East, 245; *Coffin* v. *Coffin*, 4 Mass. R. 1; *Bodwell* v. *Osgood*, 3 Pick. 379; *Worster* v. *the Canal Bridge*, 16 Pick. 541; *Blunt* v. *Little*, 3 Mason, 102, which was an action for a malicious prosecution, the verdict, being for $2000 damages, was directed to be set aside, unless the plaintiff should remit $500 of his damages; *Wiggin* v. *Coffin*, 3 Story's R. 1, which was also an action for a malicious prosecution. In the case of *Jacobs* v. *Bangor*, 16 Maine R. 187, it is said, that where there is no certain measure of damages, the verdict of a jury is not to be set aside for excessive damages, unless there is reason to believe, that they "were actuated by passion, or by some undue influence, perverting their judgment." It is unnecessary to refer to that class of cases, where verdicts, in relation to property, and injuries to it, have been set aside, and new trials granted.

Honest and well meaning men are liable to be led astray, by strong feelings of sympathy, arising from a narration of painful and protracted sufferings, and while thus excited, often

inflict upon the author of them, a severer punishment, than he merits.

It is not alleged against the defendant, that he was ignorant of the duties of his profession, or that he wilfully and intentionally departed from them. It is true, that his conduct was not guided, with sufficient deliberation, and he relied with a confidence too strong, upon his own judgment.

The plaintiff had been lame for several years; his thigh bone was diseased. It is not denied that in 1843 an amputation was necessary, to arrest the progress of the disease. In that year, the defendant performed two operations, upon the plaintiff's thigh, by amputation. The first was unobjectionable as to the place of amputation, but the bone was left protruded too far, from the muscular parts.

The ground of complaint is principally for the second, that there was an error in not cutting off the limb nearer to the body, and want of care and skill in the mode of execution. But it is not shown, that the plaintiff sustained any material injury from the mere mode of execution, although it did not accord with the most correct and careful practice.

But as soon as the second amputation took place, it was apparent, that the bone was infected above the place of amputation. The plaintiff could not then bear another operation. The caries continued to increase in virulence, until the whole of the thigh bone was removed from its socket, by another surgeon.

The alleged fault of the defendant consisted in an error of judgment, in not removing more of the diseased limb. It is by no means certain, that the removal of a larger portion would have been effectual. When the first operation took place, the remaining bone appeared to be perfectly sound, but in a short time the disease manifested itself in such a fearful manner, as to require a second amputation. It seems therefore highly probable, that the whole bone was diseased, and that nothing short of its entire removal would have saved the life of the plaintiff. If such were the fact, it was of little importance, at what precise part of the limb, below the hip joint,

the operation was performed. Yet damages, against him, have been rendered, not because he failed to remove the whole limb, but that he should have removed a few inches more of it.

It was the inevitable fate of the plaintiff to be a cripple for life, without any agency of the defendant. The want of judgment of the latter may have protracted his sufferings, and caused an increase of expense and loss of time.

The defendant is not liable for a want of the highest degree of skill, but for ordinary skill. *Sear* v. *Prentice*, 8 East, 347; Chitty on Con. 165. And of course only for the want of ordinary care and ordinary judgment.

The practice of surgery is indispensable to the community, and while damages should be paid for negligence and carelessness, surgeons should not be deterred from the pursuit of their profession, by intemperate and extravagant verdicts. The compensation to surgeons in the country is small, in comparison with what is paid in cities for similar services, and an error of judgment is visited with a severe penalty, which takes from one a large share of the surplus earnings of a long life.

We are constrained to believe, that the jury must have been actuated "by some undue influence," and that justice requires a reduction of the verdict. But we have so much reluctance, to interfere with it, that we will allow it to remain, if the plaintiff will remit $500 of it. If this is not done, the verdict will be set aside, and a new trial granted.

MARTIN C. HARRIS *versus* JONATHAN HUTCHINS, JR.

Where an action, commenced before a justice of the peace, has been defaulted, no appeal lies thereupon to the district court.

And if, in such case, there is an entry of the action in the district court, and it is continued, it may be dismissed, on motion of the plaintiff, at the second term.

If the defendant procures an appeal, from a justice of the peace, to the district court, in a case where he is not entitled to it, and the record which he introduces, exhibits a bar to his proceeding, it will be dismissed on motion of the plaintiff, with costs for the plaintiff as the prevailing party.

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

This action of assumpsit, was originally commenced in the municipal court for the city of Portland. The action was entered and defaulted, and afterwards, on the same day, the defendant appeared, claimed the right to appeal to the next term of the district court, and entered into recognizance to prosecute the appeal. The appeal was allowed to the district court, if the defendant could appeal under such circumstances, and the appeal was entered at the next term, of the district court, and continued. At the second term in the district court, on motion of the attorney of the plaintiff, the district Judge ordered the action to be dismissed, and gave judgment in favor of the plaintiff for costs.

The counsel for the defendant filed exceptions.

A. W. and *J. M. True*, for the defendant, insisted, that within both the letter and the spirit of the law, a party might appeal from a default. By the stat. 1821, c. 76, an appeal would lie only "where both parties have appeared and plead." This provision is left out in the Revised Statutes, and an appeal now lies in all cases.

If there had been ground for this objection, it should have been made at the first term in the district court; and such is the rule of that court. If not made at the first term, any objection on that ground, must be considered as waived.

If the appeal was rightly dismissed, the court erred in

awarding costs. No cost is allowed, where the court has no jurisdiction.

J. Adams, for the plaintiff, said that no appeal would lie from the justice, unless given by statute. And the statute does not allow an appeal from a default. The remedy is in a different mode, if the party has from accident neglected to appear and plead.

There can be no appeal from a default. In such case, the defendant is out of Court. 22 Maine R. 401; 20 Maine R. 145.

In all cases the prevailing party is entitled to costs.

The opinion of the Court was drawn up, and delivered at a subsequent day of the same term, by

WELLS J. — This action was commenced before the municipal court, for the city of Portland. After a default in that court, the defendant appealed, and entered his appeal in the district court, in which court, it was continued one term, and then dismissed with costs for the plaintiff. It comes to this Court on exceptions. By c. 98, § 3 and 7, Rev. Stat., the judge of the municipal court can exercise jurisdiction "over all such matters and things" as appertain to the jurisdiction of a justice of the peace, and an appeal may be taken from his determination, "as from a sentence or judgment of a justice of the peace."

By c. 116, § 7, it is provided, that if a person, duly served with process, shall not appear and answer thereto, his default shall be recorded, and the charge in the declaration shall be considered as true, and the justice shall enter judgment and issue execution.

In § 9 it is also provided, that any party aggrieved by the judgment of the justice, may appeal. If this section is to be construed, so that there may be an appeal from a default, it would not be in harmony with § 7. By considering the right of appeal, as taken away, in cases of default, there is no disagreement in the two sections.

It would present an anomoly in judicial proceedings, that a

party should have an execution, while the question was in litigation, whether he was entitled to one.

The judgment of the justice, in § 9, must be construed to mean, a determination of the cause, where the defendant appears and answers. The entering of judgment mentioned in § 7, relates to the mode of recording it, as well upon default, as where the action is on trial, maintained.

The phrase in the statute 1821, c. 76, § 10, "where both parties have appeared and plead," must have been omitted in § 9, Rev. Stat., not for the purpose of changing the law, but because it was not deemed necessary to insert it.

It is contended, that the objection to the appeal, should have been taken, at the first term of the district court, agreeably to a rule of that court, in relation to pleas in abatement and to the jurisdiction. The rule does not embrace motions, the time of making which, must be under the control of the court to which they are addressed; but if in the exercise of such control, the rights of parties, established by law, are taken away, a remedy can be had, by appeal or exceptions. *Rathbone* v. *Rathbone*, 4 Pick. 89. It does not appear, that the defendant was deprived of a right to which he was legally entitled. The action could not be tried in the district court because it was defaulted, and if the court had possessed the power to allow the defendant to plead to the action, no such request was made. In *Bailey* v. *Smith*, 3 Fairf. 196, the writ was abated on motion, for want of a proper seal, after the action had been pending in court more than four years. The proper course was pursued, in dismissing the action.

The Rev. Stat. c. 115, § 56, contains the provision, that "in all actions the party prevailing shall be entitled to his legal costs."

There is no exception of any kind in the statute. Where there is an action and a decision of it, the party prevailing is entitled to his costs. It is said, that where the court has not jurisdiction, the action must be dismissed, without costs to either party.

In *Greenwood* v. *Fales & trustee*, 6 Greenl. 405, the Court

decided, that the action was not brought in the proper county, and upon demurrer to a plea in abatement, awarded costs to the defendant.

The court had jurisdiction over the subject matter of the action, but not over the defendant.

In *Reynolds* v. *Plummer et al.*, 19 Maine R. 22, in addition to the action having been brought in the wrong county, the plaintiff's writ bore the seal of another court. On motion of the plaintiff, the Judge of the district court ordered, that the writ abate, and awarded costs to the defendant. Upon exceptions, the decision of the Judge was sustained. In *Bailey* v. *Smith*, no question was made concerning the costs. The cases in Massachusetts are conflicting. In *Williams* v. *Blunt*, 2 Mass. R. 214; *Clark* v. *Rockwell*, 15 Mass. R. 221; and *Osgood* v. *Thurston*, 23 Pick. 110, costs were disallowed, for want of jurisdiction. But in *Cary* v. *Daniels*, 5 Met. 239; *Turner* v. *Blodgett*, in note, *ibid.* 240; *Jordan* v. *Dennis*, 7 Met. 590; *Hunt* v. *Inhabitants of Hanover*, 8 Met. 343, although the court had not jurisdiction, costs were allowed. In the last case, it is said to be immaterial, whether the want of jurisdiction is more or less apparent.

In *Hunt* v. *Inhabitants of Hanover*, the plaintiff had omitted to take the necessary oath, required by the statute and to have the same indorsed on his writ. That case, and also *Reynolds* v. *Plummer et al.*, were defective in the process. If these two cases had been rightfully brought, the courts would have had jurisdiction of the subject matter of the actions.

In the present case, if the action had been properly appealed, the district court would have had jurisdiction. But the defendant procures an appeal, in a case, where he is not entitled to it, and the record which he introduces, exhibits a bar to his proceeding. Whether from defect or inaptitude of process, or a want of jurisdiction, over the parties, arising from commencing the suit in the wrong court, or the subject matter of the suit, an action is dismissed, the defendant must be considered as the prevailing party. The same principle must

govern in the present case, the defendant is the appellant, the moving party; he comes into Court with a record and proceedings of such a character, that they are properly dismissed, and therefore the plaintiff is entitled to recover his costs.

Exceptions overruled.

CHRISTOPHER C. TOBIE *versus* CHARLES H. SMITH.

In an action for *use and occupation*, where a third person, during the time, was in the actual occupation of the premises, and there was no letting to the defendant, and the only extent of his undertaking was, that he would pay the subsequently accruing rent; such an agreement cannot make the defendant liable in such an action.

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

The ruling and instructions, in the District Court, are so rendered upon the particular language of the witnesses, that a copy, instead of an abstract of the exceptions is given.

"Western District Court, Cumberland, March term, 1848. *Christopher C. Tobie* v. *Charles H. Smith.*

"This was an action of assumpsit on an account annexed, for use and occupation, &c., as per writ, which may be referred to, as part of the case. The house was owned by one Benjamin Lord, and leased by him, by parol to the plaintiff. The plaintiff claimed to have underlet the premises to the defendant, and that he had had the use and occupation of them, by virtue of a parol agreement, testified to by Charles Harris, which was substantially as follows: — that he, the said Harris, sometime in the spring of 1847, heard a conversation between the said Charles H. Smith and the plaintiff, in relation to a house in Federal Street; that Mr. Smith agreed to be responsible for the rent. The reason for this, as the witness understood from their conversation, was that the owner was unwilling for him, Smith, to occupy the house unless the plaintiff would be responsible. Something was said about Smith's father and mother occupying the house. Smith said he was

willing to pay the rent in advance. The plaintiff did then agree to be responsible to the owner, for the rent, if Smith would be accountable to him. And Smith agreed to be so accountable to the plaintiff. The witness did not see Smith pay any money, and has not seen the defendant since, to his knowledge. The witness understood that Smith's father and mother were then in the occupation of the house, and that the plaintiff was unwilling they should occupy the house, unless the defendant would be responsible for the rent.

"Benjamin Lord testified that he leased the premises by parol to the plaintiff, from the 19th of October, 1846, to September 25, 1847, and received from him the rent, at the rate of $120, per annum, and that the plaintiff informed him in May, 1847, that a woman lived in the house, by the name of Smith, who was a cousin of his, and that Mrs. Smith occupied it two months after the plaintiff gave it up, in September, 1847, and made the bargain with him for it, for said two months. And that the plaintiff said he would be accountable to the witness for the rent, till he gave him notice to the contrary, which was given September 25, 1847, when he considered Mrs. Smith his tenant, and received the subsequent rent of her.

"Augustine Tobie testified that he was a son of the plaintiff, that in September, 1847, he heard a conversation between the defendant and his father, that the defendant said he had left a note of $100, with his mother to collect and pay the rent of the house, that his mother was acting as his agent for this purpose. That the defendant admitted that he had told the plaintiff if he would let his father and mother have, and occupy the house, he, the defendant, would be responsible for the rent, but he did not wish to pay it twice, that he knew he was holden and would pay it.

"Upon the above testimony of the plaintiff, the defendant moved the Court to order a nonsuit, which the Judge declined to order.

"The defendant then introduced Mrs. Nancy Smith, the mother of the defendant, who testified that she was the cousin of the plaintiff, and that in May, 1847, (she thinks the 14th)

she hired the house of the plaintiff, that she, with her husband, made the agreement with him at the rate of $120 rent per year, that she was to pay $10 per month rent in advance, but agreed for no specified time; that she sent up the money for the first month's rent the next day by her son, Charles H. Smith, the defendant, a receipt was taken by him of the plaintiff, dated May 20, 1847, which makes a part of the case, that she was then in the occupation of the house, that when the next rent became due according to the agreement she had made, the plaintiff then called on her for the pay, that she promised him that she would pay it promptly if he would wait till the expiration of two months, to which he assented. That her son was at home but a few days while she occupied the premises and then boarded with her and paid for his board. That the plaintiff frequently called on her and demanded the rent afterwards. That her son, the defendant, was absent at sea most of the time, and it did not distinctly appear whether he was or was not at home at any one time when the plaintiff called on her for rent. She also testified that Charles H. Smith never hired or occupied the house to her knowledge.

"The Judge instructed the jury that an interest in real estate could not be conveyed by one to another by parol, that a verbal lease could not be enforced, that no action could be maintained upon it. That it could not be set up effectually against the owner of the estate to keep him out of it, that if a person in fact occupies under a verbal lease he is under obligation to pay the rent he has engaged to pay, or so much as it is worth. That a man may occupy personally or by others. That no person is liable to pay the debt or to answer for the default or misdoing of another unless he promises to do so in writing. That they would consider and determine in this case whether the credit was given to Charles H. Smith or to his father or mother. That if the credit was given to them or either of them originally and he only undertook to be responsible for the rent in the event of their failure to pay it, then this action could not be maintained. That as no time was agreed upon, and the rent to be paid was to be paid monthly in ad-

vance, the plaintiff would have a right to resume the possession of the premises at the expiration of the first month, if the rent for the second month was not paid according to the agreement. That if there was an original agreement with Mrs. Smith, such as she had stated, for the first month, they would inquire whether it was abandoned and a new agreement made with the defendant in lieu of it as to the rent after the first month, for which she testified she had sent the money in advance. That the plaintiff had a right to insist upon such an agreement or possession of the premises, notwithstanding the agreement testified to by the mother of the defendant, after the expiration of the first month. After the charge was concluded the Judge declined to give certain other instructions, in the language of the counsel for the defendant, which are hereunto annexed, which did not seem to present any material point upon which he had not already instructed the jury.

"To which rulings and instructions, and that the Judge declined to instruct the jury as requested by defendant's counsel, the defendant excepts and prays that the exceptions may be allowed and signed.

"By J. H. Williams, his Attorney."

"The foregoing exceptions 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 conformable to the truth, are allowed.

"Daniel Goodenow, Judge of Western Dist. Court."

"The defendant's counsel requested the Judge to instruct the jury as follows: —

"1st. That if there was an original letting of the premises to Mrs. Smith and an occupation of the same by her under a promise to pay rent to Tobie, and she was in possession of the same prior to any verbal promise by defendant to be responsible, the plaintiff was not entitled to recover.

"Also, that it was not in the power of the plaintiff to terminate the tenancy of Mrs. Smith at once, without her knowledge and assent.

"Also, that if the jury were satisfied that the defendant had never used or occupied said premises, nor any person under him, but the same were occupied by an acknowledged tenant of the plaintiff and of whom he demanded rent monthly, the plaintiff was not entitled to recover.

"Also, that if there was an original letting and credit given to Mrs. Smith, a promise by the defendant, (while she is in occupation of the premises) to pay rent, to bind him must be in writing and signed by him, and if the plaintiff recognized Mrs. Smith as tenant after the conversation testified to by Harris, between the plaintiff and defendant, the plaintiff should not recover.

"Upon the foregoing points, made by the defendant's counsel, the Judge declined instructing the jury, and to his rulings as set forth and to his declining to instruct the jury as requested, the defendant excepts and prays that the exceptions may be allowed and signed. "By J. H. WILLIAMS, his Attorney."

J. H. Williams, for the defendant, complained that the language of the instructions, was not such as would be understood by the jury. Enough, however, may be understood, to show that they were erroneous, especially when viewed in connexion with requested instructions, which were refused.

Mrs. Smith was in the occupation of the premises before the alleged promise of the defendant, and so continued afterwards. She never gave up the tenancy under the plaintiff, and he could not terminate it under thirty days at least. Rev. Stat. c. 95, § 19; 22 Maine R. 395; 25 Maine R. 286, 287. Any verbal promise to pay the rent of the house, when in the occupation of Mrs. Smith would be void. Considering this sufficient to obtain a new trial, he would not now urge the other objections.

Sweat, for the plaintiff, said that the jury had found, under the instructions of the presiding Judge, that the credit was given originally to the defendant, and that Mrs. Smith gave up her tenancy under the plaintiff, and became the tenant of the defendant. There could be no lease by parol, which could not be given up by parol; and therefore, the former tenant

could give up at pleasure her tenancy under the plaintiff, and become the undertenant of the defendant. The occupation of the mother of the defendant was, therefore, the same, as if by him personally. Rev. Stat. c. 91, § 30; 9 Shepl. 395; 9 Greenl. 62; 8 Shepl. 308 and 410; 6 Pick. 509; 1 Pick. 43.

The court rightly declined to give the instructions requested, because the Judge had already given all the instructions that were proper.

The opinion of the Court was drawn up by

WHITMAN C. J. — As this case comes before us upon exceptions to the decision of the court below, we have only to look to what was there decided, and excepted to. The action is for use and occupation. It is not pretended that the defendant ever actually occupied the tenement; but his parents did, and were in the occupation of it at the time when he agreed with the plaintiff, as testified to by the witness, Harris. If he had actually entered into possession, or had been the original lessee, by parol, and had underlet it to his parents, he would have been responsible in this form of action for the rent. *Bull* v. *Sibbs*, 8 T. R. 327. But there is no ground for pretending that he ever had any agency in putting his parents into possession, or that he ever underlet the tenement to them.

The error in the decision of the court below, consisted in putting the cause to the jury upon the hypothesis, that there was evidence upon which they would be authorized to find, that the defendant was, by his agents, his parents, a tenant to the plaintiff; which the evidence, even on the part of the plaintiff, did not tend to show; but rather the contrary; for Harris, the witness, mainly and solely relied upon as to the original undertaking on the part of the defendant, testified that the defendant's parents, as he understood, were, at the time, in the occupation of the premises; and that the plaintiff was unwilling they should continue to occupy the same, unless the defendant would be responsible for the rent. There was no pretence in form of a letting to the defendant; and, therefore, none that he could have entered and ejected the occupants.

The whole extent of the undertaking on his part was, that he would pay the subsequently accruing rent. Such an agreement could not make him liable in an action for use and occupation; and such should have been the instruction to the jury by the court.

Whether the defendant was or not a guarantor, that the rent should be paid, need not be considered in this form of action; and the maintenance of it was not put upon any such ground. And the case of *Blake* v. *Parlin*, 22 Maine R. 395, may be an authority decisively against the maintenance of an action upon the guaranty. *Exceptions sustained.*

THE ATLANTIC AND ST. LAWRENCE RAILROAD COMPANY *versus* THE CUMBERLAND COUNTY COMMISSIONERS.

There is no provision of law, by which the Atlantic and St. Lawrence Rail Road Company, can be compelled, by an order of the County Commissioners, to pay for the "services of the commissioners and for their expenses, incurred while they were employed on petitions presented by the company to have the damages assessed, sustained by persons, by the location of that rail road over their lands.

THIS case came before the Court, upon the facts stated in a petition for a *certiorari* to the county commissioners, of which the following is a copy: —

"To the Hon. Justices of the Supreme Judicial Court, next to be holden at Portland, within and for the County of Cumberland, on the Tuesday next but one preceding the last Tuesday of April, A. D. 1848: —

"The petition of the President, Directors and Company of the Atlantic and St. Lawrence Rail Road Company, respectfully represents, that on divers days and times in the years 1846 and 1847, your petitioners made application to the County Commissioners for said county of Cumberland, under and by virtue of the first section of the act to establish the Atlantic and St. Lawrence Rail Road Company, to establish and determine the damages sustained by divers individuals by the location of

said rail road over their land in said county, and that said commissioners in compliance with said application, did on divers days and times in said years 1846 and 1847, proceed to examine said lands and to ascertain said damages and made report thereof, in which report final adjudication has been made and the damages so ascertained have been paid by said company in all cases, whether said reports were accepted without appeal, or whether on the petition of any of such individuals said damages were ascertained by a jury, or a committee, according to the provisions of law, in which last mentioned cases all costs recovered against said company have also been paid by said company.

"Your petitioners would further represent, that in none of the cases where the damages aforesaid were ascertained and established by said county commissioners, was the said company ordered or adjudged by the said county commissioners to pay the costs and expenses of the said commissioners for their services, travel or other expenses in ascertaining and establishing the damages aforesaid.

"Your petitioners would further represent, that at a court of county commissioners holden on the 4th day of January last, being an adjournment of the last December term of said court, an order was passed by said court, and made a part of the records thereof, in the words and figures following, viz: —

"STATE OF MAINE.

"CUMBERLAND, ss. — At the court of county commissioners, begun and holden at Portland, within and for the county of Cumberland, on the 4th day of January, 1848, being an adjournment from December term, 1847, it was ordered, that the Atlantic and St. Lawrence Rail Road Company pay into the County Treasury of the county of Cumberland the sum of six hundred sixty-eight dollars and sixty-two cents, being the amount of costs and expenses of the board of county commissioners, officers, jurors and committees for estimating the damages on lands over which the road of said company passes, and for other costs and expenses, and also for the

amount of the bill of the clerk of the judicial courts, against said company, which costs and expenses have been examined and allowed and ordered to be paid out of the County Treasury of said county. And that the Clerk of this court cause a copy of this order to be served upon the Treasurer of said company."

"And your petitioners further represent, that in the sum of six hundred sixty-eight dollars and sixty-two cents, named in said order, are included large sums of money allowed to Lemuel Rich, 3d, Richard Greenleaf, Daniel Merrill, and Daniel M. Cook, for their services and expenses, in ascertaining and establishing the damages aforesaid in compliance with the applications, so as aforesaid by said company made, and the particular items and amount of which will appear by the schedule hereunto annexed, and all which make a part of the records of said court of county commissioners.

"And your petitioners say, that said records and order are erroneous and illegal in this, that said commissioners have no right to make their services and expenses in ascertaining and establishing damages aforesaid, a charge upon said company, or to order that said company pay the same into the Treasury of said county of Cumberland.

"Whereupon your petitioners pray this Hon. Court to issue their writ, ordering the said court of county commissioners to certify their records aforesaid, relating to the damages so as aforesaid ascertained and established, and the amount allowed said Rich, Greenleaf, Merrill and Cook for their services and expenses in ascertaining and establishing such damages, and their order aforesaid, directing said company to pay the same, for the inspection of this Court, and that the order aforesaid, or so much thereof as relates to the services and expenses of said commissioners aforesaid, be quashed.

"By Willis & Fessenden, their Attorneys."

Swasey, county attorney, for the respondents.

The respondents contend that the writ should not be granted; because, they say —

1st. That there is no *substantial* error in their proceedings; and if there be any error, it is merely in the form of their proceedings.

2d. The question as to awarding that the corporation pay such costs is one within the discretion of the commissioners. If so, no error has been committed.

By the 6th sect. chap 81, Rev. Stat. entitled, " of railroads," the commissioners are authorized upon the application of the corporation or the owner of the land, for an estimation of damages, to require the corporation to give security for the payment of all such damages and costs as shall be awarded, &c.

It is contended, that this provision extends to all costs incident to the examination and determination by the commissioners; their own fees, as well as any other costs; and that the commissioners, acting under the provision of the statute referred to, may well require the corporation to give security for the payment of their fees as a part of the costs. If the commissioners thus take security, the corporation would be bound to pay. If they act without the security, they may, within their discretion, award and adjudicate that the corporation pay such fees as they may tax as a compensation for their services. There is no provision of law or of the statutes, relating to the subject which restricts them.

3d. That the county commissioners, in cases of application to them to determine the damages caused by the taking of land belonging to private persons, by a railroad corporation, have a legal right, and it is their duty, to award and order that the railroad corporation pay all legal costs, including their own fees.

The owner of the land can, in no event, be charged with them. Such costs, therefore, are a legal charge, either upon the corporation or upon the county. If they cannot be legally charged, by the commissioners, to the county, they are a proper charge upon the corporation. It is contended that the commissioners have no right or power to charge the county with

their fees for such service. They are not paid by a salary, for their official services, but in a manner somewhat peculiar.

Rev. Stat. chap. 99, sect. 13. "The compensation of each commissioner shall be two dollars and fifty cents a day, &c., actually employed in the service of the county." And each commissioner shall keep an accurate account, specifying the kind of service, &c., which shall be audited by the county attorney and clerk. They cannot therefore legally charge to and be paid by the county for any services excepting as the statute has authorized. The commissioners are not employed in the service of the county, when they act upon applications such as have been referred to. A railroad is not a public highway. It is the property of the corporation. It is not a county road. The county is not liable to the owner of the land for the damages awarded; they are to be paid by the corporation. The county should not be made liable for costs, by virtue of a charge against the county, by the commissioners for their fees.

If it be said that the county commissioners constitute a tribunal to which the petitioners may apply for specified purposes, without subjecting themselves to liability to pay the commissioners their fees for official services; the reply is, that for every day the commissioners may be employed in the service above referred to, they have the right to charge a given sum, either to the county, or such a sum, as may compensate them, to the company. It is believed they cannot charge the county. And further, that they do not in the case alluded to, act by virtue of their office, but by virtue of a special designation by the statute; and again, that there are other cases where the services of county commissioners are brought into requisition by virtue of statute regulations and provisions, for which services the county is not to be taxed. Rev. Stat. chap. 25, § 32, 33, 34. In certain cases, they are authorized and required to lay out town ways. — To discontinue town ways. — To approve of town ways, &c.

For services rendered by commissioners for either of these

purposes, they cannot legally claim of the county. They are not services rendered for the county. And the practice has been for the commissioners to order their fees, in such cases, to be paid by the town or by the individuals who applied, according to the result of the case.

This practice has been acquiesced in as a legal and proper one. The Court will pardon me for referring to the fact, that the proceedings of the county commissioners here complained of as being erroneous are, as I believe, in conformity to what has been the practice in Massachusetts; and with what has heretofore been the practice in this State, in the counties of York and Cumberland.

W. P. Fessenden, for the petitioners.

In answer to the foregoing, the counsel for the petitioners would observe, that the 6th sect. of chap. 81, manifestly refers only to the damages and costs of the party, where land is taken. If the company applies to the commissioners to estimate damages, how can the owner of the land require the company to give him security for costs with which he has no concern?

As to the 13th sect. of chap. 99, it is replied, that the commissioners are in the service of the county, when they are performing the duty imposed on them as county commissioners.

But it is further replied, that if the commissioners are entitled to be paid for such services, by the company, they have no right to charge it to the county, take their pay out of the county treasury, and then order the company to pay the amount into the county treasury. They cannot fix the amount of their own compensation, and fix it by judicial decision, order a third party to pay it, and then order the company to pay that third party.

If they act merely because they, as individuals, are specially designated, then, as the law fixes no rate of pay, they must receive a *quantum meruit*, like any body else. They cannot first act as individuals, and then, as a court, judicially decide their pay.

The statute gives them, nowhere, the power to fix their pay

as a court of county commissioners; and we object, that their attempt to do so is extra-judicial.

The opinion of the Court was drawn up by

SHEPLEY J. — The question presented for consideration is, whether the railroad company can be compelled by an order made by the county commissioners, to pay for the services of the commissioners and for their expenses, incurred while they were employed on petitions presented by the company, to have the damages assessed, sustained by persons, by the location of the railroad over their lands.

The statute c. 99, § 13, provides, that "the compensation of each county commissioner shall be two dollars and fifty cents a day, and in that proportion for any part of a day actually employed in the service of the county." They are authorized and required by that statute to perform many duties for the county. They are also authorized to perform many duties not particularly beneficial to the county. In some of those cases, provision is made for the payment of their services by those who are especially benefitted by them, and in other cases no such provision appears to have been made.

They are authorized to lay out and alter town and private ways, when the selectmen of towns have unreasonably refused or neglected to do so. In such cases the costs of the proceeding, which would include compensation for their services, are to be paid by the persons for whose benefit private ways are laid out or altered, and by the towns, when town ways are laid out or altered. c. 25, § 32.

When such ways have been laid out or altered by the selectmen, and towns have unreasonably refused or delayed to approve the same, the county commissioners are authorized to approve them, and to direct the proceedings to be recorded by the town clerk. But no special provision is made for the payment of their services. c. 25, § 34.

They are also authorized to discontinue town and private ways, when any person is aggreived by the refusal of a town to

discontinue them; and no special provision is made for the payment of their services. c. 25, § 33.

They are required to perform certain duties on applications made by individuals for the assessment of damages sustained by them, by the laying out, alteration, or discontinuance, of town and private ways; and there is no special provision made for the payment of such services. c. 25, § 36.

They are required to cause town and private ways accepted by them to be opened, when the towns have neglected to open them; and there is no special provision made for the payment of their services. c. 25, § 40.

They are authorized to ascertain and determine the damages to be paid by railroad corporations for any real estate taken by them under the same conditions and limitations, as are by law provided in case of damages for laying out highways. c. 81, § 3.

A like provision exists in the first section of the charter of the corporation, which has presented this petition. But in neither of those enactments is there any special provision made for the payment of the services of the commissioners. And yet those services are not performed for the particular benefit of the county.

If requested by the owners of real estate taken by railroad corporations, the commissioners are authorized to require those corporations to give security for the payment of all such damages and costs, as shall be awarded for the real estate so taken, whether the application for the assessment of the damages be made by the corporation or by the owner of the land. c. 81, § 6. In behalf of the respondents it is contended, that the amount to be taxed for the services of the commissioners would be included in the costs to be thus secured. The owner of the estate taken surely could not be liable to pay for the services of the commissioners in those cases, in which the application was made by the corporation, and yet in such cases they are authorized to require security to be made for the payment of the damages and costs. Those damages and costs are such only as are awarded to the owner of the estate, and can include

the amount to be paid for the services of the commissioners only, when the owner of the estate is liable to pay them. There is no provision, that he shall be liable to pay them even, when the application is made by him.

The result of an examination of the several statute provisions is, that there are indications of a purpose or design, that the commissioners should be paid by the county, while employed in business, in which the county has a particular interest; and that they should be paid by towns, corporations, or individuals when employed in business, in which such towns, corporations, or individuals, had a particular interest, and in which the county had no such interest. But there are no statute provisions suited to carry into effect in certain cases the design thus indicated. And among them is the case of services rendered for railroad corporations to estimate the damages to be paid by them for real estate taken for their use. As the county commissioners cannot exercise any power not conferred upon them by statute, they cannot compel payment for their services performed for the benefit of railroad corporations, unless some statute provision is found authorizing them to do so. It may be highly probable, if not clearly perceived, that the Legislature would have conferred the authority to do so, if the defective provisions of the statutes had been noticed and considered.

While judicial tribunals should so interpret legislative enactments as to cause the intention of the Legislature to be carried into effect, if it be possible, they are not authorized to supply obvious defects, when by their supply alone power would be granted to enable those entrusted with the exercise of it, to carry into effect the purposes contemplated by the general course of legislation.

The writ prayed for is granted.

Inhabitants of Minot *versus* Cumberland Co. Com.

A *certiorari* will not be granted to quash the proceedings of the county commissioners relative to the assessment of damages occasioned by the laying out of a town way, on the ground that the application for damages was not filed in the clerk's office within one year, where it appears that the application was found on the clerk's files, after the expiration of the year, without any entry or proof of the time of filing, but bearing date before the expiration of the year, and no objection is made on that ground to the appointment of the committee, or to their proceeding to act in the matter.

Nor does it furnish sufficient cause for granting the *certiorari*, that where there was no town agent, the selectmen agreed upon a committee to act in the matter, instead of a jury, and the town appeared by an attorney before the committee and before the county commissioners on the return of the report, without making that, a ground of objection.

Whether the applicant for damages occasioned by the location of a town way, is or is not the owner of the land, is one of the questions to be determined by the jury or committee on the hearing of the parties, on such application.

A general allegation in the petition for a *certiorari*, that the committee were actuated by motives of gross partiality, is too uncertain and indefinite to require the consideration of this Court.

The facts, so far as they can be discovered from the papers in the case, are stated in the opinion of the Court. The case came before the Court on a petition for a *certiorari*, to the end that certain proceedings of the commissioners in relation to the estimation of damages by the laying out of a road be quashed.

J. C. Woodman, for the petitioners, said he should take four grounds, either of which was sufficient to show that the proceedings were illegal, and ought to be declared to be void.

1. The application for damages was not filed within one year after the way was laid out, as the statute requires. Rev. Stat. c. 25, § 36. It should appear by the records, that it was so done.

2. The committee who estimated the damages had no authority to act in that matter. The selectmen, the only persons agreeing to their appointment, had no authority whatever for that purpose. It can be done legally by the town agent

only; and if there be no agent, then the other mode, by means of a jury, is to be pursued. Rev. Stat. c. 25, § 31.

3. The proceedings were wholly illegal and void, and no acceptance of the report of the committee could cure the difficulty. It was their duty to determine the ownership of the land, so far as to ascertain whether the claimant was entitled to damages or not.

4. The county commissioners have power to accept or reject the doings of the committee. If there are errors on the face of their report, and the commissioners accept it, their own acts are illegal in so doing. And if the commissioners refuse to receive evidence to show the misconduct of the committee, that is an error on their part. 6 Greenl. 24; 10 Pick. 275.

Codman, for Jacob Dwinal, the original petitioner for damages, said that the granting or withholding a writ of *certiorari* was a matter of discretion, and would not be exercised unless it was shown, that injustice had been done. 11 Mass. R. 417; 20 Pick. 77; 24 Pick. 181. In the present case, he said Dwinal was now prepared to show, that he was the owner of the land.

It has not been the practice until lately of minuting upon the petition the time it was filed. In this case the petition was found on the files of the clerk before the sitting of the court; and must be presumed to have been filed at the day of its date, within the year.

The selectmen are the general agents of the town, and have authority to agree to the appointment of the committee; especially if there be no town agent, as here.

The committee has no power to settle the title to the land over which the road passed. But if this be not so, the town is not aggrieved thereby, for no other person claimed damages, and it is too late to do it now. The town is bound to pay the damages to the person injured, and it is only when there are conflicting claimants that the committee is to decide upon them.

It is a sufficient answer to all the charges of partiality, that the road passed over the land of the petitioner one hundred

and ten rods, and was three rods in width, thus, in addition to the loss of his land, subjecting him to the necessity of making and keeping in repair two fences the whole distance; and that the damages awarded are but thirty-five dollars.

The opinion of the Court was drawn up by

WELLS J. — This is a petition for a *certiorari*. The reasons alleged for it, as gathered from the petition, are as follows.

1. That the application, for damages, was not made within twelve months, after the establishment of the road.

2. That the proceedings of the commissioners were illegal, in assuming jurisdiction, and in appointing a committee to determine the question of damages.

3. That the action of the committee was partial and unjust, and their report illegal.

4. That the course of the commissioners was erroneous in rejecting the evidence of partiality, and illegal in accepting the report.

On the 21st of Oct. 1845, the selectmen of Minot laid out a road, for the use of the town, describing its location, by courses and distances, and its terminations, in a manner sufficiently explicit. On the fifth of the following Nov., the location was accepted by the town.

Jacob Dwinal, who claimed to be an owner of land, over which the way was laid out, and no damages having been allowed him, by the selectmen, presented a petition to the county commissioners, at their session in Dec. 1846, that his rights might be ascertained by a jury or committee.

It is objected, that the petition was not filed in the clerk's office, within a year, after the allowance of the way. Rev. Stat. c. 25, § 36. There does not appear to be any entry on the petition of the time of filing it. It bears date Oct. 1, 1846, and was found upon the files of the clerk. No objection, in the subsequent hearing before the committee, was suggested, because the application was not duly made. If any had been raised, it might have been shown, to have been filed in season. The question was not agitated until after the committee had made

their report, but was allowed to pass *sub silentio*. The commissioners must have deemed the objection either waived or groundless. Dwinal presented an agreement, to the commissioners, signed by himself, who was one of the selectmen, and two other members of the board, that their appearance for the town of Minot might be entered, *in opposition to his petition*, and that certain persons, therein named, might be appointed a committee. The committee was appointed, a hearing had and a report made.

Any person aggrieved by the action of the selectmen, may have his rights ascertained by a jury, or if he can agree with the *agent* of the town, or party liable to pay, by a committee, to be appointed by the commissioners of the county. Rev. Stat. c. 25, § 31. At the time of the application and hearing there was no town agent. It is contended, that the selectmen could not act in behalf of the town, and that the whole proceedings should be vacated. But it appears, that the town was not ignorant of these proceedings, and that the gentleman, who takes charge of this petition, was present at the hearing before the committee, and resisted the claim of Dwinal. The record states, that he appeared as the attorney for the town of Minot. It is not pretended, he was not authorized to appear for the town. He did not take this exception before the committee, and at the subsequent meeting of the commissioners, in June, when the subject of the report was brought before them, it does not appear, that this objection was then made. The counsel for the town objected to the acceptance of the report "for reasons upon the face thereof." Whether the present objection was one of those reasons, it is not practicable to determine.

It would not be just, after the town has been heard and had the full benefit of the chance of a decision in its favor, upon the rendering of a decision adverse to its interest, to allow it to deny the authority of the tribunal, on the ground of not assenting to its action.

When a town has appeared at the sessions, and opposed the report of the locating committee, without objecting to the

shortness of the notice, given to the town, the Court will not quash the proceedings on account of such shortness. 3 Mass. R. 406.

In the report of the committee, it appears that Dwinal was called upon by the attorney of the town, to prove his title to the land, over which the road was located, but the committee ruled, he need not do it. The attorney of the town then offered to prove, that Dwinal had no interest, in the land, but the committee ruled this evidence inadmissible; they considering the only question, submitted to them, was the damages.

The interest of the petitioner claiming damages, in the land, is one of the questions to be submitted to the jury. It is the foundation of his claim for damages. And the committee are substituted, by the parties, for a jury. Section 31, before cited. Neither does it appear, that any evidence of title was laid before the commissioners. It is too plain to need an argument, that one cannot be damnified by the location of a road, over land, in which he has no interest, and if Dwinal had no such interest in the land, as to entitle him to damages, the proceedings, relating to the damages, ought to be quashed. Where part of the proceedings are so independent and disconnected with the residue, that it may be quashed, and leave the remainder an available judgment to the purposes for which it was intended, the Court may quash what is erroneous, and affirm the remainder. *Com.* v. *Carpenter*, 3 Mass. R. 26; *Com.* v. *Blue Hill Turnpike*, 5 Mass. R. 420; *Com.* v. *West Boston Bridge*, 13 Pick. 195. And in the present case, the proceedings in relation to the location and acceptance of the road are so far independent of those in relation to the damages, that if Dwinal is not entitled to receive any, the former may be affirmed and the latter quashed.

It was stated, at the hearing of this case, that Dwinal did own the land, and an offer was made to exhibit his title. Such evidence is admissible to show, that no injustice has been done, it being within the discretion of the Court to grant or refuse the writ. *Rutland* v. *Commissioners of Worcester*, 20 Pick.

78. The allegation, that the course of the commissioners was erroneous in rejecting the evidence of partiality and in accepting the report, was doubtless founded on the conduct of the committee in not requiring and refusing to hear evidence, concerning Dwinal's title to the land. The allegation is, that in making their report, the committee were actuated by motives of gross partiality for the petitioner, and this matter is offered to be proved before the commissioners. The particulars constituting this gross partiality, are not stated. Whether the commissioners would have power, to set aside the report of a committee, for what they might consider partiality, it is not now necessary to decide, for the generality of the charge precludes us from a satisfactory examination of it.

In the exercise of our discretion, we have come to the conclusion, that upon the exhibition to us, by satisfactory evidence, of Dwinal's title to the land, over which the road was laid, and for which damages were allowed to him, the proceedings will be sustained, but if we are satisfied, he had no just claim to damages, the writ of *certiorari* will be granted, and such part of the proceedings as relates to them will be quashed.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF YORK,

ARGUED APRIL TERM, 1848.

JAMES RANGELY *versus* JOHN SPRING.

Where a mortgage was made by a husband and wife, of four separate parcels of land, of which three were the property of the wife, and the other of the husband, to secure a debt before due from him; and where an entry for condition broken was made by an attorney of the mortgagee, by entering upon one of the parcels belonging to the wife, having in his possession the mortgage deed, and stating in the presence and hearing of the husband and of two witnessess that "he entered for condition broken;" and where afterwards certain acts were done amounting to a waiver by the mortgagee of the entry thus made; and where, after the expiration of three years from the time of such entry, the mortgagee, with the assent and at the request of the husband, but without the knowledge of the wife, made a quitclaim deed of the premises to the demandant, he, however, not being present at the time, wherein it was said — "do hereby remise, release, bargain, sell and convey and forever quitclaim unto said, (the demandant,) the land described in said deed of mortgage, entry having been made to foreclose, and the right of redemption having expired, and the said, (the demandant) having at said (the husband's) request paid the amount which would be due on said mortgage. This release is made to said (demandant) at the request of said (mortgagors) and is intended to discharge all title acquired by said (mortgagee)"; — In a real action brought by the grantee of the mortgagee against the male mortgagor, *it was holden*, that as between them, the demandant was entitled to recover.

THIS was a writ of entry, wherein were demanded four several parcels of land in Saco, no one of them adjoining either

of the others, on one of which was a dwellinghouse and other buildings.

On January 4, 1830, Mrs. Olive Spring, the wife of the tenant, was the undisputed owner of three of the lots, including that on which the buildings stood, and on that day joined with her husband in a mortgage to the Saco Bank, to secure the payment of a sum of money due from him to the bank, receiving back an obligation to re-convey to Mrs. Spring, the land belonging to her, on the payment of the money secured by the mortgage.

At the trial, before WHITMAN C. J., proof was offered tending to show, that on the 9th or 10th of May, 1833, an attorney of the bank made entry upon the parcel of land on which the dwellinghouse stood, in the language of the attorney, a witness for the demandant, he "did do certain acts to make an entry for condition broken of a mortgage from John Spring and wife to Saco Bank, by taking the deed of mortgage, and walking into the dwellinghouse of said Spring, and in one of the front rooms of the house stating in said John Spring's presence, that I entered for condition broken." This was done in the presence of two witnesses.

On Sept. 30, 1833, as the charter of the bank was about to expire, the corporation conveyed all their effects to three trustees for the benefit of the stockholders.

Testimony was offered, at the trial, by the tenant, to prove, that, on the 9th of May, 1836, Spring delivered over to one of the trustees, another being present, a check dated on the day following, and payable to the bearer on the 12th of July, 1836, drawn by David Webster on the Manufacturer's and Trader's Bank, and accepted by the bank, and offered to pay the balance in money, the sum then due to the bank being about $5140, and that it was then agreed between the parties that the trustees "should take said check, and hold the same, and if the check should be paid at maturity, that then the money due on the mortgage should be considered as paid on that day, and should have the same effect, as if paid on that day," and that the money for the check, and the balance also,

was actually paid to the trustees on the 12th day of July following, and on that day credited to the stockholders in these words and figures. "By cash balance due on mortgage of Spring property, $5190,95." And that on the tenth day of May, 1836, the said Spring held a policy of insurance upon the dwellinghouse, and made an assignment thereof to the trustees in these words. "Know all men by these presents, that the within named John Spring in consideration that Jonathan King, Samuel Hartley and George Thacher, as trustees of the Saco Bank, the charter of which has now expired, hold a mortgage of the within described real estate, and being willing to secure them, do hereby set over and transfer to the said Jonathan King, Samuel Hartley and George Thacher for the use and benefit of the said stockholders, or whoever shall be interested in the within described buildings, this policy of insurance. To have and to hold the same to them, their heirs, assigns, or successors as trustees, as fully as I could do. Dated this tenth day of May, A. D. 1836.

"J. Spring. [L. s.]"

That this policy was delivered over to the trustees, and on the 12th of the same May, the transfer of the policy of insurance, at the request of the trustees, was assented to by the insurers. The presiding Judge rejected all such proof, excepting the payment of the money to the trustees.

On the 13th of July, 1836, the trustees in the presence of John Spring and at his request made and executed a deed of which the following is a copy.

"Know all men by these presents, that we Jonathan King, Samuel Hartley and George Thacher, of, &c., as trustees of the stockholders in a corporation now expired, called the President, Directors and Company of the Saco Bank, in consideration of five thousand one hundred and ninety dollars and ninety-five cents, paid by David Webster, of, &c., the receipt whereof we do hereby acknowledge, do hereby remise, release, bargain, sell and convey and forever quitclaim unto the said David Webster, his heirs and assigns forever, all the right, title

and interest in and to the land and buildings in said Saco, described in a deed of mortgage made by John Spring and Olive, his wife, to said corporation, dated January 4, 1830, recorded in the registry for York county, book 135, page 28, reference being had to said deed for a more particular description, entry having been made to foreclose and the right of redemption having expired, and said Webster having, at said Spring's request, paid the amount which would be due on said mortgage.

"This release is made to said Webster at the request of said Spring and wife, and is intended to discharge all title acquired by said corporation, the mortgage having been assigned to us in trust.

"To have and to hold," &c. Dated July 13, 1836, and signed by King, Hartley and Thacher, trustees, and recorded Feb. 13, 1837. At the time this deed was made, Mrs. Spring was not present, and it did not appear, that she had any knowledge of it.

At the time the check was handed by John Spring to the trustees, May 9, 1836, nothing was said respecting Webster, but that the check was drawn by him, and accepted by the bank on which it was drawn.

On April 18, 1838, Webster gave a deed of the premises to Daniel Burnham; and on July 6, 1839, Rangely, the demandant, having previously recovered judgment, levied his execution upon the premises as the property of Webster and Burnham. The appraisers valued the property at the sum of nine thousand six hundred dollars.

Webster was not present at any of the times before mentioned.

The verdict for the demandant was to stand and judgment be entered thereon, unless the same is not supported by the evidence admitted and legally admissible, and the facts offered to be proved and not admitted and which should have been admitted, and would have essentially varied the state of the case. In such case the verdict is to be set aside and a new trial granted.

This case was very fully argued in writing by

S. Fessenden and *S. Bradley* for the tenant: — and by

Howard, for the demandant.

Bradley, in the opening argument, made these points: —

I. No legal entry was made to foreclose the mortgage of the demanded premises.

The alleged entry was only upon one of several parcels of land included in the mortgage. There can be no foreclosure of a mortgage, but by a compliance with some one of the modes authorized by the statute. That does not permit an entry to be made on one of several tracts of land in the name of the whole. There must be a peacable entry, and upon each lot.

The mortgagor might be willing, that there should be a peaceable entry into one lot, and not into another. Even if the law admitted of an entry into one parcel in the name of the whole, there was no attempt to do it. The language used, forbids the supposition.

Now it has been decided in this Court, in a recent case, that where several parcels of land are included in the same mortgage, there can be no foreclosure of the mortgage, as to one tract of the land without the whole is foreclosed. *Spring* v. *Haines*, 21 Maine R. 126. The same principle is found in Cruise's Dig. Tit. 15, c. 33, § 66, 67; 1 Powell on Mort. (Rand's Ed.) 389.

II. If the Court overrule the case of *Spring* v. *Haines*, and decide that a legal entry was made, then we say, that the entry was waived by the trustees.

1. By the receipt of the check of Spring on May 9, 1836, even if received as collateral security.

2. By the receipt of the balance of the debt of Spring, on July 13, 1836.

3. By taking the assignment of the policy of insurance from Spring to the trustees, under his hand and seal, on the tenth day of May, 1836, the day after the alleged expiration of the equity of redemption, and by procuring the assent of the president of the insurance company on July 12, 1836, to the

assignment. The assignment to them is an estoppel by deed against denying that the mortgage was an open and subsisting mortgage on the tenth of May. When an entry to foreclose, once made, is waived, there is an end of it, and there can be no foreclosure, but by commencing anew. If there was a foreclosure what right had the trustees to the security of the policy when they had, as is now said, the absolute fee simple in property worth twelve thousand dollars, to pay their debt of $5190,95, and a check of $5000, good as cash besides. The entry was proved by parol, and the waiver of it, is not only proved in the same manner, but by the acceptance of an assignment under seal of the policy.

In support of his reasoning upon this point, he cited 10 Peters, 507; 18 Maine R. 201; 5 Pick. 418; 5 Greenl. 153; 1 Powell on Mort. (Rand's Ed.) 380 to 402; 3 Sumn. 159; 4 Johns. R. 44; 3 Pick. 439; 8 Pick. 490; 2 Kent, 62; 9 Wheat. 489; 20 Maine R. 111; 5 Metc. 5; 8 Greenl. 219; 3 Johns. R. 531; 3 Fairf. 444; 18 Maine R. 357; 6 N. H. Rep. 12; 11 N. H. Rep. 474; 1 Greenl. Ev. § 304; 7 Cowen, 48; 13 Wend. 75; 4 Pick. 527; 6 Peters, 466; 4 Shepl. 168.

III. The next inquiry is, what was the effect of the payment on the title of the trustees of the bank? It is contended, that, as the entry, if one was ever legally made, was waived; that, as the jury would be authorized to find, and must find, that on July 12 and 13, 1836, the mortgage was an open and subsisting mortgage, and that the debt secured by the mortgage was fully paid on those days; the title by the mortgage was wholly divested and the premises entirely discharged therefrom. This is believed to be the well settled law on this subject. The following authorities, on this point, were cited, and comments made upon most of them. 5 Mass. R. 237; 11 Mass. R. 134; 2 Gallison, 152; 1 Cowen, 123; 6 Greenl. 260; 23 Maine R. 345; Rev. Stat. c. 125, § 10; 2 Greenl. 322; 8 Pick. 490; 5 Pick. 243; 2 Mason, 531; 18 Johns. R. 110; 5 Cowen, 248 and 671; 9 Cowen, 641; 3 Mason, 520; 5 Metc. 310; 14 Pick. 401; 1 Metc. 390; 1 J. J. Marshall, 257; 20 Maine R. 111.

The trustees of the bank, then, had nothing to convey to Webster, and could convey nothing to him. Nor did the trustees undertake to convey any thing, because the deed on its face says, that the intention was merely "to discharge all title acquired by the bank." 6 Pick. 499; 11 Pick. 289; 14 Pick. 95; 3 Mason, 520, 531.

IV. The tenant contends, that the title, both legal and equitable, was in him and his wife at the time this suit was commenced. Should it be pretended, that on any equitable principle, he is entitled to recover, he is met by a still stronger equity against him. He does not stand in the relation of an innocent purchaser, without notice of the title of Spring and wife. In the argument upon this point, he cited and commented upon the following authorities. 6 Johns. C. R. 417; 2 Sumn. 533; 14 Wend. 63; 22 Maine R. 316; 1 Story's Eq. § 400; 14 Pick. 231; 2 Powell on Mort. (Rand's Ed.) 564 and notes; 3 Johns. C. R. 344; 1 Story's Eq. § 395; 18 Maine R. 221; 3 Fairf. 453; 19 Maine R. 115; 3 Metc. 405.

V. Nor is the defendant estopped from setting up the defence relied upon by him. The present is an action at law. A man is not barred of his right to real estate by an estoppel, in an action at law, unless by record or deed. If he is to be barred of any right to defend his land by parol merely, then there may be a conveyance of land by parol. Personal property may be conveyed by parol, and therefore any proof showing a recognition by one claiming the property, that it belonged to another, would be admissible to show title.

He examined the decision of the Court in the present case, (21 Maine R. 130,) and in the case of *Hatch* v. *Kimball*, 16 Maine R. 146, and insisted, that neither of them authorized the assumption, that this Court had decided that a man can be barred of his land by parol proof, in an action at law, by way of estoppel. He also cited and examined the following authorities: — 1 Johns. Ch. 344; 6 Johns. Ch. 166; Story's Ag. § 91; 6 Ad. & Ellis, 469; 15 Mass. R. 153; 19 Maine R. 146; 2 Metc. 90; 1 Greenl. Ev. 26, note 2; 5 Metc. 476,

484; 4 Wend. 403; 7 Pick. 116; 16 Pick. 460; 1 Hill, 19; Roberts on Frauds, 94.

VI. If it should be said, that the deed from the trustees to Webster operated as an assignment of the mortgage, and on that ground, it is to be considered, that the demandant has a subsisting mortgage, it is sufficient to reply, that even if it were so, the demandant has no right to the mortgage, as his only claim is under a levy upon the land, as the property of Webster. 3 Pick. 484; 16 Maine R. 345.

VII. If it be said, that the demandant has a title by the record, it is sufficient to reply, that the utmost that can be claimed by the records is an assignment of the mortgage, and that cannot with any plausibility be set up; and as has been before said, the levy of the plaintiff's execution upon the interest of a mortgagee of land is entirely void, and nothing passes by it.

Howard, for the demandant, in his argument, made the following points: —

I. The entry to foreclose the mortgage was legally made. Statute 1821, c. 39, § 1. An entry into one parcel of land, included in the deed, for the purpose of foreclosing the mortgage, is a sufficient entry into all the parcels. It is equivalent to an entry into one parcel in the name of the whole; and that is sufficient. Co. Lit. 252, (a); Stearns on Real Actions, § 3, 17; 1 Cruise, 64. And besides, as will be shown hereafter, Spring is estopped from denying, that there was a legal entry to foreclose the mortgage.

II. The foreclosure was complete at the expiration of three years from the entry. Statute 1821, c. 39, § 1.

1. It was not waived in May, 1836, by the reception of the check, or by the assignment of the policy.

2. But another view of the matter would seem to be conclusive, against the tenant, that the trustees had no power or right to waive the foreclosure. And if they could waive, they did not, as it could only be done by them as a body, and not separately as individuals. 6 Johns. R. 39; 6 Mass. R. 46; 1 Bos. & Pull. 235.

3. The entry to foreclose, or foreclosure was not waived by the payment of the money July 13, 1836. There can be no waiver of a legal estate once vested. The reception of the money was but the consideration of the conveyance. 1 Sumn. 118; 3 Sumn. 159; 6 N. H. Rep. 12.

4. If these acts can be considered as amounting to a waiver, then Spring afterwards waived all rights he might have had under the supposed waiver of the trustees; he waived their waiver. Co. Lit. 352, (a); Com. Dig. Estoppel, E. 9.

III. Spring is estopped from setting up a waiver; and from contesting the title of Webster, or of the demandant, who derives his title through Webster. The principle of estoppel, under the circumstances of this case, is applicable to it. The principle is applicable at law to real, as well as personal estate.

Estoppels are of three kinds — by matter of record, by matter in writing, and by matter *in pais*. Co. Litt. 352, (a and b); Com. Dig. Estoppel, A. 2; 1 Greenl. Ev. § 207. The courts of common law have adopted the rule in chancery, as applicable to real estate. In Maine, in 16 Maine R. 146; 20 Maine R. 231; and 21 Maine R. 137. In Massachusetts, 14 Mass. R. 437; 18 Pick. 313; 23 Pick. 92; 2 Metc. 431. In New Hampshire, 6 N. H. Rep. 521. In Connecticut, 11 Conn. R. 248. In Pennsylvania, 7 Serg. & Rawle, 468, and 13 Serg. & R. 306. In New York, 8 Wend. 448; 9 Wend. 148; 12 Wend. 57; 3 Hill, 216. In England, 2 Ad. & Ellis, 256.

Shepley J. did not sit in the case, having been called upon as a witness by the parties. Whitman C. J. and Wells J. concurred in the result, that judgment should be rendered in favor of the demandant, each giving his reasons therefor. Tenney J. dissented.

Whitman C. J. — This cause has been before us upon a former occasion, (21 Maine R. 130) upon the report of the Judge, who presided at a former trial; and a new trial was granted on account of the misdirection to the jury, in that

trial, that the consent of the defendant's wife was necessary to render a conveyance to one David Webster, by certain individuals, acting as the assignees of the Saco Bank, effectual. As the facts were presented to the Court at that time a strong impression was made, that it would be extremely iniquitous, that the defendant should be allowed to prevail; and in delivering the opinion of the Court, as then formed, it was not deemed out of place for the Court to intimate such an impression. It was further stated, that it was a principle in equity, that, if one having a title to real estate, and standing by and seeing another person convey the same estate to a third person, without apprising such third person, that he was buying such estate of one who had no right to convey it, he would not be allowed afterwards to claim it against such grantee; and that a similar principle had been recognized at common law. These views, not being those upon which the new trial was more particularly granted, were thrown out, without much research, and perhaps, somewhat loosely; and may be regarded as *obiter dicta.*

The cause is now before us upon a report of the Judge, who presided at the new trial, in which a verdict was returned for the plaintiff, under an agreement, that, if it is not supported by the evidence admitted, and legally admissible, including such as was offered on the part of the defendant and rejected, and which should have been admitted, then, that judgment should be entered thereon; and that otherwise, a new trial should be granted.

The plaintiff in this, as on the former trial, relied upon a title under a mortgage deed, made by the defendant and his wife, of the demanded premises, to the Saco Bank; and a title deduced therefrom to himself. The premises were, at the time of making the mortgage, held by the defendant, partially, if not wholly, in right of his wife. No question appears to be made in argument, and none occurs to the Court, as to the chain of title posterior to the deed made by Jonathan King and others, as the trustees of the Saco Bank, to David Webster. In this deed the following description and recital is to be

found, viz.: "In consideration of five thousand one hundred and ninety dollars and ninety-five cents, paid by David Webster, &c., the receipt whereof we do hereby acknowledge, do hereby remise, release, *bargain, sell and convey*, and forever quitclaim unto the said David Webster, his heirs and assigns, all the right, title and interest in and to the land and buildings in said Saco, described in a deed of mortgage made by John Spring and Olive, his wife, to said corporation, dated January 4th, 1830, and recorded in the registry in York county, book 135, page 28, reference being had to said deed for a more particular description; *entry having been made to foreclose, and the right of redemption having expired;* and said Webster having, at said Spring's request, paid the amount, which would be due on said mortgage. This release is made to the said Webster at the request of the said Spring and wife; and is intended to discharge all title acquired by said corporation, the mortgage having been assigned to us in trust." To the operation of this deed, various objections are made; some depending on the language contained in the deed itself, and others on the alleged want of power in the trustees to convey the premises.

As to the language of the deed, it is insisted that it imports nothing more than a discharge of the mortgage. The words "remise, release and forever quitclaim," and, "is intended to discharge all title acquired by said corporation, the mortgage having been assigned to us in trust," are supposed to amount to such discharge. If these were all the operative words, by way of showing the intention of the parties, to be found in the instrument, although the writing were made to a stranger, and not to the mortgagors, the construction might be such as is contended for. But this is very far from being the case. Every instrument in writing, must have effect according to what, from the nature of the instrument, taken in connection with the subject matter to which it relates, and the whole of the language used in it, must be believed to have been the intention and understanding of the parties to it.

The first difficulty in the way of the construction contended

for, arises from the fact, that the instrument was not made to the mortgagors themselves, or to either of them.

If a simple discharge of the mortgage were in view, how did it happen, that the instrument to effect such purpose, was made to a stranger, and not to those in whose favor it is alleged it was intended to operate. And this difficulty will be augmented, when it is considered, that the evidence is abundantly to the effect, that the instrument was not made at the personal solicitation of the grantee in it. The grantors never saw him personally in reference to it. Whatever he did, concerning the procuring it to be made, was done by his agent; and that agent was the defendant. How came the instrument, then, to be made to Webster, and not to the defendant himself? Judge Shepley states, that he drew the deed; that he drew it at the request of the defendant, Webster not being present; and that he thinks the defendant did assume so far to act for Webster as to receive the deed. Jonathan King, another witness, and the grantor in the deed, principally active in the negotiation, preparatory to making it, says the deed was made to Webster, at the request of the defendant; and that he never heard him express a wish that it should be made to any one else; and that the defendant received it from him, with the original note and mortgage.

When we come to look at the deed, we find language in it, other than that relied upon by the defendant, by no means of an equivocal tendency in showing that a conveyance was actually intended. The deed recites the receipt of a consideration of five thousand one hundred and ninety dollars and ninety-five cents, as paid by Webster. It, however, recites, that it was paid at the request of the defendant, but not by him. We then find, not only the words remise, release and forever quitclaim, in the granting part of the deed, which of themselves might be equivocal, but the words bargain, sell and convey, which are not equivocal; and are never used when a mere release is in contemplation. We find, then, the acknowledgment of a consideration for a conveyance, as received from Webster, and the appropriate words of a conveyance used. And

we next find the subject matter of a conveyance, viz.: all the right, title and interest in and to the premises, described in a deed of mortgage, made by the defendant and his wife, to said corporation, accompanied with a statement of an "entry, having been made to foreclose; and the right of redemption having expired." There is next the recital, much relied upon in the defence, in these words; "This release is made to the said Webster at the request of the said Spring and wife, and is intended to discharge all title acquired by said corporation, the mortgage having been assigned to us in trust." These words, if the scope and design of the instrument were, in other respects, indicative of a mere intention to release and discharge the mortgage, might well be used. But such language is sometimes used, and not inappropriately, where one wishes to rid himself of all concern in a transaction, and merely wishes to discharge himself from it, and turn it over to some one else. In this instance, the trustees may well be considered as having intended to say, that they discharged the corporation and themselves from all concern with the mortgaged estate, and turned it over to Webster. The whole tenor of the instrument would seem to show, that they could have meant nothing more, especially when we come to the *habendum*, which is in the common form contained in deeds of conveyance, viz.: to hold to the grantee, his heirs, &c. If nothing was intended to be conveyed, such an *habendum* would have been absurd. It would seem that no one could read such a deed, and entertain a doubt, that an estate was intended to be conveyed. If such were not the intention, why was any language used, not appropriate to a mere naked release. The deed was not written by one unacquainted with the language suitable to such purpose; and it was written at the request of one, who, beyond any one else, was interested to have it so drawn, if such were the design of it.

The ground that the trustees were not vested with power to make the conveyance does not seem to be sustainable. The deed to them was under the corporate seal of the Saco Bank, and signed and acknowledged by their president, the head of the

corporation. This was, therefore, the deed of the corporation itself. It was not a deed made for them, by a person to whom authority for the purpose had been delegated. "Though a corporation can do almost any business of a commercial nature, by a resolution, without seal, yet the conveyance of land is not one of the excepted cases; and they cannot convey or mortgage, but under their corporate seal." 4 Kent, 451. The affixing of the common seal to a deed of conveyance, by a corporation, is sufficient to pass the estate even without a formal delivery. *Derby C. Co.* v. *Wilmot*, 9 East, 360. The common seal gives perfection to corporation deeds. Jacob, Title, Corporation, II. The deed of the bank, to the trustees, conveys the property mortgaged by Spring and wife, the same as it does their other real estate. This deed was duly recorded, and contained all that strangers could be expected to regard, in reference to the title of the trustees. Webster, in taking his deed, had a right to rely upon it as he found it upon record. Any votes or instructions the corporation might pass or give to the trustees, was a matter between those two parties, with which Webster had nothing to do.

But the circumstances, legitimately in evidence in this case, are such as do not call upon us minutely and critically, either to examine into the authority of the trustees to make the conveyance in the manner they did, to Webster, or the effect of the acts relied upon to prove a redemption of the premises from the operation of the mortgage. For it cannot be doubted, that if Webster, arising from any such facts, could take nothing by his deed, he must be considered as having been led into an egregious misapprehension; and that, too, through the instrumentality of the defendant. And we should be sorry to doubt, that, what the defendant did, in accomplishing the negotiation, was, at the time, done in good faith on his part. The evidence shows his great anxiety lest he should lose the estate, while it was in the hands of the trustees; and no one can doubt, that in procuring a transfer of it to Webster from the trustees, he must have been actuated by some arrangement, between him and Webster, whereby such loss

would not become inevitable. What this arrangement may have been has not, in the last trial, been developed; and in the former did not, perhaps, appear by competent evidence, though a document was admitted as such, by the Judge, who presided at it. Although, at present, we must regard ourselves as uninformed as to what the arrangement was, we cannot think, that a jury could have doubted that there was one, which, at the time, was satisfactory to the defendant; nor that, at the same time, that he was procuring a conveyance, absolute in terms, to be made to Webster, his mind was put at rest as to the danger of ultimately losing the estate. We are not at liberty to doubt the capacity of the defendant to read, and understand what was presented to him in plain English, and which he *himself* had procured to be written, nor that he must have had full knowledge, that he had caused, of his own mere motion, a deed to be made, purporting to be to Webster; and conveying to him in fee, the demanded premises, in consideration of five thousand one hundred and ninety dollars and ninety-five cents, paid by him; and setting forth, that they were an estate which the defendant and his wife had mortgaged to the Saco Bank; and that an entry had been made thereon to foreclose; and that the time of redemption had expired, all tending to give Webster to understand, that an indefeasible estate was thereby conveyed. And, as the evidence was, no jury could fairly be at liberty to doubt such facts.

Notwithstanding all which, it is proposed to show, that King and others had no power to convey the premises; and that in fact the amount received by them, which purports in their deed, to be the consideration for their conveyance, was intended as, and for, and was in effect, a redemption of the mortgaged estate; so that King and others had no estate to convey; and it is contended, that the defendant, at law, is not precluded from availing himself of such facts. In equity, nevertheless, it is not denied, that he would be estopped. And Mr. Chancellor Kent, in *Storrs & al.* v. *Barker*, lays down the rule, with great precision, and in accordance with numerous authorities, to be, that, "where one having title, acquiesces

knowingly and freely, in the disposition of his property, for a valuable consideration, by a person pretending to title, and having color of title, he shall be bound by that disposition of property ; and, especially, if he encouraged the parties to deal with each other in such sale or purchase."

If such be the settled rule in equity, it must amount to an entire refutation of the argument of the defendant's counsel, that such doctrine is repugnant to the statute of frauds, and to that concerning the conveyance of real estate. Courts of equity are no more at liberty to disregard, what can be deemed statutory enactments, than are courts of law. The statute of frauds must not be construed so as, unnecessarily, to open a door to the commission of fraud. The rule above cited, is admitted, in reference to the personalty to have full operation at law, but it is denied that it has in reference to the realty.

We must now examine and ascertain whether such a distinction is well founded, and ought to be recognized as such, in the courts of this State. The reason for the distinction does not seem to be very obvious. No rule is more familiar than, that, in reference to real estate, persons are estopped from setting up titles in themselves, in opposition to recitals in their deeds. In such cases though there may be nothing like operative words of conveyance in the recitals, yet, if they be such, that the attempt to claim an estate, adversely thereto, by individuals, who had made the recitals, to the injury of those who had a right to depend on the truth of them, would be repelled at law, as well as in equity, and be adjudged tantamount to a relinquishment of title to the latter. Again ; if one has taken a conveyance, purporting to be by deed of general warranty, and the grantor's widow afterwards claims dower in the estate, purporting to be so conveyed, how often has it been held in this State, that the grantee is estopped from showing that the title, at the time of the conveyance, was not in the grantor, but had before been in the grantee, or in some one else under whom he claims? *Nason* v. *Allen*, 6 Greenl. 243 ; *Haines* v. *Gardner & al.*, 1 Fairf. 383. Again ; though the

statute concerning conveyances of real estate formerly provided, that a deed, to be effectual against others than the grantor, his heirs and devisees, must be recorded, yet it was held that actual notice to a second grantee, prior to a conveyance to him, of the existence of the prior grant, though not recorded, would be a bar to the claim of the second grantee of the same premises. Courts often look to the reason of the rule prescribed; and when that ceases the rule is treated as inapplicable to the case.

In the *Welland Canal Co.* v. *Hathaway*, 8 Wend. 480, we find it laid down, that estoppels are of two kinds, viz.: those technically such, as by deed, &c., which must be pleaded, to make them absolutely such, and those *in pais*, which, though not pleaded, may be given in evidence, so as to operate as effectually as those technically such. Mr. Justice Nelson, in delivering the opinion, says, "In many, and probably in most instances, whether the act or admission shall operate by way of estoppel or not, must depend upon the circumstances of the case. As a general rule a party will be concluded from denying his own acts or admissions which were expressly designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of the latter." Estoppels, therefore, are not always to be deemed odious. When not technically such they can only be used in the furtherance of right, and the promotion of justice; and such are never sanctioned, but when they are seen to be of that tendency. And of this character is the rule relied upon by the plaintiff in this case. And why it should be a good rule every where in regard to the personalty, and not as to the realty, is not so easily comprehensible. What would be justice in the one case would be equally so in the other; and, in equity, is admitted accordingly; and why should it not be so at common law?

What are the objects of legal rules? Surely the promotion of justice. The common law aims at that object; and especially at the promotion of fair dealing among men, and the prevention, in an especial manner, of whatever would be in effect a fraud. Whatever rule would be conducive to this end

it would ordinarily adopt; and none sooner than the one in question, which has confessedly been adopted already in regard to the personalty. The common law is characterized, as being founded upon reason, and as being "the perfection of reason, acquired by long study, observation and experience, and refined by learned men in all ages." Its principles accumulate with the experience of ages, adapting themselves to the progress of society in knowledge and civilization. Accordingly, no one of the elder States in the union is without its common law principles, not to be found in the common law of the mother country, adapted to its own peculiar situation and wants.

The rule in question is no new rule. It has long been clearly defined, and well settled in equity jurisprudence, and of unlimited operation. Why should it not be so in proceedings at comon law? If it is a salutary principle in one court how can it be otherwise in the other? It is admitted, that the common law courts of Pennsylvania have adopted it. And they have adopted many others of the principles, which had first received their sanction in courts of equity. *Wents* v. *Dehaven*, 1 Serg. & Rawle, 312. If the courts there have adopted the principle in question, there would seem to be no good reason why we should not do so. But, in opposition to our doing so, the counsel for the defendant say, that we have a court of equity; and, as the junior counsel erroneously alleges, of general equity jurisdiction. If he were right in that particular, it would seem to be strange, if not preposterous, that we, at law, must turn a party over to another tribunal, to enable him to avail himself of a well known, well defined and well settled rule in jurisprudence, as applicable in a rational point of view, to proceeding in the one tribunal as in those of another; and which had already been adopted to some extent in both; and, especially, when, as in this State, the very court, which is to decide in equity, is the same tribunal which is to decide at law. But general equity powers are very far from being conferred upon any tribunal here. The powers of that kind, existing here, are conferred upon this

Court, and are comparatively few in number, and are specific. We have, it is true, equity jurisdiction in matters of fraud. But in this case we have not been led to suppose, that the defendant, in procuring the deed to Webster, meditated a fraud; and there is no reason to suppose that a bill alleging it could be sustained. The defendant, in setting up the defence he now relies upon, is endeavoring to avail himself of what he deems to be a legal right, in doing which he affords no ground for the plaintiff to proceed against him as and for fraud. The defendant has or has not a legal right to prevail. If he has, he cannot be guilty of fraud. If he has not, the plaintiff will have no occasion to accuse him of any thing of the kind.

In Massachusetts, there have been strong indications, that the principle in question would be adopted by her Supreme Court as at common law, whenever a fit occasion may call for it. In *Barnard* v. *Pope*, 14 Mass. R. 437, Mr. C. J. Parker says, "if it appeared, that, when William Barnard conveyed to Peck, the petitioner stood by, knowing that his brother was about conveying a moiety, and had declared that he had conveyed his share to him, the case would be analogous to those alluded to; and would deserve serious inquiry, whether so manifest a fraud must prevail in a court of law."

Even in England, where there is a court of chancery of the most extensive jurisdiction, it is believed there are indications of a similar tendency, in their courts of law. In *Hearne* v. *Rogers*, 9 B. & C. 577, Mr. Justice Bailey, in delivering the opinion of the Court, says, "there is no doubt but that the express admissions of a party to the suit, or admissions implied from his conduct, are evidence and strong evidence against him, but we think that he is at liberty to prove, that such admissions were mistaken, or were untrue, and is not estopped or concluded by them, *unless another person has been induced by them to alter his conduct.* In such a case the party is estopped from disputing their truth with respect to that person." The case then before the Court was trover for goods sold.

The plaintiff had been erroneously declared a bankrupt; and his goods had been sold by an assignee. The defence was, that by his own acts he had induced the sale. To make out the defence it was proved, that he, as a bankrupt, surrendered a lease, which he held of a tenement, &c. Upon this the same Judge remarked, that this was between other parties, and therefore no estoppel; but that if he were to bring trover for his lease, *or ejectment to recover the land*, he would not be permitted to deny, that he was a bankrupt, to avoid the effect of the surrender. And in *the King* v. *the Inhabitants of Butterton*, 6 T. R. 554, Mr. Justice Lawrence said, "I remember a case some years ago, in which Lord Mansfield would not suffer a man to recover, even in ejectment, where he had stood by and seen the defendant build on his land." Lord Mansfield was certainly one of the greatest lawyers that ever sat on the English bench; and it cannot be questioned that he did more than any other Judge ever did, by way of improving the common law of England, by the adoption of equitable principles, not before recognized as belonging to it. His opinion, in this instance, can but be entitled to very great weight, as it must have been acquiesced in by the counsel engaged in the cause, as otherwise the point would have been reserved for further consideration, and would have appeared in the reports. It is true, however, that Mr. Chancellor Kent, while sitting as chancellor, once threw out a doubt of the correctness of such a decision at law. But if such a Judge as Lord Mansfield, where there was a court of equity of general jurisdiction in equity matters, could so decide, can it be that we should not do so, where so important a principle could not otherwise be brought into operation in reference to titles to real estate?

This adoption of principles at law, that have grown up in, and have long been sanctioned by courts of equity, is very far from being a novelty or unprecedented; even where both courts exist. Mr. Chancellor Kent, himself, in his valuable commentaries, vol. 4, § 15, holds this language. "The narrow and precarious character of the mortgagor, at law, is

changed under the more enlarged and liberal jurisdiction of the courts of equity. Their influence has reached the courts of law; and the case of mortgages is one of the most splendid instances, in the history of our jurisprudence, of the triumph of equitable principles, over technical rules; and of the homage, which those principles have received by their adoption in courts of law."

Mr. Justice Buller, in *Goodtitle* v. *Morgan*, 1 D. & E., at page 762, remarked, in regard to a title claimed by a mortgagee, who had had the precaution to take, with his mortgage, the title deeds of the mortgagor, and which in equity had been held to make a title paramount to that of a prior mortgagee, who had not taken such precaution, that, "if this has become a rule of property in a court of equity, it ought to be adopted in a court of law;" and the decision of the court in that case, presented the very point, there having been no notice to the subsequent mortgagee of the existence of the prior mortgage. And the same learned Judge, in *Farr* v. *Newman*, 4 D. & E., at page 636, remarks, that, "when a rule of property is settled in a court in equity, and there are no decisions against it at law, I am as ready as any man to follow the line of equity; for I think it absurd and injurious to the community, that different rules should prevail in different courts on the same subject." Ram on Legal Judgments, p. 29, is to the same effect. It may be remarked, that it is a fundamental principle in equity, that *equitas sequitur legem.* If so, when we find a rule, as to the title to property, settled in equity, it would seem to be but evidence, that such was the settled law every where in the same country, and so to be recognized in all its courts. Lord Elden says, in *Smith* v. *Doe*, 7 Price, 509, in regard to courts of law, "they should inquire of decisions in courts of equity, not for points founded on determinations merely equitable, but for legal judgments, proceeding upon legal grounds, such as those courts of equity have, for a long series of years, been in the daily habit of pronouncing as the foundation of their directions and decrees.

In *Morrison* v. *Morrison*, 2 Dana, 15, it was held, that one, seeing another buying an estate, and having a title to it, and giving no notice of it, should be postponed to the one seen to be buying it. In *Morse* v. *Child & al.* 6 N. H. Rep. 521, which was a writ of entry, and, of course, at law, the reporter's abstract is, "One who has acted as an appraiser in making an extent of an execution upon land, may be estopped to set up a title against the title acquired by the extent." Mr. Justice Green, in that case, said; "If the extent, under which the tenant claims, had been perfected so as to be sufficient to pass the land, and it had appeared, that Fifield (the appraiser) set up no claim when the extent was made, we are not prepared to say that Fifield, or any one claiming under him, could have been permitted to set up a title against the extent." In *Marston* v. *Brackett*, 9 N. H. Rep. 336, in equity, Mr. C. J. Parker remarks, "If the defendant's claim had been under an absolute deed, there would have been great force in the position, viz. one being present at the sale, and seeing repairs made, and giving no notice of his title, shall be estopped from afterwards making claim to the estate so transferred;" and cites the case of *Morse* v. *Child & al.* as authoritative. And in *Thomson* v. *Sanborn*, 11 N. H. Rep. the same learned Judge remarks, that "it is an established rule in a court of equity, that the second mortgagee, who has the title deeds, without notice of any prior incumbrance, shall be preferred; because, if a mortgagee lend money upon mortgage, without taking the title deeds, he enables the mortgagor to commit a fraud. If this has become a rule of property in a court of equity it ought to be adopted in a court of law." These decisions seem to settle the law on this subject in the State of New Hampshire.

We come now to the case of *Hatch* v. *Kimball*, in this Court, 16 Maine R. 146, an action at common law, in which this doctrine seems to have been fully adopted. This was a real action. The tenant was held by his conduct, in reference to the plaintiff, to have precluded himself from sustaining his defence. The reporter's abstract, at the head of the case,

shows, that he understood it to be therein held, that, "If the owner of land, knowingly stands by and suffers another to purchase it, and expend his money thereon, under an erroneous impression, that the legal title is acquired thereby, without making his own title known, he shall not afterwards be permitted to exercise his legal rights, against such purchaser." But, perhaps, the decision itself did not go quite so far. If, however, the case were such as the reporter has supposed, a fraudulent intent might well be inferred; and no one should be allowed to avail himself of benefit from his own fraudulent act; and this is a principle adopted, as well at law as in equity. It would be the duty of both courts equally to guard against an iniquitous result. For such purpose it is not unusual, as before shown, whenever new cases arise, to call in aid principles well established, but not before applied. And when a case, like the one before us, arises, in which, to allow the defence set up to prevail would be obviously a perversion of the principles of justice, it would seem to be inadmissible, that, to prevent it, we should be withheld from the adoption of a principle, long sanctioned by a court, practising merely under other forms; and a principle too, which must approve itself to the mind of every enlightened jurist. We do not think, therefore, whenever a case may require it, that the principle in question should not be applied in its fullest extent, as well at law as in equity.

But, in the case before us, it may not be necessary that we should apply it in its broadest extent. We need, only, to keep within it so far as it is most explicitly and emphatically recognized as sound law by Lord Denman, in delivering the opinion of the court of King's Bench, in *Pickard* v. *Sears & al.* 6 Adol. & Ell. 469; in which he says, "the rule of law is clear, that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time; and the plaintiff in this case might have parted with his

interest in the property by verbal gift or sale, without any of those formalities, *that throw technical obstacles in the way of legal evidence.*" The proof to establish the defendant's position, that the premises had been redeemed, was dependant wholly upon oral testimony. The deed to Webster, as we have seen, has no tendency to prove any such fact. And oral testimony was clearly admissible to rebut the allegation. The defendant's admissions, whether express or arising from his conduct, are deemed the best evidence against him; and where he wittingly and willingly thereby induces another to alter his position, so far as that other is concerned, are conclusive. Now no one can doubt, that, by the acts and doings of the defendant, Webster was induced to take the deed in question, without any reason to entertain a doubt, but that he was acquiring a title to the premises; and the defendant, at the time, could not have supposed otherwise. Here, then, there were no "technical obstacles in the way of legal evidence." No deed of bargain and sale or title by fine and recovery was to be presumed. The defendant and his wife had made their deed to the bank, and the bank had assigned its right to Webster. Here was a chain of title made out in the form by law required, and duly registered. The defendant would destroy it by matter *in pais;* and the plaintiff shows him, by his own acts and admissions, to be precluded from doing so. We think, therefore, that the verdict is well supported by the evidence, which was clearly admissible.

I am not to be understood in coming to this conclusion, however, as intimating any opinion as to what may be the legal rights of the defendant's wife, should she survive him, or of her heirs. The acts and admissions of the defendant will not then, be admissible, except in so far as she has joined him therein, in the conveyance of the estate, to prevent the establishment of the fact, that a redemption in truth was the result of what took place, between the defendant, and the grantors to Webster. *Judgment on the verdict.*

WELLS J. — This case, reported in 21 Maine R. 130, again comes before the Court.

The demanded premises were conveyed, in mortgage, to the Saco Bank, Jan. 4, 1830, by John Spring and his wife. The bank, by its president, whose authority was derived from a vote of the stockholders, by deed of Sept. 30, 1833, to which its corporate seal was affixed, conveyed the premises in controversy, with other real estate, to Jonathan King, and two others, and their heirs, in trust "to dispose of, sell and collect, for the use and benefit of the stockholders, &c." This deed is in proper form, and contains the appropriate terms, by which, to pass the title. The bank does not question its validity. The trustees, July 13, 1836, in consideration of $5190,95 paid by David Webster, "remise, release, bargain, sell and convey and forever quitclaim," &c. to Webster and his heirs, all their title and interest in the premises. In it is recited, that the right of redemption had expired, that Webster, at Spring's request, paid the amount, "which would be due on said mortgage," and that "this *release* is made to said Webster, at the request of said Spring and wife, and is intended to discharge all title acquired by said corporation, the mortgage having been assigned to us in trust."

It was the manifest intention of the trustees to convey whatever interest, they had derived from the bank, to Webster, who had paid, as a consideration for the conveyance, a sum equal to what "would be due on said mortgage." The deed is in the usual form of quitclaim deeds, by which real estate is daily transferred, from one person to another, and is a well recognized mode of conveyance. The word "discharge," contained in the recital, must be construed in reference to the other and more controling language. "This *release*, is made to said Webster," &c. is a phrase in perfect accordance with the other parts of the deed. The word "discharge," when taken in connection, with the word "release," and the rest of the deed, can mean nothing more, than that the bank had no remaining claim upon the property, and whatever title

it had acquired was released to Webster, at the request of Spring and his wife.

The cases of *Wade* v. *Howard et al.* 6 Pick. 492, and 11 Pick. 289, are relied upon, with confidence, to show, that no title passed to Webster. It appears that Wade purchased a conveyance of the equity of redemption of land, subject to two mortgages, and that on the day before the first mortgage was foreclosed, he paid the amount of it to Willard, the assignee of the mortgagee, the assignee holding the first mortgage, in trust for the owners of the second mortgage. Willard's deed to Wade contains terms, similar to those in the deed to Webster, with this recital, "the aforesaid sum having been this day paid me in discharge of said mortgage." The court considered in its first decision, that Wade stood in the place of the mortgagor, he having become the owner of the right of redemption, and that the recital in the deed, indicated the intention of the parties, that the money was paid to discharge the mortgage, and that it would be unjust for the mortgagor or any one succeeding to his right to redeem, to exercise that right, in relation to the first mortgage, and claim the property as foreclosed, against the owners of the second mortgage. And although it appeared, upon the investigation of the case the second time, that Wade's purchase of the equity was defective, the Court adhered to its opinion, because the deed to him was made upon the supposition, though erroneous, that he was the owner of the equity of redemption, and the intention of the parties ought to govern.

If the trustees had made their deed to Spring and his wife, or any one owning their right to redeem, and there had existed two mortgages, and the mortgage to the bank had been the first, and there had been such a recital in the deed, as is contained in Willard's deed, there would have been a closer analogy between the cases, but as they are in reality, they are widely different. The recital, in Willard's deed, is positive and express that the money was paid to discharge the mortgage. In the deed of the trustees, the amount paid is that, "which *would* be due on said mortgage." This language implies, that

the mortgage, as such, is at an end, and had ripened into an absolute estate. But there is no need of looking at words, which may be regarded as equivocal in their meaning; for it is stated, that the "right of redemption having expired." Does this language mean, that the right had *not* expired, and that Spring was paying the money to discharge the mortgage? The phrase "and is intended to discharge all title acquired by said corporation, the mortgage having been assigned to us in trust," may have been inserted for the purpose of affirming the power possessed by the trustees over the property. The recital "at the request of said Spring and wife," was inserted, probably, to exhibit the reason, why a conveyance was not made to Spring and wife, according to the agreement of the bank, Jan. 4, 1830; in which it was stipulated, that part of the property mortgaged should be conveyed to Mrs. Spring, and the residue reconveyed to Spring, upon the payment of all his paper in the bank.

It is very properly said, that such a recital was not necessary to pass the estate to Webster. In the case cited, 11 Pick. the form of the deed was appropriate to pass the legal estate, as was there decided. A release, if the releaser is seized, or if made to the disseizee, passes the estate. *Pray* v. *Pierce*, 7 Mass. R. 381; *Russell* v. *Coffin*, 8 Pick. 143. The possession of Spring was in submission to the title of the trustees. If the mortgage had been paid, the tenant, being in possession, could not be disturbed. But the facts do not show a payment to discharge the mortgage.

The parol evidence introduced did not contradict the deed, but corroborated it. It did not, therefore, affect the rights of the parties.

So far as appears by the deed itself, the title passed from the trustees to David Webster.

But it is objected, that the trustees had no power to make this conveyance. Is the objection a valid one? By the deed of the bank to the trustees, they were "to dispose of, sell and collect" the property conveyed to them. At that time, the

bank could not know, whether the mortgage would be foreclosed or not; and the language used, was broad enough, to enable the trustees, either to collect the debt, secured by the mortgage, or sell the interest of the bank, in the premises. It also appears by a vote of the stockholders, passed Sept. 30, 1833, that the deed to the trustees, containing the powers before mentioned, was confirmed, as the deed of the bank; and on that day, one of the trustees was chosen. If the votes passed August 31, conferred powers more limited, the last vote is entirely effectual to confer the powers, actually contained in the deed. It does not appear, that the bank adopted any other mode of conveyance, to the trustees, than that by the deed of Sept. 30.

The tenant offers to prove, that before the time of redemption expired, the trustees agreed to discharge the mortgage, if the check, received by King, should be paid, according to its tenor, and that it was so paid, with the balance, and the note and mortgage were delivered to Spring. It appears, that the trustees were willing to perform their promise, but instead of claiming a performance of it, Spring directs them to convey the premises to Webster. He might have had the mortgage discharged, notwithstanding the lapse of time, but he waives the promise made by the trustees, and allows the foreclosure to remain, and the estate to become absolute.

Such was the expression of his will. His intentions were manifested by his acts, and by the deed, which he procured the trustees to make to Webster. The promise, made by the trustees, was prevented from being executed, by the interposition of Spring. All the parties considered the mortgage foreclosed, and if so, the estate was absolute, and the taking of the note and mortgage deed by Spring, could have no effect upon the title.

The fair construction to be put upon the possession of the note and mortgage would be, that he held them for the benefit of Webster, to whom he directed the deed to be made. The admission of these facts in evidence could not alter the result.

It is quite apparent, that the title of the bank, through the trustees, passed to Webster.

The next question, which arises in the case, is, whether the mortgage was foreclosed? For if it were not, then the demandant could not levy upon it, as the property of Webster; he having an assignment of the mortgage, and standing in the place of the bank. *Smith* v. *People's Bank*, 24 Maine R. 185.

Oct. 8, 1831, the bank, at a meeting of the stockholders, appointed Ether Shepley, Esq., an "agent for the collection of the debts due to the Saco Bank," and "to receive of the bank the funds and paper, and therewith to redeem the bills and pay the deposits," &c. Judge Shepley states in his second deposition, that the entry to foreclose was made "on or about the ninth day of May, 1833." The charter of the bank was drawing to a close, and it was solicitous to collect its debts. There does not appear to be any express authority, given to the agent, to make entries into lands. But one mode of collecting a debt, secured by mortgage, is to procure a foreclosure, and convert a conditional into an absolute estate, by which the debt will be satisfied, to the extent of the value of the property mortgaged. The entry, made by him, appears to have been ratified by the trustees, and recognized by Spring, who was excited to action by it, and in reference to which, he procured the promise of the trustees, as offered to be proved by him. And in the deed to Webster, made under the supervision of the tenant, it is said, "entry having been made to foreclose." Neither the entry nor the authority to make it, were controverted by any of the parties interested, at the time of making the deed to Webster. Judge Shepley's deposition shows, that he made the entry as attorney for the bank, but does not state the mode, in which the authority was conferred.

It appears by his depositions, and by the testimony of Seth S. Fairfield, that the entry was made into the dwellinghouse of Spring, which was standing on one parcel of the demanded

premises. Fairfield says, "that Spring was present, and he thinks Mrs. Spring, but is not positive of her being present, that Mr. Shepley said he entered for the purpose of foreclosing a mortgage of the Saco Bank, that he subscribed a paper, setting forth the fact of the entry made by Shepley, but whether on the deed or a separate piece of paper, he does not recollect — that the other witness was Greenleaf Thorn, and that Thorn signed a paper, that he cannot recollect the language Shepley used, but the amount of it was, that he entered to foreclose the mortgage to the bank." Judge Shepley says, in the deposition taken at the request of the tenant, Spring, "I did, as attorney for the Saco Bank, do certain acts, to make an entry for condition broken of a mortgage from John Spring and wife to said bank, by taking the deed of mortgage, and walking into the dwellinghouse of said Spring, and in one of the front rooms of the house, stating in said Spring's presence, that I entered for condition broken, and believe that I made a memorandum in writing, on the back of said deed to that effect, and that I did so in the presence of two witnesses, who subscribed the same, I am not certain who those witnesses were, but believe they may have been Seth S. Fairfield and John F. Hartley, Esquires."

The tenant was duly requested to produce the deed, upon which the memorandum was supposed to have been made, but did not do it.

One of the modes of entry to foreclose a mortgage, provided by stat. 1821, c. 39, § 1, is "by the mortgagee's taking peaceable and open possession of the premises mortgaged, in the presence of two witnesses." Subsequent statutes made it necessary to perform other acts, but the law of 1821 was the only law, regulating such entries, in force, when the entry in question was made. The name of one of the two witnesses, to the entry, does not appear to be made certain, but that it was made, "in the presence of two witnesses," is a fact well established. If the certificate were produced, by the tenant, it would probably corroborate the testimony, relative to the entry, which appears to have been legally made.

The entry was upon one lot, by entering into the dwelling-house, and declaring the entry to be made for condition broken, the agent having the deed of mortgage, with him, when he made the entry. Fairfield says, that the amount of the language was, that "he entered to foreclose the mortgage to the bank." Spring must have understood the language used, as applied to the several parcels, embraced in the deed; and that the entry then made was intended to affect the mortgage, and whatever was embraced in it. When an agent declares, that he enters to foreclose the "mortgage," it must be understood, that it is for the whole, and not for a part of the premises, described in the mortgage. If the entry had been intended to be restricted to one parcel, the agent would have said so. The several parcels were situate in Saco Village, but did not adjoin. The agent must be understood as entering into one parcel for the whole and the language used as indicating that purpose.

"But an entry in one part of the land, in the name of all the land subject to one condition, is good, although the parcels be several and in several towns." Co. Lit. 253, (a). The same principle is laid down by Stearns, in his work on Real Actions, 45. 8 Cranch. 229. Litt. Sec. 417, does not limit the entry to any particular class of cases, but says, "if a man hath cause to enter into any lands or tenements in divers towns, in one same county," &c. The law, it is said, does not require vain and useless acts. Judge Shepley, having made the entry, and declared, in the presence of Spring, that he, as agent of the bank, entered to foreclose the mortgage, that is, all the parcels mentioned in the deed of mortgage, would have performed but an empty ceremony, to have gone into the other parcels of land.

The object of the statute in requiring an entry to be made, was to give notice of the intention to foreclose, it was not to regain a lost seizin, for that remains in the mortgagee, between him and the mortgagor. Here was an entry on part for the whole, and the mortgagor had express notice.

In *Spring* v. *Haines*, 21 Maine R. 126, the question was, whether a redemption could be had of those parcels of real

estate which had not been foreclosed, and which were included in the same mortgage with other parcels, that had been foreclosed, without a payment of the whole debt, secured by the mortgage. It was not controverted in that case, that some of the parcels had not been foreclosed. The reasoning of the Court is predicated upon those facts. In the present case, one of the questions is, whether the whole was foreclosed. The conclusion in the present case, that there was a foreclosure as to all the parcels, does not conflict with the decision of *Spring* v. *Haines*. The two cases are dissimilar.

The deed to Webster was made July 13, 1836, more than three years after the entry. The payment made was not intended to discharge the mortgage, but was a consideration for the conveyance from the trustees to Webster, and so acknowledged in the deed, which was taken by the tenant acting for Webster. Were there no other evidence of foreclosure, the recital in the deed to Webster, "the right of redemption having expired," would be very strong evidence, if not conclusive, upon the tenant of that fact. The tenant procures a deed to be made, in which it is stated, that his own right to redeem is gone, that the money is paid by the grantee, and takes the deed containing these recitals, and either procures it to be recorded or hands it to the grantee. These acts of Spring are in perfect harmony with the other evidence in the case, that on the thirteenth of July, the time of redemption had expired, and the mortgage was foreclosed. The tenant offered to prove, as evidence of a waiver of the entry, that the money received had been immediately divided among the stockholders; that on the tenth of May, 1836, a policy of insurance, held by Spring on the mansion house and lot, had been assigned to the trustees, that the arrangement to transfer the policy was made May 9, at the same time, when the check drawn by Webster was taken by King, and that after the entry to foreclose, Spring made divers payments on the original notes, for which said six thousand dollar note and the mortgage were given, as collateral security, which payments were accepted and indorsed on said notes."

The division of the money among the stockholders would have taken place, whether received in discharge of the mortgage, or as the consideration of the sale of an absolute estate. The money belonged to the bank but it was no longer needed for banking purposes, as the bank was then closing up its affairs.

The assignment of the policy of insurance, to be held by the trustees after the expiration of the three years from the time of the entry, and the payments, which are offered to be proved, tend very clearly to show a willingness on the part of the trustees, to allow the tenant to redeem. But Spring did not claim to have these acts so considered. The waiver, which is alleged to arise, by implication, was not accepted by him. He preferred, that the mortgage should be considered as foreclosed. The principle may be correct, that a reception of the money due on the mortgage, or even a part of it, is a waiver of the foreclosure. *Deming* v. *Comings*, 11 N. H. Rep. 474. But where the mortgagor directs a deed to be made to a third person, and procures a recital to be inserted in the deed, that the right of redemption had expired, the implied evidence becomes nugatory, against that, which is of a character so positive and express. In *Deming* v. *Comings*, one ground relied upon was, that there was a tender within the year. Articles of produce had been received, which by the agreement, were to be applied in payment. Afterwards these articles were paid for, in a different manner. The Court say, that the defendant *rescinded* the contract, by which the produce was to be applied, to the payment of the mortgage debt. If, then, there had been a contract between Spring and the trustees, that the entry should be waived or the time of redemption enlarged, upon certain conditions; according to the authority of *Deming* v. *Comings*, Spring could rescind that contract.

The reception of the evidence offered could not have changed the result.

It is contended that the levy is defective, because it is made upon one parcel as the property of Webster and Burnham,

and upon the other, as the property of Webster alone. According to the view taken of the case, the fee was in Webster, at the time of the attachment, and the officer, in his return, states they were both duly notified of the making of the levy. If the title to the land were in either of them it passed by the levy to the demandant. *Herring et al.* v. *Polley*, 8 Mass. R. 113; *Crafts* v. *Ford*, 21 Maine R. 414.

The rights of Mrs. Spring cannot be taken from her, unless she has legally parted with them, and they will depend upon principles of law, applicable to her, in a state of coverture, and may be determined upon future investigation.

By the agreement, contained in the report of the Judge, before whom the case was tried, the verdict, which was for the demandant, is to stand, if it appears to be sustained by the evidence, which was "admitted and legally admissible;" and that, which was not received would not "have essentially varied the state of the case;" and it so appearing, therefore, there should be judgment on the verdict.

ABRAHAM KNOX *versus* ISRAEL CHADBOURNE.

The Rev. Stat. c. 114, § 38, does not exempt *machines* from attachment or sale on execution. Articles correctly designated by the use of that term, *in popular language*, cannot be considered as exempted by the words of the statute, "*the tools of any debtor*."

A "*peg machine*" is not exempted from attachment, or sale on execution, under that section of the statute.

EXCEPTIONS from the western district court, GOODENOW J. presiding, as follows: —

"This is an action of trespass for the taking by defendant, a certain "peg machine," the property of plaintiff. The defendant pleads the general issue and for brief statement, says, that he took said machine, by virtue of a writ in favor of Peter Frost against said Knox, as defendant, in which suit, judgment was obtained, and said machine was regularly seized and sold on the execution, recovered in said suit.

"The plaintiff introduced Mr. Ivory Bean, who testified that he sold said machine, about ten years since, to the plaintiff for $50, having some years before purchased it in Bradford, Mass. That after he sold the same, the said plaintiff worked with him awhile, and paid him for giving information in the business of making pegs.

"Also there was testimony tending to show, that the plaintiff worked in Waterborough, on his own account, making pegs; that while he was at work at Waterborough, the said machine was for about one year, operated by horse power. Also, Mr. Bean testified, that the machine was constructed to be used by hand power, and was always so used, excepting the time above named at Waterborough; that similar machines were in use in Massachusetts, where he purchased this, worked exclusively by hand power, and that after plaintiff purchased it he worked it alone in making pegs; he transported the machine from Georgetown, Massachusetts, to Maine, in a one horse wagon, and that it required but one person to use it.

"Joseph Downs, Jr., testified that about seven or eight years ago, the plaintiff brought the machine to Waterborough and used it, making pegs, as his principal business; that it was constructed to use by hand power, and was so used by said Knox, till about a year before it was attached, when it was placed in a mill of Peter Frost, and there used by the application of horse power, by attaching other machinery to it; that it was then taken out of said mill, and was in his blacksmith's shop when it was attached on the writ; that he, the witness, receipted to the officer for the machine when attached, and that the plaintiff worked with the machine, operating it by hand power, in his other shop, after it was attached and before the officer took it upon execution and sold it; that the machine was worked to saw the bolts, which were then taken and shoved in one end by hand, to make the end of the peg, and then the machine was used to point the other end of the bolts by grooving them, and afterwards the bolts were split by hand, by use of a frow; that one person could operate the machine

alone; and plaintiff did so use it. It was proved by defendant's witnesses, that when said machine was put into Frost's mill, and operated by horse power, said Frost was to find horse, mill and wood, and board the plaintiff, the plaintiff to make the pegs and each to receive half the proceeds of the pegs made.

"There was testimony introduced by defendant, tending to show that the plaintiff occasionally worked at painting and joiner's work.

"There were submitted to the jury two questions. *First.* Was peg making a trade or occupation, within the meaning of the Revised Statutes, c. 114, sect. 38? *Second.* Was peg making the occupation of the plaintiff?

"GOODENOW DIST. J. charged the jury, that as the machine could be used by a single person, and was not of great value, and operated by hand power, they should regard it as a tool of the plaintiff's trade or occupation; and they could determine from all the testimony, whether peg making was the trade and occupation of the plaintiff; and if so, whether this machine was necessary to the prosecution of the ordinary and necessary business of his calling?

"If so, the machine was exempted from attachment, and the plaintiff would be entitled to recover. If otherwise, their verdict should be for the defendant. The jury found a verdict for the plaintiff for forty dollars damages, which makes a part of the case. To all which rulings of the Court, the defendant excepted.

"COPY. Verdict of the jury.

"The jury find that the defendant is guilty in manner and form as the plaintiff has declared against him, and that peg making was a trade within the exemption of the statute; and that peg making was the plaintiff's occupation; and assess damages for the plaintiff in the sum of forty dollars."

This case was argued in writing.

McDonald, for the defendant.

The defendant complains of the Judge's charge in this, for

that he instructed the jury to regard the machine in question, as a tool of the plaintiff's trade.

Our statute, exempting the necessary tools of trade, is copied from the Massachusetts act of 1805, which act received a judicial construction in the case of *Daily* v. *May*, 5 Mass. R. 313. The Court in that case say, that "tools of trade do not include the implements of husbandry," adding as a reason, that "their use necessarily implies the ownership of horses and oxen." The same act of 1805 was before the Court again in the case *Buckingham* v. *Billings*, 13 Mass. R. 82, in which case the statute and the rules for its construction were more thoroughly discussed. It is therein remarked by Chief Justice Parker, that the statute, being in derogation of the common rights of creditors to secure their debts out of the property of debtors, ought to have a strict construction; a remark which commends itself alike for its legal accuracy, and wholesome honesty. With this principle in view, the Chief Justice proceeds to inquire into the intention of the Legislature, and remarks, that, it is not to be supposed that it was designed to comprehend in the term tools, (which are properly small articles used by hand) complicated machinery or expensive utensils, evidently making an exception of complicated machinery, from the very nature of a tool, a tool being a small article used by hand; and a further exception of expensive utensils is made for the reason, that as the value of household furniture is limited to fifty dollars, it may well be inferred, that the tools intended to be excepted are such only as are suitable to the condition of a man who is reduced to so humble a style of housekeeping.

The last named case was fully considered by the Court in 1830, in the case of *Danforth* v. *Woodman*, 10 Pick. 424; and was fully sustained, although it was supposed that a more liberal construction of the statute was suggested in *Howard* v. *Williams*, 2 Pick. 81. The Court say, that such a supposition was entirely groundless.

From the doctrine of the cases above referred to, it is evident, that the term tools of trade, in our statute, is to be

limited in its meaning. Neither implements of husbandry, nor a printing press, nor types are included. Yet all these might come within the popular meaning of the term tools. But in the application of this statute they could not be regarded as such, for they are not small articles to be used by hand, nor are they simple instruments of manual operation, — a printing apparatus being regarded as complex machinery.

The machine in question is neither a small article nor a simple instrument. Although the case finds that it was brought from Massachusetts in a single horse wagon, it is hardly supposed that it will be contended that one horse drew it; and although the case finds that it required but one person to tend it, it certainly will not be pretended that one man could move it. It is constructed sufficiently strong to be propelled by horse power, and must be of considerable weight to ensure the requisite strength.

The mechanism of the machine can only be inferred from the work performed by it. By its own operation it saws off the bolts of proper length, which being shaved on one end by hand, and again put into the machine and grooved, then split into pegs by hand. A machine, which by being merely put in motion, is capable of doing this work, must necessarily be complicated in its construction. I think it apparent that a statute which is only designed to comprehend small articles used by the hand should not be construed so as to include such a machine as the one in question, certainly not, if the construction suggested in *Buckingham* v. *Billings*, is adopted.

It is further suggested, that if this machine be regarded as a tool of trade, it is difficult to perceive where the Court will establish the line of distinction between tools and machinery, or in other words fix the point at which tools shall cease and machinery begin.

The Dist. Judge has given three *indicia* for regarding the machine as a tool, viz.: because it could be used by a single person, — was not of great value, — and could be operated by

hand. It is thought that all of these reasons, will, upon examination be found faulty, if the word tool is understood either in its strict sense or judicial construction. I only propose, however, to examine the third reason given by the Dist. Judge, viz.: that as the machine was operated by hand power it was a tool of trade, thinking it self-evident, that the other two are but blind guides to any such conclusion.

It is hardly understood how the motive power of machinery can change its character. It may be a mode of classification, and as such used for distinction. Thus, we speak of a steam factory or steam grist-mill in contradistinction to a factory and grist mill; but the factory and the mill remain the same in both cases, and it is not conceived how they would lose their character as machinery, should some Sampson arise of sufficient physical strength to put them in operation without the aid of foreign power.

Aside from this speculative view of the point in question, it must be admitted, that the printing press of Mr. Buckingham was operated by hand power, yet Chief Justice Parker failed to discover in that fact, a reason for considering it a tool.

As the machine in question could be operated by horse power as well as by hand, its character must vary from a tool to machinery, as its owner found it most economical to operate it either by horse or by hand.

By allowing the machine in question to be a tool of trade, we not only violate the judicial construction of the statute already referred to, but we also are compelled to disregard the ordinary meaning of the word tool; which is "any instrument lifted up or taken up to work with." In this case the machine was too ponderous to be lifted up, and whether propelled by the lever held in a man's hand, or by the gear attached to a horse power, it did the same work. If in the first instance it was the tool of the man, in the last it would be equally so of the horse.

The defendant further objects to the charge of the Judge in this, for that he left it to the jury to determine whether the employment of the plaintiff was a trade within the meaning

of the statute. This is a question of law, which the Court should have decided. It is conceived to be similar to a new promise, wherein the Court informs the jury what amounts to such an undertaking, and leaves it to them to decide if the facts warrant such finding. In this case it is contended that the Court should have informed the jury what constituted a trade, and left it for them to decide whether the employment came within the direction. I suppose it may be replied that although a question of law was left to the jury, they having decided it correctly, the verdict should not be disturbed.

I do not propose to go fully into a discussion of what constitutes a trade within the meaning of the statute, yet I think it justly and easily inferable from the whole enactment, being taken together, that the Legislature only intended those employments which entitled the person engaged in them, to the appellation of mechanics.

The Judge told the jury, that the machine was a tool of trade, and left it for them to decide whether peg making was a trade, a conclusion which would seem to be implied, if the machine was a tool of trade.

The jury returned a special verdict, which is made a part of the case. They find, that peg making is a trade within the exception of the statute. Also, that it was the trade or occupation of the plaintiff. They omitted to find the important fact whether the machine was necessary for the plaintiff's trade.

The question of necessity, was the peculiar one for the jury. Yet, their verdict, while it contains much that is irrelevant, is entirely silent on this point.

Should the Court concur in opinion with the District Judge, that the machine was a tool of trade, the very next inquiry would be upon the point of necessity. The burthen is upon the plaintiff to show that it is a necessary tool; which should be shown affirmatively, to render even a tool exempt from attachment.

Appleton, for the plaintiff.

In this case the plaintiff claims damages of defendant for

the acts of his deputy in taking and selling the peg machine, described in the declaration, upon the ground, that it was exempted from attachment by the Rev. Stat. c. 114, sect. 36. The statute referred to, exempts from attachment the tools of any debtor, necessary for his trade or occupation.

The case shows and the jury have found, that peg making was a trade, and that it was the plaintiff's trade and occupation; and under the instructions of the Court, they have also found that the machine in question was necessary for the prosecution of his ordinary business and calling.

The only question presented by the exceptions is, whether the charge of the District Judge to the jury was correct. He charged them, that as the machine could be used by a single person, and was not of great value, and operated by hand power, they should regard it as a tool of the plaintiff's trade or occupation, and they could determine from all the testimony, whether peg making was the trade and occupation of the plaintiff, and if so, whether this machine was necessary to the prosecution of the ordinary and necessary business of his calling. If so, it was exempted from attachment, and plaintiff was entitled to recover, otherwise their verdict should be for defendant.

It is difficult to perceive the error or "fault" in those instructions, and it is not quite "self-evident," that they should be considered "blind guides" to the jury in forming their opinions. Especially, as they appear to be reasonable and just, and some of them are almost identical with the language used by C. J. Parker in the case cited and relied on by the counsel for the defendant.

In deciding what is meant by the term tools in the statute, it becomes necessary to look at the design and object of the statute. For it will not be denied that the intention of the Legislature, when ascertained, should be fairly and fully carried into effect. The terms used in the act of exemption, indicate that object too clearly to admit of doubt or misconstruction. The tools of any debtor necessary for his trade or occupation, must have been intended to embrace every variety of instru-

ments or implements of manual operation, made use of by that large class of persons, who obtain their subsistence and that of their families by their daily labor, in whatever business they may be engaged, whether called and known as mechanics, artizans, tradesmen, manufacturers, or handicraftsmen, or any other designation expressing their peculiar employment. The words trade and occupation, in the statute, are sufficiently broad to comprehend all kinds of employment and business. Hence the word tool in connection with them, must be understood in its broad and popular sense, and not according to the narrow, restricted definition given to it by some lexicographers. Take, for instance, the definition adopted by defendant's counsel, that it is "any instrument lifted up or taken up to work with." It will at once be perceived, that this would exclude from the exemption, a great variety of instruments, indispensable to the business and occupation of a large class of tradesmen and mechanics, who are justly entitled to its benefit. For while it would protect the hammer of the blacksmith, it would exclude his anvil and vise.

The statute in question was enacted for humane and wise purposes, and in its effect and operation, has been found equally beneficial and useful to the creditor and debtor; and while it should not be extended by construction, beyond its fair and reasonable design, it should not be so limited and restricted as to defeat its proper and legitimate objects. It is said, that statutes in derogation of the common law rights of creditors should be construed strictly, "but they are also to be construed sensibly, and with a view to the objects aimed at by the Legislature." *Gibson* v. *Tenney*, 15 Mass. R. 205.

The views of the Legislature on this subject cannot be mistaken. Its course has been liberal in extending and increasing the articles exempted from attachment. In this respect the policy of the State has been wise and just, and adapted to the progress of society, and the sentiments of an enlightened age. Since Maine has become a State, the articles exempted from attachment have been more than doubled, in number and value. The effect has been to augment the comfort and happiness of

poor debtors and their families, and by securing to them the means of living, to encourage and elevate them. And instances are rare, if indeed there be any, where creditors have thereby suffered injury or injustice.

Few cases have been reported in Massachusetts, and but one in this State, giving a construction to this clause of the statute, although the law has been in force over forty years. The first case, that of *Daily* v. *May*, 5 Mass. R. 313, for taking an ox-cart wheels, yoke, bows, &c., was decided expressly on the ground that the "case did not state that they were the tools of the plaintiff, necessary for his trade and occupation." The Court subsequently remark, however, that if they could presume that the chattels seized were necessary for plaintiff in tilling his land, yet he must fail; for it would be preposterous to admit that the Legislature would extend the protection of the statute to the cart and plough and their gear, and leave the cattle, without which they would be of no use, to be seized on execution. This reasoning may be correct, for it is that of a man eminent for wisdom, yet, suppose the oxen had been exempted, and the debtor owned no land to cultivate, might not the inference have been equally strong, that in such a case, the exemption, though expressly given, did not apply, because the oxen and implements of husbandry, would be of no use without land. But whether this *dictum*, be satisfactory or not, the effect of it has been long since done away by Legislative action, and it is entitled to very little consideration in the decision of this case. The fact, that so few cases have arisen, touching the construction of this clause of the statute, shows that practically, a liberal and common sense construction has been given to it, otherwise, it would have been amended and enlarged by the Legislature, as almost every part of the act has been.

The peg machine in question comes within the letter and spirit of the statute. The jury have found that it was a tool or implement of plaintiff's trade. Though called a machine, it was simple in its construction and used by hand power for which it was made, and was of comparatively small value.

The fact that it was once propelled by horse power does not alter its character. That was a mere experiment and proved a failure, and was abandoned, as it involved too large an expenditure to be profitable. Many of the tools and implements of mechanics, necessary to their business, may be worked or used by horse or water power, and often are. As the smith's bellows and lathe, and the turner's wheel, although usually moved by the muscular power of man. But there can be no just reason or pretence for not exempting them on that account. The case finds, that this instrument was constructed to be used by hand, and was so used, and not so ponderous but it was conveyed from Massachusetts in a one horse wagon and one horse, as is clearly implied in the report, and as was the fact. Since the shoe business has become so important a branch of industry, peg making has become a trade, and this machine was invented to perform by muscular power a part of the labor, and facilitate the work, by sawing the bolts and grooving them, when sawed, to point the pegs.

Very many of the tools used by jewellers, blacksmiths, and joiners, which are necessary and indispensable for their work, are more complicated in their construction and much more costly and expensive, than the machine in question. Such as the vise, lathe, rolling and morticing machines, &c., which are simple in their construction, but not more so than this, yet necessary to enable them to conduct their appropriate business in a convenient manner.

At common law the instruments of a man's trade were not distrainable for rent, under certain circumstances. In *Simpson* v. *Hartop*, Wills, 512, a stocking frame for making stockings, was held to be an instrument of trade, and distrainable. So in *Gorton* v. *Falkner*, 4 T. R. 565, looms for weaving small wares, were held to be instruments or tools of trade. The peg machine was the tool or instrument of plaintiff's trade, as the jury have expressly found, and certainly the value of $40,00, as estimated in this case, was not an unreasonable amount for the plaintiff to hold free from attachment, the original cost being but $50,00, compared with the amount in

value of the tools of other mechanics, which often amount to upward of $150,00, or with the exemptions of the farmer, which ordinarily exceed $300,00, including his oxen and produce.

The charge of the District Judge is fully sustained by the principles settled and the reasoning of the Court in the case of *Howard* v. *Williams*, 2 Pick. 80. In that case a jeweller's tools were held to be exempted from attachment to the amount of $556,58, and the exemption was not limited to the tools used by the tradesman himself with his own hands, but was extended to those used by his apprentices or journeymen; being such as were necessary to enable him to carry on his trade in a convenient and usual manner. LINCOLN J. in giving the opinion of the Court, says, the design and object of the law was to secure to handicraftsmen the means by which they are accustomed to obtain subsistence in their respective occupations; and the only rule by which it can be restricted is that of good sense and discretion in reference to the circumstances of each particular case. In *Patten* v. *Smith*, 4 Conn. R. 450, HOSMER C. J. says, "as a general legal truth, a statute in derogation of the common rights of creditors ought to receive a strict construction, but if it concern the public good, it should be construed liberally. Now the public has a deep interest in the prosperity of mechanical employments, and a sufficient corrective is interposed by the prescribed inquiry, whether the articles claimed to be exempted are necessary."

The case of *Buckingham* v. *Billings*, 13 Mass. R. 80, and the principles upon which it was decided, when carefully examined, does not sustain the positions of defendant.

In that case the tools attached amounted in value to $852, and those left in the possession of the plaintiff amounted to $1600, and was decided upon two grounds. *First*, that the statute was not intended to comprehend complicated machinery or expensive utensils, which might be of great value, and thus enable a debtor to hold a great capital, which could not be reached by a creditor. Thus determining only that the furniture of a printing office was too expensive to have been

exempted by the statute, and cautiously avoiding cases like the present, to which the argument and reasoning of the Court do not apply.

That case was decided, secondly, on the ground that a printing apparatus in all respects complete and of great value, had been left with the plaintiff by the use of which he might carry on his trade in many branches.

The case of *Danforth* v. *Woodward*, 10 Pick. 423, was trespass for attaching printer's types and forms to the value of $147,00 and was decided upon the grounds first noticed in the preceding case. The Court say, types cannot be used as tools of trade by a printer after he is stripped of the other parts of his printing apparatus, so that the exemption of the types would not enable him to pursue his trade and obtain his subsistence, which was the object of the statute. Besides, property so valuable as a complete printing apparatus cannot be protected under the statute. The object being to make a humane provision for the poor, but not to enable an insolvent person to withhold a large amount of property from the just claims of his creditors.

How far some of the principles assumed in those cases are correct, it may not be necessary for the Court now to determine. They would, in effect, however, exclude a large class of mechanics from all participation in the benefits of the statute, contrary to its express provisions and obvious intentions. For if the types of a printer are not properly the tools of his trade, and therefore exempted from attachment, it is difficult to conceive of any case where the object of the law may not be defeated by an ingenious and specious argument. This construction of the statute appears the more harsh and unreasonable when it is considered, that many individuals support themselves and families by the business of printing, making use of their own types, of small value, and a hired press As well might a farmer's cart and plough be taken from him, because at the time he happened to be without oxen.

The Supreme Court of Connecticut, in the case of *Patten* v. *Smith*, before cited, decided, that a printing press, cases and

types were tools, within the meaning of their statute (substantially like ours) exempting certain articles from execution. That Court, in commenting on the case of *Buckingham* v. *Billings*, say, that they cannot subscribe to the principles there assumed, or admit so confined a construction of the terms of the act. It was the object of the statute, they say, to protect the tools of a trade, so far as they were indispensably necessary; and the words of this, as of other laws, ought to be expounded, according to their popular acceptation, in order to attain the legislative intent.

In *Gibson* v. *Jenny* and *Howard* v. *Williams*, already cited, and the more recent case of *Brown* v. *Wait*, 19 Pick. 471, the Court in Massachusetts seem to have entertained more reasonable and liberal views of the design and purposes of the statute. The true principle is concisely but accurately stated by SHEPLEY J. in pronouncing the opinion of the Court in *Ordway* v. *Wilbur*, 16 Maine R. 263. He says, "the intention of the Legislature in exempting certain goods from attachment, should be carried into effect. A construction of the statute so liberal as to allow it to be perverted to fraudulent purposes, should be avoided, while one so strict as to defeat the object designed ought not to prevail."

The inquiry is made, if this machine be regarded as a tool of trade, where will the Court establish the line of distinction between tools and machinery? The answer to this inquiry may be made in the language of LINCOLN J. in the case of *Howard* v. *Williams*, already referred to. "The only rule," he says, "by which the statute can be restricted, is that of good sense and discretion, in reference to the circumstances of each particular case. Whenever an attempt is made to abuse the protection, which the law affords to the unfortunate debtor, in the prosecution of the ordinary and necessary business of his calling, to the purpose of a fraudulent security of property from attachment by the possession of unnecessary tools of trade, or those of unreasonable price and value, it will be in the power of the creditor to defeat the object, by successfully

submitting the question of their necessity to the decision of a court and jury.

But it is further objected to the charge of the District Judge that he left it to the jury to determine whether the employment of the plaintiff was a trade within the meaning of the statute; and that this was a question of law which the Court should have decided.

If this was correct in point of fact, it would not be a sufficient reason for disturbing the verdict, the jury having decided right, as has been often determined. The exceptions state that two questions were submitted to the jury; first, was peg making a trade or occupation within the meaning of the statute? Second, was peg making the occupation of the plaintiff?

Both these questions, and these alone, were strenuously pressed in argument to the jury by defendant's counsel. The instructions of the Judge were, that as the machine could be used by a single person, was not of great value, and operated by hand power, they should regard it as a tool of the plaintiff's occupation or trade; and they could determine from all the testimony, whether peg making was the trade and occupation of plaintiff, and if so, whether this machine was necessary to the prosecution of the ordinary and necessary business of his calling. If so, the machine was exempted from attachment, and the plaintiff would be entitled to recover. Surely there can be no just ground of objection to the charge that it was not sufficiently distinct and explicit on this point.

But another objection is made, that the jury have omitted to find the fact, whether the machine was necessary to the plaintiff's trade.

It is too late now to make this objection, as it does not appear to have been taken in the court below. *State* v. *Davis*, 23 Maine R. 403.

But another and conclusive answer to this objection is, that the Judge charged the jury to find whether the machine was necessary to the prosecution of the plaintiff's business or trade, and if so, and they found the other facts, the plaintiff was

entitled to recover. Now, it necessarily follows, from the finding of the jury for plaintiff, that they must have found that the machine was necessary for the plaintiff's trade. In finding for plaintiff they must have found this fact, under the instructions.

The verdict is not technically a special verdict, as defendant's counsel has stated in his argument It is a general verdict with a special finding upon two points, to which their attention was particularly directed, and upon which they were requested to be able to report specially. Instead of stating how they found on these two points specially from their general verdict, the jury incorporated them into it. Indeed, the verdict would have been good and sufficient under the charge, without the special finding. It is, therefore, but surplusage and does not vitiate the general verdict. 3 Blackstone's Com. 377, 378.

Howard and *G. F. Shepley*, for the defendant, in reply.

The question involved in the present discussion, can hardly be more clearly or fairly stated, than the learned counsel for the plaintiff has stated it in the first paragraph of his argument.

He says, "the plaintiff claims damages of the defendant, for the acts of his deputy in taking and selling the peg machine described in the declaration, upon the ground that it was exempted from attachment by the Revised Statutes, c. 114, sect. 38. The statute referred to, exempts from attachment the tools of any debtor, necessary for his trade or occupation."

The article attached, was a machine, described in the plaintiff's declaration and argument, as a peg machine, and consequently not embraced in the exemption of the statute, unless the words "tool" and "machine" are synonymous, or unless the word tool is the more comprehensive and generic term, and embraces the word machine, as one species of tool.

It will hardly be contended that the words are synonymous, or identical in meaning.

A machine, as defined by Webster, is more properly a complex structure, consisting of a combination or peculiar modification of the mechanical powers.

A tool, according to the same lexicographer, is an instrument of manual operation, particularly such as are used by farmers or mechanics, as the tools of a joiner, smith, or shoemaker.

This broad distinction between the two terms, is one recognized not only by lexicographers, and the learned, but observed in the every day language of common life.

No person speaks of an article manufactured by machinery and one made by tools in the hand of the operator, as if they were fabricated in the same way. When an article is said to be made "by machinery," we understand that the skill which moulded and fashioned it, was in the brain of the inventor of the machine. When the same article is spoken of as made "by hand," we understand it as having been made by the aid merely of tools, "lifted up and guided by the hand of the operator," and exhibiting his skill, while in the case of the article made by machinery, nothing is usually necessary but the application of the requisite quantity of power, or brute force.

The fore plane of the joiner is a tool, "an instrument of manual operation," lifted up and guided by the hand of the operator." But when that joiner does the same work with "Woodworth's planing machine," does that become a tool also, and exempt from attachment?

The saws, by means of which the peg maker formerly sawed off his blocks, and the knives and mallets, with the aid of which, he split the blocks into pegs, were the tools of his trade, but when he substituted for these tools a machine, which simply upon the application of the requisite power of man, horse, or steam, did the same work, it did not become a tool, simply because it was substituted in the place of tools.

Nor is it more reasonable to contend, that the word tool is the generic term, and embraces the word machine as one of the species; for the one has none of the general attributes of the other. Those peculiar properties or attributes of an article which entitle it to be classed as a tool, are all wanting to machines in general, and especially to the one in question.

The result of including the word machine as a species of tool, in the exemption of the statute, would be to embrace in

the exemption from attachment, the locomotive of the engineer, the power press of the printer, and all other machines, however complicated and expensive, provided they were only necessary in the debtor's trade or occupation.

The argument for the plaintiff seems to be grounded upon the assumption, that the exemption embraces every article of the debtor necessary for his trade or occupation.

The library of the jurist, the theologian, and the author, are necessary and indispensable to each one of these in their respective occupations. So is his machine to the maker of pins or nails. So is his thrashing machine to the man whose occupation is the thrashing of his neighbor's wheat, so is the hydraulic, or other press, to the man whose occupation is to compress hay. Yet, surely, all these are not exempt from attachment, and why? Because, though necessary in these respective occupations or trades, they are not tools, and therefore not embraced in the terms of the exemption.

The District Judge endeavors to bring this machine within the statute exemption of tools, or in other words to designate it as a tool, upon these three grounds. "That as the machine could be used by a single person, was not of great value, and operated by hand power, they should regard it as a tool." With deference, we submit, that these are very unsafe attributes or tests, to rely upon as guides, in determining whether or not a given article is a tool. Tried by the tests designated in the charge of the District Judge, a hand organ is a tool; for it can be used by a single person, is not of great value, and operated by hand power, and we might add for the benefit of the learned counsel for the plaintiff, "necessary for the occupation of" the owner.

Printing presses of one description may be used by a single person. So may many very complicated machines, and within the case of *Buckingham* v. *Billings*, they are not exempted from attachment.

The mere fact, that "it is operated by hand power," although that is one of the attributes of a tool, does not alone confer that character upon it, and besides, this machine is operated

indifferently, by "hand power" or by horse power. Was it a tool when operated by hand, and a machine when driven by horse power? Exempt from attachment when operated by hand power and attachable when driven by a horse?

In attempting to arrive at a true construction of a statute provision, we shall be more likely to arrive at a correct conclusion by looking at the statute itself, than by speculating upon what it ought to be, or upon what the framers of the law intended to have made it.

The only contrariety which is apparent in the decisions upon the construction of a similar provision of the statute in Massachusetts, has arisen very evidently from the application of such tests as those applied by the District Judge, and those contended for by the counsel for the plaintiff, instead of meeting directly the simple question, whether the article contended to be exempted is, or is not, fairly embraced in the terms of the statute exemption.

At the present time, when the debtor may ride to and from the place, where the poor debtor's oath is administered to him, with his own span of horses, exempt by law from attachment, there would seem to be little occasion to call upon the Court to enlarge, by judicial construction, that protection, which the Legislature is so ready to extend alike to the unfortunate, and to the dishonest debtor.

The opinion of the Court was drawn up by

Shepley J. — The question presented upon the merits is, whether a "peg machine" was liable to attachment and sale as the property of the plaintiff, upon precepts legally issued against him.

The jury were instructed, "that as the machine could be used by a single person, and was not of great value, and operated by hand power, they should regard it as a tool of the plaintiff's trade or occupation."

By the provisions of the statute, c. 114, § 38, "the tools of any debtor necessary for his trade or occupation" are exempted.

The Legislature must have used this language with a design to make known to the citizens what property was exempted from attachment and execution. The people were to be informed by it, what their rights were. The intention must have been to communicate the ideas, which would be conveyed to their minds by the ordinary and popular use of the language. This was the rule of construction adopted in the case of *Patten* v. *Smith*, 4 Conn. R. 450. No property can therefore be considered as exempted or intended to be, as a tool, which in popular language is not and cannot be designated or described by the use of that word.

The bill of exceptions and the written arguments show, that the article of property attached cannot be intelligently described, without the use of the word machine or of other words, neither commonly used nor well suited to designate or describe a tool. Neither the presiding Judge, nor any one of the counsel, nor any witness, appears to have been able to designate the property attached without the use of the word machine.

The statute does not exempt machines. Articles correctly designated by the use of that term in popular language cannot be considered as intended to be exempted by the words "the tools of any debtor." If all property properly designated by the use of the word machine, were to be exempted by the use of the word tool, property never designated by the use of the latter word in a correct, technical, or popular sense would be exempted. If machines are exempted, there can be no limitation of that exemption to a particular class of them on account of their value. The exemption is not by the statute made in any degree to depend upon the value; and there would be no criterion, by which the value could be determined. There must be some rule or principle, by which to determine what property is exempted by the use of the word tools, and what is not exempted by the use of the word machines. No other rule is discernable more satisfactory than that arising out of the popular use of language. That determines ordinarily with sufficient accuracy, what article is a tool, and what article is a machine. By the use of it, the article attached is de-

termined to be a "peg machine," and not a tool. It may possibly happen, that by some unusual use of language an article properly designated as a tool and easily described as such may commonly be called by those who use it, a machine. In such case it is not intended to state, that it would not become liable to attachment, because in popular language it was commonly called a machine. For in such case as it could with more propriety be designated and described as a tool, the more correct description might prevail over the more common and vulgar one. It might well constitute an exception to the general rule, that the popular use of language should determine the character of the article.

Exceptions sustained and new trial granted.

GEORGE LITTLEFIELD *versus* JOHN S. LITTLEFIELD *& al.*

The word *beach*, must be deemed to designate land washed by the sea and its waves; and to be synonymous with shore.

The rule is, that parties to contracts are supposed to know and use language legitimately, and therefore parol evidence, that a word is used in a particular place in a different sense from its true meaning, is inadmissible.

Where land is described in the deed as containing two and an half acres of salt marsh and as being within the following bounds, and gives the boundaries as beginning at a corner by the beach, and running by a given line to a creek, and by the creek to a certain marsh, and then by the marsh to a ditch, and then by the ditch to the beach, and running by the beach to the place begun at; the land granted adjoins upon the land washed by the waves of the sea, although the quantity of land within the boundaries may exceed that named in the deed, and may not be wholly salt marsh, and although the ditch may not extend the whole distance to the beach.

THE action was trespass *quare clausum fregit*. The defence seemed to be based on the alleged want of title of the plaintiff to the land where the alleged trespass was committed.

The place of the alleged trespass, was situated between marsh land and the ordinary line of high water, as the sea ebbs and flows. It was admitted, that this land had never been enclosed, and that all persons having occasion so to do passed over it unmolested.

Several witnesses were called in defence, who testified, among other things, that the space between the marsh and high water mark, was there usually called the beach.

The defendant offered to prove conversations between the plaintiff and the witness, the grantor of the plaintiff, at and about the time of the conveyance, respecting the bounds of the lot conveyed; but as the conversation was not upon the lot, nor were its bounds pointed out, the testimony was excluded.

A copy of the description of the premises in the deed, under which the plaintiff claims title, follows: — "Two acres and a half of salt marsh, be the same more or less, contained within the following bounds, being part of the marsh commonly called Jonathan's ten acres. Beginning at Isaac Bourne's corner by the beach and run by said line to the creek; then run by the creek to Joshua Bragdon's marsh; then by his marsh to the ditch; then run by the ditch to the beach; then run by the beach to the place begun at."

The ditch extended to the sea wall, adjoining the marsh, but not to high water mark.

The cause was taken from the jury and submitted by the parties to the decision of the Court upon the testimony, or so much thereof, as may be legal testimony; and they authorized the Court to draw such inferences as a jury might properly do. If the testimony offered by the defendant and excluded, was properly excluded, judgment was to be rendered for either party, by nonsuit or default, according to their legal rights. If the testimony was improperly excluded to the injury of the defendant, a new trial was to be granted.

Bourne, for the plaintiff.

1. The defendant has no right to contest the plaintiff's title. He sets up no title, and the plaintiff has been long in possession. 1 Metc. 100; 23 Maine R. 542; 25 Maine R. 453.

2. As no one has had the exclusive occupation, our seizin extends to the boundaries in the deed. The boundary is the *beach* — and the *beach* means that part of the space on which the sea beats, — shore, strand, flats, beach, all have the same

meaning. *Cutts* v. *Hussey*, 15 Maine R. 257; *Storer* v. *Freeman*, 6 Mass. R. 435. By the common meaning of the word, and by the legal meaning, our land extends to high water mark.

3. Parol evidence is inadmissible to explain the meaning of the word beach. The meaning of a word can no more be explained by parol, than the meaning of a clause in a description. Roberts on Frauds, 64; 1 Phil. Ev. 487; 8 Metc. 573; 13 Pick. 264; 19 Maine R. 115; 5 Metc. 224; 10 Pick. 280.

4. The declarations of former owners can be admissible only where adverse possession is set up. 2 N. H. Rep. 372; 6 Johns. R. 21; 6 Conn. R. 139.

5. The grantor cannot be admitted as a witness to explain the meaning of his own deed. 1 Mass. R. 91; 8 Mass. R. 431; 12 Mass. R. 440; 4 Mass. R. 441.

Bradley & Eastman, for the defendant, contended, that the deed to the plaintiff did not convey any land, but what is properly called marsh, covered by salt marsh grass; and extends only to, and is bounded by the base of the ridge, or embankment thrown up by the sea. 8 Greenl. 85; 4 Mason, 349; 16 Maine R. 245; 6 Mass. R. 435; 3 Pick. 356; 10 Mass. R. 149; 13 Pick. 261.

The question in controversy is, in what sense the word *beach*, is to be understood in the deed, and where was the boundary intended to be fixed by the parties? We say, that the beach extends but to the shore, and that the boundary intended by the parties was the line, between the marsh and the ridge or embankment, separating the marsh from the sea. *Storer* v. *Freeman*, 6 Mass. R. 435; *Cutts* v. *Hussey*, 15 Maine R. 237. And it is remarkable, that it appears from the latter case, that in the statute of 1749, relating to Winter harbor beach, the words beach and shore, are clearly used as different and distinct, one from the other.

Where a deed is of doubtful construction, as to boundaries, the construction given by the parties themselves, by their acts and admissions, is deemed to be the true one, unless the contrary be clearly shown; and this practical construction is prove-

able by parol. 3 Met. 379; 1 Mass. R. 362; 10 Mass. R. 149; 1 Term R. 701; 6 Mass. R. 440; 13 Pick. 261.

The plaintiff's deed purports to convey *salt marsh*, and no other land; and is to be confined to that. 3 Pick. 356.

The meaning of words is not to be prescribed by arbitrary judicial edicts, but is to be ascertained by popular usage. The presumption is, that the word *beach*, was used in the deeds in the sense in which it was ordinarily used, and understood at that place, whether it accorded with strict legal accuracy or not. The testimony is full and explicit, that the word *beach* was applied to the embankment or space between the marsh and the sea, and that alone. 14 Maine R. 185.

And such has been the sense in which the word *beach* has been used by Legislatures for a hundred years past. Mass. Sp. Laws, Vol. 3, pages 10, 12, 14, 26, 31, 16; Vol. 2, page 204; Vol. 3, page 4, and appendix, p. 27, and 24, 13; Stat. of Maine, of 1827, c. 442; and it will be found, that in Massachusetts, there are twenty-four acts to prohibit cattle from feeding upon beaches, and to prohibit persons from cutting the grass growing thereon.

The opinion of the Court was drawn up by

WHITMAN C. J. — The action is trespass *quare clausum*. The place where the alleged trespass was committed, was near the sea, upon a bank of sand, where no vegetation grows; and which the defendant alleges to be a beach; and the documentary title of the plaintiff, appearing to be bounded seaward on the beach, that the locus is excluded from, and not included within his limits. The plaintiff must, to maintain his action, show title of some kind to the *locus in quo*. He does not rely upon any other than the limits embraced in a deed introduced by him. Those begin by the beach; and run thence from seaward to a creek; thence by the creek to Bragdon's marsh; thence by the marsh to a ditch; thence by the ditch to the beach; thence by the beach to the beginning; thus excluding the beach. The plaintiff contends that these boundaries carry him to high water mark, and thus include the locus.

The word beach, he insists, has a fixed and settled meaning, and indicates the land between high and low water mark; and so is a permanent and fixed monument; and that parol evidence is inadmissible to show that any thing else could be his boundary seaward, than high water mark; and if he is right in his premises, viz. that beach is the land between high and low water marks, his conclusion would be undeniable, unless some other portions of his deed should show, that such was not the intention of the parties.

The term beach is defined by Webster, to be the shore of the sea, or of a lake, which is washed by tide waters and waves. Other lexicographers say it is the sea shore, the strand, the coast. Webster says the shore is the coast of land adjacent to the ocean or sea, and that strand is the shore or beach of the sea or ocean or of large lakes. Other lexicographers say, that shore is the coast of the sea, and that strand is the sea beach. C. J. Parsons, in *Storer* v. *Freeman*, 6 Mass. R. at p. 439, says, the sea shore is "all the ground between the ordinary high water mark and low water mark." And he says this question is largely considered by Lord Hale, in his treatise *de jure maris et brachiorum ejusdem*; and his definition of sea shore is, "that ground that is between the ordinary high water mark and low water mark." Mr. C. J. Weston, in *Cutts* v. *Hussey*, 15 Maine R. at p. 241, says, that, "by a beach, is to be understood the shore or strand; and it has been decided, that the sea shore is the space between high and low water." If a beach is not to be so limited, it would be difficult to define its limits. In many places the same kind of diluvial matter, that composes the land between high and low water marks, extends a great distance from the sea. For instance, such is the case upon Cape Cod. In many places there, it extends from sea to sea, across the cape. On the whole, the word beach must be deemed to be land, washed by the sea and its waves; and to be synonymous with shore.

But it is contended, that words acquire different meanings in different places, and that they must be taken to bear a meaning according to their acceptation where they may happen to

be used. But the difficulty in such case, is to ascertain, whether the parties might not know the true meaning of the language used; and, if they did, whether they intended to conform to it or not. The only safe and convenient rule is to suppose parties to contracts, to know and use language legitimately. Sometimes words have several meanings. When such is the case we must ascertain, from the subject matter to which they relate, or perhaps from proof, the sense in which they may be used, as in the case cited in the defence, of *Stone* v. *Bradbury*, where proof was admitted to show the term bond to have been used to designate an unsealed instrument. For, in common parlance, as may be seen in the works of English lexicographers, bond means any written obligation, while in a law dictionary, it may be defined to be a deed, stipulating for the payment of money at a time and place appointed.

The defendant has introduced various acts of legislation to show that beach must mean upland. In the first place it may be remarked, that it is not quite clear, that legislatures may not misuse language. If it were, many of the difficulties, so often occurring in discovering what they mean, would instantly vanish. The first and second acts cited, speak of "meadows or shores adjoining said beach," indicating that beach and shore were entirely different, the one being adjacent to the other. The next six citations speak of meadows, beaches and shores, without any indication of the meaning intended particularly to be affixed to either. The ninth citation is of a prohibition to "cut wood, poles, brush or trees, standing and growing upon Plymouth beach." Most people, perhaps, would require stronger proof than a legislative act to satisfy them, that wood and trees ever grew on a beach. The tenth citation speaks of beach, hummocks and sedge ground, and prohibits cutting "trees or shrubs growing on said beach or hummocks." Trees might grow on hummocks if always above water. From the case of *Thomas* against *Marshfield* nothing can be gathered decisively, as to what constitutes a beach. It is manifest that grass grew on it, such as cattle would eat; and that such is the

case between high and low water marks is well known. But for it the cattle, upon what is often called the south shore, viz. the coasts of the old colony of Plymouth, would in the summer time, be greatly deficient of feed. And a road might well be laid out upon a beach below high water mark, that might be of great public utility. The case of *Green* v. *Chelsea*, is an authority, if any thing, against the idea, that beach is above tide water; for it is coupled with flats, and they (beach and flats,) are said to be overflowed by the tide. Finally, nothing can be gathered from these citations, whether from the statutes or cases cited, that can authorize the conclusion, that a beach is not the strand, and constituting such ground as is overflowed and washed by the sea, or the waters of great lakes.

The next question is, where must we look for the starting point in the plaintiff's deed? We must find Isaac Bourne's corner; and according to authorities, we must find it by the beach. *Pride* v. *Lunt*, 19 Maine R. 115. A stake and stones, as the corner, could not be shown to be elsewhere. We are to run from thence round to a ditch; and by the ditch to the beach; thence by the beach to the beginning.

To this, several objections occur, of considerable weight. In the first place, the deed purports to be of but two and a half acres; and the ground comprised within the above boundaries would exceed that quantity. This is no otherwise important, than to serve to indicate the intention of the parties; that it was not intended to convey so much as is embraced in the above exterior lines. In the next place, the deed speaks of the ground conveyed, as being salt marsh, and the ground within the above limits would not all be salt marsh.

In the third place, the course by the ditch is said to be to the beach. Now it does not appear that the ditch ran further than the sand embankment, to be found before reaching the beach; and which the defendant contends, is in truth the beach referred to in the deed. Such being the case, the line by the ditch could not run all the way by it to the true beach; but it is truly stated, that it ran by the ditch, and to the beach. Both branches of the statement are measurably, though per-

haps not literally, true. At any rate we must run to the beach, or we could not, afterwards, run by it to the beginning. These difficulties, however, are not greater than often occurs in opposition to what is ascertained to be the legal intendment of the parties. Old landmarks and fixed principles, in giving construction to instruments, must not be departed from. We cannot be authorized to admit every sand bank, found upon the margin of the sea, whatever the extent of it into the country may be, to be a beach. The testimony of a few of the neighbors, that it was so considered, cannot make it such. It is no uncommon occurrence, that the quantities alleged in deeds to be conveyed, are far from being accurate; nor that the land denominated arable or pasture, or other kind of land, should turn out not to be wholly such. Whatever the kind or quantity of land may be, if fixed and permanent monuments are given for its boundary, they must be allowed to have a controlling effect.

It is not perceived, that any testimony, material to the defence, was excluded.

As agreed by the parties, the defendant must be defaulted, and judgment be entered for $2,50 damages.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF OXFORD,

ARGUED MAY TERM, 1848.

COLMAN GODWIN *versus* WILLIAM GREGG *& al.*

The levy of an execution upon an undivided portion of a part of a farm, such part being specified by metes and bounds, the whole of which farm was holden by the debtor as tenant in common, with another, will, it seems, be considered to be valid until the other co-tenant has obtained partition, and ousted the creditor from the part so levied upon; and therefore an action cannot be maintained on the judgment, until the creditor has been ousted of some part of the land levied upon.

And if the officer making the levy, as a coroner, held at the time one commission, as a coroner, and another, as a justice of the peace, that will not render the levy void.

IN this case, no copies of the case, or statement of facts, came into the hands of the Reporter. It may, however, be understood from the opinion of the Court.

At May Term, 1847, the Chief Justice called on the counsel for the defendant, to show that the suit could not be maintained, and did not call on the counsel for the plaintiff.

At the May Term, 1848, the Court informed the plaintiff's counsel, that they would be heard, who handed in a brief, and the action was again continued *nisi.*

S. & G. F. Emery, for the plaintiff, argued in support of these positions: —

A balance is due to the plaintiff at all events, whether the levy be good or not. We say, that we should have judgment for the full amount of the execution and interest, but at all events, we must have judgment.

The levy is void, because the officer making it held commissions both as a coroner and a justice of the peace. No person can legally exercise the office of a coroner, while he is a justice of the peace. Const. of Maine, art. III, § 1 and 2; 3 Greenl. 487; 3 Greenl. 326; 4 Greenl. 340; 7 Greenl. 14.

The levy is also void, because a part only of the estate in common was taken. The farm was owned in common, by the debtor and another, and the levy was made upon the debtor's interest in a portion, only, of the farm. 1 N. H. Rep. 42; 9 Mass. R. 34; 12 Mass. R. 349 and 474; 13 Mass. R. 51; 3 Greenl. 288; 24 Pick. 327; 18 Maine R. 230; 8 Metc. 47.

The plaintiff is not estopped by the levy. And to make it an estoppel, it should be pleaded. 15 Mass. R. 495; 14 Pick. 167; 3 A. K. Marsh. 41; 4 Litt. 272; 2 Johns. R. 582.

Debt is the proper form of action. 3 Fairf. 303.

Codman and *J. A. Poor*, for the defendants, contended, that under the provisions of the Revised Statutes, the action of debt could not be maintained in a case like this. There is a distinction between Rev. Stat. c. 94, § 23, and the former law, under which the case in 3 Fairf. 303, was decided. *Scire facias* is now the only remedy to revive a judgment.

The levy is good against every one, but other co-tenants, and is therefore good until they interfere to avoid it.

If the coroner, who made the levy, had also a commission as a justice of the peace, the latter would be vacated the moment he acted as coroner, and he would continue legally a coroner, though not as a justice.

The opinion of the Court, SHEPLEY J. taking no part in the decision, was drawn up by

WHITMAN C. J. — The levy, relied upon in defence, is in satisfaction of a part only of the plaintiff's claim; and the plaintiff objects, that it was void, it having been made upon

an undivided moiety of a certain part of a larger tract of real estate, which the debtor, Gregg, held as tenant in common with another person; and insists on his right to recover the whole amount of his former judgment; and whether he has such right, is the principal question raised for our decision. No case, it is believed, has occurred, in which a question precisely similar, in all its concomitant circumstances, has been adjudicated upon. Numerous cases have been decided, in which it has been determined, that levies upon, and conveyances of, distinct parts of property held by a debtor or grantor, in common with others, was inoperative upon the rights of the co-tenants; and in several of them it has been incidentally remarked, that such a levy is good, by way of estoppel, against the debtor; so that, if the other co-tenants should have their purparties set off, on partition, in severalty, without interfering with the part levied upon or conveyed, it would make a good title thereto to the grantees or persons, who had levied thereon. *Bartlett* v. *Harlow*, 12 Mass. R. 348; *Baldwin* v. *Whiting & al.* 13 *ib.* 57; *Varnum* v. *Abbott & al.* 12 *ib.* 474; *Brown* v. *Bailey*, 1 Metc. 255; *Staniford* v. *Fullerton*, 18 Maine R. 229; *Gregory* v. *Tozier*, 24 *ib.* 308. And it does not seem, from the authorities, that it should make any difference, if the levy be of an undivided portion of such parts of a larger tract held in common. The case of *Varnum* v. *Abbott & al.* was of this description. Yet it was held, in one of the cases cited, that one holding such undivided part could not maintain a petition for partition against a co-tenant of the whole tract; and it is not conceivable that the debtor could have partition of the residue against the co-tenant of the larger tract, unless it were by consent.

But, perhaps, it would not be admissible for a creditor, who had taken it upon himself so to levy, to make objection to its validity. It may be more reasonable that he should, in such case, be required to wait till the other co-tenant should have obtained partition, and, then, if ousted of his enjoyment of any portion of the estate levied upon, to revive his claim under

his judgment against his debtor, in one of the appropriate modes, in such cases provided.

In the statement of facts it is agreed, that the officer, who made the plaintiff's levy, was also a justice of the peace. It is not, however, stated, that he performed any act, or professed to exercise any of the powers incident to the latter office. Though he might hold commissions, both as coroner and justice of the peace, it was still competent for him to act in one of those capacities; and acting as a coroner it might be inferred that he had renounced the exercise of his powers as a justice of the peace.

But if he acted under both commissions, on different, and independent occasions, his acts, so far as the rights of others were concerned, may be deemed valid. Having a commission for the purpose, duly issued, and acting publicly under it, the citizens cannot be expected to be conusant that he holds another commission, with the duties of which his acts are incompatible. He may be culpable for exercising powers under incompatible commissions. And the government may have a right, by information, to inquire of him *quo warranto* he assumes the performance of the duties of the one or of the other office; and to annul his power to exercise the functions of one of them. But while he holds both commissions, and acts under them, on independent occasions, the citizens are not bound to know, nor can they well be expected to know that he is not authorized to perform either; and his acts, in either capacity singly, and independent of the other, must be held to be valid as between other parties. It was so considered in the case of the *Commonwealth* v. *Fowler*, 10 Mass. R. 290; and this although Fowler's commission as judge of probate, under which he had acted, was adjudged void, it having been issued to him, before the law authorizing his appointment had gone into operation. And this seems to have been a more glaring case of official exercise of authority, unwarranted by law, than the one before us; especially as the coroner in the case must be supposed to have acted under a commission duly issued by authority of law; and, so

far as is apparent, unaffected by any incompatibility of action.

If he, in this instance, had returned, that he, as a justice of the peace, had administered the requisite oath to the appraisers, it would have presented a case of more difficulty, as he would then have appeared to have acted in both capacities in the same transaction. The case, however, of *Bamford* v. *Melvin*, 7 Greenl. 14, by implication, might have been considered an authority for holding such a levy to be void. But the Court, nevertheless, decided in that case, although the certificate of the taking of the oath by the appraisers, had the officer's name affixed to it, in his capacity of justice of the peace, whereby it was made evident to the Court, that he pretended to act in both capacities, yet, it was holden, inasmuch as he had stated in his return, that the appraisers were duly sworn, without saying by whom, as it is a principle of law, between other parties, that his return must be deemed conclusive, that the levy was valid.

On the whole our conclusion is, that judgment must be entered upon default; and that the plaintiff is not yet in such a situation, in reference to the land levied upon, that judgment can be entered up for any more than the balance, with interest, after the amount purporting to be satisfied by the levy shall have been deducted.

If execution might have been issued no costs to be taxed for plaintiff.

Nathaniel Soper *& al. versus* Inhabitants of School District No 9, in Livermore.

It is not necessary to the validity of a warrant from the selectmen to call a school district meeting, that the application therefor should be recorded, or produced, or that the fact that a proper application had been made, should be recited in the warrant. It is sufficient, if it appears by parol evidence, that such application had been made.

Where it was proved, that there was no school house in the school district, a return upon the warrant from the selectmen to call the meeting, made by the person to whom it was directed, that he had notified, &c., "by posting up four copies of this warrant, one on the sign post at the confluence of the B. and F. roads, one on the corner of the blacksmith's shop, one on the Methodist meeting house, and one in the post-office, all of which places are in said district," — was holden to furnish sufficient evidence, that the notices were posted, as to place, in the manner required by Rev. Stat. c. 17, § 24.

In the proceedings of our numerous and various municipal corporations, a scrupulous observance of the most approved formalities is not to be expected. If, therefore, the intention of the voters of a school district, to raise a sum of money for the purpose of building a district school house, is perfectly apparent upon their records, it is sufficient to authorize the assessment and collection of the amount, although such intention may be very informally expressed.

The parties agreed to submit this action to the decision of the Court, upon the following statement of facts.

"This is an action of assumpsit for money had and received, brought to recover the amount of a school district tax assessed against the plaintiffs, including the costs upon a sale of the plaintiffs' property, taken and sold to pay said tax, by the collector of said town, under the warrant of the assessors, amounting in the whole to the sum of fifteen dollars and sixty cents.

"It is agreed by the parties aforesaid, that the school house in said district, was consumed by fire in the winter of 1845; that the selectmen of said town, on the 30th day of April, 1845, upon the written request of three or more of the legal voters in said district, (a fact agreed upon only on condition that parol evidence may be offered to prove that such written application was made, or by the production of such original

application) issued their warrant in the words following, to wit: —

"To Isaac S. Daley, one of the inhabitants of school district No. 9, in the town of Livermore. "GREETING.

"You are hereby required in the name of the State of Maine, to notify the inhabitants of said district, qualified to vote in town affairs, to meet at the dwellinghouse of John H. Bigelow in said district, on Saturday the tenth day of May next, at one o'clock in the afternoon, to act on the following articles, to wit: —

"1st. To choose a moderator to regulate said meeting.

"2d. To choose a clerk for said district.

"3d. To see if the district will vote to build a school house in said district.

"4th. To see if the district will choose a committee to superintend the building of said house, or act any thing relating thereto.

"5th. To see if the district will vote to raise money to defray the expense of building said house, or act any thing in relation thereto.

"Given under our hands at Livermore, this thirteenth day of April, in the year of our Lord, one thousand eight hundred and forty-five. "Hezekiah Atwood, "Josiah Hobbs, "Silvester Norton, } Selectmen of Livermore."

"Said warrant was returned at said time and place of meeting, with the following service indorsed thereon. "Pursuant to the within warrant, I have warned and notified the inhabitants of school district number nine, as within directed, by posting upon the third day of May instant, four copies of this warrant, one on the sign post at the confluence of the Brittuns and Farmington roads, one on the corner of the blacksmith's shop, one on the methodist meeting house, and one in the post-office at Livermore centre, all of which places are in said district. May 10th, 1845. Isaac S. Daley."

"The inhabitants of said district met agreeably to the foregoing warrant. The meeting was called to order by John A.

Hayes, clerk of the district, Capt. John Strickland, chosen moderator, and sworn by Isaac S. Daley, Esq.

2d. "Chose John A. Hayes clerk for the district, who was sworn into office by the moderator.

3d. "Voted to build a school house.

4th. "Voted to choose a committee to superintend the building the house.

5th. "Voted that this committee consist of three.

6th. "Chose Isaac S. Daley, John Strickland and Joel H. Bigelow, the forenamed Committee.

7th. "Voted that the building committee be instructed to ascertain the spot where the school house is to be built according to the vote of the district in which it located the house, and also to draft a plan of a house, and ascertain the probable sum of money that such a house can be built for, and report progress at the adjournment of this meeting, and also for what the spot where the house is to be built, can be purchased for; and shall have the general supervision of things incident to the building of said house.

8th. "Voted that the district raise a sufficient sum of money, to defray all the expenses incident to the building of said house.

9th. "Voted that when we adjourn, that we adjourn to the thirty-first day of May instant, at four o'clock in the afternoon, at this place.

"The district again met at said time and place of adjournment, and the building committee made their report as to the location of the house, having measured the distances from the two extremes of the district, north and south to the centre, as directed, which report was accepted. Also voted that the building the school house in two jobs, the wood work in one and the stone and mason work in the other, be sold to the lowest bidder, upon the plan as presented by J. S. Daley, on Saturday the seventh day of June next, at four o'clock, P. M., on the spot selected by the committee for building of said house. This meeting was adjourned to the seventh day of June aforesaid, at four o'clock, P. M. on the spot selected by the committee for building the school house.

"The district met agreeably to adjournment. The moderator being absent, Isaac S. Daley was chosen moderator pro tem. who was sworn by the clerk.

"Proceeded to business, as per vote of last meeting. After consultation, voted not to have a basement story to the house, as suggested by the committee at the previous meeting. At the meeting, the building of the wood work was sold to John W. Bigelow, for one hundred and forty dollars, on condition that it should be built in a particular manner set forth, and the stone and mason work were sold to Charles Wyer for forty-six dollars and fifty cents. [Here the mode of building was stated.]

"This meeting was then adjourned to the first Monday in November next, at six o'clock, P. M., at the dwellinghouse of J. W. Bigelow, in said district.

"The district met agreeably to adjournment and the building committee reported progress, which was accepted, and the meeting further adjourned to the twenty-fourth day of November instant, at the school house now building in said district. November 24th, 1845. District again met, agreeably to adjournment, and the committee reported the house was not completed, and the meeting was further adjourned to the eighth day of December, then next, at six o'clock, P. M. at the same place.

"December 8th, 1845. The district met agreeably to adjournment, and proceeded to business as follows: —

"*First*, heard the report of the committee, which was as follows: — Your committee to whom was assigned the duty of ascertaining the place where the school house was to be located by measuring from the extremes of the district to the centre, and ascertain what sum the land for the location of the school house could be obtained for; also to sell the building of said school house and superintend its construction, have attended to their duty, and ask leave to report, that they have endeavored to be faithful in the performance of their trust. The mason and stone work was done by Charles Wyer, which in our opinion was well done, and accepted by your committee. The wood work has been done by Mr. Nathaniel Bartlett, who,

though extremely tardy in the performance of his labor, has in our opinion, at last, got a good house as a whole — he has been faithful in putting the work together, so that the house has met the unanimous approval of your committee.

BILL OF EXPENSES.

To Charles Wyer,	$ 46 50
To John W. Bigelow,	140 00
To John A. Hayes, for stove and funnel,	15 38
To John W. Bigelow, for removing the remains of the old school house and leveling the door yard, and banking the new house, agreeably to contract with Joel H. Bigelow, for site, which has been verbally reported at a previous meeting,	4 00
To Isaac S. Daley, for services,	4 00
To John Strickland, "	1 00
To Joel H. Bigelow, "	1 00
In addition to which your committee have taken the liberty to have the plastering each side of the chimney smoothed and painted for a black board, which additional expense is	1 50
	$213 38

" December 8th, 1845.

" Isaac S. Daley,
" John Strickland,
" Joel H. Bigelow, } Committee."

" Which report was then and there accepted by a vote of the district and recorded by the clerk with the doings of this meeting, and the meeting adjourned without day.

" By reason of the aforesaid proceedings at said district meeting within forty-eight hours from the adjournment aforesaid, the clerk of the district made out and delivered to Hezekiah Atwood, chairman of the board of assessors in Livermore, his certificate in the words and figures following, to wit: —

" At a legal meeting in school district number nine, in the town of Livermore, called for the purpose of locating and building a school house in said district, voted to raise a sum of

money sufficient to defray the expenses of said house, which are $213,38.

"Livermore, December 8th, 1845.

"John A. Hayes, Clerk of said District."

"Within thirty days from the time aforesaid the assessors of Livermore apportioned and assessed said sum of $213,38, with an overlay of about ten dollars, upon the polls and estates in said district, and made out lists thereof together with their warrant in due form of law, commanding and directing the collector of said town to collect and pay over the same to Benjamin Bradford, Treasurer of Livermore, which tax bills and warrant were delivered to Ulmer Perley, collector of Livermore, who, upon the refusal of the plaintiffs to pay their proportion of said assessment, distrained their property and sold it by virtue of, and as commanded in said warrant, to satisfy the plaintiffs' tax aforesaid, which (including costs of sale) amounted to $15,60, and the whole amount of taxes in the bills committed to said collector as aforesaid have been by him collected and paid over to said town treasurer, and drawn out upon the orders of said building committee, to pay the expenses of building said house and assessment and collection of said tax.

"Upon the foregoing statement of facts the parties agree that such judgment may be entered up, upon nonsuit or default, as law requires.

"Seth May, Attorney to Plaintiffs.

"Ruel Washburn, Attorney to Defendants."

S. May, argued for the plaintiffs, and among other things, said, that the plaintiffs claimed to recover back the amount of the money paid, on the ground that the tax was not legally assessed, and that therefore their property was illegally taken and sold.

The school district had received the money, and the action was rightly brought against the district. Rev. Stat. amendment, page 748.

We contend that the tax was illegal, because there is no legal evidence that any written application of any three or more of the legal voters of said district was made to the selectmen to call the meeting, as required by Rev. St. c. 17, § 23.

The legislature, by requiring the application to be in writing, must have intended that it should be matter of record. And this fact should have been recited in the warrant. Parol evidence to prove such application is, therefore, inadmissible. And public policy requires that such should be the rule. This question was raised in Massachusetts, but left undecided. *Williams* v. *Sch. Dist. in Lunenburg*, 21 Pick. 75.

The meeting was illegal, because the inhabitants of the district were not legally notified. Several particulars were pointed out, and 21 Pick. 82, and 20 Maine R. 439, were cited.

But the principal objection, on which we rely to show that the tax was illegal, is found in the doings of the meeting, rather than in any of the preliminary steps leading to it. No sum of money was voted to be raised at the meeting. Here the proceedings at each meeting were examined, and it was insisted, that neither at the first meeting nor at any adjournment thereof was there any vote passed to raise the money. The certificate of the clerk was therefore wholly unauthorised and void. The most favorable position for the defendants is, that the vote was to raise enough money to build the school house, without stating any sum; and that is wholly insufficient. The allowance of bills to a certain amount, seven months afterwards, cannot enlarge or alter the vote to raise money. Would the vote of a town to raise money sufficient to defray the expenses of the poor be an authority to raise money? The clerk of the district should have been able to certify the vote to raise money, when it passed, and not from what took place months afterwards.

Codman and *Washburn*, for the defendants, contended that it was not essential to the validity of a school district meeting that any written application should be made to the selectmen to call it. The application is only to render it imperative on them to call a meeting, but they may do it without the application of any member. The presumption of law is, that the selectmen had the written request to grant the warrant. 7 Pick. 112; 3 Greenl. 390; 4 Pick. 258; 3 Pick. 282.

If necessary, we say that parol proof is admissible to show, that a written application was made to the selectmen to call the meeting. 21 Pick. 80.

The return of the warrant shows, that legal notice was given. *Fletcher* v. *Lincolnville*, 20 Maine R. 439; 1 Pick. 112; 24 Pick. 122; 5 Metc. 287.

We contend that at the school district meeting such a legal vote to raise money for the purposes specified in the warrant was regularly passed and such proceedings had, as authorised the assessment and collection of the tax. The money was duly, regularly and legally raised, assessed and collected under the provisions of Rev. St. c. 17, § 28. The counsel examined the proceedings of the district, and insisted that there could be no possible reason, in law, equity or good conscience, urged to justify the recovery of this money back by the plaintiffs, which as good citizens they ought voluntarily to have paid; and that it would be a reproach to the law and a stigma upon justice, if the plaintiffs can be suffered to prevail.

The opinion of the Court, SHEPLEY, J. being absent and taking no part in the decision, was drawn up by

WHITMAN C. J. This action being for money had and received, the plaintiffs have a right to recover of the inhabitants of the district whatever money they may have in their hands, if any there be, derived from the plaintiffs or received for them, which in equity and good conscience they ought not to detain from them. This species of action has ever been regarded as purely of an equitable nature. *Moses* v. *Macferlan*, 2 Bur. 1005.

It does not seem that the plaintiffs complain, or have any reason for so doing, that they have been compelled to pay an unreasonable proportion of the expenses of building a school house, in the district in which they reside; and the building of which, by reason of the destruction of the only one the district before had, had become indispensable. It is not pretended they were not liable to be taxed for such purpose: but the contention is, that due proceedings had not been adopted there-

for; — nor is it pretended, that they had been assessed for any estate they did not own. In fact there does not seem to have been the slightest ground for believing that there was, in any respect, in connection with the building of the house, or in the assessment of the tax in question, the least deviation from what was supposed to be an imperative duty. The plaintiffs seem to be endeavoring to escape from their liability upon grounds purely technical; but, nevertheless, if such are actually to be found in the case, in reference to particulars preliminarily required to render the imposition of a tax valid, they must be allowed to avail the plaintiffs in their endeavors to avoid being responsible for their just proportion of the burthen of building a school house for the accommodation of themselves, as well as the rest of their fellow citizens of the district.

We will now proceed to consider the objections in the order in which they have been urged upon our consideration. The first is, to the proceedings of the defendants, in which it is insisted that there was no legal evidence adduced at the trial, that any written application of any three or more of the legal voters of the district was made to the selectmen to call the meeting, to consider of the subject of building a school house, and the raising of the money to defray the expense of it. It is, however, agreed to be admitted, that the selectmen were furnished with such an application, if it be admissible to prove it without producing the application, or a record of it; and that they thereupon issued their warrant for the calling of the meeting, but without reciting such application or alluding to it. The statute concerning school district meetings does not prescribe, that the selectmen should make any such recital, or that they should return such written request to the clerk of the district or to any other place. It was a document addressed to them, and which they might keep on their files; and it would seem to be proper that they should there preserve it; and there would seem to be a propriety in their reciting it in their warrant, by way of making an exhibit of their authority for issuing their warrant; but we cannot say that it would be

indispensable to its validity, that they should do so, as the statute does not expressly require it.

This matter was alluded to in *Williams* v. *The School Dis. in L.* 21 Pick. 75, without any express decision concerning it. But the Chief Justice, in noticing it, would seem not to have been much impressed with the necessity of such a course on the part of the selectmen. He notices that, though it did not appear by the warrant, that such application had been made, yet that it appeared *aliunde* that such application had been made, without intimating any doubt of the admissibility and sufficiency of such proof. In *Fletcher* v. *Lincolnville*, 20 Maine R. 439, it was objected, that it did not appear that the applicants for the school district meeting were legal voters, residing within the district; but the Court observed, "if that fact is not to be presumed from the official action of the selectmen, which followed, it is established by the agreement of the parties; and if the fact existed the warrant is justified." If, then, the fact existed, also, that a written application was made to the selectmen, it would seem to follow, by parity of reasoning, that their warrant, thereupon issued, would be justified. Selectmen are officers of a highly responsible character. It is made their duty upon such applications alone to issue their warrants for the calling of school district meetings. When therefore they issue their warrants for such meetings, specifying the purposes therefor, there would seem to be the highest degree of propriety in presuming, that they had proceeded upon due application therefor. Selectmen are authorized to call town meetings, on the application of ten or more of the qualified voters in writing, for any special purpose, but it is believed not to be usual in calling any such meeting to state any thing more than the purposes for which it may be called. There can scarcely be a doubt that meetings so called would be held to be legal.

The next objection is, that the return of the officer, on the warrant for calling the meeting, did not expressly state, that the places at which notices were posted were public places, one of them being the school house in the district; the statute

requiring that the notices should be published in two or more public places in the district, one being on their school house, if any there be. But the case shows that the school house in this district had been consumed by fire; and the return states, that the notices were posted at four different places in the district, one being at a meeting house, one at the post-office, one at the sign post, (meaning doubtless at the guide post,) where two public roads formed a corner, and one at a blacksmith's shop, all well known to be public places in a country neighborhood, to which the people are accustomed to resort. The decision in *Fletcher* v. *Lincolnville* shows, that under such circumstances, this objection is not well founded.

We come now to the objection principally relied upon by the plaintiff: and it is, that there was no proper vote authorizing the raising of the money by assessment, necessary to defray the expense of erecting the school house. All the votes of the district were passed at one and the same meeting, though partly at the adjournments thereof. On the tenth day of May, 1845, when the meeting commenced, it was voted, that a sufficient sum should be raised "to defray all the expenses incident to the building of said house." The adjournments were from time to time till the 8th December of the same year, at which time the house had been built and finished, as reported by the building committee, with the amount of the charges therefor, which report being accepted, and the amount necessary to defray the expenses of building the house, the clerk of the district, thereupon, made his certificate to the assessors of the town, that, at said meeting, it was voted to raise the sum necessary to defray the building of the house, the precise amount of which was $213,38. These proceedings, taken together, were perfectly intelligible, though perhaps not in the most appropriate form. There was a vote to raise the requisite amount, and that amount was precisely ascertained, and when ascertained by the actual expenditure for the purpose, instead of a conjectural estimate, it might well be considered as being voted to be raised.

In the proceedings of our numerous and various municipal

corporations we ought not to look for a scrupulous observance of the most approved formalities. If their proceedings are in substance what they should be, and intelligible, it would be mischievous to set them aside for the want of technical formality. The intention of the voters of the district is perfectly apparent in the case before us, and the certificate of their clerk was in conformity thereto; and on the whole we do not perceive, but in equity and good conscience, the defendants should be allowed to retain the amount obtained from the plaintiffs.

Plaintiffs nonsuit.

WELLS FORBES *versus* THE INHABITANTS OF BETHEL.

Where an action was commenced in the District Court, and a verdict was there rendered in favor of the plaintiff for eighty dollars as damages, and the defendant appealed; and on the trial in this Court the verdict was for the plaintiff for twenty dollars, damages; and exceptions to the ruling of the presiding Judge were filed by the plaintiff, and the action was continued; *it was holden*, that in entering up judgment, the plaintiff must be restricted to the recovery of costs equal to one quarter part only of the amount of damages found by the jury.

ACTION on the case to recover damages alleged to have been sustained through a defect of a highway in Bethel, which the town was bound to keep in repair. The action was originally commenced in the District Court, where the plaintiff recovered a verdict for eighty dollars as damages. The defendant appealed, and in this Court the verdict was for the plaintiff for twenty dollars damages.

WELLS J. presiding at the trial, instructed the jury, that they were to judge, whether the highway where the injury happened was safe and convenient for travelers; that in deciding that question they would take into consideration the amount of travel upon the highway; that highways were required to be wrought more perfectly and more smoothly in some places, than in others; that the greater the amount of the travel upon them, the more perfectly they should be made and

kept in repair; and that it was their province exclusively to decide, whether the highway in question was safe and convenient.

To these instructions the plaintiff excepted.

Howard and *Rawson*, for the plaintiff, contended, that the instructions were erroneous, inasmuch as they required a road to be made better, that is, more safe and convenient, where there is much travel, than where there is little. The law requires roads to be made safe and convenient, and alike in all places.

They also contended, that they were entitled to full costs. The plaintiff was entitled to have interest upon the amount of the verdict until judgment was entered up. The judgment must be for more than twenty dollars. Rev. St. c. 116, § 1 and 2; 2 Wash. C. C. R. 463; 1 Wash. C. C. R. 1; 8 Cranch, 229; Rev. St. c. 97, § 6, 7; c. 96, § 16, 17, 18, 19, 20; c. 151, § 13. The verdict for eighty dollars in the District Court, furnishes conclusive evidence, that the action should not have been brought before a justice.

Codman and *Frye*, for the defendants, contended that the instructions were correct; and that if they were erroneous, they were too favorable for the plaintiff, and therefore it is not for him to complain. He is not aggrieved. Rev. St. c. 25, § 68, 69 and 89.

The plaintiff ought not to have full costs on account of his own misconduct in filing groundless exceptions. Interest should not be cast upon the verdict, when the exceptions are filed by the plaintiff, as in this case. 4 Greenl. 66; 2 Greenl. 397.

Tenney J. was not present at the argument, and took no part in the decision, and Shepley J. dissented.—The opinion of the other two Judges, Whitman C. J. and Wells J., was drawn up by

Whitman C. J. — This action is trespass on the case, for an injury received from a defect in a highway, which the defendants were bound to have kept in repair. The action is

before us, at this time, upon exceptions taken to the ruling and instructions of the Judge, who presided at the trial. His instructions to the jury were, that they should inquire and determine whether the highway, where the injury occurred, was safe and convenient for travelers; that, in deciding that question, they would take into consideration the amount of travel upon the same; "that it was their province exclusively to decide whether the highway in question was safe and convenient." The verdict was for the plaintiff for damages to the amount of only $20,00; and the exceptions were taken by him, as is supposed, upon the ground, that, by the misdirection of the Judge, the damages were not commensurate with the injury. But the jury have found in his favor, and could not have been influenced, injuriously to him, by the instructions given. They must have found, that the highway was defective; and this was all that the plaintiff could, in this particular, have desired they should do; and to this particular alone did the instructions of the Judge have reference. The plaintiff, therefore, is not aggrieved by the instructions, even if erroneous, and as he relies upon no other supposed errors in the ruling and instructions, his exceptions must be overruled.

But, the verdict having been rendered for damages to the amount only of $20,00, a question arises of some moment, which the counsel have argued, and which must be decided on entering up judgment, though not regularly before us under the exceptions; and we proceed to consider it. It is as to the costs, which the plaintiff will be entitled to recover.

The defendants contend, that the plaintiff is entitled to recover only one quarter part as much for costs, as his verdict is for damages; and rely upon Rev. St. c. 151, § 13, which provides, that, if, in any action, originally brought before the Supreme Judicial or any District Courts, it shall appear, on the rendition of judgment, that the action should originally have been brought before a justice of the peace, &c., the plaintiff shall be entitled to recover only one quarter part as much costs as damages.

It may be observed that it is not said, if the plaintiff shall

recover no more than twenty dollars damages, that he shall be restricted as to his costs; but that, if it shall appear on the rendition of judgment, &c. This phraseology was used doubtless with an intention that the Court should look into the case, and see that the plaintiff, when he commenced his action, could not have commenced it properly elsewhere than in the S. J. Court or in a District Court; as in the case of a large claim, which might or might not, at the option of the defendant, be reduced below $20,00, by a demand filed in set-off. In such case the plaintiff's right to full costs could not be impaired, if a balance were ultimately found in his favor. And in the case of a note of hand bearing interest, if before the plaintiff could expect to recover judgment thereon, it would amount to over $20,00, including the interest, the Court might hold, on the rendition of judgment, that an action on it had properly been brought in the District Court. The District Court, by the Rev. St. c. 116, § 2, is not ousted of jurisdiction, though the demand to be sued may be under twenty dollars. The language of that section is, — "but in personal actions, mentioned in the exception contained in the preceding section, when the sum demanded does not exceed twenty dollars, a justice of the peace shall have original jurisdiction *concurrently* with the District Court." The restriction lies in the plaintiff's liability to lose a large portion of his costs if he commences such actions otherwise than before a justice of the peace, or a municipal court.

In actions of tort, however, where unliquidated damages are sought to be recovered, the Court cannot well have any other criterion whereby to determine whether they ought to have been brought before justices of the peace, or a police court, than the amount for which verdicts may be rendered in them. This is an action of that kind, and the verdict is for a sum not exceeding twenty dollars. But the plaintiff contends, that, the action having been continued one term, interest may be allowable on his verdict, so that he will finally recover more than twenty dollars for his damages, and therefore, that he should not be restricted as to his costs. But an answer may

be found to this proposition in the fact, that it is "on the rendition of judgment," apparent, from the finding of the jury, that his action should have been brought before a justice of the peace. And, moreover, it may be noted that the provision, that interest may be added to the amount of the verdict, is not imperative. The language of the Rev. St. c. 96, § 20, is, "the Court *may* allow interest" in such cases; whereas in c. 97, § 20, in reference to the not entering an action in the Court above, carried there by an excepting party, from the Court below, the language is, "the S. J. Court *shall* increase the damages, if any, by adding legal interest thereon," showing that the Court may exercise a discretion in the one case, but not so in the other. And where the increase, in the cases like the present, if allowed, would be consequent upon the fault of the plaintiff in filing unsustainable, if not frivolous exceptions, the Court might well hesitate to allow of the increase, if it would have the effect so essentially to change the rights of the parties, in reference to a heavy bill of costs. We are therefore of opinion that in entering up judgment, in this case, the plaintiff must be restricted to the recovery of costs equal to one quarter part of the amount of damages found by the jury.

Shepley J. — The case is presented by a bill of exceptions taken by the plaintiff to the instructions to the jury. A verdict was found for the plaintiff, and the damages assessed at the sum of twenty dollars. The instructions had no reference to the amount of damages. If they presented the question, whether the highway was safe and convenient, less favorable to the plaintiff than it should have been, he cannot have been aggrieved by them, for the jury must have found that point in his favor. These instructions could not properly have had any influence upon the amount of damages, and the Court cannot presume, that they had. The exceptions must be overruled.

Another question has been presented by the argument, whether the plaintiff is entitled to recover full costs.

When a verdict is returned and exceptions are taken, the

statute c. 96, § 20, provides, that "the Court may allow interest on the damages given in the action from the time the verdict was returned to the time of rendering judgment thereon." The word "may," when used in a public statute, is imperative and equivalent to the word must, unless the intention be to confer a discretionary power to be exercised or not according to the judgment of those upon whom the power is conferred. *Rex* v. *The Commissioners of the Flockhold Inclosure*, 2 Chitty's R. 251; *Minor* v. *The Mechanic's Bank of Alexandria*, 1 Peters, 64; Exparte Simonton, 9 Port. 390. Could it have been the intention of the Legislature by this section not to form any general rule alike applicable to all, but to grant a power to the Court merely discretionary to allow interest on a verdict in one case and disallow it in another according as it might seem to the Court to be equitable? There is nothing in the language of the section, or in the context, or subject matter that authorizes such a conclusion. The evident intention was to confer a right to receive interest on a verdict between the time of finding and the time of judgment. The party has a right to have that power exercised and to recover such interest, unless he has forfeited that right by his own misconduct. That the plaintiff cannot be said to have done in this case, unless his exceptions can be overruled as frivolous. And they have not, and could not have been so overruled. The judgment to be rendered must therefore exceed the sum of twenty dollars; and the plaintiff will be entitled to full costs, unless the Court has a discretionary power to allow or disallow full costs in such cases. It has rarely, if ever, been the policy of the legislation in this State respecting costs in actions at law, to give to the Court a discretionary power over them without determining the manner in which it should be exercised. No statute should be so construed as to give the Court an arbitrary discretion respecting such costs, unless the language admits no other fair interpretation.

It is provided by statute c. 151, § 13, "If in any action originally brought before the Supreme Judicial Court or any District Court it shall appear on the rendition of judgment,

that the action should have been originally brought before a justice of the peace or the judge of any municipal or police court, the plaintiff shall not be entitled to recover for costs more than one quarter of the debt or damage so recovered." The rule or criterion, by which the Court is to determine, whether the action should have been originally brought before a magistrate is determined by the statute; and it is, that "it shall appear on the *rendition of judgment*," that it should have been so brought. No other general rule applicable to all cases could well be established; for there is no verdict found in very many actions before judgment. The amount of the verdict is not made the criterion of judgment for costs in any case. The Court cannot substitute a rule of its own for that provided by the statute.

The language of the former statute for the restriction of costs, c. 59, § 30, was not adopted, when the statutes were revised, but the language was used as before stated. The cause for the change can be readily ascertained. It was provided by statute c. 59, § 30, that no action should be sustained in the circuit court of common pleas, where the damage demanded did not exceed twenty dollars, unless by appeal from a justice of the peace, saving such actions, wherein the title to real estate may be concerned; "and if upon any action originally brought before the circuit court of common pleas judgment shall be recovered for no more than twenty dollars debt or damage; in all such cases the plaintiff shall be entitled for his costs to no more than one quarter part of the debt or damage so recovered." Here the rule prescribed by the statute to determine, whether the plaintiff was entitled to full costs, was in all such actions, wherein the title to real estate was not concerned, that he did not recover judgment for more than twenty dollars. That could not continue to be the rule under the Revised Statutes, because justices of the peace had no longer exclusive jurisdiction of all actions wherein the debt or damage did not exceed twenty dollars, and where the title to real estate was not concerned. This exception respecting actions wherein the title to real estate might be concerned was

enlarged by the provisions of statute c. 116, § 1. By that statute the exception extends to "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." It is provided by the second section, that the District Court shall have concurrent jurisdiction of the actions enumerated in this exception. There are therefore actions, which may be brought originally before the District Court under the Revised Statutes, in which the plaintiff does not demand more than twenty dollars damages, and in which the title to real estate may not appear to have been concerned. Such for example as actions of trespass on real estate, in which the general issue alone is pleaded; and actions for the disturbance of a right of way or of an easement, the only defence to which is, that there has been no disturbance. Hence the necessity for the change of the criterion, by which the limitation of costs was to be determined. The Court could not deprive the party of full costs in such excepted actions, although his judgment should be obtained for less than twenty dollars damages. To meet this change in the law it became necessary to change the rule by which the plaintiff's right to full costs was to be restricted, and to substitute the words, when it should "appear *on the rendition of judgment*, that the action should have been originally brought before a justice of the peace," for the former words when "judgment shall be recovered for no more than twenty dollars debt or damage."

If the amount of the verdict were by construction to be substituted for the amount of the judgment as the rule for the restriction of costs, it should be applied in all cases, in which verdicts are rendered. The statute authorizes no distinction between delays of judgment after verdict occasioned by exceptions taken by the plaintiff and by the defendant. Nor can any person be punished or deprived of any rights for taking exceptions, except in the mode prescribed by the statute, by overruling them as frivolous and subjecting him to the penalty

of double costs and to the other conditions prescribed. The plaintiff in this case must be considered as having conducted legally in taking the exceptions, and the delay occasioned by a legal course of conduct cannot be imputed to him as so blameworthy as to authorize the Court to deprive him of any right or to refuse to allow him the same construction of the statute, as it must receive, had the exceptions been taken on the part of the defendants. It cannot be determined "on the rendition of judgment, that the action should have been originally brought before a justice of the peace," and a case is not therefore presented, which authorizes the Court to restrict the costs. Should it be admitted, that the plaintiff has no equitable claim to full costs, that would be no satisfactory reason for an erroneous construction of the statute to deprive him of them. To regulate the costs in actions at law the Legislature has prescribed general and often arbitrary rules which cannot be expected to work out a perfect equity in each case. To allow costs in this case, which may appear to be wholly inequitable in accordance with those rules, is a consideration of small importance compared with the mischief to be anticipated from an erroneous construction of statutes.

JOSIAH BENNETT *versus* EZEKIEL TREAT, JR.

In an action to recover the amount of a tax assessed in the town of C. upon the defendant, as an inhabitant thereof, and where the defence was that he had removed from that town prior to the first day of May of that year, a copy of the record of an assignment of a mortgage to him, from the registry of deeds, wherein he was described as of C. without any other evidence to connect the defendant with such assignment, is not admissible in evidence against him.

EXCEPTIONS from the District Court, GOODENOW J. presiding.

Among the numerous objections made to the rulings and instructions was the following: —

"As evidence that the defendant continued and admitted

himself to be an inhabitant of the town of Canton, the plaintiff offered the record of the assignment of a mortgage from Jotham Bush to the defendant, from the records of the registry of deeds for the county of Oxford, vol. 69, page 19, which may be referred to as a part of this case, which though objected to by the defendant was admitted." No copy of this record, however, was in the case, but it was said in the argument, that in this assignment, the defendant was called as of Canton.

The defendant filed exceptions.

The arguments were mainly on other points.

Codman, for the defendant, contended that the copy of the record of the assignment of the mortgage was improperly admitted in evidence. The paper was not in his handwriting, and there was no evidence that he procured it to be recorded, or had any connexion with it.

Howard and *Shepley*, for the plaintiff, said this was admissible, as a declaration, that at that time the defendant lived in Canton. The putting on record must have been his own act, as it was solely for his benefit, and no other person would do it.

The opinion of the Court, TENNEY J. not acting in the decision, was drawn up by

WELLS J. — This was an action of debt brought by the plaintiff, as collector of taxes for the year 1845. It comes before us, upon exceptions to the opinion of the Judge of the District Court.

There are several grounds of exception, but as we are satisfied that a new trial must be granted, in relation to the ruling as to one of them, it becomes unnecessary to examine the others.

The defence was, that the defendant had removed from the town of Canton, prior to the first day of May, and had no residence there at that time.

The Court permitted the plaintiff to introduce, as evidence,

that the defendant continued and admitted himself to be an inhabitant of Canton, "the record of the assignment of a mortgage from Jotham Bush to the defendant, from the records of the registry of deeds for the county of Oxford."

By a rule of this Court, in actions touching the realty, office copies of deeds are, in certain cases admissible in evidence. In this case, the defendant had a right to require the production of the original, or if it was in his own possession, notice should have been given him to produce it, agreeably to another rule of this Court, before the introduction of a copy would be admissible.

If the defendant had received the assignment of the mortgage, in which his residence was alleged to be in Canton, after the first of May, such a fact would be legal evidence. But there was no testimony, showing any knowledge, on the part of the defendant of the assignment, except what would arise from its being recorded. And constructive notice, derived from the registry, does not apply to such case. That is evidence of notice to after purchasers, under the same grantor. *Bates* v. *Norcross*, 14 Pick. 224; *Pitcher* v. *Barrows*, 17 Pick. 361. A deed can be recorded without the knowledge of the grantee therein named, and he ought not to be held to have constructive notice by the fact of registry alone of a mere recital in the deed, not affecting the title.

The act of registering a deed does not amount to a delivery of it. *Maynard* v. *Maynard*, 10 Mass. R. 456. But where a registered deed, purporting to have been delivered, has been lost, the presumption is, that it was delivered. *Powers* v. *Russel*, 13 Pick. 69.

There is no evidence, that the original assignment is lost, nor who has the possession of it.

The evidence in relation to the alleged change of residence is not stated in the exceptions, but we are bound to presume there was sufficient to authorize the laying it before the jury, and that the objectionable testimony was considered necessary to rebut what had been introduced by the defendant.

Exceptions sustained.

RICHARD W. HOUGHTON *versus* JOHN B. STOWELL.

In an action of debt, brought to recover back money paid as usurious interest, an amendment, by leave of the District Court, changing the form of the action to case, is unauthorized by law and void, and the writ remains as before the alteration, an action of debt.

It is competent for the Court to permit an amendment, which shall make the language of the declaration pertinent to the form of action.

Debt is a proper form of action to recover back money paid as usurious interest.

Under the provisions of the Revised Statutes, c. 69, the person paying usurious interest may recover it back, although a party to the illegal contract.

THE facts on which the decision of the Court rests appear in the opinion.

Codman, for the defendant, said that when a case comes to this Court from the District Court by appeal, a paper cannot be read as a copy of the writ, unless it is certified by the clerk to be a true copy. The presiding Judge therefore erred in permitting the paper to be read.

The plaintiff had no right to alter the writ, even with leave of Court. The amendment should be added by a new count, or other addition, and not by erasing any thing once upon the writ.

The remedy to recover back money paid as usurious interest is case or assumpsit, and not debt.

The plaintiff violated the law equally with the defendant, and cannot recover back money paid under an illegal contract.

Gerry, for the plaintiff, said that the amendment originally permitted in the District Court was wholly unauthorized, and therefore when ruled to be inadmissible in this Court, and ordered to be stricken out, the writ was necessarily as it was before. Howe's Practice, 378.

The objection to the certificate of the clerk has no foundation. He certified to all the facts as they took place. 1 Greenl. Ev. 544.

Debt is the proper form of action. All penalties are to be

recovered by an action of debt, if the statute gives no other form of action. 1 Chitty's Pl. 108; 10 Mass. R. 368.

The statute, c. 69, § 5, expressly gives the action to the party to the contract.

The opinion of the Court was delivered at the same term by

Shepley J. — An action of debt was commenced to recover the amount of unlawful interest paid by the plaintiff to the defendant. An amendment was allowed in the District Court, by which it was changed to an action of the case. Exceptions were taken, and this Court decided, that the amendment was not authorized by law.

On trial of the action at a subsequent term of this Court the plaintiff's attorney proposed to read a copy of the writ as it was originally made. This was objected to, and the objection was overruled. The plaintiff was permitted to amend his declaration to make it conform to the nature of the action as an action of debt. To this objections were made, which were overruled.

The change from debt to case, being unauthorized, the action in legal contemplation remained as before, an action of debt. That which is done without legal or competent authority, is inoperative. Should a change of language be made in a writ by a stranger wholly unauthorized, no one would doubt, that the plaintiff's rights would not be affected by it, and that he might restore the writ to its original condition. Such a change must be equally inoperative, when made by permission of a Court without any lawful right to grant it. The plaintiff might well be permitted to erase language found to be in the writ without legal authority, and to restore the language, which had without authority been erased.

The amendment of the declaration to make it conform to the nature of the action did not introduce a new or different cause of action, and it was legally authorized.

It was further contended in defence, that an action of debt could not be maintained. The statute c. 69, § 5, provides, that the amount paid as illegal interest may be recovered back

"by an action at law," leaving the form of the action to be determined by law. Debt is a proper action for the recovery of a sum certain, secured to the party by a statute, unless some other remedy be provided. It may often be maintained, when assumpsit might also be maintained. The distinction between debt and assumpsit is, that debt is founded upon the contract, or statute liability, and assumpsit upon the promise. When the action of debt could be maintained was much discussed in the case of *Bullard* v. *Bell*, 1 Mason, 243. Mr. Justice Story appears to have come to the conclusion, that it was often the proper remedy to enforce a right secured by a statute, while it was not necessarily the correct or only remedy. That the form of the action must depend upon the provisions of the statute. It would not of course be the proper remedy to recover uncertain damages provided by statute as a compensation for an injury. But in this case it may well be maintained, for the plaintiff could not recover without proof that he had paid a sum as unlawful interest, which could be ascertained and rendered certain by testimony.

The presiding Judge correctly refused to instruct the jury as requested. The plaintiff's right to recover is not by the statute made to depend upon an actual or supposed freedom from a participation in a violation of law. On the contrary the right to recover is given to one, who was assumed to have been a party to an unlawful transaction. Nor can the reception of unlawful interest on the sums paid until applied to the payment of his debt, deprive the plaintiff of a right secured to him by statute; for that alone must determine the circumstances under which he may be entitled to recover. The Court cannot interpose as a condition of his right to recover, a freedom from blame, which the statute does not require.

It does not appear to be necessary to enter upon a discussion to show, that the defendant could not have been aggrieved by the instructions which were given to the jury.

Judgment on the verdict

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF LINCOLN,

ARGUED MAY TERM, 1848.

SAMUEL STEVENS, JR. *versus* LEWIS BACHELDER.

A levy of an execution on real estate not recorded within three months, will be invalid, except against the debtor and his heirs, and those having actual knowledge thereof.

The record of the conveyance or the deed, or levy on real estate, itself, left in the registry for record, was the only legal notice by registry of the conveyance of real estate, recognized by our statutes before the enactment of the provisions contained in Rev. St. c. 91, § 25, and perhaps still is. If therefore, before that statute, the deed or levy was left with the register of deeds, and he made a certificate thereon that it had been recorded, and it was then withdrawn and taken from the office by the grantee or creditor before any record thereof was actually made, such proceedings furnish no legal notice to subsequent purchasers or creditors of such conveyance.

The record of the return of the officer of the levy of an execution on real estate without his signature to the return to authenticate it, cannot be considered such a record as the statute required to make the levy effectual against subsequent purchasers.

Where the defendant pleads the general issue with a brief statement, and both are signed by his counsel, and the plaintiff's counsel makes and signs a counter brief statement, but accidentally omits to sign his name to the joinder of the general issue, this furnishes no sufficient cause for setting aside a verdict for the defendant.

TRESPASS *quare clausum.* The plaintiff claims title by virtue of a deed from John Spear to himself, dated January

28th, 1841, and recorded February 23d, 1841; and to establish title in said Spear he puts into the case the originals and also authenticated copies of the original writs, judgments, executions and officer's returns thereon, in two suits in favor of said Spear against one Samuel Stevens (senior) from which it appears that in the first suit the writ was dated August 14th, 1830, the officer's return of attachment and service the same day, judgment rendered May 12, 1831, $146,45, debt, and $11,95, cost, and execution therefor issued May 27, 1831, and the officer's return of his levy of the same on a portion of the premises, is dated June 9, 1831, and the same was recorded Sept. 6, 1831; and this tract described in this first levy as 14 1-2 acres, more or less, is appraised at $171,55, and is called *the first levy.*

It also appears that the writ in the said second suit bears date June 9, 1831, and the officer's return of attachment the same day, judgment rendered May 11th, 1833, for $111,28, and costs $32,70, from which the plaintiff remits $50,64; and execution issued May 14th, 1833, and the officer's return of a levy upon the remaining portion of the premises is dated June 15th, 1833, and the certificate thereon of Warren Rice, Register of Deeds, that the same had been "received and entered with the records for deeds for said county," is dated Sept. 12th, 1833, and the tract embraced, being 10 1-3 acres, is called the second levy; and there was evidence that Stevens, senior, the execution debtor, was in possession of the place, called "The Stevens farm," of which these premises were a part, some years before the said first attachment, and continued to reside there till subsequent to the second levy. The defendant contending that he was seized and possessed of a certain close in said Union, as particularly described by courses and distances, puts into the case, in support of that defence, the following papers, to wit: —

A deed from Gilbert Welman to said Bachelder dated Oct. 31, 1821, and recorded, Dec. 26th, 1827; also a deed from said Batchelder to Oliver Fales, dated March 2d, 1831, and recorded July 12th, 1831; also a deed from said Fales to Artemas

W. Wiley, of release and quitclaim, dated, Dec. 27th, 1838; and a deed of release and quitclaim from said Wiley to said Bachelder, dated, Feb'y 27th, 1840, and recorded March 3d, 1840. The plaintiff contending that said Bachelder sold and conveyed said farm to Samuel Stevens, senior, at the time Stevens went into the possession of the same in 1828, and long before the attachment and levies in behalf of said Spear, by deed duly delivered to Stevens, and which deed was retained *unrecorded* in his own possession, or in the hands of his friends for him, till long after both attachments and both levies and the recording of the same, and that the existence of said deed was well known to Fales at the time he received his subsequent deed from Bachelder.

Christopher Young testified, that in conversations with Bachelder he told the witness that he first gave a deed to Samuel Stevens (senior) before he gave the deed to Fales, and that afterwards he gave the deed to Fales to accommodate Stevens and took back the deed given to him, Stevens. The witness thinks he saw the deed in said Stevens' hands several years ago, and thinks, but is not certain, that he had it in his own hands.

Oliver Fales testified, that he knew of the existence of said unrecorded deed from Bachelder, at the time he took his said deed to himself, and that he held in his own hands and possession that unrecorded deed a long time, he thinks three years or more, perhaps four years, after he had received his own deed from Bachelder; and Walter Blake testified that he saw such unrecorded deed some eight or nine years ago and examined the same.

The defendant contended, that the several acts of trespass complained of were done and committed, if at all, wholly upon the 10 1-3 acre lot, or second levy, and that said second levy was void and inoperative, because it was alleged that the book of records, where the levy was recorded, would, upon production, show that the name of the officer, who made the levy, had not been recorded, though the levy itself, including all the formalities of his return, was recorded at length, and

he proposed to introduce the book of original records as evidence and the register himself as a witness, to all which the plaintiff objected, whose objections were overruled by the Court, and thereupon the register was sworn and a book of records produced and exhibited, by which it did appear that such a levy had been recorded, but the record of the officer's name omitted, and the register testified that the name of the officer was not signed to the return when it was brought to the office for record; that he had no recollection that it was not so signed except from the fact that it was not recorded; that the record was not made by himself but by another person, that it was signed by him, and was examined by him to see that it was correct after it was made; that he had no recollection of examining it, but never let one go out of his office without examining it himself.

The original execution being in the case, the officer's return of the levy thereon bears the name of "John Copeland, Deputy Sheriff," the officer by whom the levy was made, and which purported to have been placed there at the date of the levy; and under this return of levy there is borne upon the execution the following official certificate, to wit: "Lincoln, ss. Received Sept. 12, 1833, and entered with the records for deeds for said county, vol. 152, page 295, Warren Rice, Register;" and the copy from the clerk's office, used in the case, is his authenticated copy of said original execution, the officer's return, and of the foregoing certificate of the register of deeds. Walter Blake testified, that he had conversations with said Bachelder very soon after, he could not tell the precise time, these levies had been made, respecting them, and that Bachelder was aware of their existence.

Shepley J., the presiding Judge, decided, as matter of law, that the said levy was void, and without any legal effect in the case, because the officer's name does not appear of record on the book of records produced and exhibited by the register; and he accordingly restricted the trial before the jury to that portion of the premises alone embraced in the first levy.

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

H. C. Lowell, in his argument for the plaintiff, made these points.

First. The plaintiff having proved the due execution of his deed from John Spear, had gone far enough with the other evidence in the case, to entitle himself to recover, as against all the world, excepting such only as could establish a better title in themselves.

His title the law protects, so that none can assail it, or take advantage of any supposed errors, or clerical omissions in the record of the same, but those, who may stand in the relation of innocent purchasers, for a good and valuable consideration and without notice. *Crafts* v. *Ford*, 21 Maine R. 416; *Buck* v. *Hardy*, 6 Greenl. 164; *Allen & al.* v. *The P. S. Co.* 8 Greenl. 210.

Second. — The defendant did not stand in the relation of an innocent purchaser, without notice: — first, because the legal estate having previously vested in Stevens, senior, by his unrecorded deed from this defendant, nothing passed by the subsequent deed from the same grantor to Oliver Fales; second, because said Fales did not intend to convey any portion of the premises covered by these levies, but merely released to Wiley any possible claim he might be supposed to have in the residue of the premises, while this defendant, well knowing the state of the title, took by Wiley's release to himself, nothing in the premises, certainly nothing in the portion embraced by the levies; and third, because the deed from the defendant to Fales was fraudulent and void as against the creditors of Stevens, senior, of whom Spear was one. *Bolton* v. *Carlisle*, 2 H. Black. R. 259; *Morgan* v. *Elam*, 4 Yerger's (Tenn.) R. 375; *Farrer* v. *Farrer*, and authorities there cited, 4 N. H. R. 191; *Botsford* v. *Morehouse*, 4 Conn. R. 550; *Marshall* v. *Fiske*, 6 Mass. R. 32; Cruise's Digest, Title, Deed, c. 26, § 18, 19, 20; *Bank of Orange* v. *Fisk*, and authorities there cited, 7 Paige, 87; *Adams* v. *Cuddy*, 13 Pick. 460; *Kimball* v. *Fenner*, 12 N. H. R. 248: *Dame*

v. *Wingate*, 12 N. H. R. 291 ; and see the authorities cited under the first point.

This defendant cannot therefore call in question the validity of this levy.

Third. The official certificate of the register of deeds on the original execution, as returned into the clerk's office, is conclusive evidence between these parties that the levy had been recorded. *Ames* v. *Phillips*, 18 Pick. 314; *Tracy & al.* v. *Jenks*, 15 Pick. 465; *Beverly* v. *Ellis*, 1 Randol. R. 102; *Williams* v. *Birbeck*, 1 Hoffman's R. 360; *Levy* v. *Burley*, 2 Sumn. R. 355; *Bamford* v. *Melvin*, 7 Greenl. R. 14; *Dodge* v. *Farnsworth*, 19 Maine R. 278; *Brown* v. *Watson & al.* 19 Maine R. 452; Buller's N. P. 226; 1 Greenl. Ev. § 91; *Lawrence* v. *Pond*, 17 Mass. R. 434; *Niles* v. *Hancock & al.* 3 Metc. R. 568; *Stinson* v. *Snow*, 1 Fairf. R. 263; *Bott* v. *Burnell*, 9 Mass. R. 99; *Same* v. *Same*, 11 Mass. R. 166; *Ladd* v. *Blunt*, 4 Mass. R. 402; *Breckenredges* v. *Todd*, 3 Munro. 54; *Reed* v. *Jackson*, 1 East, 355; *Jones* v. *Gibbens*, 9 Vesey's R. (Sumner's Ed.) 407; *Wheeler* v. *Lothrop*, 16 Maine R. 20.

Fourth. The register who had received his fees for recording the levy and had made that official certificate under his oath of office, was an incompetent witness to falsify the same, and to charge the deputy sheriff with nonfeasance in the discharge of official duty, in exculpation of himself. — First, because of disqualifying interest, and second, because the policy of the law wisely excludes him, he is estopped. *Dickson* v. *Fisher*, 1 Bl. 664; 4 Burr. 2267; *Leighton* v. *Leighton*, 1 Str. 210; 2 Evans' Pothier, (Ed of 1839,) 120; *Gardner* v. *Hosmer*, 6 Mass. R. 325; *Bamford* v. *Melvin*, 7 Maine R. 14; 1 Greenl. Ev. § 393, 394, 395, 396, 404. But even the whole evidence does not disprove the record and title as exhibited by the plaintiff. He might have had another book of records. The proof offered fails.

Fifth. Where one party derives his title by levy, and the other by deed, their respective rights shall be determined by the same rules of construction, and the same principles of law

are alike applicable to both. An unrecorded levy is treated like an unrecorded deed. *Mc'Lellan* v. *Whitney*, 15 Mass. R. 139 ; Statutes of 1821, c. 36, § 1 ; do. c. 60 § 27 ; Statute of 1825, c. 319 ; Rev. St. c. 11, § 17, c. 94 ; § 19, 20, 21 ; *Nason* v. *Grant*, 21 Maine R. 160 ; *Mathews* v. *Demerritt*, 22 Maine R. 312.

Sixth. Were it proved then, that the name of the officer to his return was not recorded, it would be a sufficient answer to the objection, that the defendant had notice and was aware of the existence of the levy. *Curtis* v. *Mundy*, 3 Metc. R. 405 ; *Rogers* v. *Jones*, 8 N. Hamp. R. 264 ; *Jackson* v. *Terry*, 13 Johns. R. 471 ; *Adams* v. *Cuddy*, 13 Pick. 464 ; *Gorham* v. *Blazo*, 2 Greenl. 238 ; *Mc'Lellan* v. *Whitney*, 15 Mass. R. 139 ; *M'Mechan* v. *Griffing*, 3 Pick. 149 ; *Doe* v. *Flake*, 17 Maine R. 249 ; *Emerson* v. *Littlefield*, 3 Fairf. 149 ; *Pope* v. *Cutler*, 22 Maine R. 105.

It will not be pretended, that there is any proof that the officer's return of levy was not signed before the execution was returned unto the register of deeds office ; indeed the Judge was understood to proceed on the ground, that the return was duly made and signed, but that the register omitted to record the officer's name, till the execution had passed from his own unto the files of the clerk of the Court from which it had issued.

By a true construction of the deed under which the defendant claims, Bachelder did not intend to purchase, nor the grantor to convey the portion previously taken by Spear by the levies, but merely what was left.

Ruggles, for the defendant.

All the evidence touching the title being out, the Judge ruled, that as to the 10 1-3 acres covered by the second levy the plaintiff had shown no title to it as against subsequent purchasers without notice, and restricted the inquiry touching the trespass to the land covered by the first levy.

The only record of the second levy was one in form but not signed by any officer, nor indication of who made the writing so recorded. That surely was no notice to subse-

sequent purchasers. The recording of a deed or execution, without a signature, would be a mere nullity. A deed recorded before acknowledgment, would be no notice. *Sigourney* v. *Larned*, 10 Pick. 72; *Pitcher* v. *Barrows*, 17 Pick. 361; *Blood* v. *Blood*, 23 Pick. 80; *Heister* v. *Foster*, 2 Binney, 40.

A record is not evidence of actual, but only of legal constructive notice; and to be such it must be in conformity with the statute making it so. 1 Porter, 298.

The original record being produced, the testimony of the register, as to whether the return was signed when recorded, was unnecessary and immaterial. The record is itself the highest evidence and speaks for itself. It shows conclusively, that the return of a levy, when recorded, had no signature to it. That a signature has since been added, does not affect the record, nor help the plaintiff.

The register was not called to contradict his record, but to sustain it. His certificate on the execution, was correct when made. If the officer has since supplied the omission of his signature, it does not disprove the record.

But whether the record was right or wrong is not in this case material; for in either case it constitutes no legal notice.

The position contended for, that the deposit of the execution with a return of a levy upon it, in the clerk's office, is "conclusive evidence between these parties," cannot be sustained, even if it had been shown at what time the execution was in fact deposited in the clerk's office. That is no notice to after purchasers, because the statute has not made it so. Even registration of a deed is not notice to the world of its contents, unless made so by statute. 1 Porter, 298, before cited.

Had the return been signed by an officer, and the register omitted by mistake or design to so record it, the remedy would be against the recording officer.

"The fault or fraud of the recording officer, in the recording of a deed, concludes the rights of the parties to the deed,

as to third parties. The remedy of the parties is against the officer." *Sawyer* v. *Adams*, 8 Vern. 172.

But here was neither fault nor fraud of the recording officer. He transcribed the writing as it was at the time he did so. The record is the highest evidence, and the testimony of the register was in accordance with the record, though unnecessary. The registry of a deed is made by statute, a legal notice to all the world. The certificate on the deed or other instrument, is no notice whatever, to after purchasers. It is the record of the deed, that constitutes the notice. Office copies of the record are evidence, *prima facie*, but the record itself is better evidence.

In *Hastings* v. *Bluehill Turnpike Corporation*, 9 Pick. 80, it was decided that the certificate of a recording officer, that a deed has been duly recorded, is only *prima facie* evidence of the fact.

But at the time of the attachment, Stevens, sen'r, had no title and acquired none afterwards. The deed to Oliver Fales, was given March 2d, 1831. The attachment by Spear, was not made till June 9, 1831. It is not pretended that the deed to Fales was not *bona fide*. The testimony of Young, introduced by plaintiff, shows the transaction. Bachelder first gave a deed to Stevens, sen'r. On Stevens' selling to Fales, his deed from Bachelder not being recorded, he gave up his deed to be canceled, and procured Bachelder to give a deed directly to Fales. There is no pretence of any fraud on the part of Bachelder, nor is any shown on the part of Stevens or Fales. Fales was then an innocent purchaser, without fraud, and the title vested in him, and there was from that time nothing in Stevens to be attached. It is precisely like the case of *Holbrook* v. *Tirrell*, 9 Pick. 105 — 108. It was there held that such a purchaser was protected against a subsequent attachment of a prior existing creditor. *Commonwealth* v. *Dudley*, 10 Mass. R. 403 ; *Barrett* v. *Thorndike*, 1 Greenl. 78.

So also was Wiley an innocent purchaser, and the title vested in him by the deed of Fales to him, and by his deed to Bachelder, the title vested in him, whether he then had notice

of Spear's attachment and levy, or not. *Trull* v. *Bigelow*, 16 Mass. R. 406 ; *Dana* v. *Newhall*, 13 Mass. R. 498 ; *Coffin* v. *Ray*, 1 Metc. 212; *Connecticut* v. *Bradish*, 14 Mass. R. 296; *Knox* v. *Silloway*, 1 Fairf. 201 ; *Boynton* v. *Rees*, 8 Pick. 329.

The opinion of the Court, was drawn up by

SHEPLEY J. — It is admitted, that the defendant became the owner of a farm by conveyance from Gilbert Wellman, on October 31, 1821. The testimony exhibited in the case shows, that he conveyed the same to Samuel Stevens, who entered into possession thereof during the year 1828, but never caused his deed to be recorded.

The plaintiff claims title to a part of that farm, by virtue of the levy of two executions, issued on judgments, recovered by John Spear, against Samuel Stevens, and by a conveyance from Spear to himself. His title to that part covered by the first levy is not disputed. The second levy was made, June 15, 1833, as appears by the return of the officer, made under that date, upon the back of the execution. The register of deeds also made upon it the following certificate: — "Lincoln, ss. Received September 12, 1833, and entered with the records for deeds, for said county, vol. 152, page 295." It appeared from the book of records, that the execution and return had been recorded, except the name of the officer, which had been omitted in the record.

The defendant claims title, by a conveyance, made of the farm by himself to Oliver Fales, on March 2, 1831, recorded July 12, of the same year, and by one from Fales to Artemas W. Wiley, made on December 28, 1838, and by one from Wiley to himself made on February 27, 1840. It appears from his declarations, introduced by the plaintiff, that the defendant made a conveyance of the farm to Fales, after he had conveyed it to Stevens, to accommodate Stevens, taking back from Stevens, the unrecorded deed made to him. Fales testified, that he knew, that the unrecorded deed to Stevens existed, when he received his conveyance, and that he had it in his own possession for three or four years.

In the case of the *Commonwealth* v. *Dudley*, 10 Mass. R. 403, it was decided, that the only exception to the rule, that a previous conveyance, unrecorded, is not good against any other person, than the grantor and his heirs, was that of a second purchase made with a knowledge of the first and with a fraudulent design to defeat it. In this case it is apparent, that the conveyance made from the defendant to Fales, was not made to defeat the previous conveyance to Stevens, for it was made for his accommodation. It is alleged in argument, to have been fraudulent as against the creditors of Stevens; but there is no testimony in the case, that any fraud upon creditors was designed. Such fraud cannot be inferred from the transaction itself; for the inference is unavoidable, that Stevens received the consideration for the conveyance made to accommodate him. Fales' title appears therefore to have been good against Stevens and those of his creditors, who had not obtained a title under him, before the conveyance to Fales was recorded. *Holbrook* v. *Tirrell*, 9 Pick. 105. If there could be any doubt respecting the title of Fales, it would seem, that there could be none respecting the title of Wiley, for there is no testimony presented tending to prove, that he was not an innocent purchaser, without notice of the existence of the conveyance from the defendant to Stevens. The title of the defendant, derived from Wiley, will not be impaired by his knowledge of his own conveyance to Stevens, and of the levy made upon the estate by Spear. This must be the result, unless the plaintiff can establish his title by relation to the date of the attachment made by Spear, of the estate of Stevens, on June 9, 1831, prior to the record of the conveyance from the defendant to Fales, on July 12, 1831. In such case the arrangement between Stevens and the defendant, to have the farm conveyed to Fales and the conveyance made accordingly, cannot operate to defeat any rights, which the plaintiff had already obtained. A levy, not recorded, within three months, as the statute requires, will be invalid, except against the debtor and his heirs and those having actual knowledge of it. *McLellan* v. *Whitney*, 15 Mass. R. 137.

The counsel for the plaintiff insists, that the certificate of the register of deeds made upon the execution, is conclusive evidence of the record of the levy as of that date.

The statute then in force, c. 60, § 27, required the execution with the officer's doings thereon, to be recorded in the registry of deeds, within three months. The statute c. 36, providing for the record of conveyances of real estate, required, that they should be recorded at length in the registry. There was then no statute provision making it the duty of the register of deeds to certify upon a deed or execution levied upon real estate, that it had been recorded. It might be regarded as recorded, when left in the registry for that purpose, while it remained there subject to examination, before the record was actually made. The record, or the conveyance itself, left in the registry for record, was the only legal notice of the conveyance of real estate, recognized by our statutes, before the enactment of the provision contained in the Revised Statutes, c. 91, § 25, that the register shall certify on every deed recorded by him, when it was received, and every deed shall be considered as recorded at the time, when received. Whether under this provision a record wholly imperfect, may be treated as a nullity, and the certificate be regarded as evidence of a record, after the deed has been withdrawn from the registry and retained in the private custody of the grantee, may well be doubted. The design probably was to make the certificate evidence of the time of the record, while the deed remained in the office unrecorded. But it is not now necessary to decide, what may be the true construction. To maintain such a proposition before the statutes required, that a certificate should be made, and that a book should be kept, containing the names of the grantor and grantee, the places of their residence, and the date, when the deed was left for registry, would be to establish a rule, which would deprive all persons, except those to whom it was actually known, of all legal means of obtaining knowledge of the existence of a conveyance, by which their rights might be affected, and at the same time, making it effectual against them. It would make

the registry, legal notice of a conveyance, without affording any legal right and opportunity to obtain actual knowledge of it.

A similar question was presented and decided in the case of *Hastings* v. *Blue Hill Turnpike Corporation*, 9 Pick. 80. The clerk of the corporation had certified on the back of a deed conveying shares, that it had been duly recorded, On production of the records it appeared that it had not been. The Court decided, that the record was admissible and conclusive, that the certificate was only *prima facie* evidence and that it would be no notice to subsequent purchasers, that to determine otherwise would be to defeat one of the principal objects of the record.

One question presented in the case of *Tracy* v. *Jenks*, 15 Pick. 465, was when a deed of real estate was received and recorded. The certificate indorsed upon the deed by the register and his entry upon the record corresponded in stating the time to be on May 27, 1832. There was an entry made by the register on the record. "N. B. The above was taken from this office on Monday, 28th of May, 1832, about 2 o'clock P. M. before it was recorded, and returned back to the office on Wednesday, 30th May, about 10 o'clock A. M." The Court did not consider this to be any legal evidence of the fact, and observed, that the original certificate of the register of deeds, is to be taken to be conclusive as between creditors. The decision was not, that it would be conclusive against the record stating the time differently, but conclusive against a memorandum not regarded as evidence of the fact stated in it.

In the opinion of the Court, in the case of *Ames* v. *Phelps*, 18 Pick. 314, there is found a decision in these words: — "the original mortgage is certified to have been recorded by the town clerk, who for this purpose is the regular certifying officer; the mortgagee relies upon it as a valid security. It is like the return of an officer and cannot be impeached or controlled by producing the supposed record and showing a variance." How far this decision may be founded upon the provisions of statutes in that State, or be reconcilable with the

decision made in the case of *Hastings* v. *Blue Hill Turnpike Corporation*, it is not necessary to consider; for the doctrine that a certificate made by the register on the back of a deed withdrawn from the registry and remaining where a subsequent purchaser cannot have access to it, or is not required to look for it, can be conclusive evidence of legal notice to him, affecting his rights, cannot be admitted, in the absence of any statute provision, declaring that such shall be its effect.

The record of the return of the officer without his signature to authenticate it, cannot be considered such a record as the statute required to make the levy effectual against subsequent purchasers; and there was no testimony tending to prove, that Fales had any actual knowledge of it.

It is unnecessary to inquire, whether the testimony of the register was legally admitted. It was immaterial, and so treated by the presiding Judge, who decided, that the levy was without any legal effect in the case, because the officer's name authenticating his doings was not found in the record.

It has been contended in the argument for the plaintiff, that by a true construction of the deeds of conveyance, by virtue of which the defendant claims title, that part of the farm remaining, after both the levies had been made, would be conveyed, and no more. No such question appears to have been made at the trial, or to have been presented in the bill of exceptions; and no copies of the conveyances have been furnished, to enable the court to decide it, if it had been made.

A motion has been made to set aside the verdict, because no pleadings had been made and joined, and no issue had been legally presented to the jury. The general issue had been plead by the defendant, accompanied by a brief statement, both signed by counsel. The counsel for plaintiff, had filed and subscribed a counter brief statement, but had omitted by accident, to subscribe his name to the formal words, making the general issue complete. This is no sufficient cause for setting aside the verdict, and granting a new trial, for it is evident, that the plaintiff has suffered no injury from it, and has no just cause of complaint. *Exceptions overruled.*

GEORGE W. CASWELL *versus* JAMES M. CASWELL *& al.*

Although an administrator of an insolvent estate may be entitled in proper cases to the aid of this Court, as a court of equity, to obtain property conveyed by the intestate to defraud his creditors, for the purpose of appropriating the same to the payment of the debts against the estate, yet one creditor cannot maintain a process in equity for that purpose.

The plaintiff in equity must do all which the law will enable him to do, to obtain the object of his pursuit; and until he has exhausted his legal remedies, he is not entitled to the aid of a court of equity.

When it is attempted to reach the avails of property fraudulently conveyed, by a process in equity, it should appear that a judgment has been obtained of some description, which cannot be impeached by the party to be affected by the relief sought; and that every thing has been done therewith, which the law requires, to obtain satisfaction of the same.

It is generally true, that an erroneous judgment is to be avoided only by a writ of error; but this rule does not apply to cases where a party has a right to impeach a judgment illegally rendered, and yet has no right to reverse it by a writ of error.

In a suit in equity, for the purpose of avoiding a conveyance of land by the deceased debtor, it is competent for the grantee to impeach the judgment, which is the foundation of the suit, if such judgment be unlawfully obtained; and this may be done by plea and proof.

And if the debtor has deceased, and his estate has been rendered insolvent, and the claim founded upon the judgment, thus unlawfully obtained, has been laid before the commissioners of insolvency and has been allowed by them, and their report has been accepted in the probate court, this can have no greater validity, to the prejudice of a stranger, than the judgment. The grantee has the same right to impeach the one as the other, and in the same mode.

Where an action was intended to be carried by demurrer from the District Court to the S. J. Court, and for that purpose an erroneous judgment was entered for the plaintiff by consent, when on the pleadings, which by agreement might be waived, the defendant was entitled to judgment; and the appeal was entered in the S. J. Court, and the action continued, and then dismissed, because no legal recognizance had been taken, and thereupon judgment was rendered in the District Court in favor of the plaintiff, without any appearance there for the defendant, or any notice to him, or any change in the pleadings; *it was held*, that such judgment might be impeached by one injuriously affected thereby, and not a party or privy thereto.

BILL in equity by George W. Caswell against J. Madison Caswell, and Amasa Russell as Administrator of Job Caswell deceased. The case was heard upon bill, answer and proof.

To those who are conversant with equity proceedings, it may occasion no surprise, when it is stated, that in the present case, one copy of the abstract of the case covers three hundred and seventy-four closely written manuscript pages; and that the printed and written arguments of the highly respectable and learned counsel for the parties extended to two hundred and thirty-five pages more, about equally divided between them, enough in all to fill a volume. They cannot be so abridged as to bring them within the limits of publication.

J. T. Mc'Cobb, for the plaintiff.

H. C. Lowell, for the defendants.

The opinion of the Court, WHITMAN C. J., SHEPLEY and TENNEY Justices, was drawn up by

TENNEY J. — The plaintiff presents himself in the bill, an alleged creditor of the estate of Job Caswell, deceased, represented insolvent, his claim having been allowed by commissioners of insolvency. He alleges, that the defendant, J. Madison Caswell, holds real estate, conveyed by the intestate to him, in fraud of the rights of creditors, and seeks discovery and relief in his bill, without a statement of the facts, a discovery of which is desired, and an averment, that they rest within the knowledge of the defendants alone, and are not susceptible of other proof, and that a discovery of them is material, to enable the plaintiff to obtain the relief sought; and prays the Court, acting under their equitable jurisdiction, as in cases of fraud and trust, to order the defendants to make true answers under oath, to the allegations in the bill, and that the defendant, J. Madison Caswell, be decreed to hold the real estate so conveyed, in trust for the benefit of the creditors of said estate, and that he make full and ample release of the same, to such persons as shall purchase it under a sale, by license of the court of probate, and that the administrator be ordered to take measures to sell the same, according to law. The defendants file their several answers, denying that the plaintiff can maintain this suit, because, if he is entitled to

impeach the conveyance as fraudulent, he has a plain and adequate remedy at law; and denying all fraud, touching the conveyance referred to in the bill, and denying also, that the claim of the plaintiff as a creditor, is valid against the title of J. Madison Caswell, in the lands.

The statute has provided that all the personal property, and real estate, of a deceased debtor, who died insolvent, is subject to the payment of the debts in the hands of his administrator, who is the representative of the intestate, and the trustee of the creditors. In the capacity of a trustee for the creditors, he is required to dispose of all the property of the intestate, and apply the avails in discharge of his indebtedness *pro rata;* one creditor has no preference over another, excepting in certain claims, which are to be fully paid. The power of the administrator under the statute, is ample, for the purpose of reducing all the means of the deceased debtor, to the condition, which will make them available for the object intended. The authority is not limited to the administration of the personal effects, and the real estate, of which the intestate died seized, but extends to that which was fraudulently conveyed by him, and of which he has been colorably disseized, with the intent to defraud creditors, giving him the power to make sale of the same, under a license from the court of probate. Rev. Stat. c. 112, sect. 31.

An administrator of an insolvent estate, as trustee of the creditors, is entitled in proper cases, to the aid of this Court, as a Court of Equity, to obtain property belonging to the intestate, which creditors may lawfully claim, to apply in satisfaction of their debts, where the same is held by others in fraud of their just rights. And the Court has the power, upon satisfactory evidence, that a conveyance was made by the intestate, for the fraudulent purpose of delaying or defeating creditors of the grantor, to pronounce the conveyance inoperative and void, and thereby enable the administrator more effectually to obtain means to be appropriated in discharge of the debts. *Holland* v. *Craft,* 20 Pick. 321.

If the administrator should faithfully perform all his duties

according to the law, and his authority thereby conferred, the object intended, would be fully attained. He has the power to accomplish substantially all which is sought by the present suit. The creditors are secured, as a part of his qualification, against negligence, and for the faithful discharge of his trust, by his oath, and his bond. If he should unreasonably refuse or neglect to administer the estate according to law, and his undertaking, on proof of such delinquency, to the judge of probate, the latter would be bound to remove him, and make an appointment of another, who might be a creditor; and if such should be appointed, he would be induced by his interest, as well as by his duty to do all, which would be for the benefit of those for whom he should act.

The Legislature, thus having provided a mode, by which insolvent estates may be settled, and all just claims against the same, paid to the full extent of the means, which can be applied for the purpose; and these provisions being intended to secure perfectly the whole object, and to afford all the relief, which can be demanded in any form and of any tribunal, creditors cannot be allowed to assume, that the mode so provided, is unsatisfactory, and can therefore be disregarded, and resort be made to a court of equity, for relief, by proceedings not contemplated by the statute.

It would be certainly very embarrassing to administrators, and a great impediment to the speedy settlement of estates, if such a course should be encouraged, or permitted, when administrators are conducting with fidelity and promptness; much more so, if one creditor alone, of others, whose claims have been allowed by commissioners, should be allowed to institute a suit in equity, to secure results which may be more readily brought about, by following the provisions of the statute. According to the answer of the administrator, in this case, he has administered all the estate of the intestate, which has come to his hands. He was applied to, in behalf of this plaintiff, to obtain license from the probate court, to make sale of the estate, alleged in the bill to have been fraudulently conveyed. The judge of probate, upon being consulted, expressed doubts

of the propriety of such proceedings, and no steps were afterwards taken for such purpose, but the administrator states in his answer, that he has at all times been ready, and is now willing to take such measures in reference to such real estate, and any and all property belonging at any time, to said intestate, as the law regulating the settlement of estates requires; or that the decree of the judge of probate may render proper to be adopted and pursued. The statements in the answer are not attempted to be disproved.

The plaintiff must do all, which the law will enable him to do, to obtain the object of his pursuit, and until he has exhausted his legal remedies, he is not entitled to the aid of a court of equity. We are not satisfied that under the statements and averments in the bill, the answers and the proofs, that it is a case, which comes within their equity jurisdiction, even if the claim allowed by the commissioners, were not liable to impeachment by the defendants. But if it were otherwise, is is manifest that no decree could be framed, by the authority of which a final disposition of the suit, or a full settlement of the estate could be made.

But when it is attempted to reach the avails of property fraudulently conveyed, by a process in equity, it should appear that a judgment has been obtained of some description, which cannot be impeached by the party to be affected by the relief sought; and that every thing has been done therewith, which the law requires to obtain satisfaction of the same. A judgment of a court of common law, would not be required, however, to lay the foundation for such a process, by the administrator for the benefit of the creditors of an insolvent estate. It is sufficient if the property sought to be recovered, would be applicable by law to the payment of the debts. The commission of insolvency, the report thereon allowing certain claims, and the acceptance thereof, without appeal, are judicial proceedings, in the nature of a judgment. The order of distribution on such report and acceptance, has the character of an execution, and is binding upon the property liable for the debts allowed, and for the benefit of the creditors.

In a suit in equity for the purpose of avoiding a conveyance of property by the deceased debtor, it is competent for the grantee in such conveyance to impeach the judgment, which is the foundation of the suit, if unlawfully obtained; and this may be done by plea and proof. It is generally true, that an erroneous judgment is to be avoided only by a writ of error; but this rule does not apply to cases where a party has a right to impeach a judgment illegally rendered, and yet has no right to reverse it by a writ of error. If a debtor suffers judgment to be rendered against him by collusion, for the purpose of having his property taken by virtue thereof, to the delay of creditors, a creditor may avoid the effect of the judgment by proof of the collusion. And if the judgment is wrongfully obtained by fraud between the parties, for the purpose of defeating the title of a third party, the latter may plead the matter, in avoidance of the judgment. *Fermor's case*, 3 Co. 77; *Pierce* v. *Jackson*, 6 Mass. R. 244. If the judgment has not been obtained by collusion with the debtor, or with any fraudulent design, yet, if it was unlawfully recovered, to the injury of a third person, who cannot reverse it for error, not being a party thereto, he can avoid it in the same manner. *Downs* v. *Fuller*, 2 Metc. 135.

The allowance of a claim by the commissioners of insolvency, and the report thereon, and the order of distribution, can have no greater validity to the prejudice of a stranger, than the judgment of another court; he has an equal right to impeach these proceedings by the same kind of evidence and in the same mode.

The basis of the plaintiff's claim is alleged to be a judgment obtained in the county of Kennebec, by the consideration of the District Court, held on the first Tuesday of April, 1842, against Elbridge G. Caswell and Job Caswell. The execution purporting to have issued upon that judgment, was the evidence presented to the commissioners in support of the claim which was thereupon allowed and reported, and an order of distribution made. J. Madison Caswell, was not a party to the judgment in the District Court, nor in any way privy to its ren-

dition. He has instituted no claim by virtue of it, and he does not stand in the place of either party thereto. The same remark may be made in reference to his connection with the claim of the plaintiff, presented to the commissioners, and the consequent proceedings thereon, in probate. If the judgment can be successfully impeached by him, so that it cannot be valid against his rights, the allowance of the claim of the plaintiff, having no other basis than this judgment, will be also impeached.

The suit in the District Court, which resulted in that judgment, was *assumpsit* in favor of the plaintiff, against Elbridge G. Caswell and Job Caswell; the liability of the defendants was denied; they pleaded *non assumpsit*, and the action proceeded to trial; witnesses were introduced and examined on both sides; without a verdict, by the agreement of the parties to that suit, a demurrer was filed to the plea of *non assumpsit*, by the plaintiff, which was joined, and the plea was to be adjudged bad, both parties having the right to waive their pleadings, in this Court, and plead anew. Ten days were allowed after the final adjournment of the Court, to the defendants in which to furnish sureties for the prosecution of the appeal taken, and a justice of the peace, who was the clerk of the Court, appointed to take the recognizance. Within the time prescribed, Job Caswell and another person presented themselves as sureties, who were received as such, and their names entered upon the docket under the action, and the recognizance made by the person appointed; but it has not been found upon the files by the clerk, and there is not satisfactory evidence, that it ever was filed in the case. The action was entered at the term of this Court, in the county of Kennebec, to which the appeal was attempted to be taken. The counsel previously engaged in the suit, for the plaintiff, entered a general appearance for him, and the action was continued to the next term of the Court, which was held on the first Tuesday of October, 1842. In the vacation, Job Caswell, one of the defendants, died, and E. G. Caswell, the other defendant, obtained his certificate of discharge in bankruptcy, who for that

reason, and the death of Job Caswell, directed the counsel to appear no further in the action. At the Oct. Term, upon the motion of the plaintiff's counsel, it being distinctly stated by those who had before appeared for the defendants, that they answered no further in the suit, and no one appearing for the defence, the appeal was dismissed, upon the ground, that one of the defendants was taken as a surety in the recognizance, and that no recognizance had been filed with the clerk. Subsequent to the dismissal of the appeal, damages were made up and entered upon the docket of the District Court, as of the April Term. 1842, without the direction of the Court or notice to the surviving defendant in the suit, or to the administrator of the one who had died; and on the 8th day of March, 1843, execution was issued.

The dismissal of the appeal was authorized and required by the law under the facts presented to the Court. The recognizance, if taken, was not shown ever to have been filed with the clerk. Rev. Stat. chap. of amendment, sect. 13. But it does not follow, therefore, that the plaintiff was entitled to treat the proceedings in the District Court, as having terminated in a valid judgment, upon which execution could issue, without direction of the Court, so as to have a binding effect, to the prejudice of persons not party or privy thereto. It is satisfactorily shown, that the parties to that suit, considered every thing done, necessary to withdraw the case from the District Court. It was the expectation of both, that a further trial was to be had in the appellate Court, as is manifest from the entry of a general appearance for the plaintiff, and a continuance of the action. This expectation is not shown to have been abandoned, till it was known that one of the defendants had become a certificated bankrupt, discharged his counsel, not wishing further to defend the suit, and the other defendant had died. The judgment, which lies at the foundation of the present claim was not obtained upon a verdict or default; there is nothing which shows, that the plaintiff, from the evidence adduced at the trial, was entitled to a verdict, but the claim of the plaintiff was resisted throughout by the defendants. The

judgment is as upon an issue of law, not relied upon, by the plaintiff, but made up by consent as matter of form, merely for the purpose of a more expeditious and economical mode of transferring the cause to another tribunal. Upon the issue, there was really no adjudication by the Court, but it was agreed, that the plea should be recorded bad, to give progress to the action. The plea was good and sufficient, and would have been so adjudged by the Court, if its attention had been called to it, as a question to be settled independent of the agreement of the parties; and a judgment for the defendants would thereupon have been entered. The issue was not intended to be presented to the Court, on the appeal, but the pleadings were to be waived and so far varied, that an issue of fact could be made for a trial by a jury. To the agreement, by which alone, this judgment was rendered, the defendant, J. Madison Caswell, was a stranger, and he cannot be bound thereby. If the judgment was not recovered by collusion of the parties for a fraudulent purpose, and there is plenary evidence, that it was not, it was a judgment illegal as it respects those, not party or privy to it, who may be injuriously affected thereby. Persons so affected have a right to avoid it. The claim presented to the commissioners had no other foundation than this judgment; and having no legal basis, it is not entitled to greater respect than the judgment itself.

Bill dismissed with costs.

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

The lien preserved by the second section of the act of Congress, approved August 19, 1841, called the bankrupt act, cannot exist after the debt, judgment, or other instrument, by which it was upheld, has been discharged or annulled.

But where the lien by virtue of an attachment of chattels, is discharged by proceedings in bankruptcy during the pendency of an action of replevin of the property attached, the creditor, by the provisions of Rev. St. c. 130, § 14, is entitled to receive from the officer interest, at the rate of twelve per cent. per annum, on the value of the property for so long a time as the service of his execution was delayed; to be retained for his own use, and not applied to the discharge of his judgment.

Where the purchaser of the debtor's right to the property attached, at a sale in bankruptcy, has released to the attaching officer all claim thereto, the latter cannot recover any thing on the replevin bond for the use of such debtor or his assignee, although it did not appear, that the assignee had observed all the rules prescribed in making the sale.

Under Rev. St. c. 130, in order that the replevin bond should be considered a statute bond, it is not necessary that the plaintiff in replevin should sign the bond, or that it should appear on the bond, that it was given in his behalf.

The damages recovered by the attaching officer in the action of replevin, being recovered in trust, are not conclusive upon the parties in a suit upon the replevin bond.

Where the value of the property replevied might be expected to be diminished by the use of it, and by lapse of time, it has been considered, that the obligors in the replevin bond should be bound by the value of the property named in the bond.

When the original debtor has received a discharge in bankruptcy, and his assignee has discharged all claim against the officer for the property attached, the damages to be recovered in an action upon the replevin bond, are, to be retained for the plaintiff's own use, the amount of the judgment for costs recovered in the action of replevin, with interest from the time of judgment, his reasonable expenses incurred in that action, and interest for the same time, and his reasonable expenses incurred in the suit upon the bond; and also, to recover for the use of the creditor, interest at the rate of twelve per cent. per annum on the value of the goods, as alleged in the bonds from the time of the recovery of his judgment to the time when the attachment was dissolved.

AT the trial of this action many papers were read in evidence, and some depositions. After the reading was finished, the parties agreed, that the Court, upon this testimony, or so

much thereof as should be legally admissible, should be authorized to decide upon the rights of the parties, and to make up and enter judgment accordingly.

The facts, found by the Court to be admissible and material, are stated in the opinion.

The arguments were in writing.

Ruggles, for the plaintiff.

The property replevied, had been attached by plaintiff, a deputy sheriff, on a writ, *Call* v. *Harrington*, in which action, judgment was recovered April Term, 1842, for $558,59 debt, and costs taxed at $34,72.

Legg & Co. claiming the property attached by virtue of a mortgage from Harrington, replevied it Nov. 8, 1841, from the plaintiff, Howe. In that action judgment was rendered Sept. Term, 1843, in favor of Howe, for $104,10, and for a return of the property. On which judgment, execution issued September 29, 1843, and the officer to whom it was committed, made return September 30, of demand on Coffin & Hussey, two of the three defendants, *non est inventus*, as to Legg & Co. and *nulla bona*, and no part satisfied.

This action was brought October 16, 1843, on the replevin bond, and plaintiff claims the right to recover the value of the property replevied, and the amount of his judgment in the replevin suit. The condition of the bond is express, that the goods shall be returned, and that the party replevying, shall pay, &c. if the Court so adjudge: — and the Court did so adjudge.

The bankruptcy of Harrington cannot affect plaintiff's right to recover on the bond, nor does the proof of debt by Call, discharge these defendants from their liability to plaintiff. A poor debtor bond, will hold the obligors to strict performance, notwithstanding the bankruptcy of the debtor.

If such proof of debt is to be construed as affecting the plaintiff's right to a return, it should have been alleged and shown in bar of such judgment. The proof of debt, if it embraces the creditor's judgment, was made December, 1842; the judgment for a return was rendered September, 1843.

The judgment for a return is conclusive, and cannot now be avoided, but by due process of law.

Call and Harrington are no parties to the replevin or the replevin bond. Neither, could by bankruptcy or proof of debt, affect it.

Howe attached property of Harrington. Legg & Co. availing themselves of the forms of law, took it out of his possession wrongfully, having no title as against the attaching officer to hold it, as a trial has proved. They made a "false clamor," and are bound to restore the property to Howe, with damages for taking and detaining it. The creditor was injured, by being delayed and defeated in the collection of his debt, or a part of it. But for its having been taken out of Howe's possession, he would have realized its value by a sale on his execution, before his debtor became a bankrupt. Has Harrington's bankruptcy, or Call's proof of debt, purged the wrong done by the detention of the property? The replevin suit was pending — Call could not foresee the issue of it, nor what amount, if any, would remain, (in case the officer should have judgment for a return,) after paying the officer's charges, and expenses of that suit and of this. That there would be but little remaining, not one-fifth of the amount of his judgment, he knew. He was obliged, therefore, to prove his debt; and for the reasons stated, must prove the whole, for he could not foresee what balance would remain unsatisfied. No other course was left to him, but to present his judgment as it stood, and leave it to the assignee in bankruptcy, to protect the estate from any wrongful drafts upon it, which could easily be done through the plenary equity powers of the U. S. Court, sitting in bankruptcy. I am not aware that the fifth section has ever been construed to operate as an unqualified discharge, or payment of a judgment. On the contrary it has been held, that where a lien exists on property, by virtue of an attachment, the suit or judgment may be proceeded with, for the purpose of securing the benefit of the lien. The bankrupt act, like all other acts, should receive a reasonable interpretation.

The creditor under such circumstances, surrenders his judg-

ment, only so far as the property on which the lien exists, may be insufficient to satisfy it. In this case, the creditor's lien was preserved by statute, till 30 days after the return of the replevied property. He had a judgment, and a right to have his execution levied, whenever the property should be returned, or to have so much of his judgment satisfied out of the damages, recovered on the replevin bond, as should remain unpaid. So far, then, as his judgment is not satisfied out of the bankrupt's assets, it remains in force, so far as to entitle him to receive of the attaching officer, any balance which may remain in his hands, on which the lien takes effect, by force of the statute, c. 130.

If it were otherwise, the lien which it is the object of both the statute of the State, and the act of the United States to protect, would be defeated, and the law would be found punishing the vigilant, instead of favoring him. When any right is obtained by grant, every thing passes by the grant, necessary to the enjoyment of the right.

The creditor's claim, then, on the officer is not destroyed, and the plaintiff holds this bond, as his only indemnity against that claim, or rather as the means of answering it. Harrington's assests pay nothing. If there *were* any dividend, the officer's liability to the creditor, on a recovery on his bond, would be only for the balance remaining in his hands, after deducting his own charges and expenses in the replevin suit, and in this suit; and under the equity powers of the U. S. Court, in bankruptcy, the creditor's dividend would be limited accordingly, or, if paid on the whole judgment, he would be held liable to the assignee for such part as he could not equitably retain, to be disposed of, by the assignee, as additional property of the bankrupt.

But the plaintiff is entitled to recover the value of the goods, not only on account of his liability to the creditor, but for his own indemnity, for his own fees and charges, and his reasonable expenses, in the action of replevin, and in this action on the bond, as the statute provides. This personal indemnity, can in no wise be affected by the proceedings in bankruptcy.

J. S. Abbott, for the defendants.

The property replevied, was attached on writ, *Call* v. *Harrington*, in Oct. 1841. Judgment in that suit, was recovered, April Term, 1842. Harrington was decreed a bankrupt, May 17, 1842. If by the attachment, a lien was created, and was perfected by obtaining the judgment so as not to be defeated by the Bankrupt Act; it was still competent for the creditor to waive that lien. And I contend, that he did waive it. The judgment was a debt proveable in bankruptcy; and on the 8th of Oct. 1842, Call did prove it. He claimed and proved the whole; reserving no part, to be paid by property attached. Harrington obtained his discharge. 15th of Nov. 1843. This, taken in connection with Call's having proved his judgment in bankruptcy, operated to discharge that judgment. The execution, if any ever issued on said judgment, could not be legally renewed or enforced. Call could not thereafterwards, "maintain any suit at law or in equity therefor." Bankrupt Act, § 5. And it does not appear that the execution, if any ever issued, has been renewed.

It is urged by the plaintiff's counsel, that "the judgment for a return is conclusive, and cannot now be avoided but by due process of law." The judgment, perhaps, cannot be vacated, but by legal process; but I suppose its effect may be avoided by proof *aliunde*. It would evidently be unjust to preclude the defendants from showing facts, from other sources, to excuse them for not returning the property. Suppose, for example, that after judgment for a return in the replevin action, Harrington had paid Call, his, (Call's) original judgment; surely, in such case neither Call, nor his officer for him, (Howe,) could recover in an action on the replevin bond, for the same thing. Suppose further, that Harrington, besides paying Call's judgment, had released the officer, Howe, and after the judgment for a return, had been rendered, from all claims and demands whatever, on account of said property, for what purpose, could Howe proceed with his writ on the replevin bond? Plainly, only to recover the lawful fees and charges of the officer, and the reasonable "expenses of the action of

replevin, and the action on the bond, so far as they are not reimbursed by the costs, that may have been recovered;" and perhaps to pay the creditor, as damages, penal interest on the value of the property, from the rendition of judgment in *Call* v. *Harrington*, till the rendition of the judgment in the replevin suit, that is "the time the money was withheld from the creditor" or "the service of his execution, delayed by reason of the replevin." Revised Statutes, chap. 130, § 13. If, in such supposed case, Howe was permitted to recover a larger sum, say the value of the property replevied, what would he do with it? After paying his "fees and charges," and "reasonable expenses," in the replevin suit, and in the suit on the bond, whatever additional sum he should receive, he would receive not for himself, but as trustee for the creditor or debtor, or as an indemnity against some legal claim of the creditor or debtor against him. Now in the case supposed, it seems plain, that neither creditor nor debtor, has any claim upon the fund or against the officer.

And it seems to me, that the case at bar, is similar, as to the principles involved, and the important facts.

The judgment in the replevin suit, was for $33,00 damages, the penal interest before spoken of, and $71,10 costs. This judgment was rendered on the 22d of Sept. 1843; and judgment was also rendered for a return of the property, and rightfully; and for this reason, and only this, viz: that at the time, Harrington had not obtained his certificate of discharge, and it could not be foreseen, whether he ever would, for Call was opposing him. He obtained his certificate of discharge on the 15th of Nov. 1843. Further, it could not then be foreseen, that Harrington's assignee, or some one claiming under him, would not claim of the officer, the value of the property. But now it appears, that the assignee sold it to Messrs. Hussey & Coffin, and they released and discharged Howe. Why should Howe be permitted in this action, to recover any thing above "the fees charges," and "reasonable expenses," before spoken of? The fund could not be applied, on any execution of *Call* v. *Harrington*, because no such execution can be

legally issued. Call cannot maintain any action against Howe, for any part of the fund, because he has waived his lien, created by the attachment; he has elected to prove his whole judgment, in bankruptcy, and cannot maintain any suit at law or equity for it, and *non constat*, that he has not obtained every dollar of the judgment.

Harrington cannot maintain any action against Howe, because all his right thereto, vested in his assignee. That assignee duly sold his right to Hussey & Coffin, and they have discharged Howe, so that no one representing Harrington's rights, can maintain any action against Howe.

The question returns, why then should Howe be permitted to recover any thing more than to pay his "fees, charges, and reasonable expenses?" These defendants are not to be punished as wrongdoers, nor are Legg & Co., the plaintiffs in replevin, to be regarded as criminals, and visited with penalties. They had a mortgage of said property to secure the payment of a debt. They honestly instituted their writ of replevin.

I agree with the plaintiff's counsel, in the conclusion of his opening argument, that the plaintiff is entitled to recover enough "for his own indemnity, for his own fees and charges and his reasonable expenses in the action of replevin, and in the action on the bond, as the statute provides." What sum would be required for this purpose, has not been shown. The defendants in writing, offered to be defendants then, and that judgment should be awarded against them, confessing a breach of the bond; — and that execution might be awarded against them, for $110,75, and costs. This sum is made up of the amount of the judgment, in the replevin suit, $33, and $71,10 costs. And interest on the whole from the rendition of the judgment, till the time of the offer to be defaulted. This sum is more than the plaintiff is entitled to.

But if it should be still insisted that the statute prescribes the judgment on replevin bonds, and that the Court cannot depart from the statute requisitions, then I reply, that the bond in suit is not a statute replevin bond. It is not given by the plaintiffs

in replevin, as the statute requires, but by other persons, and is therefore, a common law bond, subject to the chancery powers of the Court, and for reasons already given, the judgment should be for $18, and interest, less than the offer. The defendants claim costs, from time of offer made.

The opinion of the Court, WHITMAN C. J., SHEPLEY, TENNEY and WELLS Justices, was drawn up by

SHEPLEY J. — This suit is upon a replevin bond. The plaintiff, as a deputy of the sheriff, by virtue of a writ in favor of Moses Call against William P. Harrington, attached a horse, sleigh, harness, and two buffalo robes, as the property of Harrington. The plaintiff in that suit, recovered judgment in the month of April, 1842. Before that attachment was made, Harrington, on March 5, 1841, had conveyed the same property in mortgage to William Legg and William Knowlton, who replevied it from the officer, and the bond now in suit was made by the defendants to the plaintiff, then defendant in replevin, who in the month of September, 1843, recovered a judgment for a return of the property attached and for damages and costs. An execution issued on that judgment was delivered to another deputy of the sheriff, who, having demanded the property of the defendants, failed to obtain it, and made return of the execution on Sept. 30, 1843, in no part satisfied.

It is admitted, that the plaintiff is entitled to judgment. But it is contended in defence, that he is not entitled to recover damages to a greater amount than the sum for which they have, according to the provisions of the statute, offered to be defaulted.

1. The facts relied upon to establish this, are, first, that Harrington, upon his own petition, was decreed to be a bankrupt on May 17, 1842. That Call, on October 8, 1842, proved his judgment in bankruptcy, as a debt due from Harrington. That Harrington obtained his discharge as a bankrupt on Nov. 15, 1843.

The question thus presented is, whether the officer, should he recover in this suit for the value of the property attached, will hold it, or any part of it, for the use of Call, the creditor.

The lien preserved by the second section of the act of Congress, approved on August 19, 1841, cannot exist after the debt, judgment, or other instrument, by which it was upheld, has been discharged or annulled. The fifth section of that act declares, "and no creditor or other person coming in and proving his debt or other claim, shall be allowed to maintain any suit at law or in equity therefor, but shall be deemed thereby to have waived all right of action and suit against such bankrupt; and all proceedings already commenced, and all unsatisfied judgments already obtained thereon, shall be deemed to be surrendered thereby." The fourth section also provides that the bankrupt shall be entitled to a full discharge of all his debts. It is said, that the discharge is not absolute, but liable to be impeached for fraud or wilful concealment; and that the judgment should not therefore be considered as discharged. But the certificate is "to be deemed a full and complete discharge of all debts," "unless the same shall be impeached for some fraud or wilful concealment;" and there is no evidence presented in this case of any fraud or concealment, and it cannot be presumed. There can be no doubt, that the judgment must be regarded as surrendered and discharged. The plaintiff will not be entitled to recover any damages to be applied to satisfy that judgment. But the creditor by the provisions of the Revised Statute, c. 130, § 14, is in such cases entitled to receive from the officer interest at the rate of twelve per cent. per annum on the value of the goods for so long a time as the service of his execution was delayed, to be retained for his own use and not applied to discharge his judgment. His judgment was recovered in April, 1842. His attachment was not discharged until October 8, 1842. The lien by attachment has been uniformly considered in this State as subsisting, when the creditor has or could obtain a judgment in common form by the ordinary course of judicial proceedings. And as discharged by a failure to recov

er such a judgment, or by its discharge, or by the neglect of the creditor to enforce it. If the officer could have regained possession of the property attached, the execution of Call might have been levied upon it at any time before the attachment had been discharged. The lien upon the property was not dissolved until that time. This is not essentially at variance with the doctrine established by the decisions of other courts. *Cook's case*, 5 Law Rep. 443; *Ames* v. *Wentworth*, 5 Metc. 294. The plaintiff may therefore recover in this suit, the amount of damage occasioned to Call by the delay of service of his execution until October 8, 1842, his right to that amount not being affected by the discharge of his judgment, because it was not to be applied in part payment of it.

2. In the second place it is contended in defence, that the plaintiff is not entitled to recover any damages for the use of the owner of the property attached or his assignee.

The facts relied upon are, that the assignee of Harrington in bankruptcy, conveyed on December 2, 1842, all his interest in the property mortgaged to Legg and Knowlton, to Hussey and Coffin, who, on October 3, 1844, released and discharged the plaintiff from all accountability to them for it. This would seem to be sufficient to protect him against any claim made by the mortgagor or his assignee. It is objected, that it does not appear, that the assignee in bankruptcy made a conveyance of the property according to the rules prescribed by the court authorizing the sale. It does not appear, that he did not. The property passed by operation of law to him, and he could make no claim upon the plaintiff for it after having made sale of it to others. The mortgagees do not appear to have discharged the plaintiff from accountability to them. Nor does their title to the property appear to have been discharged or surrendered. It may be valid as against Harrington and his assigns, while it was decided to be invalid as against an attaching creditor. The answer is, the officer is seeking to recover damages against them in effect, though not in form, for they are not parties to this suit. The suit is against those, who must be considered to have given this bond on their account

and for their benefit. The plaintiff should not therefore be allowed to recover damages from the agents only to restore the amount recovered to their principals.

3. It is contended, that this is not a statute bond, and that the plaintiff can recover only the actual damages proved, and not the damages provided by the statute. It was made on Nov. 8, 1841, since the Revised Statutes were in force. By the tenth section of c. 130, the officer is authorized to "take from the plaintiff or some one in his behalf a bond to the defendant with sufficient sureties." It must be presumed, that the officer proceeded legally, in the absence of proof that he did not, and that this bond was taken in behalf of the plaintiffs in replevin. It must therefore be regarded as a statute bond; and the damages must be assessed accordingly.

4. The damages recovered in the action of replevin, by the present plaintiff, being recovered in trust, are not conclusive upon the parties in this suit. The service of the creditor's execution may have been delayed long after the recovery of that judgment, and he may therefore be entitled to greater damages. Ch. 130, § 12. Or a part or the whole of his debt may have been discharged since the recovery of the judgment, and the officer is only to recover to his use and pay to him so much of his judgment, as shall remain unpaid. Ch. 130, § 13.

5. The defendant in replevin is not concluded by the value of the property named in the replevin bond. Nor are the obligors in all cases. But in cases like the present, in which the value of the property might be expected to be diminished by the use of it, and by the lapse of time, it has been considered, that the obligors should be bound by the value named in their bond. *Melvin* v. *Winslow*, 1 Fairf. 397; *Swift* v. *Barnes*, 16 Pick. 194; *Parker* v. *Simonds*, 8 Metc. 205.

The plaintiff will be entitled to recover the amount of the judgment for costs recovered in the action of replevin, with interest thereon from the time of judgment. His reasonable expenses incurred in that action with interest thereon from the same time. His reasonable expenses incurred in this suit upon

the bond. These sums he will be entitled to recover for his own use.

He will also be entitled to recover for the use of the creditor, interest at the rate of twelve per cent. per annum on the value of the goods, as alleged in the bond, from the time of the recovery of his judgment to the time when the attachment was discharged on Oct. 8, 1842.

When the expenses to be allowed to the plaintiff have been ascertained, by casting the interest upon the items as before stated to the time of the offer to be defaulted, it will be perceived, whether the amount thus offered was sufficient, and the costs of this suit will be thereby determined.

Defendants to be defaulted, and to be heard in damages.

JOHN B. BROWN *versus* JONATHAN WILLIAMS, and THE THOMASTON MUTUAL FIRE INSURANCE CO., *as Trustees.*

SAME *versus* SAME.

Where a mutual fire insurance company were entitled to a lien on all property insured by them, and where one condition of the insurance was, that if the representation made by the applicant for insurance, was materially false, the policy should not cover the loss; and where the insured, in his application, stated that he was the owner of the building insured, when he had only a bond, for a deed of it, upon the performance of certain conditions, which have never been performed; — *it was holden*, that the company was not liable to pay for a loss by fire, otherwise within the policy.

THE facts sufficiently appear in the opinion of the Court. Applications in writing for insurance were required to be made, and certain questions to be answered. In this case, one was:

"*Question.* Who is the owner of the building? Is there any incumbrance? *Answer.* Applicant." On the same paper was the following: —

"N. B. If the representation above, is materially false, the policy will not cover a loss or damage done to the property." In the policy, reference was made to the application.

M. H. Smith, for the trustees, made one point, that the

company was not liable, because the applicant, represented himself to be the owner of the land and buildings, when in fact he was not. It was required by the very terms of the policy, that this should be stated; and the applicant was warned that the policy was void, on failure of compliance. This was not mere matter of form, for it was the only security the insurers had, that the losses would be paid.

Ruggles, for the plaintiff, said, that the holding of the property for the premium, was merely collateral, and not material. But the agent of the company knew of the actual situation of the property at the time, and it is now too late to escape from responsibility, on this ground. Besides, the applicant had an insurable interest in the buildings, and so are the authorities. The company might waive the right to have an answer, and did so in this instance.

The opinion of the Court was drawn up by

WHITMAN C. J. — The defendant, being defaulted, and the trustees, who are the Thomaston Mutual Fire Insurance Company, having disclosed, we are required to determine whether they are chargeable, or not. If they are, it is because they were, at the time of the service of the writ upon them, answerable upon two policies against damage by fire, issued by them in favor of the defendant, Williams, upon buildings represented by him to be his; and which had been consumed by fire, before that time. The company are entitled to a lien on all property insured by them, to secure the payment of premiums or assessments.

Propositions for insurance are made to the company, in a form prescribed by them, containing interrogatories, which are to be answered by the applicant. The policies issued, refer to the applications made in each case, and are conditioned, if the statements made in the application, be not materially true, that the policies shall be void. It is insisted, for the company, that the applications for the policies relied upon by the plaintiff, contain untrue statements, as they represented that the buildings described therein, were the defendant's property; and also

that the policies contain the same untrue statement. It appears that both applications and policies, do contain such a statement. They call the buildings his. And there was an omission in both applications to answer the interrogatories, as to whether there were any incumbrances, on the property. It appears that the defendant had no legal title to the property insured. He had only a bond for a deed of it, upon the performance of certain conditions, which have never been performed. The company, therefore, could have no lien upon the estate insured. The misrepresentation, therefore, was materially untrue; for each member of the company was interested in having such a security, from every other member thereof, as would insure the payment of his proportion of any losses, occurring during their mutual membership. If an assessment upon one should fail to be collected, it must be assessed upon the others.

It is true, that an equitable interest may be the subject of an insurance; and in policies obtained at the common offices, for the purpose, it need not be described as such. But at mutual insurance offices, it must necessarily be otherwise, when a lien in behalf of all concerned, is to be created. It then becomes material, that the company should become apprized of the true state of the ownership, in the property insured. It will operate as a fraud upon the members of the company, if the applicant calls the property, proposed to be insured, his, and thereupon, obtains an insurance of it, when, in fact, he has but a contingent interest in it; and, as in this case, of a very precarious kind; and in reference to which, a lien in behalf of the company, could not be enforced.

An attempt was made to make it appear, that the agent of the company was informed that the defendant, when he made his applications, had no other title than a right to a conveyance, upon the performance of certain conditions. But such fact, as the evidence stands, cannot be regarded as established. The defendant's agent merely says, he is not positive, but thinks he did state to Loring, the agent of the company, that there were incumbrances upon the land upon which the buildings were

erected; that he does not, at this distance of time, recollect the particulars of the conversation; and again, that he knew the defendant did not own the land, and thinks he so informed Loring; but he is positive, that nothing was said of Reed's ownership, with whom the defendant had contracted for the land. Loring, however, is positive, that if any thing had been said to him about any defect in the title, it would have appeared in the defendant's applications which he filled up at the request of his agent; and none appears therein.

Our conclusion is, therefore, that the policies were not obligatory upon the company, and therefore, that, as trustees, they must be discharged.

DAVID KELLOGG *versus* THE INHABITANTS OF ST. GEORGE.

A town is not liable to pay a physician, for his services, in attending upon persons sick with a contagious disease, who have ability to make payment themselves, without his being employed by the selectmen of the town; although they have, under the provisions of Rev. Stat. c. 21, taken measures to prevent the access of others to the place, and have appointed a person to superintend the house, and take care of its inmates. To make the town liable, the physician must be employed by the selectmen; their knowledge and assent to his performing the services is not enough.

No copy of the exceptions, or instructions of the presiding Judge have come into the hands of the Reporter. The objectionable instruction, seems to be given, *verbatim*, in the opinion of the Court.

Ruggles, in his argument for the defendants, took these positions.

It is necessarily assumed, to support this action, that the charge is first to be made to the town, and then charged over by the town, to the individual who receives the aid. That is to say, the medical or other aid, is to be at the charge of the town, though the person be of ability, and the town is to turn round and recover it of the individual. The language of the statute, it is respectfully submitted, does not warrant

any such construction. It certainly does not require it. The public safety does not call for any such construction; and it would therefore involve a very unnecessary circuity of action. If such circuity had been intended, the statute would have provided, in so many words, that the medical aid, &c. should be at the charge of the town, and that the town should have a right of action, to recover the same of the individual, if he be of ability. But the language of the statute is very different and clearly indicative, as it would seem to me, of an intention, that the town is not chargeable for the expenses of the sickness, unless the individual be poor and unable to pay. In that case, he is a pauper and in need of support, and the town must pay. In the case of a wealthy citizen, whose child has small pox, what necessity, or propriety is there, in the town's assuming the expenses of the sickness? That could add nothing to the public safety, which is the sole object of the statute. The parent may be interdicted from going abroad among his neighbors, and it becomes necessary to have some medium or agency through which he can obtain the attendance of a physician. That agency is very properly devolved on the selectmen. They are to see that the doctor is sent for, when necessary, at the charge of the individual, he being able. The very statement of the case is sufficient. Argument can scarcely make it plainer. If so, then it was not "competent" for the jury to find for the plaintiff on the evidence in the case.

But the defence does not rest solely on this construction. The plaintiff was in attendance as Robinson's physician before the selectmen knew any thing of the matter. He continued to attend. They had no occasion to interfere in that respect. They interdicted intercourse with the family, but not the plaintiff's attendance as the family physician. They allowed or "assented" to his visiting there, but they never employed him on the account of the town. There was no occasion for their doing so. Their "knowledge and assent" to his attending at Robinson's did not create any liability on the part of the town to pay his bills, any more than their "knowledge and

assent" to the mother's nursing and taking care of the child, would make the town liable to pay her bills.

The opinion of a majority of the Court, SHEPLEY, TENNEY and WELLS Justices, WHITMAN C. J. dissenting, was drawn up by

WELLS J. — Accompayning the directions given to the jury, they were instructed, "that if from the evidence in the case, they were satisfied, that the plaintiff rendered the services, and attended the persons sick at Robinson's, with the *knowledge and assent* of the defendants, he was entitled to recover."

The case discloses, that the small pox had attacked the children of Robinson, dwelling in his house, under the care of their mother, and while he was at sea. Before any knowledge of the manifestation of the disease had come to the officers of the town, the plaintiff had been called to visit the family in his professional capacity. The selectmen took the necessary measures, to prevent the spread of the disease, by placing a fence across the road leading to Robinson's house, interdicting the access of persons to it without permission, appointing a person to superintend the house and take care of its inmates. Three other persons, residing in the neighborhood infected by the same disease, were sent to Robinson's house. The plaintiff was the only physician who attended upon the patients. Robinson was able to pay for the medical services rendered to his family. The verdict embraced compensation for attending upon all the persons, in the house, who were sick.

Under the provisions of the Rev. Stat. c. 21, towns are liable, primarily, for expenses incurred by the selectmen, within the scope of the act. And the employment of a physician would, without doubt, fall within their line of duty.

But in order to render the town liable, the physician must be *employed* by the selectmen. Towns are under no other obligations, than those prescribed by statute, in relation to the claim of the plaintiff. *Miller* v. *Inhabitants of Somerset*, 14

Mass. R. 396 ; *Mitchell* v. *Inhabitants of Cornville*, 12 Mass. R. 333.

The defendants had no knowledge, except that of the selectmen. The general rule of law is, that where one performs a beneficial service for another, with his knowledge and assent, a promise of payment is implied. Does this case fall within the rule ?

The family, being sick, send for a physician, they are not removed from their house. The selectmen interpose, and send other sick persons to the same house, and the physician continues his attentions to all. The family had a right to employ their own physician, and the selectmen did not interdict the exercise of it. A beneficial service was rendered to the family ; it could not be considered as rendered to the town, unless the plaintiff was employed by the selectmen. If a necessity existed, requiring the town to engage the plaintiff, then the service would have been rendered to the defendants. The selectmen might have had a knowledge that the plaintiff was attending upon the family and assent to his doing so, without intending to employ him for that purpose. The fact of the plaintiff's employment, by the selectmen, does not necessarily arise from their knowledge and assent.

The beneficial service was not performed for the town, unless the plaintiff was employed by its officers.

The case does not, therefore, come within the rule, before mentioned. The jury might have found for the plaintiff, without determining, that he was employed by the selectmen. The instruction must have assumed, that the service performed, was for the town. That was a fact to be settled by the jury, and could only have been found affirmatively, by finding, that the plaintiff was employed by the selectmen. Whether the jury would have so found, upon the facts proved, or by inference from those facts, it is unnecessary to inquire, because, if there was an error in the instruction, the verdict must be set aside.

The same rule, as to the liability of the defendants, must apply to the medical services rendered for those, who were sent to the house, in consequence of their sickness. But a

jury may have less difficulty, in finding, that the plaintiff was employed to attend upon them, than they would have, in relation to the family of Robinson.

Believing the instructions were not sufficiently definite, and were liable to mislead the jury, there must be a new trial granted. *Exceptions sustained.*

ELIZABETH K. STIMPSON *versus* PRESIDENT, &c. OF THOMASTON BANK.

Where two grantors conveyed land, by deed of warranty in common form, without any designation of the manner in which it was held by them, and one of the grantors died, and his widow brought her action of dower, claiming to be endowed of one half the premises granted, *it was holden* by the Court, that the grantee was estopped by his deed, from showing, that the living grantor was seized in severalty of a much greater proportion of the premises described in the deed, and the deceased, of a much less one, than an undivided moiety thereof.

Statement of facts: —

"This is an action of dower. The writ is dated June 1st, 1846. The dower was duly demanded on the 12th day of Dec. 1845.

"The demandant claims dower as the widow of Brown Stimpson, late of Thomaston, in this county, deceased, and the marriage is admitted, as having been duly solemnized, January 1st, 1809, and that the husband died in 1838.

"The demandant puts into the case an office copy, duly certified, to be used as the original, of a deed from said Brown Stimpson and Elizabeth Sawyer, to the defendants, dated March 10, 1828, of the premises in which dower is demanded, acknowledged March 12th, 1828, and delivered to the defendants, and by them procured to be recorded March 14, 1828. This deed is made a part of the case.

"The general issue is pleaded, with a brief statement, which may be referred to.

"The defendants put into the case, a deed from Miles Cobb and wife, to Elizabeth Sawyer, of August 12, 1823, of a part

of the lot, described in the deed of Sawyer and Stimpson, to the defendants; also a duly certified copy of a deed, from Benjamin Bussy to said Brown Stimpson, dated August 15, 1827, of the residue of said lot, both duly acknowledged and recorded.

"These deeds embrace the whole land, described in the deed from said E. Sawyer and B. Stimpson, to the defendants, being the same, wherein dower is demanded in the plaintiff's writ.

"It is admitted to be true, (provided the defendants are entitled by law to put the same in evidence, in defence of this case,) that no evidence of title, in said Brown Stimpson, can be found among the records of this county, to the land described in the deed from Miles Cobb to Elizabeth Sawyer. And defendants offered to prove, (so far as a negative can possibly be proved,) that said Stimpson never had any right, title or interest in and to the land conveyed by Miles Cobb to Elizabeth Sawyer.

"For the purpose of presenting at this time, to the full Court, the questions of law in the case, the plaintiff admits that the defendants set out to her in due form, Sept. 3d, 1842, her dower in and to the lot of land described in the deed of said B. Bussy to B. Stimpson.

"At the time of the conveyance of Elizabeth Sawyer and Brown Stimpson, to the defendants, said Stimpson occupied the premises, residing in a part not embraced in that portion wherein the defendants have assigned dower as aforesaid, said Elizabeth Sawyer, his mother-in-law, living with him and having her home in his family.

"The above named deeds, offered by the defendants, are objected to by the plaintiff as inadmissible.

"The full Court, upon the evidence thus offered, or upon so much of the same as is legally admissible, is to render such judgment as to law and justice may appertain."

"G. Abbott & Lowell, for demandant.

"Ruggles & M. H. Smith, for defendants."

From a sketch, made by one of the counsel, and conceded truly to represent the premises, it appeared, that but a small portion of the premises described in the deed, from Sawyer and Stimpson to the tenants, was included in the deed from Bussy to Stimpson, the principal part having been conveyed by the deed from Cobb to Sawyer.

The following is a copy of the deed from Sawyer and Stimpson to Thomaston Bank: —

"Know all men by these presents, that I, Elizabeth Sawyer of Thomaston, in the county of Lincoln and State of Maine, widow, and Brown Stimpson of said Thomaston, in consideration of ten hundred and seventy-five dollars paid by the President, Directors and Company of the Thomaston Bank, the receipt whereof I do hereby acknowledge, do hereby give, grant, sell and convey unto the said President, Directors and Company of said Bank, a certain lot of land situated in Thomaston aforesaid, on the south side of the county road, and bounded, beginning at a stake and stones on the south side road at land of Mrs. Sampson; thence southerly by the same seventeen rods to stake and stones at Mr. Bussey's land; thence westerly parallel with the county road, eighteen rods and four and one half links; thence northerly bounded by land of said Bussey and land of Rowland Hatch, seventeen rods, to the road aforesaid; thence easterly by the same to the place of beginning, containing two and one half acres, more or less, together with a large building thereon standing; being the same land which was conveyed to said Sawyer, by Miles Cobb and B. Bussey, Esq. Excepting therefrom a road across the same which was deeded to said Bussey. To have and to hold the aforegranted premises to the said President, Directors and Company, their heirs and assigns, to their use and behoof forever. And we do covenant with the said President, Directors and Company, their heirs and assigns, that we are lawfully seized in fee of the aforegranted premises; that they are free from all incumbrances; that we have good right to sell and convey the same to the said President, Directors and Company, that we will warrant and defend the same premises

to the said President, Directors and Company, their heirs and assigns forever, against the lawful claims and demands of all persons.

"In witness whereof the said Elizabeth Sawyer and Brown Stimpson have hereunto set our hands and seals, this tenth day of March, in the year of our Lord one thousand eight hundred and twenty-eight.

"ELIZABETH SAWYER, and a seal,

"BROWN STIMPSON, and a seal.

"Signed, sealed and delivered in presence of

"E. H. STIMPSON."

G. Abbott, for the demandant.

In order to constitute a title to dower, three things are required by law — marriage, seizin and death. The first and last are admitted. And it is the seizin of the late B. Stimpson in the estate described in the deed of Cobb to Sawyer, that is attempted to be controverted by the defendants.

We claim dower in one moiety of the whole estate, covered by the deed from Elizabeth Sawyer and Brown Stimpson to the defendants. This deed, it will be perceived, is from two grantors, Mrs. Sawyer and Brown Stimpson — that the defendants hold under this deed —that they have treated it with all of the solemnities of a deed — by procuring it to be recorded, within four days after it was executed — and still claiming and holding title under it. And further, I would call the attention of the Court, to the covenants of warranty and seizin in this deed, under which the defendants hold their title. It contains all the usual covenants that are in any deed of warranty. The covenants in this deed are joint covenants.

We contend that the defendants are estopped from denying the seizin of Brown Stimpson, the late husband of the demandant, in one moiety of the premises, in which dower is claimed; and we oppose the introducing of evidence by the defendants, that would have any tendency to controvert such seizin of Brown Stimpson, in one moiety. If this position be correct, then is the plaintiff entitled to dower in one moiety. That a person holding under conveyances in fee, deduced from the

husband of the demandant, in dower, is estopped, from controverting the seizin of the husband, is a principle of law, that has long been firmly established by numerous decisions in this Court, and in New York. *Kimball* v. *Kimball*, 2 Greenl. 226; *Nason* v. *Allen*, 6 Greenl. 243; *Hains* v. *Gardner*, 1 Fairf. 383, and cases there cited, by plaintiff; *Smith* v. *Ingalls*, 13 Maine R. 284.

"Where two persons convey land, by deed of warranty with covenants of seizin, the grantee and all claiming under him, are estopped to deny the seizin of each grantor in a moiety of the premises thus conveyed," is the law as laid down by this Court, in *Hamblin* v. *President, Directors and Company of the Bank of Cumberland*, 19 Maine R. 66; and apply the same doctrine to case under consideration, and the plaintiff is entitled to her dower as contended for.

The occupation and actual possession of the premises, by Brown Stimpson, at the time of his conveying with Mrs. Sawyer to the defendants, is evidence of his seizin, in one moiety of the whole estate conveyed, and goes to establish or strengthen the legal construction as laid down in *Hamblin* v. *Bank of Cumberland.*

It is sufficient for the demandant in dower, to show her husband's possession during the coverture; it is then incumbent on the defendant, to show a paramount title in himself. *Knight & ux.* v. *Mains*, 3 Fairf. 41.

M. H. Smith, for the tenants, said that the land owned by Elizabeth Sawyer lies contiguous to that owned by Brown Stimpson, but that the latter never owned any portion of, or had any interest in the land owned by Sawyer. It is said on the part of the demandant, that we cannot be permitted to deny, that Sawyer and Stimpson owned in moieties. The claim of the demandant to maintain this action rests entirely upon the application of the law of estoppels to the deed of Sawyer and Stimpson to the tenants.

In order to maintain the estoppel, it must be shown not only, that the tenants are estopped to deny that Brown Stimpson had any title in the land, but to maintain also a very

different position, that the tenants are estopped from showing what part, or how much, he had title to; or in other words, that the tenants, by receiving the deed, acknowledged that E. Sawyer and B. Stimpson were tenants in common of the land, and also acknowledged, that they each owned an undivided moiety of the land. The demandant from thence would infer, that the tenants are estopped from showing, that Sawyer owned more than a moiety, and B. Stimpson less. The demandant can recover, it is believed, only by extending the odious doctrine of estoppel still further, with the certainty, that manifest wrong and injustice will be effected by it. It has been said, and with much reason, that there is no principle, and nothing but precedent, to justify the application of the doctrine of estoppel to a case of dower. 2 Smith's Leading Cases, 454 to 479, and note of Mr. Hare. She is no party to the deed, and cannot claim an estoppel by virtue of it.

But it is not necessary for the tenants to say, that Brown Stimpson was not seized. They merely say, that he was not seized and owner of one half of the premises in which dower is now claimed, and they merely claim to be allowed to show of what portion of the premises he was seized and owner of, and what portion his co-grantor. The grantees make no other admission by receiving the deed, but simply that the two grantors owned the land. They, therefore, are not estopped to deny any thing not inconsistent with that. The Court, it is said, will protect the rights of widows. The present demandant claims that the Court should grant her rights, which she never had before. Suppose A and B to be tenants in common, each having a wife. A owns nineteen twentieths and B one twentieth. They convey the land by deed in common form, without reciting the proportions owned by each, to C. A and B both die. Is A's widow to have dower in but one half, and B's to have an equal share with her?

The best authorities go merely to the extent, that in a case like this, the grantee is estopped to deny, that the grantor had nothing in the land. Jacob's Law Dic. Estoppel; 4 Dane, 448. The principle of estoppel, as applied to deeds, is, that the deed

is to be conclusive as to the point intended to be affected by it, and no more. 1 Shower, 59. The case of *Hamblin* v. *Bank of Cumberland*, 19 Maine R. 66, has been cited by the counsel for the demandants to show, that where two persons convey land by deed of warranty, that the grantee is estopped to deny the seizin of each to a moiety. Such is the Reporter's note, but the note is not authorized by the opinion of the Court. An estoppel, not being favored by the law, ought to be certain to every intent, and therefore, if a thing be not directly and precisely alleged, it shall be no estoppel. Co. Litt. 352, (a) and 303, (a); 2 Saund. 418; 5 Dane, 383; 4 Greenl. 214; Cro. Eliz. 36.

If an estoppel exists it must of necessity be mutual; but it cannot therefore be said, that where a husband has conveyed, and dower is claimed, that the real nature of the estate may not be shown. 3 Bing. 69.

Ruggles, on the same side.

Abbott replied.

The opinion of the Court, WHITMAN C. J., SHEPLEY, TENNEY, and WELLS Justices, was drawn up by

TENNEY J. — The plaintiff claims dower in a tract of land, described in her writ. Her right to be endowed in the premises, depends upon certain deeds, referred to in the case, and facts agreed by the parties, so far as the deeds and facts are competent evidence. The marriage, the death of the husband and demand that dower be assigned, are admitted as alleged in the writ. It is conceded by the tenants, that the husband of the plaintiff was seized during the coverture of a portion of the premises; and by the plaintiff, that dower has been assigned to her therein; but the seizin of the husband in the residue, is denied by the tenants.

To show that the husband of the plaintiff was seized of the whole tract, she introduced the joint deed of the husband and one Elizabeth Sawyer to the tenants, covering all the land in which dower is claimed, containing the usual covenants

of seizin, that the premises were free of incumbrances, that they had good right to sell and convey the same, and that they would warrant and defend the same, against the lawful claims and demands of all persons. At the time of this conveyance, the husband occupied the premises, residing on a part not embraced in that portion, wherein the tenants have assigned dower, the said Elizabeth, the other grantor, at the same time living with him, and having her home in his family. The tenants introduced deeds, showing that the husband had title to the portion in which dower had been assigned, and that the other grantor had title to the residue of the premises. It is admitted by the plaintiff, that the records of this county exhibit no evidence of any title of the husband to the portion last referred to. All this evidence offered by the tenants is objected to by the plaintiff, as being incompetent. The deed to the tenants from the husband and Elizabeth Sawyer was the only evidence of the title of the former; and hence it is contended by the plaintiff, that the grantees therein are estopped to deny the affirmations contained in the deed under which alone they claim.

The tenants insist that the common law doctrine of estoppel is not applicable, because the plaintiff is a stranger to that deed, and is not bound by any thing therein contained, so that she would be precluded from showing, that her husband was seized of a greater portion of that land described, than a moiety; and that estoppels cannot be admitted unless they are mutual. "Every estoppel ought to be reciprocal, that is, to bind both parties; and this is the reason, that regularly a stranger shall neither take advantage nor be bound by the estoppel." Co. Litt. 352, a. And in accordance with the principle contended for, would, seems to be the decision in the case, *Gaunt* v. *Wainman*, 3 Bingham's N. C. 69, where the plaintiff therein claimed dower in land conveyed to the defendant by her husband as *freehold*, in which she was dowable, if it were freehold; the defendant proved, that the premises were *leasehold*, in which estate she was not entitled to dower. It was objected that the tenant was estopped to offer this

proof against the deed under which he claimed title; the verdict was entered against him with leave to move to set it aside. The Court say, "I think this is a case, in which the defendant is not precluded from showing the real nature of the estate. According to Co. Litt. 352, a, "Every estoppel ought to be reciprocal, that is, to bind both parties; and this is the reason, that regularly a stranger shall neither take advantage, nor be bound by the estoppel. It would be hard, if it were otherwise, and therefore the rule must be made absolute." In *Osterhout* v. *Shoemaker*, in New York, 3 Hill, 518, the ground that the acceptance of a deed of real estate is a necessary estoppel, against denying the title of the grantor, at common law, is not defended, but the principle was, that if *possession* was obtained from the grantor under the deed, he might enforce the estoppel. And it was intimated in the same case, that the grantee of the husband is estopped from denying the widow's title to dower, because the rule was so settled in that State, rather than by any sound principle. But in this State, the husband's grantee has been estopped by the affirmation in the deed under which he held, by the uniform current of decisions; the purchaser buying the property subject to dower, is to be regarded as taking his title in effect of the wife as well as the husband, and therefore, she is not a stranger, so far as to be precluded from enforcing the estoppel. In New York, and in other States, the doctrine, which has governed the Court in this State, has been admitted to be true, and cases decided accordingly. In *Bancroft* v. *White*, 1 Caines, 185, it was held, that a person holding under conveyances in fee, deduced from the husband of the demandant in dower, is estopped from controverting the seizin of the husband. The same principle is recognized in *Hitchcock* v. *Hutchinson*, 6 Johns. R. 290, and affirmed in *Collins* v. *Torrey*, 7 Johns. R. 278; in which the Court say, "the tenant derives his title from and holds under the title of the husband of the demandant, as it existed during the coverture, and he therefore is not permitted to deny the seizin of the husband. *Hitchcock* v. *Carpenter*, 9 Johns. R. 344. This Court hold the same doctrine, in *Kim-*

ball v. *Kimball*, 2 Greenl. 226. In *Hains* v. *Gardner & al.* 1 Fairf. 383, it is said, "This Court has repeatedly recognized the principle, that a person holding under a conveyance in fee from the husband of the demandant in dower is estopped from controverting the seizin of the husband." In the case of *Nason* v. *Allen*, 6 Greenl. 243, and in *Smith* v. *Ingalls*, 1 Shepl. 284, the husband was not in fact seized of an estate which would have entitled the widow to dower, but as the tenant in each case held under the husband alone, the Court applied the doctrine of estoppel to him.

It is contended, further, that the principle of estoppel does not apply, where any interest passes from the grantor to the grantee, but only where the grantor had nothing in the land. The cases referred to in support of this proposition are those, where a less estate was conveyed, than that, which might be inferred from the terms in the deed; "and one shall not plead my deed to a double purpose, as an estoppel, and passing an interest to him also." 5 Dane's Ab. p. 383, art. 1, sect. 22. Though a lessee is estopped from showing that his lessor had no title to the premises demised, yet he may show, that he was entitled to a particular estate, which has expired. *Neave* v. *Moss*, 1 Bing. 380; *Walton* v. *Waterhouse*, 2 Wms. Saunders, 418 and notes. But it is believed, that this principle is not applicable to a deed purporting to be a conveyance in fee of two parcels of land, to one of which only the grantor had title or seizin. The deed in the case of *Nason* v. *Allen*, before cited, contained the description of a parcel of land to which the grantor had no seizin, and also of another parcel, where the right of dower was not resisted, and the grantee was held estopped to deny the seizin of the husband. And there cannot be a distinction between such a case, where two parcels of land are described, the grantor having title to one only, and the case, where the two parcels are embraced in one description. And in this respect, it is not material, whether the deed be from the demandant's husband alone, or that of him and another jointly.

But it is insisted, for the tenants, that the deed under which

they claim, and which is relied upon as conclusive evidence of seizin, in the grantors, by the plaintiff, does not estop the tenants from showing what portion of the land belonged to one grantor, and what portion to the other; that they have not admitted, by receiving that deed to them and claiming under it, that both the grantors were seized of the entire land described therein; that proof of the fact, that each was seized of a certain portion in severalty, which together made the whole, and not of the residue, is no contradiction of the terms of the deed, but is an explanation consistent therewith.

The common law doctrine touching estoppel, requires, that it must be certain to every intent, and not taken by argument or inference, and should be a precise affirmation of that, which maketh the estoppel. Co. Litt. 352, (a). If the affirmation be wanting in these particulars, the truth cannot be excluded. In the case at bar, the tenants, therefore, are not precluded from denying any affirmation not stated in the deed with certainty, directness and precision. But on the contrary they are not allowed to contradict the facts affirmed, or to weaken the force of them, by other evidence, if they are stated with certainty, directness and precision. The language of the covenant of seizin in the deed is, "We do covenant with the said President, Directors and Company, their heirs and assigns, that we are lawfully seized in fee of the aforegranted premises." The deed is joint, and the grantors profess to convey the whole land, and not each a distinct parcel. The covenant of seizin is also joint. Stimpson covenants, that he and Elizabeth Sawyer are both seized of the whole land; and Elizabeth Sawyer does the same. An individual taking upon himself an obligation, or entering into a promise, covenants or promises in writing accordingly, is bound by such undertaking, and he cannot successfully resist his liability by the introduction of other proof, if inconsistent with the certain, direct and precise terms of the contract. If the covenants or provisions in the same terms, are intended to be made by two jointly, the only modification of the writing required, would be the use of the names of the two or the plural,

instead of the one or the singular. One would be as certain, direct and precise as the other; nothing could depend upon argument or inference in the construction of one more than the other. If two persons give a joint bill of sale of two distinct chattels, receive the consideration therefor and make delivery of the same, both vendors are equally bound to make good the damage, if the title to either should fail, though one might have been the exclusive owner of one, and the other of the other chattel before the sale, and it is not perceived that a covenant would not be held to be equally broad. If the tenants, at the time they took the deed, knowing the state of the title as it really was, and fearing that some defect existed in that portion which was claimed by Stimpson, and had required that the deed of the entire tract with all the covenants should be executed by both, it is not doubted, that the covenants would extend to the whole tract, and their supposed purpose be effected. If the conveyance had been simultaneously made by the several deeds of the grantors, each of a moiety in common and undivided, of the whole, the description and covenants being the same, no want of certainty, directness and precision would be manifest; the terms of conveyance, and the covenants would each have applied to the whole parcel, in common and undivided. *Hamblin* v. *Bank of Cumberland*, 19 Maine R. 66. And the force and effect of such a conveyance as has been supposed, would not be weakened, if the conveyance was by the joint deed of the two.

There is nothing in the facts agreed, tending to prove that if the two grantors were each seized of the whole premises, they were not seized of them in moieties, and therefore nothing to show, that the demandant's husband was not seized of a moiety, instead of a less undivided share.

The tenants are supposed to have known the state of the title, and possession of the whole parcel as it was, or certainly as the public records disclosed it, at the time of the conveyance. They chose to take the joint deed of the two several owners, both of whom were in possession, so far that the title and seizin of each portion was in harmony; they received

possession under the deed to them, and were seized according to the terms of the conveyance, and the covenant of seizin. They had the benefit of covenants of the two, for the whole, instead of each, for a separate portion. Under the decision in the case of *Osterhaut* v. *Shoemaker*, before cited, where it was held, that had possession gone with the deed, it might have been an estoppel, the ground taken by the plaintiff is sustained, though the correctness of the rule so broadly applied, as it has been in New York, is denied.

According to the agreement of the parties, there must be judgment for the plaintiff, for dower in an undivided moiety of the premises.

CHARLES CROOKER *versus* THEODORE S. TREVETT.

The simple omission of certain items, the property of the bankrupt, in his schedule of assets is not alone sufficient to sustain the allegation, "that the defendant fraudulently omitted in his schedule of assets" that property.

In an action upon a note, where the defence set up is bankruptcy, and the answer to it is, that the defendant fraudulently omitted certain property belonging to him, in his schedule; an instruction to the jury, that if they believed the defendant "*considered*" this property, to be the property of another person named, then they should find a verdict for the defendant, is erroneous, as it might mislead the jury.

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

Assumpsit upon a note of hand, dated Feb. 6, 1841, for $215,24. The writ was dated June 9, 1845. The defendant pleaded bankruptcy, to which the plaintiff replied, "that the defendant fraudulently omitted in his schedule of assets a claim against one David Ingalls, and also one share in the whaling bark Massassoit, valued at one hundred dollars, of which due notice was given to the defendant." The schedule of effects was dated Feb. 7, 1842, and the discharge in bankruptcy, on Feb. 28, 1843.

Several witnesses were examined. WHITMAN C. J., presiding at the trial, as the exceptions state, instructed the jury as follows: —

"1. That if they did not believe the defendant had been guilty of wilful concealment, they should find for the defendant.

"2. If they believed the whale share was the property of Magoun, the witness, or that the defendant considered this share the property of Magoun, then they should find a verdict for the defendant."

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

Tallman & Richardson, for the plaintiff, argued, that a new trial should be granted, because the presiding Judge erred in instructing the jury, that if, "the defendant *considered* this share the property of Magoun, then they should find a verdict for the defendant." The testimony does not warrant any such instructions. He knew whether it was, or was not his property.

They also contended, that there should be a new trial granted, because the verdict was not only without evidence, but also against evidence.

Randall, for the defendant, contended that the instructions were correct.

By the bankrupt act, § 4, it is provided, that the discharge shall only "be impeached for some fraud or wilful concealment of property or rights of property." Not returning property as his own, which he believed was not his, but belonged to another, is neither a fraud nor a wilful concealment. There could be no concealment of property which he did not know was his.

The opinion of the Court, WELLS J. concurring in the result, granting a new trial, on the ground only that the verdict was against the evidence, was drawn up by

TENNEY J.— It is not denied that the defence should prevail, unless the defendant's discharge in bankruptcy, was im-

peached "for some fraud or wilful concealment of property, or rights of property." Bankrupt Act of U. S. of Aug. 19, 1841. This he attempted to do under his replication to the defendant's plea, that "the defendant fraudulently omitted in his schedule of assets a claim against one David Ingalls and also one whole share in the whaling bark Massassoit, valued at one hundred dollars." The evidence of discharge being perfect and in proper form, it was necessary for the plaintiff to prove what he had alleged in his replication, to entitle him to a verdict. The simple omission of certain items, the property of the bankrupt, in his schedule is not alone sufficient to sustain the allegation. They may have been forgotten, or omitted under an honest, though erroneous belief, that he had no interest whatever in the property.

The instructions to the jury were, 1st, that if they did not believe the defendant had been guilty of wilful concealment, they should find for the defendant; and 2d, if they believed the whale share was the property of the witness, or that the defendant considered this share the property of the witness, then they should find a verdict for the defendant. It was implied, that if there was a wilful concealment of the property of the defendant, or if the whale share was the property of the defendant, and he knew it to be so, under the evidence the result would have been otherwise. The jury must have found, by returning a verdict for the defendant, either that there was no wilful concealment; or that the whale share did in fact belong to another; or that the defendant considered that it belonged to another.

It is not easy to conceive, that a concealment of property can be fraudulent unless it is wilful. Fraud cannot exist, without some operation of the mind and the will; and where an act is done, which is fraudulent, that act must be the result of the will. But the omission may have been wilful, and not fraudulent. If the term "concealment" does not imply in the bankrupt act any more than omission, wilful concealment is the same as wilful omission. If the legitimate

meaning of concealment is a fraudulent omission, the implied instruction of the Judge was, that if the defendant was guilty of a fraudulent and wilful omission to put upon his schedule the whale share, the verdict must be for the plaintiff. If the term concealment signifies simply omission, the instruction was less favorable to the defendant than he was entitled to claim. The first instruction was unobjectionable.

The latter clause of the second instruction, we think may have been so understood by the jury as to be erroneous. By this clause the defendant was entitled to a verdict, "if he considered the whale share the property of another." It is not easy to ascertain with entire certainty the meaning of this clause. The word "consider" is often used to express an idea which exists in the mind, with perfect distinctness, but it does not always convey to the understanding of the person to whom it is addressed, one which is very precise. The clause may be used to express the deliberate and sincere opinion, that another was in fact the entire owner of the property and exclusively interested therein as the owner; and in this sense the Court probably used the language in the instructions. A person to secure his property, so that it shall not be taken in payment of his debts, may by solemn instruments transfer it to a friend, expecting to have all the essential use, as he had before. If he supposes, that this property has been legally transferred, he may with propriety say that he considers it the property of another, although *bona fide*, it is otherwise. The language being susceptible of this interpretation, we think the exceptions should be sustained.

ELBRIDGE LINCOLN *versus* DANIEL EDGECOMB, JR.

Where a line is described in the deed as running from a known bound, a specified number of rods, to a stake, in the absence of all satisfactory proof of the position of that stake in the earth, the extent of the line is to be ascertained, by measuring from the known boundary, the number of rods named in the deed.

Where the same grantor conveys to two persons, to each one a lot of land, limiting each to a certain number of rods, from opposite known bounds, running in a direction to meet, if extended far enough, and by admeasurement the lots do not adjoin, when it appears from the same deeds, that it was the intention that they should; a rule should be applied, which will divide the surplus, over the admeasurement named in the deeds, ascertained to exist, by actual admeasurement upon the earth, between the grantees, in proportion to the length of their respective lines, as stated in their deeds.

No COPY of the deeds, or of the plan, came into the hands of the Reporter, but the facts and the material parts of the deeds can be understood from the full statement thereof in the opinion of the Court.

The exceptions state, that at the trial before WHITMAN C. J. the presiding Judge permitted the deed of Hamilton to Snow to go to the jury without any explanation, containing a reference to an old bond Seelly had given to Snow, and to which the defendant was not a party, and had no knowledge of the existence of the same, notwithstanding the defendant objected to that portion of said deed. And Benjamin Thompson, one of demandant's witnesses, was permitted to testify, though the defendant objected, to a survey had by Snow, when he held Seelly's bond, and to Snow's giving his notes to Seelly in 1830, for said land now claimed by plaintiff, when no proper conveyance of which the defendant was bound to take notice, was actually made to Snow till September 14, 1835.

The presiding Judge instructed the jury, that the surveyor, Merrill, had made it 49 rods from the fence or dotted line, on the range line to the brook, and if the defendant commenced at the black line, as laid down on the plan, he would get his 47 rods according to his deed, and that would be his boundary in the absence of any permanent monument, existing or erect-

ed by the parties or those under whom they claim, and that they would find upon the whole facts, whether the red line or the black line was the true line.

The jury found the black line, to be the true line.

The defendant filed exceptions to the rulings and instructions of the Judge.

Sawyer and *Gilbert*, for the defendant, contended: —

1. As the tenant was in possession, the demandant must prove a better title in himself, or he cannot prevail. The instruction of the Judge, therefore, was erroneous, because the effect of it was, that if the number of rods, named in the tenant's deed, would not include the premises in controversy, that the demandant might recover, although he showed no title.

2. The instruction conflicted with the well known principle of law, that where there is a variance between the bound named in the deed, and the length of line, that the bound is to govern. Long continued occupation is enough to warrant the jury in inferring, that the bound was in accordance with the occupation. 5 Greenl. 482; 9 Pick. 519; 12 Pick. 532.

3. The Judge erred, in admitting proof of the acts of Snow, while a stranger to the title. Merely having a promise of a deed, gave him no interest in the land.

Mitchell argued for the demandant, contending that the whole question was rightly left to the jury, with appropriate instructions.

The opinion of the Court was drawn up by

Shepley J. — The demandant by this writ of entry, seeks to recover a small tract of land between a black line on the northerly side and a red dotted line on the southerly side, as delineated on a plan made by Abel Merrill. The tenant disclaimed all title to land lying southerly of the red line. Both parties derive their respective titles from Joseph B. Seelly, who first conveyed to the tenant and Martin Edgecomb, on July 16, 1835, by a deed recorded July 18, 1835, a tract of land

"beginning at the brook and bridge on the road leading from school house No. 3, in the town of Topsham, to the little river stream, so called, thence running south 61° east, by said road 81 1-2 rods to a maple tree, thence south 71° west, 76 rods to a stake on the 50 acre range line, thence north 19° west, by said line 47 rods to a brook, thence north-easterly by said brook to the first mentioned bounds, the above described parcel of land to contain twenty-four acres more or less." It is admitted that Martin Edgecomb soon afterward conveyed his interest in that tract of land to the tenant. The maple stump now standing at the easterly end of the red line is apparently the same named in the deed, Seelly to Edward Hamilton, from whom the demandant derives his title, and it appears to have been acknowledged by the present and by former owners as the true monument referred to in their deeds as a boundary of the respective lots. The only difficulty appears to have been to ascertain the monument or bound at the westerly end of the line between the lands of the parties.

It was described in the conveyance of the land owned by the tenant, as "a stake standing on the 50 acre range line." The position of the range line, so called, of the 50 acres, does not appear to have been disputed. That was probably made by Benjamin Thompson, during a survey in the year 1830, of 50 acres from the easterly end of lot No. 34, agreed to be conveyed by Seelly to Simeon Snow. The position of the stake does not appear to have been satisfactorily ascertained. The line from the stump to the stake is stated in the deed to be south 71° west. The plan presented by the surveyor is so imperfect, that the courses of the black and red lines are not stated upon it. The black line is parallel to the demandant's southerly line, which is stated in his deed to be upon the same course south 71° west, but the actual course of that line as measured upon the earth is not stated. The testimony presented does not afford any other means for ascertaining the position of that stake, being the south-westerly corner bound of the land owned by the tenant, than by reference to the length of his line extending northerly from it to the brook,

which in his deed is stated to be 47 rods. By that admeasurement, according to the survey of Merrill, the stake would be ascertained to have stood northerly of the black line, to which the demandant claims.

Upon this aspect of the case, the jury were instructed, "if the defendant commenced at the black line, as laid down on the plan, he would get his 47 rods, according to his deed, and that would be his boundary in the absence of any permanent monument, existing or erected by the parties, or those under whom they claimed; and that they would find upon the whole facts, whether the red line or the black line was the true line." It will be perceived, that no notice is taken in these instructions of the demandant's title to the land claimed by him, or of its legal effect, upon his right to recover it.

The tenant had been in possession of it, for several years before the commencement of the action. The demandant must establish a title superior to that, before he can recover it. He must recover upon the strength of his own title, and not by reason of the defective title of the tenant. His title commences by a conveyance made on July 17th, and recorded on July 20th, 1835, by Joseph B. Seelly to Edward Hamilton. In that deed a maple stump is named as standing at the easterly end of the tract, claimed as a boundary. The line of boundary extends from it, "south 71° west, 76 rods to the range line, thence, south 19° east, 42 rods." There is no monument named as standing in the range line. The only means afforded to ascertain the point of its intersection is the length of the line, exhibiting the widths of the demandant's lot at the westerly end, which is stated in his deed to be 42 rods.

Edward Hamilton conveyed the land to Simeon Snow on September 14, 1835, by the following description: "a piece of land situated in said Topsham, being lot numbered 34 in the north-west corner of said town, and the south-easterly part of said lot number 34, and being 50 acres of the above named lot." There is nothing in this description, from which the

width of the lot or the point of intersection of its northerly line with the range line at the westerly end of it can be ascertained.

Simeon Snow conveyed the same lot to the demandant on November 1, 1839, by the following description: "Beginning at a stake marked as a corner on the Bowdoin line between Martin Hall and Daniel Thompson, thence running south, 71° west, 208 rods, thence, 19° west, 42 rods to a stake, thence north 71° east, 156½ rods to Bowdoin line, thence on said Bowdoin line 70 rods to the bounds first mentioned, containing 50 acres, it being a part of lot numbered 34 on the plan of Topsham." The testimony shows, that the southerly line of the lot on a course south 71° west, and terminating at a beech tree on the range line, was undisputed. By that the south-westerly corner of the demandant's lot was determined. The line extending across the westerly end of it is described in his deed as terminating at a stake standing 42 rods from that corner. The stake, named in the deed from Seelly to the tenant, was, doubtless, the same referred to in the deed from Snow to the demandant. In the absence of all satisfactory proof of the position of that stake in the earth, the length of the demandant's westerly line and the north-west corner of his lot can be ascertained only by the distance of 42 rods, admeasured from his south-westerly corner at the beech tree. This will be the result by the application of the same rule, by which the tenant's westerly line was ascertained, and the south-west corner of his lot determined. And the demandant would fail to establish any title to the part claimed between the red and black lines.

By the application of the same rule to determine the bounds limiting the title of each party, their lands would not adjoin, while it appears to have been the intention of the original owner of both lots, that they should; and to carry that intention into effect, a rule should be applied, which will divide the surplus over the admeasurement named in the deeds, as ascertained to exist by actual admeasurement upon the earth, be-

tween the parties in proportion to the length of their respective lines as stated in their deeds. *Brown* v. *Gay*, 3 Greenl 126; *Wyatt* v. *Savage*, 2 Fairf. 429. This rule would not however become applicable, if the northerly line of lot No. 34 should be satisfactorily established by testimony. In such case, as the conveyance to the tenant does not appear to have included any part of it, and that to the demandant is limited by it, the true northerly line of lot No. 34, would determine the width of the demandant's lot at the westerly end upon the range line.

Exceptions sustained, and new trial granted.

MARINER'S BANK *versus* GEORGE ABBOTT *& al.*

Parol evidence is not admissible, to vary the meaning of a promissory note. If the promise is jointly and severally to pay, it cannot be shown to be otherwise. But when the creditor makes an arrangement with one of several debtors, extending the time of payment of the debt, it is competent for the others to prove by parol evidence, that they are sureties merely, and that the arrangement was injurious to them.

It is a well settled rule of law, that where the creditor, by a contract with the principal, extends the time of payment, upon a sufficient consideration without the consent of the surety, the latter is discharged.

The mere receipt of interest for a stipulated time, from the principal by the creditor, after the note has become payable, is not sufficient evidence of an agreement to give further credit.

THIS case came before the Court, upon the following exceptions.

This was an action of assumpsit on a joint and several promissory note, signed by John Holmes, deceased, and by the defendants, given to the Mariner's Bank, for two hundred dollars, dated October 26, 1841. The note and indorsements thereon, may be referred to.

The note was read to the jury, and here the evidence on the part of the plaintiffs rested.

The defendants then introduced Henry C. Lowell, Esq., as a witness, who testified that about the middle of October,

1841, as near as he could remember, John Holmes, deceased, came to him with a note corresponding in amount to this note, signed by the same parties, payable to the president, directors and company of ——— —— with a blank for the name of the bank to be inserted — thought this was the same note — that Holmes wanted him to get it discounted at a bank in Thomaston, with which witness was connected, but on inquiry he found it could not be done. Mr. Holmes then wanted money, and he lent him fifty dollars, and he, Holmes, kept the note. In about ten days after, he called and repaid the fifty dollars in bills of the Mariner's bank, and as he thought, in a fifty dollar bill. That the defendants lived in Thomaston, where there were two banks, and it was not shown that they knew it had been discounted at plaintiffs' bank, till suit was commenced.

The next witness for the defendants was S. P. Baker, cashier of Mariner's Bank, who brought with him the discount book of the bank. Mr. Baker testified that the note was regularly discounted at the bank, and he believes was handed in by John H. Sheppard, at that time a director in said bank, and that renewals took place in the manner appearing on the discount book of the bank, a copy of which, so far as respects the note in question, is to be made a part of this case. Who made the several payments he could not tell, nor did he recollect who received the money for the note, and that he had no recollection of having given any notice to either of the signers. Said Baker further stated, that as to principal or surety he knew nothing of it otherwise than was apparent upon the note itself.

The deposition of John H. Sheppard of Boston was introduced by defendants, which is made a part of the case, and may be referred to by either party without copy.

Defendants also introduced Arnold Blaney, who testified that Mr. Holmes died in the summer or fall of 1843; that commissioners were appointed Jan. 8, 1844; that his estate was rendered insolvent the same year; and it appeared by his testimony or by admission, that the note was not presented to or allowed by the commissioners and a dividend decreed.

Wm. F. Stimpson was called by defendants, who testified, that Mr. Holmes had until his death a coach, horses and a valuable library, which he used as his own.

No evidence was introduced of any agreement on the part of the bank not to sue at any time after said note came to maturity, unless the renewal of said note be considered evidence.

On this evidence, after argument by counsel, WHITMAN C. J., who presided at the trial, instructed the jury, that they might draw inferences from facts proved, so far as might be reasonable; that they would determine from the evidence in the case, whether this was the same note exhibited to Mr. Lowell, and if it was, whether it was presented to the plaintiffs' bank, and discounted for Holmes' benefit, and that the defendants were his sureties thereon, and whether he made the payments and obtained the renewal thereof without any knowledge thereof on the part of the defendants, and that the plaintiffs kept the note without giving the defendants any notice till the commission of insolvency on Mr. Holmes' estate was closed and without presenting the claim to them for allowance; and if they found these facts in the affirmative, they might find that the defendants never promised. And the jury so found.

To all which ruling and instructions in matter of law, and admission of testimony, the plaintiffs excepted.

Several indorsements were made upon the note, of which this is one: — "1842, Sept. 9, Rec'd $1,50 to renew this balance 87 days from Oct. 12." Another was this: — "1842, May 25. Balance renewed 57 days from 21st instant. 100,00."

E. Foote, Jr. for the plaintiffs, contended, that as the note was perfectly plain and unambiguous in its terms, and was the joint and several note of each signer, that parol testimony was inadmissible to change the whole character of the written evidence; and to alter a joint and several note, and make it read as a note signed by principal and sureties. 2 Stark. Ev. 544, 549, 551.

Oral testimony is not admissible to contradict, or materially

affect by way of explanation any written contract. 11 Mass. R. 27; 7 Mass. R. 522; 1 Greenl. on Ev. § 276; 4 East, 135; 3 Greenl. 399; 10 B. & Cr. 578; 6 Hill, 219.

G. Abbott, for the defendants, said that although it was true, that on the face of the note all appeared as principals, yet it was competent for the defendants, to show by other evidence the real situation of the signers, and that the present defendants were merely sureties — and that this fact was known to the plaintiffs. *Harris* v. *Brooks*, 2 Pick. 195; *Carpenter* v. *King*, 9 Metc. 515.

Such delay of payment, given by the bank to the real principal, as appears in this case, without the assent of the sureties, discharges them. *Guilford* v. *Allen*, 3 Metc. 255; *Greely* v. *Dow*, 2 Metc. 176; *Hutchinson* v. *Moody*, 18 Maine R. 393; 6 Peters, 250; 8 Pick. 122; 23 Maine R. 156.

Ruggles argued on the same side.

Wood, for the plaintiffs, replied.

The opinion of the Court was drawn up by

WELLS J. — This is an action, upon a promissory note, dated Oct. 26, 1841, signed by the defendants, and another now deceased, insolvent.

The defendants contend they were sureties, and that the bank without their knowledge, upon the application of the principal, extended the time of payment, the interest for the extended time having been paid in advance.

There was nothing on the note, indicating that the defendants were sureties.

The jury were instructed, that they might draw inferences, from facts proved, so far as might be reasonable, that they would determine from the evidence, in the case, whether this was the same note, exhibited to Mr. Lowell, and if it was, whether it was presented to the plaintiffs' bank, and discounted for his benefit, and that the defendants were his sureties thereon, and whether he made the payments, and obtained the renewal thereof, without any knowledge thereof on the part of the defendants, and that the plaintiffs kept the note, with-

out giving the defendants any notice till the commission of insolvency, on Mr. Holmes' estate was closed, and without presenting the claim to them for allowance, and if they found these facts, in the affirmative, they might find the defendants never promised, and the jury found for the defendants.

It is objected in argument, that Mr. Lowell's testimony was inadmissible, but no objection was made to it, at the trial. So far as it went to show the identity of the note in suit, with that which was exhibited to him, and that the defendants were sureties, it was clearly admissible. The acts of the person desiring to obtain the discount, in relation to the note, tended to show, that he was principal. The loan of the fifty dollars was unimportant, but the payment in bills of the Mariner's Bank, might indicate where, and by whom the money was obtained.

The name of the bank, at which the loan was expected to be obtained, was not inserted in the note, when it was first signed. It was made payable to the president, directors and company of ———. This circumstance evinces, that the defendants did not know, at what bank, the note would be discounted, and that they confided to the holder the power of filling up the blank. They are bound, by such an act of confidence, and the note is obligatory upon the parties. Bayley on Bills, 145; *Putnam* v. *Sullivan*, 4 Mass. R. 45.

Where there are two or more promisors, the presumption, it is said, is, that they are equally liable to pay, but this presumption may be rebutted, not only between the debtors themselves, but between them and the creditor. *Harris* v. *Brooks*, 21 Pick. 195. And it is also said, that it is a fact collateral to the contract, and no part of it, showing the relation, in which the promisors stand to each other, and if it can be inquired into, to adjust the relations of the debtors to each other, it can be to determine the relation of the creditor to each debtor, where the fact becomes material to the respective rights. *Carpenter* v. *King*, 9 Metc. 511.

It is quite apparent, that such proof, when introduced, to adjust the rights of the promisors between themselves is collater-

al to the contract, but when it is extended to the rights between them and the promisee, its collateral character disappears. Parol evidence is not admissible to vary the meaning of a promissory note. If the promise is jointly and severally to pay, it cannot be shown to be otherwise. All the promisors apparently stand in the same relation to the promisee, and no one of them would be permitted to show, that he was not a joint and several promisor.

But when the promisee undertakes to engraft some new provision on the note, by an agreement with one of the promisors, the others have a right to object, if they are injured by it. Where the creditor makes an arrangement with one of several debtors, extending the time of payment of the debt, the others, by proving that such arrangement is injurious to them, because they are sureties, do nothing to impair the validity of the original contract, or to vary its terms. The original contract remains in full force and effect. But the right, to engraft the new matter, is defeated by the proof of a relation not exhibited by the note. The testimony, to show that the defendants were sureties, was properly admitted.

It appears to be a well settled rule of law, that where the creditor, by a contract with the principal, extends the time of payment, upon a sufficient consideration, without the consent of the surety, the latter is discharged. *Leavitt* v. *Savage*, 16 Maine R. 72; *Hutchinson* v. *Moody*, 18 Maine R. 393; *Greely* v. *Dow*, 2 Metc. 176; *Gifford* v. *Allen*, 5 Metc. 255.

If such a contract cannot be enforced in law by the principal, it may be in equity, and is therefore prejudicial to the rights of the surety. The surety acquires a legal right, to set up, in defence, those acts between the creditor and principal, which are detrimental to him, and whatever will discharge a surety in equity will be a good defence at law. *Baker* v. *Briggs*, 8 Pick. 122.

But there must be a *contract or agreement* between the creditor and principal. The mere receipt of interest for a stipulated time, from the principal by the creditor, after the note has become payable, it has been decided in this State, is not suffi-

cient evidence of an agreement, to give further credit. *Freeman's Bank* v. *Rollins*, 13 Maine R. 202; *Strafford Bank* v. *Crosby*, 8 Greenl. 191; *Crosby* v. *Wyatt*, 23 Maine R. 157.

A similar doctrine is held in Massachusetts. *Central Bank* v. *Willard*, 17 Pick. 150; *Boston Hat Manufacturing Co.* v. *Messinger*, 2 Pick. 224; *Oxford Bank* v. *Lewis*, 8 Pick. 458; *Blackstone Bank* v. *Hill*, 10 Pick. 129.

But in the case of *Crosby* v. *Wyatt*, 10 N. H. R. 318, the reception of interest in advance was considered as *prima facie evidence* of a binding contract, to delay the time of payment.

It is unnecessary to inquire which rule is the more reasonable, for the law has been so long settled, on this subject, in our State, that it would be unwise to change it.

In the present case, there was no proof of any other agreement on the part of the bank, to extend the time of payment, than what was manifested by the indorsements. But the indorsements on the note in several instances, state the reception of the interest for a renewal of the balance, and the length of time for which it was taken. The language used in one case where the interest was paid, was, "for a renewal, &c." in three others, "to renew the balance, &c.," and in two others, "balance renewed, &c." This language very plainly indicates the intention of the parties, and contains all the essential elements of a contract or agreement, and is sufficient to authorize a jury to find such contract or agreement. It is not a mere naked reception of interest, but an absolute and positive declaration of the purpose, for which it is received, and the precise length of time during which, the payment is extended.

But the note in suit did not indicate, that the defendants were sureties. It was not submitted to the jury to find, whether the plaintiffs, at the times of the extension, knew the defendants were sureties. If they had all been principals, an agreement with one to extend the time, would not have discharged the others. Nothing but a technical release, under

seal, discharging one of several promisors can operate to discharge the others. And a covenant, not to sue for a limited time, can never be pleaded as a release by any one. *Walker* v. *McCulloch*, 4 Greenl. 421. *Shaw* v. *Pratt*, 22 Pick. 305.

If a contract to extend the time of payment would be effectual between the creditor and one of the principals, making it; it could not be obligatory upon the others. Their co-promisor could not engraft such a provision on the original contract without their assent, and to their detriment, and they be held to conform to such new provision. It is the duty of each principal to pay, and an agreement, between one of them and the creditor, cannot affect the others, unless they assent to it, or it is evidently so beneficial to them, that they may be presumed to assent to it.

If the plaintiffs believed the defendants to be principals, they might be well satisfied no hazard would be run, by making the agreement for the enlarged time of payment, although they might be well aware, that a different rule would apply to sureties. There was no designation of the character as sureties, in which the defendants signed the note. The bank ought not to be subjected to loss by this omission; if any one should suffer for it, it should be the defendants. If the bank made the arrangement, with a knowledge, that the defendants were sureties, then the defendants should be discharged, but if it had no knowledge of that fact, and it viewed them in the same light, in which they presented themselves upon the face of the note, and acted towards them as such, and nothing was done, which would discharge them as principals, they should be holden to pay the note.

The inquiry, whether the bank knew the defendants were sureties, was not presented to the jury; it is one of the facts, which should have been found affirmatively, to authorize a verdict for the defendants, who ought not to deprive the bank of its property, by claiming to be treated in a character, different from that, in which they presented themselves.

The instruction, that the jury would determine whether the note was presented to the bank, and discounted for his

(Holmes') benefit, could not be considered as drawing the attention of the jury to the inquiry, whether the plaintiffs knew that the defendants were sureties. It probably was intended to direct the jury to the evidence, to determine whether the note, which was not made payable to any bank, when it was signed, was discounted for those, who were lawfully entitled to receive the money, and not for any one, who had improperly acquired the note.

But if something different was intended, the expression "discounted for his benefit" does not very clearly imply, that Holmes was principal, and the other defendants were sureties. All the defendants were apparently benefited by the discount, and the benefit to one does not exclude the idea of a benefit to all; it does not imply an exclusive benefit to Holmes alone. Principals might make an arrangement, before the discount of the note, or before the bank had paid the money, and the one receiving the money, might have previously paid to the other signers, their portion of it. And the reception of the money by one would not therefore imply, that he was principal, and the others sureties, nor that if discounted for the benefit of one, that it was not also for the benefit of the others.

It is not within our province to determine whether there is sufficient testimony, developed in the case, for us to be satisfied, that the bank knew that the defendants were sureties.

Believing the instruction should have been more clearly expressed, that the jury must find a knowledge on the part of the bank, that the defendants were sureties, in addition to the other material facts, before they could return a verdict for the defendants, a new trial must be granted.

Exceptions sustained.

Inhabitants of Thomaston *versus* Inhabitants of Warren.

If supplies are furnished, by the overseers of the poor of a town, to a person alleged to be a pauper having a settlement in another town, their opinion or adjudication that the supplies furnished were necessary, although made in good faith, is not conclusive of that fact in a suit to recover the value of such supplies.

Exceptions will not be sustained, on the ground that the presiding Judge erred in declining to give a certain instruction to the jury on request, unless the exceptions show, that the instruction requested was applicable to the case.

If a part of an instruction requested by counsel, upon a particular point at a trial, be correct, and a part erroneous, it is not the duty of the Court to give such part as may be correct, but the whole request may well be declined.

Trial before Whitman C. J.

Copy of the exceptions.

This was an action brought for aid rendered Isaac Brackly and family, alleged to have had their settlement at the time in Warren.

The general issue was pleaded and joined.

Admissions were made by the parties for the purposes of this trial, in writing, which are referred to.

The overseers of the poor for Thomaston, during the time referred to in the writ, were called, and testified that they furnished the aid named in said writ, and in good faith, to the parties and from a sense of duty as overseers, and not to intercept his gaining a settlement in Thomaston.

Several witnesses were introduced by the defendants, relative to the furnishing of said aid, tending to show that it was not necessary or in good faith; and several witnesses by the plaintiffs, that it was in good faith and necessary.

The Court instructed the jury as per paper hereunto annexed.

The verdict was for the defendants, and the plaintiffs filed exceptions to the rulings of the Court, and to the omission to rule as requested.

The following is a copy of the requests by the plaintiffs for instructions, and of the instructions given.

1. The Court is requested to instruct the jury, that the adjudication of the overseers of the poor, acting in good faith, upon the question of whether aid is necessary, is binding upon the parties.

This was not given.

2. That the jury are not to presume fraud or bad faith on the part of overseers of the poor, but it should be clearly shown.

Instruction. May be shown by circumstances, and if satisfied from them of the fraud, they may find it to exist.

3. That it is not necessary that a person in distress should apply for relief as a pauper, it is sufficient that he receives aid and has the benefit of it.

This was not given.

4. That if the jury find the aid was rendered, and in good faith, by the plaintiffs, then so far they are entitled to recover.

Instruction. Not unless furnished in a case within the purview of the statute, viz. fallen into distress, and in immediate need of relief.

5. That a person owning property enough for his support may still be in need of relief, and if he receives it from the overseers of the poor as such, he is for the time being a pauper within the meaning of the statute.

Given, qualified by the word "immediate" preceding "need."

E. Wilson, for the plaintiffs.

Upon the point "that the adjudication of the overseers of the poor, acting in good faith, upon the question of whether aid is necessary, is binding upon the parties," the plaintiffs contend, that the 29th section of c. 32, Revised Statutes, making it the imperative duty of the overseers of the poor, to provide for the immediate comfort and relief of all persons, when they shall fall into distress and stand in need of immediate relief," contemplates that they are to be the judges, whether persons are in need of immediate relief, and thus acting in good faith,

their decision is binding upon the town in which the pauper has a legal settlement, as well as upon that in which they act. Their acts are binding upon their own town, and to allow them the same power relative to other towns, would be giving them equal power, in cases in which, generally, they would have less improper influences, actuating them. There is no provision made by statute, to ascertain, first, if a person has fallen into distress and stands in need of immediate relief, save by the adjudication of the overseers of the poor of the town where such person lives. The statute provides for the election of three or more overseers of the poor in each town, who are to be sworn to the faithful discharge of their duty, and directs that they "*shall* also provide for the immediate comfort and relief of all persons," &c. Why thus imperative for immediate action, unless their acts are of binding effect? It is a fair construction of the statute that the power to bind, follows the imperative duty and full power to adjudicate upon the question of need of aid. The statute clearly makes it their duty and gives them the power to thus adjudicate, and makes no provision for appeal; and if they contract for the support of a pauper, the town is holden. They are elected to have "the care and oversight" over all the poor residing in their town. The 29th sect. is as imperative in the one case, as the 5th sect. is in the other. In the one case it is to be done 'at the cost' of their own town, and in the other "the expenses thereof may be sued for and recovered in an action at law, against the town liable therefor." It is a summary way, wisely provided by statute, that the wants of the poor may be at once supplied. The tendency of not allowing overseers of the poor to bind, by their acts, another town, in case of aid rendered their poor, would be to prevent that timely assistance which justice might require. If overseers of the poor were to jeopardise the interests of their own town, in aiding the poor of other towns, they might withhold assistance, when they should not. Overseers of the poor are the best judges of the question of need. Theirs is a personal examination and knowledge — a thousand things are or may be seen, that cannot be well and truly rep-

resented. In this case, the overseers of the poor of Thomaston "testified that they furnished the aid named in the writ in good faith to the parties, and from a sense of duty as overseers;" and the defendant town should have been barred from going into the question of the necessity of the aid, except upon the ground of fraud. *Poplin* v. *Hawke*, 8 New Hampshire R. 305.

Upon the point, "that it is not necessary that a person in distress should apply for relief as a pauper — it is sufficient, that he receives aid and has the benefit of it," the plaintiffs contend, that the ruling of the Court was wrong — that the statute nowhere makes it necessary, that the suffering party shall apply for relief. The duty of the overseers arises when distress exists and relief is necessary. *Corinna* v. *Exeter*, 13 Maine R. 321.

E. & S. E. Smith, for the defendants.

The first request is, that the jury be instructed "that the adjudication of the overseers of the poor, acting in good faith, upon the question whether aid is necessary, is binding upon the parties." That is, that the overseers of the poor of the plaintiff town shall bind the defendant town conclusively upon this question.

This is to establish a tribunal to decide upon defendants' rights, in whose selection they have no voice, who are interested in the result, and from whom there is no appeal, unless it can be shown that they acted in good faith, and this they are permitted to disprove by their own declaration. The mere statement of such a proposition, seems sufficient to negative the conclusion. The question whether aid is necessary, is an important one in this kind of suits; one which necessarily arises in almost every case of this nature; and sometimes the only one on which the case turns. It is also so connected with the other questions which arise, whether the individual be a pauper, or whether he be in circumstances which the law requires to exist before he can be supported by one town at the expense of another; involving questions of law as well as fact; that it may well be asked, why not carry out the principle

contended for and constitute the same tribunal judges of the questions of settlement, notice and all other questions arising in the case. If established as plaintiffs contend, it would certainly give the overseers of the poor power to make any individual a pauper, whether he were so or not, if upon casual inquiry or in any other way they happen to suppose him destitute.

The third request is, that the Judge should instruct the jury "that it is not necessary that a person in distress should apply for relief as a pauper, it is sufficient that he receives aid and has the benefit of it." This instruction, it is said, was not given.

The doctrine of instructions we take to be as laid down in a late case in Massachusetts by C. J. Shaw, which I extract from Law Reporter, of Feb. 1847. "It is the duty of the Judge to instruct and direct the jury authoritatively, upon such questions of law as may seem to him to be material for the jury to understand and apply, in the issue to be tried. And he may also be required so to instruct upon any pertinent question of law within the issue, upon which either party may request him to instruct." It follows, then, that the Court may refuse to comply with a request to instruct for either of two reasons: — 1st, that the instruction requested is not law; 2d, that it is not pertinent to the issue. And we contend that upon either of these grounds the Court might have refused to give the instruction named in the third request. We contend the law to be that, in ordinary cases, the overseers of the poor should wait until application is made to them by the pauper, before proceeding to render him assistance. Nor does the case of *Corinna* v. *Exeter*, 13 Maine R., militate against this view. There the person was sick, in a situation which rendered the application impossible; the head of the family was absent, and the family in extreme and urgent need of assistance before his return.

The overseers of the poor are not required nor do they in fact, keep themselves on the alert, to see what citizens or strangers are in their town, in circumstances requiring imme-

diate relief. If any one be in such circumstances, it is usual for him directly or indirectly to make application. Extraordinary instances, indeed, like the one already referred to, (13 vol. Maine Rep.) where the application is impossible, may be exceptions. And it is true that in that case the Court use language which is general in terms and would seem to include every case of the kind. But in construing their meaning regard must be had to the point before them for decision, which was, whether in that instance an application was necessary.

But it is apprehended the Court will hardly be called to take this view of the case, if, as we contend, the instruction requested was totally inapplicable to the case. We have cited the decision of C. J. Shaw, in support of the position that the Court might well refuse to instruct the jury in a matter not pertinent to the issue, i. e. not the issue presented by the pleading alone, but by the pleadings in connection with the evidence.

The general issue was pleaded and joined, but it can hardly be said that the Court would therefore be bound to instruct the jury upon the numberless principles involved in that issue, unless presented by the proof. The issues presented in this case at the trial, appear to have been, whether the overseers acted in good faith and whether aid was necessary. No other questions were raised so far as can be judged from the exceptions.

It does not appear that any testimony was offered on the one side to prove, or on the other to disprove, an application made to the overseers by the alleged pauper; or that it was a material point on which the jury were called to pass. So far as appears, it was totally irrelevant. Had such a question been raised at the trial, it should have been set forth in the exceptions with the testimony applicable, as a foundation for the request, so that the Court, having all the facts before them, might judge of the relevancy or applicability of the proposed instruction; for in this way only, can they decide upon the reasonableness of the request.

It has been decided more than once, that the Court have no power to go out of the bill of exceptions for facts on which to base their judgment. 11 Maine R. 353. And certainly plaintiffs wishing to set aside a verdict ought to furnish, and must be supposed to have furnished every thing making for them which could in any way affect the decision of the case. 23 Maine R. 210.

For every thing that appears here the requested instruction was totally inapplicable, and the Court can hardly be held in the wrong for omitting to lay down a principle which, if true, had no applicability, and burden the minds of the jury with that which could not enter as an element into the decision of the case. 10 Maine R. 224; 11 Maine R. 353.

But again, supposing it to be true that the first part of the 3d request is founded in correct legal principles, and that application need not be made by the pauper; it is equally certain that the latter part of the same is not law. It cannot be contended that "it is sufficient that he receives aid and has the benefit of it." Many other things are necessary. The Court therefore could not have given the desired instruction as a whole, a part of it being manifestly contrary to law. Nor is it conceived to be their duty to separate the two parts, more especially when the latter part being the affirmative part of the request, seems to be that more especially intended by counsel to be insisted upon at the trial.

Moreover, we contend that in the Judge's charge under the 4th request is virtually embraced all that could be consistently given, even under the views of the plaintiffs' counsel.

The opinion of the Court was drawn up by

TENNEY J. — In the trial of this action, which was to recover the value of aid furnished to certain persons as paupers, alleged to have their settlement in the town of Warren, the Judge was requested to instruct the jury,— 1st. That the adjudication of the overseers of the poor of Thomaston, acting in good faith, upon the question, *whether aid was necessary*, is binding upon the parties. 2d. That it is not necessary, that

a person in distress, should apply for relief as a pauper, it is sufficient if he receives aid, and has the benefit of it. Under another request, that the Judge would instruct the jury, if they found the aid was rendered, and in good faith, by the plaintiffs, then so far they are entitled to recover, he remarked to the jury, "not unless furnished in a case within the purview of the statute, viz: — fallen into distress and in immediate need of relief." Exceptions were taken to the refusal to instruct, according to the first and second requests; and also on other grounds, which were not relied upon at the argument, and it is unnecessary to consider them.

1. The plaintiffs found their claim upon the Rev. Stat. c. 32, sect. 29, which provides that overseers in their respective towns, shall provide for the immediate comfort and relief of all persons, residing or found therein, not belonging thereto, but having lawful settlements in other towns, when they shall fall into distress, and stand in need of immediate relief; the expenses whereof, incurred within three months, next before written notice, given to the town to be charged, may be sued for, and recovered by the town incurring the same, and against the town which is liable therefor in an action at law. It is insisted for the plaintiffs, that when their overseers furnished the relief to the paupers, having their settlement in Warren, in good faith, it was an adjudication by them of the existence of the necessity, which required them to act, and to supply their wants, and that this judgment is conclusive upon the parties.

In a case, where relief is given, by the overseers of one town to a person having his lawful settlement in another, and the facts justify and require it under the statute referred to, the consequences are important both to the pauper and to the town of his settlement. He may be deprived of some of his rights as a citizen. He loses the right of suffrage; and a residence in a town, unless it has continued for five years before the relief is given, is so far interrupted, that it constitutes no part of the time necessary to gain a settlement therein. And this result may be brought about, when the poor person had

no opportunity of being heard upon matters, which so essentially affect him, for it is not always necessary that he should know that his wants are relieved at the expense of the town. The town in which the lawful settlement of the pauper is established, is eventually liable for expenses properly incurred by the town where he is found; and has no means provided by law, which will enable it to object to the expenses, prior to the time, when the aid is given. Such effects, we cannot presume, were intended by the authors of the statutes, unless upon a fair construction, such a design is manifest, to result from the acts of the overseers alone.

The overseers of the poor have a power, as officers of the towns, which elect them, to take charge of the poor, who are chargeable to their respective towns, in their discretion, at the cost of the towns. Rev. Stat. c. 32, sect. 5. But the language in the 29th section is different. Under the latter section, the overseers act as the agents of their respective towns, and the towns are to be the parties to actions brought for the reimbursement of expenses incurred against those, where is the settlement of the paupers; and if the overseers conduct with good faith, and do not go beyond the scope of their authority, their acts are those of their towns. But they cannot be regarded as the officers or agents of other towns, in which persons aided by them have their lawful settlement; and the clearest and most unequivocal language would be necessary to satisfy the mind, that, in a suit in favor of a town for supplies, alleged to be so furnished, it was intended that the overseers thereof, interested in the event of that suit, should be a tribunal, whose judgment, rendered without notice, should be conclusive upon the other party. But the statute will not admit of the construction contended for. In furnishing aid to a pauper, having his settlement elsewhere, the overseers like all other town officers, act as such, and if therein, they conduct honestly, their towns are bound; but it was never intended, upon a fair construction of the law, that they became a judicial tribunal, whose acts should have the authority of judgments. The liability of

the town sought to be charged, is not to depend, according to the terms of the statute, upon the opinion of the overseers, however correct it may be, or however honestly entertained, that the relief was furnished to a proper subject, but upon the *fact*, that the person provided for, had fallen into distress and stood in need of immediate relief.

It is believed, that under similar provisions in Massachusetts, and this State, in practice, it has always been regarded competent for defendant towns to deny the necessity of the supplies, which were alleged to have been furnished by those, which brought suits to recover compensation therefor. *Brighton* v. *Corinna*, 13 Maine R. 321.

The Rev. Stat. c. 32, § 35, which was repealed by act of Aug. 1846, provided another mode, by which among other objects, the town, which had relieved a poor person of another town, in his distress, might obtain the value of the supplies furnished, and this is by complaint to a justice of the peace, or to the District Court; and upon a trial the justice or Court was authorized to determine the expenses incurred by the town making the complaint, if the other party was found liable. It cannot be admitted, that the overseers of the town, which commenced a suit at law, for such expenses, were the conclusive judges of the necessity, when they were clothed with no such power, if resort was had to a complaint, when that mode was open to them.

2. If there were facts in evidence, which would have been the foundation of the instruction called for in the second request, the refusal of the Judge might have been erroneous, so far as regards the first clause, standing detached from that which follows. But unless there was no evidence, that an application was made by the pauper to the overseers, or unless there was involved in the trial a question whether such application were made or not, no occasion presented itself for such instruction; and the Court are not required to give instruction upon a state of evidence not exhibited. Before the plaintiffs can claim to have their exceptions sustained on this ground, the case must show so much of the evidence, as to satisfy the

Court, that the instruction was properly demanded. It not appearing, that such a point could result from the evidence adduced, the refusal cannot be regarded as incorrect. If however the case did exhibit evidence directly showing that such a question of fact might have been presented to the jury, the refusal cannot be considered as erroneous, when the whole request is taken together. The request implies, that the counsel for the plaintiffs contended for the proposition, that all, which was necessary to entitle them to recover, was proof that aid was given by them to the pauper, having his settlement in Warren, and that the pauper being in distress, received the benefit thereof. If all the facts implied by this proposition were established, they would not render the defendants liable, inasmuch as they all may be true, and the pauper might not have stood in need of *immediate relief*, which is essential to a right of recovery of damages. And the jury could not have mistaken the meaning of the Judge, for he remarked under the next request for instruction, that, it was necessary for the maintenance of the action, that the necessity should be such as to call for "immediate relief." *Exceptions overruled.*

Proprietors of South-West Bend Bridge *versus* Jacob Hahn.

If a grant of a charter be made, authorizing the building of a bridge, and there is contained in it a reservation or condition, with a view to the particular interest of an individual, such as exhibiting in view the rates of toll, he may avail himself of the omission, in defence of a suit against him to recover the penalty incurred by passing the bridge with the intent to avoid the payment of toll.

But if such grant be made on conditions which would not be for the particular benefit or accommodation of an individual, such as building the bridge in a different manner from that stipulated in the charter, the Legislature alone can interfere and inquire whether the condition has been performed; and an omission to comply strictly with the condition, cannot be set up by an individual as an excuse for his own violation of the provisions of the act.

Where one acts as toll-gatherer, and as such, demands toll of a person passing the bridge, and his acts are adopted by the corporation, such person passing the bridge, with the intent to avoid the payment of toll, cannot object in defence, that the toll-gatherer was not legally chosen or appointed.

In an action to recover such penalty, if the plaintiffs are described in their writ, as the "Pro. S. W. B. Bridge, a corporation established by law, in Lisbon, in our county of Lincoln," in which county the action is brought, such statement must be taken to be true, on the trial of the action, where the general issue only is pleaded.

This case came before the Court upon the following report by Redington District Judge.

"Debt to recover a penalty for passing plaintiffs' bridge with intent to avoid payment of the legal toll, contrary to Rev. Stat. chap. 80, sect. 35.

"The writ and pleadings may be referred to. The cause was opened to the jury; certain questions of law arose, and the parties agree, that the Judge should report the case to the S. J. Court for their decision.

"It was proved as follows, viz: — In 1819, certain persons were incorporated by the company name aforesaid, with power to build a bridge from Lisbon to Durham, across the Androscoggin river. In the same year, the corporators with their associates accepted the charter, and were duly organized, and erected a bridge under the charter. The corporation was kept

up by the choice of officers, &c. annually until 1838, as appears by a book, proved on the trial to be the book of records of said corporation, to which book reference may be had for a copy of the charter, as well as for the doings of the corporation, down to the year 1838. The first bridge was 32 feet wide, as the charter required.

"There was a provision in the charter, that the corporation might exact tolls, on condition (among other things,) that when they should rebuild their bridge in whole or in part, it should be made 25 feet wide. The exact words of that provision and of the condition thereof, are as follows: —

"Be it further enacted, that for the purpose of reimbursing said proprietors, the moneys by them expended, or that may hereafter be expended in building and supporting said bridge, a toll be, and is hereby, granted and established for the sole benefit of said proprietors, according to the rates following, viz: (Here the rates were given.)

"And at all times when the toll-gatherer shall not attend his duty, the gate shall be left open, and the *said toll shall commence on the day of opening said bridge for passengers*, and shall continue for the benefit of said corporation forever, *provided*, that after the term of twenty years, the rate of toll shall be subject to the regulations of government. *And provided also*: — that the proprietors shall build the said bridge twenty-five feet wide, when it shall be rebuilt in the whole or in part, or at any time when the government shall so direct, and the proprietors at the place or places where the toll shall be received, shall erect and keep constantly exposed to view, a sign board with the rates of toll of all tollable articles fairly and legibly written thereon, in large or capital letters."

The charter may be referred to by either party.

The bridge went off in two or three years after it was first erected. It was rebuilt soon afterwards, but was made less than 25 feet wide. It went off again in January, 1839. Afterwards, in 1839, the corporation sold the whole franchise to Merrill & Morse, for whose use this action is brought. Mer-

rill & Morse rebuilt the bridge in 1839 or 1840, but made it less than 25 feet wide.

"Since 1838, it does not appear that any officers of the corporation have been chosen, or any meetings held.

"By an act of 1846, the corporation are exempted from building the bridge more than 22 feet wide. That act is to be made a part of the case.

"The bridge went off in 1846, before the passage of that act. Preparations had been made for rebuilding.

"About 100 feet of the bridge was carried off, about the year 1837; it was immediately repaired, but though the caps were made twenty-five feet long, *the travel was laid at twenty-two feet.*

"On the 29th of December, 1845, the corporation having always been in the habit of taking toll, and having a gate and a board exhibiting the rates of toll, as prescribed by law, the defendant having no peculiar exemption from the payment of toll, and at a time when the toll-gatherer was attending to his duty, passed the bridge with an intent to avoid the payment of the legal toll, though the toll was demanded of him, when within two or three rods of the gate, by the toll-gatherer.

"The following questions of law were raised by the counsel.

"The bridge being partly in the county of Lincoln, and partly in the county of Cumberland, and the defendant having passed it in the direction from Lisbon to Durham, defendant contends that the offence was not completed till defendant was in Cumberland, and that therefore, the action cannot be sustained in Lincoln. And the first question is, whether the action being brought in Lincoln, is to fail on that account.

"The second question of law is, whether the plaintiffs are precluded from recovering, because no officers appear to have been chosen, or meetings of the corporation held since the year 1838.

"The third question is, whether the action is to fail because the bridge when rebuilt was not made so much as 25 feet wide.

"The next question, is as follows: If by reason of the omission to choose corporation officers, or to hold meetings since 1838, or by reason of the bridge being rebuilt less than 25 feet in width, the plaintiffs would be precluded from recovering, would the act of 1846 remove these impediments so as to entitle plaintiffs to recover.

"If, upon the decision by the Supreme J. Court of the foregoing questions, the plaintiffs are entitled to recover, the defendant agrees to be defaulted, and that judgment be rendered against him for $5, debt, and for costs, otherwise plaintiffs agree to become nonsuit with costs for defendant.

"Asa Redington, presiding Judge."

In the writ the plaintiffs were described as the "Proprietors of the south-west bend bridge, a corporation established by law in Lisbon, in our county of Lincoln."

The general issue was pleaded and joined.

The act of 1846, referred to in the report, in addition to the act of incorporation, provides, that the fourth section of the act of incorporation "is hereby so varied and amended, as not to require the bridge to be built more than twenty-two feet wide."

Groton, for the plaintiffs, contended, that the report shew, that the plaintiffs had done all that was required of them by the act of incorporation so far as to enable them to take toll. The plaintiffs prescribed the rates within the limits of the charter, and the defendant has no right to pass their bridge without payment of the toll. It is for the State alone to say whether every particular has been strictly and to the letter performed. It is but a poor defence, that "the defendant wants a guage of twenty-five feet to run his toll on."

Tallman, for the defendant, contended: —

1. That the toll must be demanded at the toll-gate.

2. The suit cannot be maintained, because the plaintiffs have not performed the conditions on which the right to take toll depended. The corporation has no right to take toll, until they have built the bridge according to the provisions of the

charter. That is a condition precedent to the right to take toll. This is not a question, whether the defendant has a right to pass the bridge without the consent of the proprietors, but whether the plaintiffs have placed themselves in a condition to exact and recover a penalty for passing the bridge without payment of a toll, which can only be done, by bringing themselves strictly within the provisions of the act.

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

WHITMAN C. J. — The plaintiffs were incorporated in 1819, for the purpose of erecting and maintaining a toll bridge across the Androscoggin river, between the towns of Lisbon and Durham; and they soon after erected a bridge in conformity to the terms of their charter; and exacted and received toll, as therein provided, of those who passed the bridge, until it was carried away by a freshet. It was again rebuilt, but of a less width that twenty-five feet. It was, however, of the same width as the former. The toll provided for in the charter, was granted with sundry provisos; one of which was, that, in case the bridge should be rebuilt, in whole or in part, it should be twenty-five feet wide, the first having been authorized to be built of the width of twenty-two feet.

This was a grant of a franchise. It was accepted by the plaintiffs. The right to it vested in the grantees, subject to a condition subsequent, and not precedent. It formed a contract between the State and the plaintiffs. Although the right had vested, the State might resume it, if the plaintiffs should not perform the conditions upon which the grant was made, or should abuse the privileges granted. Had the defendant a right to pass the bridge free of toll, because the last erection was no wider than the former? Generally speaking no one but the grantor, in a case like the present, would have a right to resume a grant. He might waive the performance of a condition, or think proper to overlook a misuser of the privileges granted. If, however, the reservation or condition was with a view to the particular interest of individuals, they might

avail themselves of the breach, as in the case of there being no toll board exhibited to view, with the rates of toll on it; or the closing of the gate when no toll-gatherer was present to receive the toll. But grants are often made by the Legislature upon conditions, such as individuals, not parties to the grant, could have no right to avail themselves of. Suppose the grant in question had been made upon condition, that a certain portion of the toll should be paid into the treasury of the State, annually, and there had been an omission to comply with the condition; no individual could refuse to pay his toll, on passing over the bridge, on that account. A great variety of regulations might be introduced into a charter, which would not be for the particular accommodation of individuals, the non-observance of which would afford them no ground of complaint; or authorize them to treat the grant as inoperative. The grantor in such case would alone have authority to interfere or not at his option. A regulation, as to how wide a bridge shall be, is of this description. The defendant was not particularly interested in having the bridge built twenty-five, instead of twenty-two, feet wide. A width of twenty-two feet was sufficient for his accommodation. The Legislature so determined, and every one else could have seen that it was so, when the first bridge was built. The Legislature, doubtless, contemplated, that many years would elapse before it would become necessary to rebuild the bridge; and that, during that time, the width of twenty two feet would be amply sufficient for the accommodation of the public. It happened, however, to be but about two years before the rebuilding, by reason of a providential occurrence, became necessary. Who can believe, in such case, that the Legislature would have deemed it reasonable to hold the plaintiffs bound to rebuild, otherwise than they did, particularly, when it is seen that by an act passed in 1846, they released the plaintiffs from the liability to rebuild it more than twenty-two feet wide?

As to there having been no choice of officers, since 1838, the statement, from the court below, is, that, "on the 29th Dec. 1845, the corporation, having always been in the habit

of taking toll, and having a gate, and a board exhibiting the rates of toll, as prescribed by law, the respondent, having no particular exemption from the payment of toll, and at a time when the toll-gatherer was attending to his duty, passed the bridge, with an intent to avoid the payment of the legal toll, though the toll was demanded of him, when within two or three rods of the gate, by the toll-gatherer." The corporation, therefore, must be believed to have had a toll-gatherer, at the time the defendant passed over the bridge, and that he was present at the time and demanded the toll. Whether he was elected or appointed before or since 1838, is immaterial. It was not for the defendant to question the legality of his appointment. His agency must be believed to have had the sanction of the plaintiffs, or they would not have kept him there constantly demanding and receiving toll. Payment to him would have been a discharge to the defendant; and in fact it does not appear, that the defendant at all questioned his authority. The case finds, that he had determined to pass without paying the legal toll.

The action was properly brought in the county of Lincoln, if the statement in the writ be true. The plaintiffs, in their writ, are styled "a corporation established by law in Lisbon in our county of Lincoln." This fact is not traversed by a plea in abatement. The cause went to trial in the court below upon a plea to the merits. The statement in the writ therefore must be taken to be true. And being so to be taken the point raised, as to this matter, was not open to the defendant.

Thus we have disposed of the three first points raised, in the court below, in favor of the plaintiffs, which renders the consideration of the remaining point there raised unnecessary.

Defendant defaulted.

WELLS J. dissenting.

I am not satisfied with the conclusion. The bridge was *less* than 25 feet. *How much less* the case does not state. It was the bridge of 1837, which was 22 feet. It was the bridge

of 1839 or 1840 over which the defendant passed, and it was *less* than 25 feet.

The condition is *subsequent* to the act of incorporation, but *precedent* to the right of taking toll. The erection of a sign board is of course to be subsequent to the passage of the act, but precedent to the right to take toll.

The corporators, by acceptance of the charter, acquire the right to do what is granted, but if the right to take toll depends upon something to be done, after the acceptance of the charter, the thing to be done is a condition precedent. In *Fales* v. *Whiting*, 7 Pick. 225, the defendant was sued for forcibly passing the gate; a way *de facto* for 20 years, but not *lawfully* laid out. If a requisition of a general law must be a pre-requisite to taking toll, it surely must be so, if it is also required in the charter. The *location* of a gate is not of more importance, than the *width* of a bridge. But where it is located, in a place different from that prescribed in the act, assumpsit for tolls, which must have accumulated on credit, cannot be maintained. *Griffin* v. *House*, 17 Pick. 432; *People* v. *Dinslow*, 18 Johns. R. 396; 1 Caines, 180; *Commonwealth* v. *Heare*, 2 Mass. R. 102; *Nichols* v. *Bertram & al.* 3 Pick. 342.

These cases proceed upon the idea, that the *terms* of the act of incorporation must be complied with, before any right exists to take toll. Nothing is said about *conditions*. The amount of it is, the Legislature say to it, if you will do and perform certain things, you are empowered to take toll. The *power* to take toll follows the doing what is granted. If what is granted to be done is not done, the right does not accrue.

That a want of compliance, with the act of incorporation and the provisions of law, is a matter to be settled between the corporation and the government, is a doctrine applicable to those acting in a public capacity and to municipal corporations. But it is not suggested by the Court, in either of the cases cited, as applicable to the right to take toll. What can be put as more strongly illustrative of the law, than what is said in these

cases, as to the location of the toll house. Unless it is in the place prescribed, there is no power to exercise the franchise.

If a charter to a rail road prescribes the track to be six feet wide, and it is made but three feet, can the toll be collected? or a canal to be 50 feet wide, and it is made but 20, can the toll be collected?

If one departure may be made from the law, how many may be made, and what protection from imposition have the community, if they must wait until the charter is revoked?

If the defendant had denied their right to take toll, they might deny his right to pass, and refuse to permit it, and if he had persisted, perhaps have maintained trespass, but this action *assumes* the right to take toll, and unless it exists, the action fails.

Commonwealth v. *Worcester Turnpike Corp.*, 3 Pick. 327, does not appear to militate with the cases cited. The defendants were not allowed to set up their own want of duty in defence.

SAMUEL ALLEY, JR. *versus* JOSHUA BLEN.

In the trial of an action to recover damages for an injury to the plaintiff's *gondola*, occasioned by the negligence of the defendant, to whom it had been bailed, in suffering it to be frozen in the ice, where the defence was that it had been delivered up to the plaintiff, before any injury to it had taken place, the Judge rightly declined to instruct the jury, that the testimony of certain witnesses, if believed, would prove that the gondola had been so delivered up to the plaintiff, that being for the determination of the jury, and not of the Court.

THIS was an action to recover damages for an injury to a gondola, belonging to the plaintiff, bailed to the defendant, and alleged to have been frozen in the ice, through the negligence and want of care of the defendant. The defence set up was, that the gondola had been delivered to the plaintiff before any injury had happened to it. The verdict was for the plaintiff, and the defendant filed exceptions.

The instruction requested by the defendant, and refused by the presiding Judge, is given in the opinion of the Court.

Ruggles, for the defendant, said that the object of the request was, that the Judge should instruct the jury, what possession of the plaintiff would constitute in law a good defence. It was believed, that the defendant was entitled to have such instruction, but the Court declined to give it. And of this the defendant complains.

Groton, for the plaintiff, thought the whole case was but this, whether it was the duty of the Court to interfere with the province of the jury, and decide matters of fact.

The opinion of the Court was by

WELLS J. — This case comes before us, upon exceptions, to the opinion of the Judge of the District Court.

All the instructions requested were substantially given, except the last. In that, the defendant requested the Judge to rule, that the facts, testified to by Blen and Pottle, if true, constituted a *sufficient possession* on the part of the plaintiff, to relieve the defendant, from liability for subsequent injury, to the gondola, occasioned by the plaintiff's or Pottle's neglect to take care of her; when taken in connection with the other testimony of the plaintiff, that the defendant had informed the plaintiff, he should not take any further charge of her.

The Judge declined to give such instruction, but did inform the jury, that it was a question of fact, for them to determine, from the evidence in the case, whether the plaintiff did have possession of the gondola, when the acts complained of happened, or whether she still remained in the possession and at the risk of the defendant. It was certainly a matter of fact, whether the plaintiff had so conducted, as to relieve the defendant from damages for not returning the gondola. Blen and Pottle testified to facts, from which such a result might be inferred, but it was for the jury to make the inference, and not the Court. The Judge stated the rules, in answer to the other requests, by which the jury would be guided, and it was their duty to determine, whether the facts corresponded to them.

It was a fact, to be determined, whether there was any possession, and if that was found affirmatively, then the sufficiency of it was to be ascertained by the instructions already given.

The Judge was not asked to define what, in law, would constitute a possession, but that certain facts, tending to prove it, did actually prove it. We do not perceive any just ground for the exceptions. *Exceptions overruled.*

JOHN R. ROBINSON *& al. versus* EZEKIEL W. BARKER *& al.*

By the use of the term "*accounts*" in the poor debtor act (Rev. St. c. 148, § 29,) the Legislature probably intended to describe such claims as the debtor might have against other persons which were the proper subjects of charge as book debts, and for the payment of which no written contract or security had been taken; and by the use of the terms *notes*, *bonds* or *other contracts*, to include all other securities and evidences of debts due.

That could not properly be denominated an account, in the sense of the statute, upon which nothing was due, any more than that could be considered a note or bond, which might exist in that form, but had been previously paid.

When the debtor discloses accounts or claims to a considerable amount against other persons, and states that they have not been settled, that he does not know the amount of them, or of the counter claims against him, but that he thinks there is nothing due to him, he must have them appraised, in manner provided by law, or the proceedings will not be considered as evidence of the performance of the condition of the bond.

If the debtor was not legally entitled to take the poor debtor's oath within the time limited in the bond, and a suit is brought upon it, testimony is not admissible on the trial, to show that evidence might have been introduced which would have authorized the taking of the oath.

And if during the pendency of a suit upon the bond, there is another action against the debtor, alleging that he made wilfully false disclosures, it cannot affect the rights of the parties to the suit on the bond.

And where a law question, in a suit upon a poor debtor's bond, was pending at the time of the act of August 11, 1848, arising on a statement of facts agreed by the parties, the Court will give an opportunity, if the condition of the bond be forfeited, for the defendant to have an opportunity to have the damages estimated by a jury.

THIS case was submitted on a statement of facts, making

the proceedings of the justices and the disclosures of Barker, the principal debtor, a part of the case.

In this statement it was agreed, that the testimony of John Glidden and of Sarah Small, tending to show that in fact nothing was due to them, respectively, from Barker at the time of his disclosures, should be taken and made a part of the case, if the same was admissible and material.

The material portions of the disclosures are given in the opinion of the Court.

Hubbard, in his argument for the plaintiffs, contended, that the disclosures, on their face, showed that the debtor had made a fraudulent disposal of his property; and that in such case, even if the oath be administered by the justices, it shall be void and of no effect.

The debtor disclosed accounts in his favor, and they should have been appraised as the statute requires. He says, he did not know, that any thing was due to him, but he also says, there had been no settlement, and that he did not know to the contrary. The counsel here went into a calculation, for the purpose of showing, that upon the disclosures, enough appeared to make it certain that on a fair settlement there would be a balance due to Barker from Mrs. Small.

The papers should show, that the justices were legally selected and were competent to sit, and the Court duly organized, or they could have no jurisdiction. The papers should show, that every thing required by law to be done, had been done.

Ingalls, for the defendants, said that the notices and selection of the justices appeared by the papers to have been perfect; and the argument on this point, would have been more properly addressed to the justices, who by statute are made the final judges of this, than to this Court.

Barker had never made any charges to Mrs. Small for his personal services, and none were ever intended to be made. A man is at perfect liberty, whether rich or poor, to perform such services gratuitously, or under the expectation of gaining

more than the value by a voluntary gift afterwards. Without making Mrs. Small a debtor, where she never expected to be and where Barker never supposed that she was, the balance is in her favor.

The answers must be taken to be true until the contrary is shown; and by them nothing was due.

The statute could never have contemplated the appraisement of the mere evidence of a demand which had been paid, or where nothing was due.

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

SHEPLEY J. — This suit is upon two bonds, made to liberate the principal obligor from arrest on executions. The debtor made disclosures of the state of his affairs in performance of the conditions of the bonds.

In the first disclosure made in performance of the condition of the bond, bearing date on December 16, 1845, in answer to the first interrogatory the debtor names several demands, and says — "Hiscock & Metcalf also owed me on unsettled account, the amount of which I am unable to state. All these demands have long since been paid, except Hiscock and Metcalf's which is still unsettled, but I do not think there is any thing due, but think I owe them." "In 1845, I finished a ship for Hiscock and Stetson, for which I received $950, I think. I have not settled with them, but think there is nothing due." In answer to the first and twenty-first interrogatories, he states, that he, as agent for Mrs. Small, procured materials and labor to build a house, that he had received money from her for that purpose, and to purchase articles necessary for his family during that year, to what amount he was unable to say, and then says:—"I have occupied her house since the same was built, and am now owing her I think." "For my own services, I have had no settlement with Mrs. Small, and have not made out my bill against her, as some of the bills are not settled as above."

The statute, c. 148, § 29, provides, "whenever from the disclosure of any debtor arrested or imprisoned on any execution, it shall appear, that he possesses or has under his control any bank bills, notes, accounts, bonds, or other contracts," if the creditor and debtor cannot agree to apply the same in part or in full discharge of the debt, appraisers shall be appointed to set off such property, or enough of the same to satisfy the amount of the debt, costs and charges.

By the use of the term "accounts," the Legislature probably intended to describe such claims, as the debtor might have against other persons, which were the proper subjects of charge as book debts, and for the payment of which no written contract or security had been taken. And by the use of the terms notes, bonds, or other contracts, to include all other securities and evidences of debts due. That could not properly be denominated an account, in the sense of the statute, upon which nothing was due at the time of making the disclosure, any more than that could be considered a note or bond, which might exist in that form, but had been previously paid. When, however, the debtor discloses claims against other persons once justly due to him, and states, that they have not been settled or paid unless canceled by accounts or claims to be applied in off-set or discharge of them, they would seem, until the off-set or discharge has been made, to be accounts in common parlance, and in the sense in which that word is used in the statute, unless it should also appear, that upon an adjustment, nothing could be due or recoverable upon them. Provision is made by the forty-seventh and forty-eighth sections of the statute, that if the debtor wilfully disclose falsely or withhold or suppress the truth, the creditor may commence an action against him, and recover double the amount of the debt and charges. The intention appears to have been, to afford the creditor the benefit of all claims, which the debtor might have against other persons, or to subject him to an action for making a false disclosure. No action could be maintained against the debtor for the expression of an opinion in his disclosure, without proof that it was at variance with his actual knowledge at the time,

and wilfully expressed. When the debtor discloses accounts or claims to considerable amount against other persons, and states, that they have not been settled, that he does not know the amount of them, or of the counter claims against him, but that he thinks there is nothing due to him, it is obvious that such an opinion is of very little value, and that he could not be proved to be guilty of making a false disclosure, should there appear upon a just settlement to be no trifling sum due to him. To allow him to be excused from having such accounts appraised, and if found to be of any value to be applied to the payment of his debt, would be to permit him to elude the provisions of the statute by the expression of an opinion of no importance, and to preserve for his own use balances due on such accounts, without subjecting himself to an action for making a false disclosure.

When a debtor, in a case like the present, ascertains that he must make a disclosure, and knows that he has unsettled accounts against other persons, he should either have them settled; take measures to inform himself, that there is nothing due upon them, so that he can state it as a fact, and not as a mere expression of an opinion formed without any competent knowledge; or should cause them to be appraised according to the provisions of the statute. This does not impose upon him a greater burden or duty, than it was the design of the statute to impose.

In this case the debtor says, that he was unable to state the amount of his account against Hiscock and Metcalf, that it remained unsettled, but he did not think there was any thing due, but thought he owed them. That he was to receive from Hiscock and Stetson $950 for finishing a vessel, as he thinks; that he has not settled with them, but thinks there is nothing due. No one can fail to perceive, that it would not be surprising, that there should be found to be due to him on the settlement of such an account no trifling sum, or that on the contrary he should be found indebted to them. While it is perceived, that such may be the fact, it must be regarded as an account in the sense in which that term is used in the stat-

ute; and the debtor should have pursued the course pointed out, or have caused these accounts to be appraised.

In the disclosure made in performance of the condition of the bond bearing date on December 27, 1845, the debtor names several debts due to him. From the certificate of the justices it appears, that these were accepted by the creditors in part satisfaction of their debt.

The debtor states, that as the agent of his mother-in-law, Sarah Small, he procured the materials and labor and superintended the erection of a dwellinghouse, which he has since partly occupied as her tenant. In answer to the 34th interrogatory he says, "I have paid out, I suppose, about $1800 for materials, work, &c.;" and in answer to the 36th, he desires $1700 to be substituted for $1800. In answer to the 29th he says, that he gave his own note to Jacob Knights for about $20, which remains unpaid, unless Mrs. Small has paid the same. It does not appear that she had paid it, or that it constituted any part of the sum of $1700. He states, that he commenced the building in the fall of 1843, and finished it in the winter of 1844. In answer to the 51st interrogatory he says, "I have superintended the building of houses and other buildings in the same manner for other persons, expecting to be paid a fair compensation. I consider that I owe Mrs. Small."

In answer to the 36th, having previously stated it to be about $1600, he states the amount advanced by Mrs. Small to him to pay on account of the house, to be $1508,60. He also says, he owed her a note of $120, and for rent of that part of the house occupied by him for about sixteen months $140; and that the amount by him advanced beyond the amount received, was by agreement to be applied to the payment of that note and the rent. It had not been so applied.

According to his statement her claim against him would then be: —

For money advanced on account of the house	$1508,60
For note due from him to her	120,00
For rent of house 16 months	140,00
	$1768,60

And his claims against her: —	
For cash paid on account of house	$1700,00
For note given to Knights or paid him	20,00
	$1720,00
Leaving a balance due to her of	$48,60

But he had a further claim against her for procuring the materials and labor and for superintending the building of the house, as yet unascertained and unadjusted. It would seem to be highly probable, that a reasonable compensation for these services would leave a balance then due from Mrs. Small to him, although he says, that he considered that he was indebted to her.

Such claims on his part, arising out of materials and labor procured and services performed without any written contract, must necessarily be exhibited and proved as an account or in the nature of an account. If this were not so, he might have obtained the benefit of the oath and of a discharge, while he retained, what might prove to be a valuable claim. The observations already made respecting the course to have been pursued and upon the effect of an opinion of the debtor, are alike applicable to this as to those accounts.

The testimony of John Glidden and Sarah Small cannot be legally admitted in this case. The question does not now arise, whether the debtor could have made such answers and proof before the magistrates, as would have entitled him to take the oath and be discharged, but whether he was entitled to that benefit upon the evidence presented before them. If he was not then legally entitled to take the oaths, the bonds became forfeited. Testimony now offered could not prevent such a result.

Nor can the action pending against the debtor, alleging that he made wilfully false disclosures, affect the rights of the parties in this suit.

Since the case has been argued and continued under advisement, the Legislature, on August 11, 1848, passed an act to take effect upon its approval, providing, that in all actions

commenced or to be commenced on bonds of this description, if it shall appear, that the debtor had taken the oath prescribed by the statute before breach of his bond, the damages shall be assessed by the jury, if such be the request of either party, and if no such request be made, then by the Court; and that the amount assessed shall be the real and actual damages and no more. This action still pending comes within the provisions of that act. The parties have had no opportunity to make their election to have the damages assessed by a jury; but their agreed statement contains a clause providing, that if the defendants have a right to have the damages assessed by a jury the action is to stand for trial. Having such a right by virtue of the recent act, the action is to stand for trial to assess the damages.

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

If the breach of the condition of a poor debtor's bond be caused by the omission to appraise a note, disclosed on the examination, the amount of damages, under the statute of 1848, c. 85, § 2, is not to be limited to the value of the note; but any legal proof, going to show the ability of the debtor to have paid the debt, or some part thereof, is admissible, and should be taken into consideration by the jury in the assessment of damages.

THIS case came before the Court on exceptions, of which acopy follows: —

"S. J. Court, Sept. Term, 1848, adjourned session, Jan. 1849.

"Writ dated 10th Oct. 1846. The action is debt on a poor debtor's bond dated 23d Sept. 1845, penal sum, $134,94, and given pursuant to statute, to release Barker, the principal therein, from arrest on execution, in favor of plaintiff.

"The defendants plead the general issue, with a brief statement that one of the alternative conditions of the bond, to wit, duly citing the creditor, and taking the oath referred to in said bond, by said Barker, the principal therein, had been performed.

"The execution of the bond by defendants was admitted, and it was read.

"The defendants introduced and read the original application and citation of said Barker; and also the certificate of discharge given by the two justices of the peace and of the quorum, for said county, which was also read, the execution thereof having been proved by the justices aforesaid; one of whom at plaintiff's request, produced the written disclosure of said Barker made before them, and whereon he was by them admitted to the oath in the certificate named, which disclosure is made a part of the case.

"The plaintiff contended, that the justices aforesaid were not authorized to make out and deliver the aforenamed certificate of discharge, the note disclosed by the said Barker, in his answer to the 6th interrogatory of said disclosure, not having been appraised and assigned as the statute requires; and the presiding Judge so ruled, unless some legal excuse for the omission should be shown.

"Whereupon the defendants called one of the justices aforesaid, and the debtor's attorney in making his disclosure, to show, that at the time the debtor made his disclosure, the creditor's attorney, in the examination, declined to receive an assignment, and that the omission to assign would not have happened, but for the course pursued by the creditor's attorney. By assignment said attorney testified, he meant an assignment under the statute, a statute assignment.

"The plaintiff puts in the case attested copies of the judgment on which the execution issued, and of the execution and officer's return thereon, which may be referred to without copying.

"It was further contended by plaintiff, that the justices were not authorized to make out and deliver said certificate of discharge, "until the books and debts due Barker & Chapman," which were assigned to Clapp & Curtis & als. to pay the debt of $1600, (named in the debtor's answer to the 3d interrogatory,) had been appraised and assigned, subject to the said assignment to "Clapp & Curtis & als." or until the debtor had assigned the claim which he, or Barker & Chapman had against said Clapp & Curtis & als., for the amount that had

been or might be realized by them from the "books and debts" aforesaid, after they (the said assignees) should be paid.

"And further, before said certificate could be legally delivered to said debtor, the account against his mother, disclosed in his answers to the 7th and 8th interrogatories, in said disclosure; and also his account against his mother, "as her agent," should have been appraised and assigned as required by Rev. Stat. c. 148, § 29.

"That the oath was illegally administered by said justices, because the debtor neglected and refused to answer pertinent interrogatories, and which by law he was bound to answer.

"The presiding Judge ruled otherwise as to all these several matters of law, contended for by the plaintiff.

"The plaintiff further contended, in case the jury should find the condition of the bond had been broken by the non-assignment of the note disclosed, (by answer to the 6th interrogatory,) he should have damages as the statute had provided by § 39 of c. 148 of the Revised Statutes. But the Judge permitted the jury, (at the defendant's request,) to assess the damages under the provision of section 3d of an act entitled "An act additional for the relief of poor debtors," approved August 11, 1848; to which the plaintiff objected, the plaintiff's right having accrued before the passage of said last named statute.

"The defendants called several witnesses, plaintiff still objecting, to prove that at or about the time of the disclosure, the promisor in said note disclosed, was generally considered to be possessed of no property whatever, and that in the opinion of the witnesses, a demand of $30 would then have been considered of little or no value, and that many executions were outstanding against Pickard, and that he was then residing out of the State.

Plaintiff offered in evidence the deposition of D. L. Pickard. The defendants objected to the use of it on the ground that Pickard had been in attendance before the case came on for trial, and had been summoned by plaintiff, and had been suffered to depart without the knowledge of defendants: but the

objection was overruled and the deposition was read, and is made a part of the case and may be referred to by either party without copying.

"As matter which the jury might take into consideration in assessing damages, the plaintiff offered witnesses tending to show, as he contended, that at the time Barker made his disclosure, he was possessed of property and credits, and had means that were concealed, and was the owner of or had a valuable interest in the house he then occupied and has continued to occupy to this time. But the Judge excluded the testimony.

"And for the same purpose the plaintiff read copies of two disclosures made subsequently to the time of making the disclosure before named, for the purpose of showing that at the time of making the first disclosure, Mrs. Small, his mother, was indebted to the said Barker in a considerable amount, and that at the time of the first disclosure the said Barker had other means; which said copies are made a part of the case and may be referred to without copying.

"The writ, bond, pleadings, application and citation, and officer's return thereon, certificate of discharge, copies of judgment and execution, and officer's return thereon are made part of the case and may be referred to by either party without copying.

"The Judge instructed the jury, if they should find that at the time of Barker's disclosure, in this case, the debtor or the justices omitted to cause the note against Pickard to be appraised and assigned by reason of the creditor or his attorney expressly waiving all right to have the same appraised or assigned; or, by reason of being led by the creditor or his attorney into an illegal course of proceeding in making such disclosure; or was induced by the creditor or his attorney to make the supposed omission in their proceedings; in either case, the plaintiff would not be entitled to recover by reason of the neglect or omission to appraise said note.

But if they should find that the conditions of the bond have been broken, they should in assessing the damages ascertain how much the Pickard note was worth at the time of the disclos-

ure, and so much as it was then worth, and all damages to the plaintiff by reason of not appraising and assigning said note, would be the measure of damages the plaintiff had sustained and would be entitled to recover.

"That the testimony of witnesses which had been introduced by plaintiff, as to Barker's property, or supposed means, concealed; or as is shown, as plaintiff contends, by subsequent disclosures; or whether or not he now has property; or made a false disclosure; are matters which cannot in the least aggravate or affect the damages which the plaintiff is entitled to recover in this action.

"The jury found that the writing declared on, was the deed of the defendants; that the conditions thereof have been broken; but they further find, that the plaintiff sustained no damage by such breach.

"To the foregoing rulings and instructions of the Judge the plaintiff excepts. By, &c."

3d interrogatory. "What personal property did you own in 1841? What in 1842? What in 1843? Please state particularly all in which you had any interest.

Answer. "I do not recollect sufficient to answer the above question. I have now no recollection as to property in 1841, other than some articles of household furniture exempted by law from attachment, and some debts due me for work and labor done, all of which have long since been paid me. — In 1842, I went into partnership with Hiram Chapman, went into trade, and we failed in business in 1843, in May, I think. — During that time we bought goods and sold them, and during the same time we bought one-eighth of the ship Archelaus which was afterwards sold. At the time we failed, we owed towards the said one-eighth about 1600 dollars — and after the failure, we assigned our books and debts due us to Clapp & Curtis and als. to pay same debt. — At the time of the fire last spring I understood that all the books and papers thus assigned were burnt.

4th. "What amount in debts (notes and accounts) had the

firm of Barker & Chapman at the time of failure as aforesaid, as well as you are able to judge ?

Answer. " I believe there were no notes. I have no means of ascertaining the amount of accounts due us — the books having been burnt, and I kept no memorandum of the accounts, when I assigned the books.

5th. " 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 S. Pickard of about 30 dollars, 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 creditor, if he deems it to be of any value.

6th. " Have you any account on your books with your mother? If so, please exhibit the same.

Answer. " I have no demand against my mother. I have an account against her, however, which is in part payment of a note she holds against me. I have not the account here.

7th. " What is the amount of the notes, when given, when and how payable, how much due thereon ? What is the amount of your account, the nature of it? Please state as nearly as you can.

Answer. " The note referred to was given in 1842, I think, for about $120 and interest, payable on demand, in joiner work. I am not able to state the balance due her on said note, but should think it was over $20. I should think the amount of the account referred to is about $100. It may not amount to that sum."

W. Hubbard, for the plaintiff. In support of his exceptions the plaintiff submits the following points on which he will rely in his argument.

The certificate of discharge was not legally granted, because the principal did not cause to be assigned or appraised the demands by him disclosed, as is particularly named in the bill of exceptions. That is to say : —

1st. The debts due Barker & Chapman on their books, assigned to "Clapp & Curtis & als."

2d. Also Barker's account against his mother, and

3d. Also his account against his mother, "as her agent." Rev. St. c. 148, § 29, 30 and 31.

The oath was illegally administered, the principal declining and refusing to answer legal and pertinent interrogatories. *Stone* v. *Tilson*, 19 Maine R. 265.

The ruling of the presiding Judge was therefore erroneous.

The testimony of witnesses and the disclosures of Barker were legal evidence for the jury to take into consideration in assessing damages. The jury should not have been limited to the value of the Pickard note, as appears by bill of exceptions. Statute of 1848.

The jury having found a breach of the conditions of the bond, judgment should have been rendered agreeably with c. 148, § 39, of Rev. Stat.

The statute of 1848, cannot operate in this case, the plaintiff's right to recover, under § 39 of c. 148, being *vested.*

Ingalls, for the defendants. The defendants make the following points, viz: —

1. The instruction to the jury by the presiding Judge in relation to the not appraising and assigning the note of D. L. Pickard, disclosed in answer to the 6th interrogatory, was correct. Opinion of Court in *Call* v. *Barker*, 27 Maine R. 97.

2. The books and debts assigned by Barker & Chapman, as mentioned in the answer to the 3d interrogatory, to Clapp & Curtis, were assigned in *payment* of their demand. Therefore no assignment ought or could be made.

3. There was no account due Barker from his mother as appears in his answer to the 10th interrogatory.

4. The debtor answered all proper and pertinent interrogatories as fully as he could or was bound to do.

5. The damages were properly left to the jury. Stat. of 1848, c. 85, § 2.

6. This act is constitutional and affects the remedy in this case. *Read* v. *Frankfort Bank*, 10 Shepl. 318; *Thayer &*

al. v. *Sevey*, 2 Fairf. 284; *Oriental Bank* v. *Freeze*, 18 Maine R. 109; *Whitman* v. *Hapgood*, 13 Mass. R. 464; *Fales & al.* v. *Wadsworth*, 10 Shepl. 553; *Bacon* v. *Callender*, 6 Mass. R. 303; *Patterson* v. *Philbrook & als.* 9 Mass. R. 151; *Walter* v. *Bacon*, 8 Mass. R. 468; *Locke, Adm'r*, v. *Dane & al.* 8 Mass. R. 360; *Commonwealth* v. *Bird*, 12 Mass. R. 443; *Brown* v. *Penobscot Bank*, 8 Mass. R. 445; *Foster* v. *Essex Bank*, 16 Mass. R. 245; *Potter* v. *Sturtevant*, 4 Greenl. 154; *Proprietors of side booms in Androscoggin River* v. *Haskell*, 7 Greenl. 174; *Holbrook* v. *Phinney*, 4 Mass. R. 566; *Morse* v. *Rice*, 8 Shepl. 53; *Watson* v. *Mercer*, 8 Pet. 110; *Satterlee* v. *Mathewson*, 2 Pet. 414; *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420; *Reed* v. *Fulham*, 2 Pick. 158; *Mason* v. *Haile*, 12 Wheat. 377; *Commonwealth* v. *Wyman*, Law Rep. Vol. 8, No. 8; *Knight* v. *Dorr*, 19 Pick. 48; U. S. Dig. (Sup.) Constitutional Law, 9, 51, 52, 53, 59, 60.

7. The instruction as to the measure of damages was correct. Stat. 1848, c. 85.

8. The testimony introduced by defendants, as to the worthlessness of the Pickard note, was properly admitted to reduce the damages, in case a breach of the bond was found, and as confirmatory of the evidence of a waiver on the part of the plaintiff of the appraisal and assignment of said note.

9. The testimony of witnesses as to Barker's property, or supposed means concealed, or whether or not he had made a false disclosure, or then had property, were properly excluded, a different remedy from an action on the bond being provided by statute. Rev. St. c. 148, § 47, 48.

This case was argued on the third day of May, 1849, and on the sixth day of the same month, the opinion of the Court, Shepley C. J., Tenney, Wells and Howard Justices, was made known, orally, by

Shepley C. J. — In a suit upon a bond of this character, under the provisions of the statute of 1848, (c. 85, § 2,) entitled "an act additional for the relief of poor debtors," the

question of damages becomes an important one. The actual damage is the loss suffered by the non-performance of the condition of the bond, and not the damages occasioned by the particular cause which produced a breach of the condition. Suppose the oath to have been taken before two justices not legally selected, this would not be a performance of the condition, but the amount of damages would not be determined by the amount of the injury sustained by the want of conforming to the law in the selection, but must be assessed on proof of the ability of the debtor to pay. The amount of damages would not be confined to the loss sustained by the illegal selection of the justices, but would be estimated by the ability of the debtor to have made payment of the debt, or some portion of it.

In the present case, any legal proof, going to show the ability of the debtor to have paid the debt, or a portion of it, was admissible, and should have been taken into consideration by the jury in the assessment of damages.

As the instructions of the presiding Judge limited the proof of damages to the value of the note disclosed by the debtor, and not appraised, the exceptions must be sustained and a new trial granted.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF KENNEBEC,

ARGUED MAY TERM, 1848.

HOWARD C. KEITH *versus* WENTWORTH TUTTLE *& al.*

There is no prohibition, either at common law or by statute, of the service of process, in criminal cases, on the Lord's day, except in so far as the service of the same might be unnecessary on that day.

A warrant, issued upon a complaint under the statute of 1846, c. 205, to restrict the sale of intoxicating drinks, may be lawfully executed on the Lord's day; although, perhaps, subject to the limitation, that it should not be an unnecessary act, to be performed on that day.

If the officer serving such warrant, would not be justified, because the act was unnecessary, it would seem, that such persons as were called by him to aid and assist him in the service, might nevertheless be excusable.

STATEMENT of facts by the parties, as follows:—

"This is an action of trespass and false imprisonment, by plaintiff against defendants. The writ alleges that the defendants, on the 25th day of April, A. D. 1847, on the Lord's day, at Canaan in the county of Somerset, seized and arrested the said Keith of Canaan aforesaid, as he was quietly and peaceably walking in the highway, and with force and violence thrust him, the said Keith, into the tavern house of one William Macartney, and there detained him for five hours, against his will, &c.

"The defendant, Wentworth Tuttle, Jr. justified as being constable of said town of Canaan, acting by virtue of a warrant issued by a justice of the peace for said county; and the other defendants, as aiding and assisting the said Tuttle, by his command, in arresting and detaining said Keith, which appears by their several pleas on file. The warrant, on which said Keith was arrested and detained, issued on a complaint made to a justice of the peace within and for the said county of Somerset, to recover a penalty for an alleged violation of "an act to restrict the sale of intoxicating drinks," passed August 7th, A. D. 1846.

"The writ, the several pleas of defendants and said warrant, are made a part of this case, and may be referred to, but need not be copied. If the opinion of the Court should be, that said warrant could legally be served on the Lord's day, the plaintiff is to become nonsuit, or go to the jury for excessive force used by defendants in the service of said warrant, at plaintiff's election. If, on the other hand, the opinion of the Court should be, that said warrant could *not* be legally served on the Lord's day, then the case is to go to the jury to assess the damages sustained by the plaintiff.

L. Johnson, for the plaintiff.

It is contended on the other side, that the observance of the Lord's day is purely a statute regulation. For argument's sake we will admit it. The 114th chapter of Rev. Stat. section 104, provides, that no person shall serve or execute any civil process on the Lord's day, &c., Chap. 160, § 26, also provides, that if any person on the Lord's day, shall do any work, labor or business, works of necessity or charity excepted, &c. The decisions of this Court go the length (which the Massachusetts decisions did not,) that contracts made on the Lord's day are absolutely void; not leaving them on the ground of the Massachusetts decisions, that the contract was good, but the parties making them on that day only liable to penalties for unnecessary work and labor, &c. Chief Justice Parker, in the case of *Pearce* v. *Atwood*, 13 Mass. R. on page 347, says, "magistrates and executive officers (where persons are charged

with crimes) will consider, that all unnecessary official labor will expose them to the penalties of the act for the due observation of the Lord's day, although their doings may not be void," placing them precisely on the ground of unnecessary labor in making contracts, &c. The reasoning to me does not seem strained, that if, by the decisions of this Court, contracts made on the Lord's day (which by the Massachusetts decisions are good) are null and void; by parity of reasoning, the service of a warrant, even in a criminal case, if unnecessary, would also be null and void, and therefore the warrant would be no justification to the officer serving it.

The case at bar presents no such case of necessity for service of the warrant on the Lord's day, even admitting, that the selling intoxicating drinks contrary to the act of 1846, be a criminal offence.

I respectfully contend, that the mode pointed out by the statute for the recovery of the penalties, in the 6th section of said act provided for, if by complaint, (and they can as well be recovered by action of debt) is only criminal in form. If the Court will look at the 6th section and the 20th section, it will perceive that an execution was contemplated to go, whether the judgment was on complaint or action of debt; although I am free to confess that the intentions of the Legislature are not very clearly defined, and that it would be no disparagement, to be unable to *even guess* what ought to be the construction of this law, and even no disparagement to this learned Court, to fail in finding out its legal intendments.

I have before handed to the Court, a list of numerous statutory provisions, where the *mode* of recovery of penalties is by *complaint* before a justice of the peace. I will call the attention of the Court to one, the 38th chapter of Revised Statutes. It contains 3 sections, the last of which provides for the recovery of one dollar, for parents, householders, &c. neglecting to perform certain things directed to be done in the 2d section of said chapter, and it is to be done by *complaint* for the *offence* of so neglecting to do what is required of them. Offence is the precise word used in act of 1846. Now if the

mode of recovery of a pecuniary penalty, makes it a *criminal* process, the Lord's day might be continually desecrated by persons bringing complaints for these penalties. Our whole State might be made the arena of warrant serving, and the holding of justices' courts on that day, a power denied to this Court by law, and thus presenting the strange anomaly of justices of the peace *legally* holding their courts on the Lord's day, which this Court cannot do. Justices of the peace have jurisdiction of these penalties, as much as this Court has for the trial of capital offences.

List of some of the penalties recoverable by complaint and indictment by the Revised Statutes.

Chap. 14, § 93; c. 15, § 30; c. 17, § 61; c. 26, § 4, 5, 6; c. 35, § 6, 8; c. 38, § 3; c. 50, § 26, 35, 36, 39, 41; c. 59, § 4; c. 60, § 2, 3, 10; c. 66, § 20, 25, 26; c. 104, § 32; c. 160, § 22, 25, 26, 27, 29; c. 114, § 104.

S. May, for the defendant.

This is an action for an assault and battery and false imprisonment. The general issue is pleaded, and a brief statement filed, in which the said Tuttle justifies his acts as constable of the town of Canaan, having a legal warrant against said Keith, for an offence against the laws of this State, wherein he was directed forthwith to apprehend the body of said Keith, and bring him to trial; and the other defendants justify as his servants, acting under his command.

The complaint and warrant are in due form of law, and the offence set forth in said complaint, is a violation of the act of 1842, entitled "an act to restrict the sale of intoxicating drinks."

By this act, sect. 5, for any person to sell spirituous liquors contrary to its provisions, is made an offence, and the offender is made liable to pay not less than one, nor more than twenty dollars for the first offence; and by the 6th section of the act, such forfeiture or penalty may be recovered by action of debt, or *by complaint* before any justice of the peace, or judge of any municipal or police court in the county where *the offence* was committed.

It is conceded, that if no more force were used than was necessary to perfect the service of such warrant, such complaint and warrant would be a justification for the acts committed, had they been committed on any other day except *Sunday*. It is contended, however, that *such process* cannot lawfully be served on that day.

And whether such process can, by our law, be lawfully served on that day is the principal question in this case.

We contend it can, and by an examination of the law upon this subject, we find that as early as the ninth of James, it was resolved in England "that judicial acts should not be done on Sunday, but *ministerial* may for necessity." 9th Coke, 66.

In the case of *Swann* v. *Broome*, 3 Burr. 1601, Lord Mansfield says, "but fairs, markets, sports and pastimes were *not* unlawful to be holden and used on Sundays, *at common law*, and therefore it was requisite to enact particular statutes to prohibit the use and exercise of them upon Sundays, as there was nothing else that could hinder their being continued in use." Anciently, courts of justice were held on Sunday, and Sir Henry Spelman, in his Original of the Terms, c. 3, p. 75, says that "the christians at first, used all days alike for the hearing of causes, not sparing (as it seemeth) *the Sunday itself*."

But in the year 517, and afterwards, the church, by its canons, which were ratified and confirmed in the times of Theodorius and Edward the Confessor, by imperial constitutions, declared that no causes should be tried or pleas holden on that day. These canons and constitutions, says Lord Mansfield, were all confirmed by William the Conqueror, and Henry the Second, and so became part of the common law of England. But this common law did not extend its jurisdiction any further than against awarding process and giving judgment, *and such like acts of court*, on Sundays. Fairs, markets, sports, pastimes and all ministerial acts, were not restrained by it. Hence we find in MacKallin's case, 9 Coke, 66, before cited, that the Court, while they recognize the principle, that Sunday is *dies*

non juridicus, at the same time affirm that ministerial acts may be lawfully executed on the Sunday.

In the case of *Pearce* v. *Atwood*, 13 Mass. R. 347, the Court say, that "ministerial acts, however relating to the administration of justice, used to be done on Sunday, and probably to an inconvenient degree. For by the statute, 29 Charles II. c. 7, the service of all processes, warrants, orders, &c. on Sunday, are made unlawful except for treason, felony, and breach of the peace."

At the common law then, any process may be served on the Lord's day which is not prohibited by statute. And it is unnecessary to inquire what processes may be served by virtue of the English statute, for "our own statutes have entirely superseded all pre-existing regulations on the subject." The Court expressly so say in the case of *Pearce* v. *Atwood*, before cited, p. 345. In that case, the Court decided that a justice of the peace has no authority on the Lord's day to receive a complaint and issue a warrant for the violation of the then laws of Massachusetts, for the due observance of that day, and that a warrant so issued is no justification to an officer making an arrest under it. The case turned upon the question whether such a warrant, so issued on the Lord's day, was void or not, and the Court held it void, and so no protection to the officer. It is evident from the case that such a warrant would have been no protection to an officer executing it on any day. It was void and could justify no act at any time under it. The officer was held liable in that case, not because he arrested the plaintiff on Sunday, but because he arrested him without a legal warrant. It was the unlawfulness of the proceedings of the justice, that made the acts of the officer unlawful, and the proceedings of the justice in that case were held to be unlawful by reason of the peculiar phraseology of the statutes of Massachusetts for the due obversation of the Lord's day. From those statutes, passed in 1791, c. 58, and in 1782, c. 23, the Court held "that the Legislature did not intend, that prosecutions for the violation of *that* law should be attended to on the Lord's day," and they say they do not found their opinion

" on any general prohibition of judicial or ministerial acts on the Lord's day."

Neither Court nor counsel in that case regard the statute of Massachusetts, passed March 8, 1792, the 9th section of which declares " that no person shall serve or execute any civil process from midnight preceding to midnight following the Lord's day," as any restraint upon the officer, in case his warrant had been properly issued. On the contrary, the Court speaking of that statute say, " by our statute the service of none but civil process is prohibited on the Lord's day; so that *warrants* against persons charged with any *crimes whatever,* may be lawfully served on that day."

By our Rev. Stat. c. 114, sect. 104, it is made unlawful to execute any civil process on the Lord's day, and the person executing it is made liable to damages to the party aggrieved in the same manner as if he had no such process. Our statute is almost an exact transcript of the statute of Massachusetts passed in 1792, before cited.

The question then is, does this statute prohibit the service of a warrant, legally issued for a violation of the act to restrict the sale of intoxicating drinks, on the Lord's day, or in other words, is such a warrant, issued on a complaint for such an offence, civil process? If it is, it cannot lawfully be served on the Sabbath; if it is not, it may be.

In the case of *Wild* v. *Skinner*, 23 Pick. 251, it was held not to be unlawful to impound cattle on Sunday, and perhaps it would not be more unwarrantable on that day to arrest rum-sellers, than cattle or swine. By their statute, cattle might be taken up at any time, but the statute relating to the service of civil process, was held not to apply.

In the case of *Tracy* v. *Jenks*, 15 Pick. 465, that the making or giving of a mortgage on the Lord's day was not civil process, or the service of civil process, so as to be prohibited by the statute.

The word civil is used in this statute in contra-distinction to criminal. That process is said to be civil which relates to the private rights and remedies of men — that criminal which re-

lates to public wrongs and injuries; thus we speak of civil process and criminal process — of civil jurisdiction and criminal jurisdiction.

"The distinction of public wrongs from private, of crimes and misdemeanors from *civil injuries*, seems principally to consist in this," says Blackstone, vol. 4, p. 5, "that private wrongs or civil injuries are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties due to the whole community, considered as a community in its social aggregate capacity." Again he says, on the same page, "A crime or misdemeanor is an act committed or omitted in violation of the public law, either forbidding or commanding it."

The violation of the act to restrict the sale of intoxicating drinks, is the violation of a public law; it is a public wrong, it is a crime within the definition which Blackstone gives, and within the meaning of the Court, in the case of *Pearce* v. *Atwood*, where they say, "that warrants against persons charged with any *crimes* whatever, may lawfully be served on Sunday." The defendants are therefore justified in what they did.

But if it be possible for the Court to come to the conclusion that the constable is not justified by his warrant in apprehending the body of the plaintiff forthwith, as therein directed, still we say, that the other defendants who came to his aid by his command, are justified in what they did. By the Rev. Stat. c. 104, sect. 32, a constable in the execution of the duties of his office in any criminal cases, may require suitable aid therein, and every person who shall neglect or refuse, is made liable to a penalty therefor. Is not this a criminal case, within the meaning of this statute, so that the officer may rightfully require aid, if he need it to apprehend or secure the offender? If it be only a civil matter and the warrant be only civil process, then by this statute the officer would have no right to require aid in the arrest, but only in case of an escape or rescue after an arrest of the offender. In this statute, all *criminal cases*, are put in contrast with civil process, and so we say, in §

104, c. 114, the words "civil process," can include no possible criminal case, and that in all criminal cases, there is no prohibition against the service of process on the Lord's day.

Bronson, for the plaintiff, replied.

The opinion of the Court was drawn up by

WHITMAN C. J. — The question reserved for the consideration of the Court is, whether a warrant issued upon a complaint under the statute of 1846, c. 205, to restrict the sale of intoxicating drinks, could lawfully be executed on the Lord's day. By the Rev. Stat. c. 114, § 104, the execution of any civil process, on that day, is prohibited. If it had been the intention of the Legislature, that criminal process should not be executed on that day, it must be very evident, that the prohibition would not have been restricted to the service of civil process on that day. In *Pearce* v. *Atwood*, 13 Mass. R. 324, it was held, that persons charged with any crime whatever may lawfully be arrested on the Lord's day. This State was then a part of Massachusetts. The enactments on this subject have not been essentially varied, in this State, from what they were before separation. There is, therefore, no prohibition either at common law, or by statute, of the service of process, in criminal cases, on the Lord's day, except in so far as the service of the same might be unnecessary on that day.

That the warrant, by virtue of which the plaintiff was arrested, was a criminal mode of proceeding, will not admit of a doubt. It had been issued by a justice of the peace upon a complaint, charging the plaintiff with the commission of an offence, a breach of a provision of a statute of the State. The sentence to be awarded against him, in case of conviction, must have been the payment of a fine. It was quite immaterial, whether it was payable for the use of an individual, or of the State. The statute under which it would have been recoverable, was not remedial, but penal. In case of the non-payment of the fine the order must have been, that he should stand committed till sentence should be performed. That the same penalty might be recovered in a civil action can

make no difference. There have been many cases in which, by provisions of law, a person might proceed either *criminaliter* or *civiliter*, at his election, to avail himself of a penalty, which he may be authorized to recover, for himself, or for himself and the State or others. Sec. 8 of the above act, (c. 205,) shows clearly, if other proofs were needed, that when proceedings by complaint and warrant are under that act, they are of a criminal character. That section provides, that if any person, after having been once convicted of a violation of the provisions of that act, shall be guilty, and upon complaint be convicted of a like offence, he shall be punished by a fine of not less than five, nor more than twenty dollars; and be committed until sentence be performed.

Thus it will be seen that the conclusion, upon the point reserved, is adverse to the plaintiff; and the cause must stand for trial, if the plaintiff should not conclude to become non-suit.

Whether it will be competent for the plaintiff to introduce proof, that his arrest on the Lord's day was an unnecessary labor or not, is not referred to us; and of course we do not definitively decide it. It may, nevertheless, be observed, that it is not perceived why the literal import of the words used in the statute, should not include the business of officers in serving warrants, they being at the same time, entitled to the benefit of the exception of works of "necessity or charity;" and on the principle, that officers shall be presumed to act within the sphere of their duty, till the contrary be made apparent. And it may be noted, that in the case of *Pearce* v. *Atwood*, before cited, the Court observe, that magistrates and officers will "consider, that all official unnecessary labor will expose them to the penalties of the act for the due observance of the Lord's day, although their doings may not be void." Those, whom the officer may call on as aids, may nevertheless be excusable, and not liable to an action, if they do no more than would ordinarily be consistent with their duty as aids. They are not bound to inquire whether the officer employing them, has good cause for making an arrest, in a criminal case, on Sunday or not.

Mark Pease *versus* Peleg Benson, Jr. *& al.*

Under the provisions of st. 1821, c. 39, the foreclosure of a mortgage cannot be made "by the consent in writing of the mortgagor" without an actual entry by the mortgagee, or those claiming under him, into possession for condition broken.

The foreclosure of a mortgage cannot be caused by the written admission of the parties, in a manner not authorized by the statute.

If an assignee purchase the mortgage by the payment of a sum less than the amount actually due, still the mortgagor or his assignee will not be entitled to redeem without payment of the full amount due upon the mortgage.

It was the design of the Rev. St. c. 125, § 16, to enable the mortgagor, in certain cases, to maintain a bill in equity to redeem a mortgage without the performance, or tender of performance, of the condition; but not to authorize him to recover costs, unless he had been prevented from doing it by some act of the mortgagee, or his assignee.

The mere denial of the right of the mortgagor to redeem will not prevent his tendering performance, and will not, of itself, authorize the awarding of costs to the complainant.

The object of the statute being to afford a party, seeking to redeem, information of the exact amount claimed to be due upon the mortgage, any failure to afford it within a reasonable time after request must be regarded, in the sense of the statute, as an unreasonable neglect or refusal.

Bill in equity to redeem a mortgage. The case was heard upon bill, answer and proof. The opinion of the Court gives a sufficient statement of facts.

S. May, in his argument for the plaintiff, advances these legal positions: —

If the complainant would prevail it is incumbent on him to satisfy the Court of two things: —

1st. That he is *rectus in curia* and entitled to this bill.

2d. That he has a right to redeem the premises, or in other words, that the mortgage held by the respondents has not been foreclosed; and

3d. If he would recover his costs, he must show that the respondents, upon request, have *unreasonably* refused to render a true account of the sum due upon the mortgage held by them, or in some way by their default have prevented him from performing or tendering performance of the condition before suit.

In the remarks I have to submit, I propose to maintain the affirmative of each of these three propositions.

And first, is the complainant rightly in Court with this bill?

By § 16 of c. 125, Rev. Stat. it is provided that a bill in equity like this may be maintained without a tender, if the complainant shall in his bill "offer to pay such sum as shall be found to be equitably due," provided the mortgagee or person claiming under him shall have refused or neglected, on request, to render a true account of the sum due before the commencement of the suit. This section, as it speaks of rents and profits and money expended in repairs and improvements, may be said to refer only to cases where the mortgagee or his assignee have the actual possession; but if this be so, still it is provided in § 17, if the money *have been paid or tendered*, such bill may be maintained although the mortgagee or his assignee shall never have had the actual possession of the premises for breach of the condition, *or* "*in such case*," refering to the want of possession as aforesaid, it is further provided in the 18th § of the same chapter that the bill may be maintained as in the 16th § without having made a tender.

That the words "or in such case," in this section refer only to cases where the mortgagee or his assignee has never had actual possession for breach of the condition, is evident, because a construction which should refer them to cases where the money due on the mortgage had been paid or tendered to the mortgagee or his assignee, would be absurd, for it would make the Legislature say nothing more than that whenever the money due had been paid or tendered, then a mortgagor or person claiming under him, may have his bill without having made a tender.

Taking those three sections together it appears plain: —

1st. That the owner of an equity of redemption may maintain his bill after a breach of the condition, if the mortgage *has been paid*, and this whether the mortgagee or his assignee be in possession of the premises or not. 2. That he may maintain his bill in all cases where the money due on the mort-

gage has been tendered before suit; and 3d. He may maintain his bill against the mortgagee or his assignee, whether in or out of actual possession, in all cases, where the money due has not been tendered, provided he shall offer in his bill "to pay such sum as shall be found to be equitably due, and if the respondents shall have refused or neglected, on request, to render a true account of the sum due before suit brought."

The fact then of a request, and a refusal and neglect to render a true account, as is alleged in the bill, is not denied. If such refusal and neglect were reasonable it might affect the question of costs, but whether reasonable or unreasonable can in no way affect the question of jurisdiction in this case. *Willard* v. *Fiske*, 2 Pick. 540; *Cushing* v. *Ayer*, 25 Maine R. 383.

I am aware that G. A. Benson, in his answer, says he made no reply to the written request, because he had before stated the extent of the claim covered and secured by the mortgage, and that it did not embrace demand for repairs, and that they had received no rents and profits from said real estate. It will be perceived at once, that no such information was communicated at either of the interviews between the parties mentioned in the answer.

I go further and contend that the account rendered should be in writing, and contain the exact amount claimed or the items from which the exact amount can be ascertained, that the account rendered should be so stated in the answer or otherwise proved as to enable the Court to say that no more was claimed than was due. *Allen* v. *Clark*, 17 Pick. 47.

If more is claimed than is due, then, in the language of C. J. Whitman, in the case of *Cushing & Ayer*, before cited, "it is not a true account."

Again we contend, that if the paper of Oct. 21, 1837, was an entry and an obtaining of the actual possession of the premises within the meaning of the stat. of 1821, c. 39, § 1, (which was the only statute in force in this State when said paper was given) then the respondents are accountable for the rents and profits, which by due diligence, they might have

received and these would have much more than paid off the mortgage before it could have been foreclosed, and so there was no rendering of a true account even if it had been done in answer to the written request.

If the rents and profits are equal to the sum due on the mortgage, the mortgage must be regarded as paid, and the complainant may, under the 17th section of the statute, maintain his bill without proof of any tender. *Tirrell* v. *Merrill*, 17 Mass. R. 117. That under the circumstances of this case the respondents are bound to account for the rents and profits, at least after the assignment of the mortgage to them, I cite Powell on Mort. (1st American edition,) 1030, as directly in point, also *Newhall & al.* v. *Wright*, 3 Mass. R. 154.

Nor is this an unreasonable rule. If the mortgagor had occupied himself, and had not assigned his interest in the estate, he would be entitled to no deduction on account of the rents and profits, because he had got in the actual enjoyment of the rents and profits all which he was entitled to receive. But when the mortgagor has parted with his right to redeem and the mortgagee or his assignee takes the possession, so that the mortgagor becomes his tenant, holding under him, he must be held to account for the rents and profits to the assignee of the mortgagor, for the good reason that such rents and profits belong to the assignee and not to the mortgagor. When the mortgagor has conveyed his right, then the mortgagee sustains the same relation to the assignee as he did before to the mortgagor, and his duties and liabilities to the assignee must be the same as if the mortgagor had never owned the estate. If it be said that this is hard for the mortgagee, because he may not even know of the assignment, our answer is, that if the deed of assignment is upon record he is bound to know it, and is estopped to deny his knowledge of it. *Clark* v. *Jenkins*, 5 Pick. 280; *Mills* v. *Comstock*, 5 Johns. Ch. R. 214; *Cushing* v. *Ayer*, 25 Maine R. 383.

But if the respondents had before the written request, rendered a true account, the complainant had the right, even a few hours after, to make a new request, and to inform them he

was ready to redeem; and they were then bound to furnish a true account, as it existed at that time, either by stating that the one before rendered remained correct, or by furnishing the items composing the amount due.

We are brought then to the second question in this case, the question of merits. Has the complainant a right to redeem?

We contend that he has: —

1. Because there has been no entry and obtaining of the possession for condition broken, according to the provisions of any of the statutes in this State.

It is now settled that an entry to foreclose, must be in accordance with one of the modes provided by the statute. *Ireland* v. *Abbott*, 24 Maine R. 155.

It will not be pretended in this case that the entry relied on was in accordance with any of the provisions of the Revised Statutes, c. 125, sect. 3 and 5, or the stat. of 1838, c. 333, sects. 1 and 2, or the statute of 1839, c. 372.

The entry relied on, must have been under the statute of 1821, c. 39, sect. 1, as that was the only statute in force on the 21st of Oct. 1837, when the writing set forth in the respondent's answer was given. By that statute the mortgagee or those claiming under him, must have entered and obtained the *actual* possession of the premises, for condition broken, before the mortgage can be foreclosed. This may be done in either of three modes, viz: — 1. By process of law. 2. By the consent in writing of the mortgagor or those claiming under him, or 3. By the mortgagee's taking peaceable and open possession of the premises mortgaged, in the presence of two witnesses. But the possession obtained in either mode must be actual possession.

This is not an entry by process of law, nor in the presence of two witnesses, nor is it by consent in writing by the mortgagor or those claiming under him, within the meaning of the statute. The statute means, that the consent shall be given by the person interested, by the mortgagor if he is the owner of the right to redeem, and if he is not the owner, then by his

assignee, or the person holding the right to redeem, and who is to be affected by the act. This is reasonable, but if the mortgagor after he has conveyed his right, can bind his assignee without his knowledge or consent, great injustice might be done. Such a construction of the statute would be extraordinary indeed. The mortgagor after he has assigned his interest, can no more consent to an entry, than the mortgagee after he has sold his interest can enter for condition broken. The language of the statute gives the mortgagee and those claiming under him the right to enter for condition broken, in the same manner as it allows such entry to be made by consent in writing of the mortgagor or those claiming under him. It has been settled by this Court, that an entry by the mortgagee after he has parted with his interest in the mortgage, is of no avail to foreclose a mortgage, but such entry must be made by the person holding the mortgage at the time the entry is made, and for the very same reasons the holder of an equity at the time when consent in writing to enter and hold for condition broken is given, can alone give such consent, whether such holder be the mortgagor or his assignee. *Call* v. *Leisner*, 23 Maine R. 25. So it has been settled that a mortgagor after he has assigned, cannot redeem, his assignee alone having the right. *True* v. *Haley*, 24 Maine R. 297.

But whatever might have been the effect of such a paper as between the mortgagor and the respondents, it clearly can have no effect to bar the complainant of his right to redeem. Such an entry, even if actual possession had been obtained with the written consent of the mortgagor, and even if he had the right to give such consent, certainly cannot bar a then existing second mortgagee, of his right to redeem, unless he had at least notice of such entry. *Gibson* v. *Crehore*, 5 Pick. 146; *Boyd* v. *Shaw*, 14 Maine R. 58.

Under the Massachusetts statutes, notice that the mortgagee was holding for condition broken, might be inferred from actual and continued open possession after a breach of the condition, and such possession might be effectual to foreclose the mortgage. But our statutes exclude this mode. Vide *Ire-*

land & Abbott, 24 Maine R. 155. Also a note in the 14th of Maine Reports, 65, at the end of the case of *Boyd & Shaw*. In the case of *Thayer & al.* v. *Smith*, 17 Mass. R. 429, it was decided that nothing short of *actual notice* to the mortgagor will supply the want of *continued* possession.

The object of the statute in regard to costs, is to protect a mortgagee who is without fault, one who is willing to receive his money and discharge his claim without the filing of a bill. But in all cases where the mortgagor or his assignee is under the necessity of resorting to a bill to obtain his rights, through the fault of the mortgagee or his assignee, costs should be allowed. This is a reasonable construction of the statute. In all cases then, where the mortgagee or his assignee claims an indefeasible title in the premises, or denies the plaintiff's right, or evades his demand, if the plaintiff is entitled to prevail, costs should follow as a part of the decree. In such a case the claim of title, the denial of the plaintiff's right, and the evasion of his demand are all wrong and unlawful; and in the eye of the law, that is unreasonable which is unlawful.

If a defendant would avoid costs he should concede the plaintiff's right to redeem, and it should appear from the facts, that he had placed no obstacle or hindrance in the way of it, and that in such case he was willing to take the amount due upon the mortgage and discharge his claim. In the case before the Court, unless the facts are greatly misunderstood, the reverse of all this fully appears, and if so, this is a "preventing of the plaintiff from performing or tendering performance of the condition before the commencement of the suit," within the meaning of the statute.

Emmons, for the defendants, in his argument, took the following legal views of the case.

The complainant, a junior mortgagee, seeks of the Court by his bill, to be allowed to redeem the premises therein described of the defendants, who are the lawful assignees of Ira T. Thurston, an elder and first mortgagee of one Ezekiel Holmes. The rights and titles of both parties, by virtue of the respective instruments under which they severally claim, are valid as

against Holmes. The great question in the case is, whether the acts and proceedings of Thurston and the defendants, who possess and enjoy all the rights, privileges and benefits that he had and those the defendants have acquired since, have in equity deprived the complainant of the right which he seeks to enforce in this process. To the discussion of this question and that of costs, will the observations which I beg to submit to the Court in this case, be principally confined. The counsel for the complainant has distributed his discussion into three general points, first, that the complainant is *rectus in curia* — second, the complainant's right to redeem, — third, the question of costs. I could not, after the laborious effort of the learned counsel, to get "*rectus in curia*", have the hardihood, if I possessed the spirit of a judicial gladiator, to attempt to remove his "*stat in curia;*" but will cheerfully submit to the Court whether they will permit his continuance. I will therefore proceed to consider the second point in the argument.

It appears that Holmes, on the 17th of August, 1835, conveys the premises described in complainant's bill, in mortgage to Ira Thurston; and on the 9th of February, 1836, makes a second mortgage thereof to the complainant, apprising him of the existence of Thurston's mortgage, which seems not then to have been recorded. The respective rights of the different claimants as thus indicated, remained unchanged, so far as any acts of either appear to have taken place, till October 21, 1837, when Holmes gave Thurston a certain paper, expressed and written as follows: — viz. "I hereby give possession to the Rev. Ira Thurston, of a certain lot of land situate in Winthrop village, bounded as follows; north by land owned by Samuel Morrill, jr. east by Morton street, south and west by the burying ground, together with the buildings thereon; said lot is the same which I purchased of said Thurston and is secured to him by a mortgage." No question can be made that the premises mentioned in the above recited paper, are identical with those drawn into the claims of the respective parties. The value and effect of this paper, must be determined by the laws

of the State, in reference to the subject at the time of its creation. That law is to be found in the 39th chap. of the laws of 1821, § 1. The first part of the section mentions and prescribes what a mortgagor's rights are in regard to redemption, when a mortgagee has taken measures to foreclose his mortgage; and in the latter part of the section, under the proviso, it is said that the entry above described shall be by process of law, *or by the consent in writing of the mortgagor, or those claiming under him, &c.*

The paper given by Holmes, the mortgagor, to Thurston, above quoted, comes, as the defendants believe, within the second mode of procedure to be taken by a mortgagee to foreclose his mortgage as prescribed by the statute aforesaid. Holmes, at the time of making and delivering this paper, was in possession of the premises. The consent in writing to be given to the mortgagee, contemplated by the statute, is to be given by the person in possession either as mortgagor or assignee. Holmes then had a right to give the paper. Does it substantially contain all the statute requires, the paper denominated "consent in writing", should contain to render it effectual? No interpreter or expositor by law authorized to make judicial adjudication of the meaning of the clause in question, would assert that the instrument contemplated therein, would require that the writing should be in the identical language of the statute; but simply any writing given and received by the proper persons which should, by a fair and just interpretation, import a consent on the part of the giver of the paper, that the person to whom given might enter and have possession of the premises to which the paper related.

The law does not demand that the paper should state the object for which the consent is given. The object may be inferred from concurring and attendant circumstances, and the declaration of both parties, so far as affects them at least. What is the language of the paper brought into consideration in this case? It is, "I hereby give possession" to Rev. Ira Thurston, then describes the premises, states that they are the same which I purchased of said Thurston, and is secured to

him by a mortgage thereon. The interpretation of this language must be, "I the mortgager, hereby give you, the mortgagee, possession of the premises described." The term give implies a giver and also a receiver. The parties then are made to say, I, the mortgager, give, and I, the mortgagee, receive possession of the premises. How can this be done, except by an *actual entry* of the mortgagee? Possession cannot be given nor received by manual tradition. The very language of the paper, necessarily implies and demands an actual entry into the premises, and obtaining possession by consent of the signer, the mortgager. To prevent confusion and unjust application of the argument, it is necessary to remark, that there is a palpable distinction between an actual entry, and obtaining possession, and an actual entry, and a continuance of the possession when obtained.

The statute of 1821, c. 39, § 1, says nothing of continuing to hold possession after it is obtained in order that a foreclosure may be effected. It does indeed speak of what may be done, in case the possession may have been continued, but nowhere insists upon continuance as indispensably necessary, to work a foreclosure. Now what could be the object of Holmes in giving and Thurston in receiving such a paper? The Court will not suspect, that two professional men, should gravely set down, the one to make and the other to receive such a paper, as amusement or pastime. They will presume that both had some distinct and important object. What conceivable object could they have had, but to fix the time within which Holmes' right of redemption under his mortgage to Thurston should expire. The case finds that at the time of the assignment of the note and mortgage by Thurston to the defendants, in 1839, both Holmes and Thurston declared to the defendants that such was the object. Neither Holmes nor Thurston can ever be permitted to testify to any fact which would be inconsistent, with the statements which they made to defendants at the time of the assignment, which operated upon defendants as a motive to the transaction. That would be a fraud which neither equity nor law would sanc-

tion. Neither can Holmes nor Thurston do or say any thing by which the right and title they were the instruments of conveying to the defendants, after said conveyance, can be impeached so far as respects them at least, if not every one else. Suppose Thurston had not assigned his note and mortgage to the defendants, and three years had elapsed after the date of the paper in question, and Holmes had not paid his notes, and Thurston had claimed to hold the premises by an indefeasible title, and Holmes had brought a bill in equity to redeem, having tendered to Thurston what was due him on his notes; and Thurston had offered the paper in question to show that Holmes' title or right of redemption was gone. Would the Court allow Holmes to say that nothing was meant by this paper and what it imported by its terms was not done? Surely he must be bound by it, and if it stated enough to meet the requirements of the statute he could not sustain his bill. We have endeavored to show that the paper does contain enough, by a fair and just interpretation, to satisfy the exigency of the law in this respect. The conclusion to which this argument conducts us is, that in reference to Holmes and Thurston their rights under the mortgage are gone forever.

It is time to turn to the consideration of the question of costs. If the Court should say that the defendants are wrong in the construction of law in regard to the foreclosure of the mortgage, and the complainant has a right to redeem in this case, we would respectfully contend that he should not have his costs. No one but the complainant's counsel, can read the answer of G. A. Benson, without seeing at once, that he supposed the right of redemption had gone from the complainant by reason of the foreclosure of the Thurston mortgage; that he had a large demand against Holmes, who had procured a discharge in bankruptcy, for which he never could obtain a brass farthing; no, not even thanks nor gratitude for many favors, unless he might, as a man of honor and honesty, hold the property included in Thurston's mortgage, legally forfeited to him, in consequence of the non-payment of what was due

him on account of the Thurston note, and the foreclosure by virtue of the paper and what it implied was done by Holmes and Thurston; that he never could have thought of holding all the mortgaged property, if he legally could, to pay the paltry sum advanced, if he had not had other demands against Holmes, which he must lose. Supposing he had the legal right, he proposed to the complainant to leave it to men to say, whether he should have from the mortgaged property any thing more than what he paid and the interest, or some thing besides for the payment of his other demands, which, notwithstanding poor Holmes' account, are several hundred dollars, and the complainant have the balance.

And when the said Benson, on pages 12 and 13 of the copies of the case, in his answer, says, "he knows, that at said time and in said interview he did state to said complainant, that said Holmes was indebted to said Peleg Benson, Jr. and this defendant in a large sum, aside from and in addition to the said note of the said Holmes to said Thurston paid as aforesaid, by this defendant, for a large part of which sum so due, and owing from said Holmes, to said Peleg Benson, Jr. and this defendant, had no other security, than what might *grow out* of the deed of mortgage from said Holmes to said Thurston, and the assignment thereof and the land therein described by the said Thurston to the said Peleg Benson, Jr. and this defendant, and expressed the opinion to the said complainant, that it would be right and just, that Peleg Benson, Jr. and this defendant *should at least* participate in the property secured by the mortgage aforesaid, to pay the demand against said Holmes, for which they had no other security," what could be his meaning, but that as he had a legal right to the property, for which he had paid but a small sum, it would be right and just, to take from said property a part payment of other demands against Holmes, for which he had no security, but what grew out of this foreclosure, and *divide* with *complainant* the loss, both must sustain from Holmes. Benson and the complainant, and every body knew, that the mortgagee could not secure more than what was mentioned in

the condition. Nothing was in the condition of the Thurston mortgage but Holmes' notes to him. And the security which was to grow out of that mortgage to Benson, *was planted in the supposed foreclosure.* Before Benson uses the language quoted in page 12th, he says he feels a confident persuasion, and it is his full belief, that he made known to said complainant the extent of the claim of Peleg Benson, Jr. and this defendant, as *covered and secured by said mortgage, &c.* making thus a distinction between that claim, and the other demands. If this idea is not clearly conveyed in the answer, it is my fault, not Benson's, because I drew the answer from his statement and sent it to Winthrop for his examination, signature and oath. He never pretended to any person, I *presume,* as he must have known better, he certainly never did to me, that he could get any part of his pay for demands he held against Holmes, not included in the condition of Thurston's mortgage, except there was a foreclosure, and then he was willing persons should be selected to say what division of that property should be made between him and the complainant, not wishing to retain the whole, to the exclusion of the complainant, though he supposed he had the legal right. Now suppose the defendant wrong in his judgment of his rights, and the complainant has a right of redemption, he was bound to pay or tender what was due to the Bensons before he could maintain his bill. Something was due upon the assumption of the complainant, that there has been no foreclosure. It is said, that the complainant did not know what was due and could not ascertain, and therefore it was no fault of his, that payment or tender of payment was not made. We deny this altogether. What says the answer? See pages 14 and 15 of the copies. On the 9th of July, 1846, the very day the letter of request was written by the learned counsel, the complainant called upon G. A. Benson. In the interview between the complainant and G. A. Benson, the latter in his answer says, the former inquired how much was due on the Thurston note? He, (Benson,) produced the note, having that day made a calculation of what was due on it, knowing the complainant was then in

Winthrop, and expecting the complainant would call upon him, and told said complainant how much was due thereon, and shew the note to him; gave the note to the complainant and furnished means to take a copy of the note and indorsements, and after the complainant had taken minutes of the notes and indorsements, Benson then said, he supposed *the object of the complainant was to ascertain the rights of the parties*, and then produced the writing of Oct. 21, 1837, which he copied, then the mortgage deed and the assignment. Now it is to be remarked, that if said Benson had pretended that he had other claims, than what were exhibited in the papers presented to the complainant, which were necessary to ascertain the rights of the parties, would he not have produced them and stated them, when he told the complainant he supposed that was his object at the time? The exhibit was tantamount to saying, sir, you have before you all which can show what I claim as matter of law, and you can see what are your rights and mine. But when in page 15, Benson in his answer gives the reason for not making a reply to the notice, he says he had previously made known to said complainant, the extent of the claim, *covered and secured* by said mortgage, (precisely the language used before in contra-distinction to the additional demands, and in exclusion of them, for which he had no security of Holmes, except what *grew* out of the foreclosure,) and that it did not embrace demand for repairs and the defendants received no rents and profits from said real estate. This Benson swears to, and there is no opposing evidence. But the learned counsel with an air and tone of triumph, demands, I ask *when* and under what circumstances was this knowledge given?

The counsel then proceeds to answer, *it was not* given at either of the interviews between the plaintiff and G. A. Benson, which are mentioned in said Benson's answer, because at these, not one word is said about repairs or rents and profits. Pray how does the learned counsel know? Was he present? Does said Benson say he stated in his answer all which was said by the parties at these interviews? Was it necessary to

state in his answer, before he came to give the reason for not replying to the notice, that he had spoken of repairs and rents and profits, and denied he had any claim for the one, or had received the others, and then when he came to assign the reason for not replying to the notice, to say he did not do so because he had made known to the complainant the extent of his claim, as before stated in his narrative of what was said, at a previous interview ? Might he not adopt this mode in his answer, without subjecting himself to the imputation of falsehood ? As no time is given in the answer, says the learned counsel, the Court cannot know when the information was communicated, and therefore must be unable to tell whether the demand was *the same when* the information was communicated and *when* the request was made in writing. This certainly is very extraordinary argument, when on the very day of the request, Benson undertook to make the complainant acquainted with the facts, so he might be able to ascertain his rights and those of the defendants. I trust the Court have some common sense if the complainant and learned counsel have not. There can be no doubt, that in the interval between the first and second calling of complainant upon defendant, on the 9th of July, 1846, the complainant was at the office of his solicitor, and carried and shew him his copies and minutes, and must have been informed, what Benson could claim and what not, by his learned counsel, and he might have tendered him the balance due, on the Thurston note, and if the Bensons had refused it, he might have brought his bill. There must be something that we cannot see, in this formal notice to a neighbor a few rods from the learned counsel's office, in all probability, almost every day in the week, except Sunday. At any rate, Benson swears he informed the complainant of the extent of his claim. And will the Court presume, *it was not*, when Benson says he presumed the object of the complainant was to ascertain the rights of the parties, a few hours before the formal written application to a near neighbor, who might be seen almost every hour, in every week by the solicitor or his student or partner. The learned counsel inquires if there were any

difficulty in the way of replying to the notice? I presume the learned counsel would not expect me to answer that inquiry. He knows whether the communication between him and the defendant is easy or difficult. The learned counsel for complainant says, that what Benson says in reference to the notice, and the reason for not replying to it, is not evidence, because it is not responsive to the bill. Pray what is? I am sure I cannot tell, if that is not.

He further says, the true reason, for not replying to the notice, was because the Bensons wanted to stretch their mortgage to get other demands than what it rightfully embraced; but Dr. Holmes dissipates the claim and shows its existence was a pretence. This Dr. Holmes, a pretty witness indeed to dissipate pretences, who after Benson had signed a bond for him to keep him out of jail, and had a bill of sale of the Doctor's library and permitted him to enjoy it undisturbed, can cooly give a warranty deed of land to Clark, which he had before conveyed to the Bensons, because he supposed the Benson deed was not recorded. Better suffer the Doctor to lie quietly on the bed of his own "pretences," and not torture him into activity to dissipate the pretences of the Bensons. Better send the Doctor to the Rev. Ira Thurston. We say that the defendants informed the complainant of what was due to them by virtue of their assignment of the Thurston mortgage, and he ought to have tendered the amount which he found due, by means furnished by defendants, and if he had tendered too much, he could have received the excess back, if received by defendants, and the defendants presented no hindrance or obstruction, and he might then have brought his bill and if the Court had determined he had a right to redeem, they would have allowed him his costs as they ought. But here was no refusal, to let the complainant know all the facts, no evasion, no skulking, no duplicity on the part of the defendants, and if the complainant be a sensible man he must have known, as the history of the case shows, just what the defendants did claim, and if he were right in his law, he should have tendered the small sum due the Bensons, and if they had not

been willing to accept it, then he would have put them legally in the wrong and the Court would have given him his rights and his costs. But now he ought not to have costs, if he should be thought to have a right to redeem.

The opinion of the Court was drawn up by

SHEPLEY J. — The plaintiff by this bill seeks to redeem the premises conveyed in mortgage by Ezekiel Holmes to Ira Thurston by deed bearing date on August 17, 1835. He is a subsequent mortgagee by a conveyance from Holmes made on February 9th, 1836. His deed was recorded before that made to Thurston, which was assigned to the defendants by a deed bearing date on August 13th, 1839; but he had knowledge of that prior conveyance and does not attempt to postpone its operation to his own.

If the plaintiff is entitled to redeem, the counsel for the defendants does not contend, that he cannot sustain his bill according to the provisions of the Revised Statutes, and it will not be necessary to consider that question.

His right to redeem is first to be considered.

The mortgager made and presented to the mortgagee a paper in the words following: — "Winthrop, Oct. 21, 1837. I hereby give possession to the Rev. Ira Thurston of a certain lot of land situated in Winthrop village, bounded as follows, north by land owned by Samuel Morrill, Jr. east by Morton street, south and west by the burying ground, together with the buildings thereon; said lot is the same which I purchased of said Thurston, and is secured to him by mortgage thereon." Signed, Ezekiel Holmes. The mortgagee states, that he never entered into possession or took any action by virtue of that paper, which was delivered by him to the defendants at the time when the assignment was made to them.

The statute then in force provided for the redemption of estates conveyed in mortgage within three years after the mortgagee, or his assignee, should "lawfully enter and obtain the actual possession of such lands or tenements for condition broken."

The entry might be made by process of law; by the consent in writing of the mortgager or those claiming under him; or by the mortgagee's taking peaceable and open possession of the premises in the presence of two witnesses.

A foreclosure could not be made according to the second mode without an actual entry into possession for condition broken, by the consent in writing of the mortgager or those claiming under him.

In this case no such actual entry has been proved. On the contrary it appears, that none was made. The words contained in the paper signed by the mortgager, "I hereby give possession," do not prove the fact, that an actual entry was made and possession obtained. If, as contended in argument, it was the intention of the parties to admit that an actual possession had been taken, they could not cause a foreclosure in a manner not authorized by the statute. Could not substitute a fiction for the actual entry into possession required by the statute and make it as effectual as the act required. The legal effect of that paper, at most, could be no more than to express the consent required by the statute. It may be doubtful, whether it was sufficient for that purpose, for it does not in terms express a consent that possession should be taken for condition broken. The mortgager himself would not be estopped by it to deny, that actual possession had been taken for such a purpose, does not recite or declare, any such fact. Much less could the rights of a subsequent mortgagee be affected by it. It is the actual entry into possession for condition broken, that may effect in due time a foreclosure, being made by the written consent of the mortgager or his assignee. The written consent is of no effect but to make such entry lawful.

There being no proof of a legal foreclosure of the mortgage, the plaintiff is entitled to redeem.

His counsel contends that he should not be required to pay a greater sum, than the defendants paid to procure the indorsement of the note secured by the mortgage and interest thereon. Although that and the assignment of the mortgage

may have been obtained by the payment of a sum less than the amount then actually due, the defendants thereby became the legal owners of the estate subject to the right of redemption, and thus entitled to retain it, until they were paid the full amount secured by the mortgage and remaining unpaid.

The plaintiff's right to recover costs depends upon the provisions of the statute, c. 125, § 16. It was the design of that statute to enable one in certain cases to maintain such a bill without performance or tender of it, but not to authorize him to recover costs, unless he had been prevented from doing it by some act of the mortgagee or his assignee. The mere denial of his right to redeem cannot prevent him from tendering performance.

The bill sets forth a written request to render an account, and alleges an unreasonable neglect or refusal.

The answers admit that such a request was made, and that no account was presented in obedience to it. But they allege that at a previous hour of the same day, one of the defendants exhibited to the plaintiff the amount due upon the note remaining unpaid, and secured by the mortgage, and informed him that there were no claims for repairs or expenditures, and that no rents or profits had been received. To an inquiry of the plaintiff, whether he had not better take the amount due upon that note and let him have the property, the answer was, that he thought he should be willing, that some suitable person should say, taking into consideration all the property and the demands of both the parties, what would be right and just. The design of the statute being to afford to a party seeking to redeem, information of the exact amount claimed to be due upon the mortgage, any failure to afford it within a reasonable time after request, must be regarded in the sense of the statute, as an unreasonable neglect or refusal. The information respecting the amount due upon the note secured by the mortgage, accompanied as it appears to have been at all times by the assertion of other claims to be adjusted before his right to redeem could be admitted, left it obscure and uncertain, whether those other claims were not insisted upon as necessary

to be paid by one entitled to redeem. Under such circumstances the plaintiff, to remove all uncertainty and obscurity, might properly make the formal request set forth, and a neglect to answer it and to remove all uncertainty must be regarded as unreasonable.

The plaintiff is entitled to a decree for a release of the mortgage title upon payment of the amount secured by it, which remains unpaid, and to recover his costs.

PHINEAS PRATT *versus* JAMES B. THORNTON.

Where a conveyance of land is made by absolute deed, and the grantee gives back to the grantor a written contract, promising to sell the land at a certain time, and to pay two notes with the proceeds, and to pay the balance to the grantor; such grantee holds the land in trust, and it is his duty to make sale thereof at the time specified, and appropriate the proceeds in the manner stated in the contract.

And if a third person be a surety on one of the notes, although he might not have known of the trust, when it was undertaken, yet when he was informed of it, and could enforce its execution, the original parties to it cannot annul it.

If there should be a mortgage upon the estate, the trustee may pay it off, and the amount paid will be a charge upon the estate.

The trustee cannot in equity, become the purchaser of the trust estate; and the *cestui que trust* may avoid any purchase of the trust estate made by the trustee.

When a party has materially improved the estate, under a belief honestly entertained, with reasonable grounds for that belief, that he is the owner of the land, and the aid of a court of equity is sought by the true owner to enforce his title, it will be granted only on the condition, that such innocent person shall be compensated to the extent of the benefit which he has conferred upon the owner. But this cannot be done to the prejudice of the owner.

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

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

The following is a copy of the agreement given by Thornton to Tucker: — "Saco, November 9, 1837.

"Know all men by these presents, that I, J. B. Thornton,

have this day received of Jonathan Tucker, Jr., a deed of the land, house and out-buildings, situate on Maine street, in Saco, bounded by land of Moses Emery and Widow Sarah Thornton, and is the same that formerly belonged to Waldo Hill, Jr., of Saco, as collateral security for payment of his note for seventeen hundred and twenty-five dollars, payable in two years, with interest quarterly; and also to indemnify me for any amount that I may have to pay on a note indorsed by me, and signed by said Tucker and Phineas Pratt, to Israel Small, of Limington, dated in January, 1836. If said Tucker pays the above named notes at maturity, or within two years from this time, I hereby agree to relinquish to him all the right received this day to the above named property; otherwise I am to raise the amount from the property, and pay the balance to said Tucker, if any remains."

Evans argued for the plaintiff, contending: —

The court has jurisdiction of the case, sitting as a court of equity. They have jurisdiction in all matters of trust. 2 Story's Eq. § 1050; 3 Sumn. 475; 4 Pick. 1; 3 Ves. 127; 2 Johns. C. R. 88. This was a conveyance in trust, to sell the property, and return the balance, unless the grantor paid the debt.

The defendant is bound in the relation of trustee, and Tucker could not have discharged him from his obligation, had he undertaken it. The answer says, that Tucker abandoned the property to him. He could not make a valid conveyance to Thornton. The trustee can take no valid conveyance of the trust estate. 2 Story's Eq. 972, 980; 3 Johns. C. R. 261; 4 Pick. 71; 8 Pick. 405; 20 Maine R. 431; 15 Maine R. 388; 1 Ves. 477; 8 Wheat. 421; 15 Pick. 23; 4 Metc. 375. He was bound to sell the property, as agreed at the time of the conveyance.

Thornton might and could have sold subject to the mortgage to Mrs. Hill. Thornton can acquire no rights against the plaintiff by the purchase in of that mortgage. 2 Story's Eq. § 1211; 3 Sumn. 487; 1 Peters, 145.

Thornton has no right to claim any allowance on account

of any thing done by him, which he calls improvements. He should have done his duty, and sold the estate, and has no right to change or alter the property. He cannot set up his own misconduct as a ground of claim in a court of equity. 17 Mass. R. 474; 18 Maine R. 366; 2 Metc. 561; 8 Pick. 122.

The Perkins judgment on the Small note was procured by fraud; and the Court should enjoin him not to proceed to execute it.

He contended that the law was in his favor, and that on the whole merits of the case, the plaintiff was entitled to relief.

W. P. Fessenden, for the defendant, argued mainly on the facts; contending as matter of law for these positions: —

The obligation to sell the property ceased, when the situation of it had materially changed. 1 Russ. & M. 236; 1 Sim. & St. 229.

The plaintiff did not rely upon the trust, but took an assignment from Tucker to himself. He has a complete remedy at law. The plaintiff, too, may pay the notes, and bring his suit at law against Thornton, and have a complete remedy, if he has any merits. 10 Ves. 420; 3 Metc. 541.

Thornton was not a surety on the note, but a guarantor, and as such might take up the note, without destroying its validity. 10 Pick. 121; 8 Pick. 423; 1 Metc. 387.

The property, if the estate is to be sold, which we trust will not be ordered, should be appropriated first to pay the mortgage, then the improvements, then the note to Thornton, and then the Small note. 3 Metc. 541; 24 Pick. 257; 20 Maine R. 427; 22 Maine R. 295.

The opinion of the Court was drawn up by

Tenney J. — On Nov. 9, 1837, the defendant having that day taken a note from Jonathan Tucker, Jr. for the sum of $1725, payable in two years, with interest quarterly; and his name being upon a note to Israel Small, signed by Tucker as principal, and the plaintiff as surety, dated Jan. 20, 1836, payable in two instalments, one on the 1st of May, and the

other the 1st November next following its date, on which was supposed to be due about $1500, took from Tucker a conveyance of certain real estate in Saco, consisting of land and buildings thereon ; and gave at the same time a written contract, in which he acknowledged, that he had received the deed as collateral security, for the payment of the note of $1725, and also to indemnify him for any amount which he might have to pay on a note *indorsed* by him and signed by said Tucker and Phineas Pratt; and then is added, "If said Tucker pays the above named notes at maturity, or within two years from this time, I hereby agree to relinquish to him all the right received this day to the above property ; otherwise I am to raise the amount from the property, and pay the balance to said Tucker, if any remains." At the time of this transaction, the estate was encumbered by a mortgage to Miranda Hill, which was not mentioned in the deed or the agreement of the defendant, but its existence was known to him.

The bill charges, that the parties thereto were co-sureties on the note to Small. This the defendant denies in his answer, saying that he refused to become such with the plaintiff, but put the following upon the back of the note. "I hereby guaranty the payment of the within note. J. B. Thornton." There is no evidence in direct conflict with this denial; the written agreement refers to a note *indorsed* by the defendant; but when that was written the note was not present, and it is evident that the language was descriptive of the note in general terms, and not intended for a distinction between the defendant as indorser and guarantor. Tucker does not testify with certainty, that the indorsement was not filled, when the defendant first put his name thereon, before the note passed to Small; but Small thinks the guaranty was filled, when he received the note. On Dec. 9, 1837, the agent of Small called upon the defendant, and he renewed his guaranty for a consideration paid in behalf of Small, to pay within one year, and the previous guaranty was thereupon erased. Soon after this, Tucker became insolvent, and as the defendant states in his answer, informed him, "that he must take the real estate aforesaid, and

get what he could from it, for he could do no more for him;" and the testimony of Tucker upon this point, is of the same import. In March, 1841, the defendant paid the amount due upon the mortgage to Mrs. Hill, she having previously entered to foreclose; and after that entry the defendant went into possession, under a lease from her, at a rent of $70 a year, and about the same time, underlet it at a yearly rent of $150, from Dec. 1838, to Sept. 1839, and afterwards has occupied it himself to the present time, has made extensive additions to the buildings, and improved the lands, and claims to hold the same by an absolute title, notwithstanding he has done nothing in fulfilment of his written agreement, made at the time of the conveyance. In October, 1838, by money and accommodation paper furnished by the defendant, the note to Small was taken up, and the payee indorsed his name in blank, "not accountable;" and by the procurement of the defendant an action was commenced in the name of Edmund Perkins, against the plaintiff, entered at the April Term, 1839, of the Supreme Judicial Court in the county of York, and came to judgment in 1840, no defence being made; execution was issued, but has never been enforced. On Oct. 17, 1844, Tucker assigned his interest in the contract of the defendant, to the plaintiff, for indemnity against his liability.

No unwillingness on the part of the plaintiff, to be the sole surety on the note to Small, at the time he signed it, is shown. When the note was first written a blank was left for the insertion of the name of another person as surety, and that blank was afterwards filled with the name of the defendant, but at what time does not appear; but there is nothing showing that the plaintiff placed his name upon the note under any agreement, that there was to be another surety. As the note was when received by Small, the defendant was not a co-surety with the plaintiff, and was not liable to make contribution to him, if he should have paid the note after its maturity. *Oxford Bank* v. *Haynes*, 8 Pick. 423; *Largley* v. *Griggs*, 10 Pick. 121.

Under the legal rights and liabilities arising from the relations

of the makers and guarantor of the note alone, the defendant was liable to the holder of the note, but was entitled to indemnity from the principal and surety, in an action upon the note after its transfer. And a judgment in the name of one, whom he had authorized to bring the action, was valid.

The subsequent guaranty made by the defendant was a contract in which the makers of the note had no connection, and it could not be to their prejudice. The note was taken up under the subsequent agreement between the holder and the defendant, and the action against the plaintiff was by the indorsee against him as the maker.

The plaintiff seeks relief of the Court sitting as a court of equity, by a decree, that the defendant be required to a specific performance of his written agreement, and from the proceeds of said property to discharge the judgment against him and to account for the rents and profits of said estate from the time the same came to his possession; and also that he be perpetually enjoined from enforcing or reviving the judgment in the name of Perkins.

A trust is an equitable right, title or interest, in property real or personal, distinct from the legal ownership thereof. Story's Eq. § 964. A declaration of trust, is required to be in writing; but it is not necessary that it should have any particular form or solemnity in writing, nor that the writing should be under seal. *Ibid.* 972. In this case the conveyance was in its terms absolute, but the agreement executed at the same time makes a part of the same transaction, and clearly declares an express trust. By it a fund was required to be raised, which the defendant was bound to apply according to the terms of the contract and the spirit of the trust. Tucker, who provided the means for raising the fund, was entitled to two years in which to pay the debts to the defendant and Small and take a re-conveyance. In less than one year afterwards finding himself unable to perform the condition, he informed the defendant, "that he must take the real estate aforesaid, and get what he could from it, for he could do no more for him." The defendant in his answer gives this direction of Tucker as the

authority for the course, which he afterwards pursued, and he relies upon it as an abandonment by Tucker of all interest in the property. Tucker in his testimony denies any such abandonment, and states the conversation between him and the defendant, which is wholly irreconcilable with such an idea. But independent of the testimony of Tucker, the abandonment cannot be inferred from the statements in the answer itself. After reciting the direction given by Tucker, the defendant says, — "The said Tucker did accordingly abandon that property to the defendant;" without stating more specifically in what that abandonment consisted. The note to the defendant remained as it was, no agreement was made in reference to that or to the note of Small; the parties were silent on the subject of the value of estate conveyed, or what sum should be allowed therefor. No consideration moved from one party to the other; the agreement creating the trust obligations of the defendant remained in force, not canceled or agreed to be annulled; no contract was then made, which in any degree lessened the defendant's liabilities, or modified essentially his duties; the very language used by Tucker, clearly imported an expectation, that the fund first in contemplation, should be raised from the estate. Tucker waived the right to redeem within the time first secured to him. Instead of an exposure of the defendant, to pay the debt to Small and wait for that and his own claim, two years from the time of his assumption of the trust, before he could proceed to raise the amount from the property, he was then at liberty to proceed immediately in the discharge of the duty, which he had undertaken. Tucker believed that sufficient might be raised from the estate to discharge the debts due to the defendant and Small, and perhaps leave a balance to himself, and he was entitled to a faithful fulfilment of the defendant's agreement. If the value of the property conveyed was sufficient for this purpose, the contract was beneficial to the plaintiff as surety on the note to Small; he was not a party to the agreement, and it was not entered into with his knowledge; yet after he knew of its existence, it was in his power to affirm it, and enforce its execu-

tion, unless it had been previously annulled by the parties to it. *Cumberland* v. *Codrington*, 3 Johns. Ch. 229; *Shepherd* v. *McEvers*, 4 *ibid.* 136; Story's Eq. 972. Nothing having been done to relieve the defendant from a strict performance of his agreement, he was bound to execute the trust; the express contract, and the interest of the plaintiff required this. The omission on his part although of long continuance, has not released him from his original obligation, or deprived the *cestui que trust* of any of the benefits, to which he was ever entitled. The trust was direct and express; and so long as it subsists, the right of the *cestui que trust* cannot be barred by the length of time during which he has been out of possession. *Cholmondely* v. *Clinton*, 2 Jac. & Walk. R. 1. *De Couche* v. *Savetier*, 2 Johns. Ch. 216. In the case of *Baker & ux.* v. *Whiting & al.* 3 Sumner, 475, the Court say, "in the case of a trust of lands, nothing short of the statute period which would bar a legal estate, or right of entry, would be permitted to operate as a bar of the equitable estate." *Prevost* v. *Gratz*, 6 Wheaton, 481.

The rights of the *cestui que trust* in the original agreement may with propriety pass to the plaintiff, as his surety, by assignment, as an indemnity against his liability. By the payment of the debt to the defendant, and the amount of the note to Small, he would, without the assignment, be entitled to the collateral security, provided by his principal for the reimbursement of the money so paid, in the same manner, that the latter would, under the contract with the defendant, be entitled to the surplus, after deducting the amount of those debts. Story's Eq. 1050, 1057; *Bigelow* v. *Wilson*, 1 Pick. 493; Story's Eq. 499, a, b, c.

It is insisted that the mortgage to Mrs. Hill, which was not excepted in the deed of conveyance, materially modified the rights of one party and the duties of the other. The defendant accepted the trust under a full knowledge of that incumbrance; and he expressed no wish to surrender it, when he was informed by Tucker, that he could do no more for him. He might have expected before the insolvency of Tucker, that

the latter would cause a discharge of the mortgage; but the defendant took the deed, and by virtue of its authority removed the incumbrance, and now claims the estate without the execution of the trust under an alleged abandonment of the *cestui que trust.* He is undoubtedly at liberty first to deduct from the avails of the property, the amount paid in the discharge of the mortgage; that was a charge upon the estate, which he could in the exercise of his discretion as trustee, remove; then proceed in the sale of an indefeasible estate, instead of an equity of redemption.

But as he accepted the trust, he cannot now contend, that any of his acts touching the estate were for his own benefit; all that he did in reference to the property, the law treats as done for the *cestui que trust.* The taking of the lease of the estate of the mortgagee in possession, the leasing of the same to another at an advanced rent, the payment of the sum necessary to redeem the estate from the mortgage, notwithstanding they may have been intended by the defendant for his own benefit, the law regards as performed in his character of trustee. Story's Eq. 1211 and 1261.

As long as the relation of *cestui que trust* and trustee exists, the latter cannot become the purchaser of the trust property; to him is confided the duty of selling; the interest of a purchaser is in conflict with the duty which he thus assumes. The law holds the two characters as absolutely incompatible, so that the exercise of the two in the same individual is prohibited. When a trustee has undertaken to become the purchaser, the fairness of the transaction, and the payment of the full value, proved to the entire satisfaction of a court of equity, gives them no power to affirm the sale. It is a fundamental principle in the law relating to trusts, that the *cestui que trust* can treat as a nullity, a sale to the trustee. *Warmly* v. *Warmley*, 8 Wheaton, 421. It follows *a fortiori*, that the trustee can acquire in no other manner an absolute title in himself. And nothing could be regarded as more absurd, than the proposition, that he could derive a title by his own wrongful omission to perform the obligations, which he had voluntarily

assumed. The payment of the debt to the mortgagee, his continued occupation of the estate, the additions to the buildings, the improvements to the lands, and his claim to hold the whole, cannot in any wise change the equitable title in the estate.

Again it is insisted, that Tucker could not claim to have the trust executed upon the estate, improved as it is contended that it has been, without first allowing all the expenditures thereon; that he stood by, saw the defendant enter upon the estate as his own, called for no sale or reconveyance; and when he made an assignment after large amounts had been thus expended, he could invest his assignee with no right, which he did not himself possess. It is true, that the plaintiff's rights under the assignment are not superior to those of the assignor; and when a party has materially improved the estate under a belief honestly entertained, with reasonable grounds for that belief, that he is really the owner of the land, and the aid of a court of equity is sought to enforce a title against him, it will be granted only on the condition that such innocent person shall be compensated to the extent of the benefit, which he has conferred upon the owner. Story's Equity, § 799, (a.) Courts of equity require this, because the party who saw that the occupant that made the outlays and improvements, was misled, and took no means to inform him of his own claim; and if he should refuse to allow this compensation, he is considered guilty of a fraud, and shall not be permitted to reap the benefit arising from his own wrong. But if his acts and silence do not mislead or in any way influence the other party, there can be no just inference of actual or constructive fraud on his part, — Story's Equity, § 386, — and the trustee cannot deduct the amount of the sums expended in additions and improvements, to the prejudice of the *cestui que trust*; it is an established principle that the trustee cannot diminish the trust fund by causing expenditures more than sufficient for necessary repairs upon the trust property, when it consists in real estate. But if it shall be made to appear that upon a sale of the property, the amount receiv-

ed is greater than it would have been, had no improvements been made, the trustee, who has been guilty of no fraudulent design in making the improvements, may be allowed to retain the excess. Judge Story remarks, "the object of this whole doctrine is to compensate the *cestui que trust*, and to place him in the same situation as if the trustee had performed faithfully his own proper duty." Story's Equity, § 1278; *Green* v. *Winter*, 1 Johns. Ch. 26. In this case the Chancellor says, "It must be and always has been the anxious wish of a court of chancery, to save a trustee from harm, while he is acting in good faith; but a misapplication of the trust property by going out of the trust can never be permitted, to injure the *cestui que trust*, without his assent." It is the business of a court of equity to afford full protection to the *cestui que trust*, but not to punish the trustee for his ignorance or carelessness merely, further than is required for such protection.

The contract, by virtue of which, the defendant became trustee, defined with precision his duties, under the law; the other party was guilty of no fraudulent concealment; nothing was known to the latter, of which the former was ignorant. The relations to each other and to the estate, all arose from the deed, and the contract to which they were the only parties. The defendant knew he had the legal title, for the purpose of obtaining the value of the property according to the agreement. The improvements were made afterwards by him without authority, when he ought to have known that he could acquire no title to the estate, till he had fully executed the trust. Such expenditure was not contemplated by the parties to the contract. But there is no proof that the improvements were made fraudulently, with any intention to prevent a sale, to cause an injury to the other party, to obtain a title to the land, or advantage to himself; but from an unauthorized belief, that the estate had become his own, when the improvements were made.

The defendant's counsel endeavor to maintain that the Court have not jurisdiction of the suit, as a court of equity; that the plaintiff by the payment of a note, which he is bound to make, can resort to his action at law for the injury received

by any breach of the agreement on the part of the defendant. This Court have power to hear and determine, as a court of equity, when the parties have not a plain and adequate remedy at law, all suits to compel specific performance of contracts in writing, and all cases of trusts. By the declaration of trust in the transaction connected with the conveyance to the defendant, the grantor, and also the plaintiff by affirming the trust, were authorized to enforce it; the rights of both are now united in the latter, and he can require that the value of the property be raised and appropriated in discharge of the claims, to which, by a proper constuction of defendant's agreement, he was bound to apply it. He can hold from the fund a sum sufficient to reimburse him for the advances to remove the incumbrance, and also the amount of his own note in payment thereof, together with the sum paid by him upon the note in favor of Small. If the estate shall fail to produce a sum equal to all these charges, he or the person who obtained the judgment against the defendant may receive thereon from the plaintiff any sum left unpaid. The parties to the deed adopted their own mode to raise the sums necessary for these objects, and it is not in the power of one of them alone to refuse to do all that he was bound to perform to carry the design into full execution. The defendant could not, as we have seen, under the agreement acquire an absolute title to the estate; in a design to accomplish such a purpose, the Court could not aid him, however honest may have been his intentions and however much for the benefit of the other party it may be supposed to be. When the court cannot exercise such a power under any circumstances, affirmatively and directly, can they negatively and indirectly in a case of trust promote such prohibited object? Can they deny to themselves jurisdiction as a court of equity on the ground, that there is a plain and adequate remedy at law, when the inevitable result of success in a resort to that remedy will be to give to the defendant, the very thing, which they are restrained by unyielding principles from granting? The defendant bound himself in writing to perform specific acts in the execution of a trust.

The execution may not be for the plaintiff's benefit, but the aid of the Court in cases like the present, cannot with propriety be denied.

The plaintiff is entitled to a decree, that a master be appointed under whose direction the defendant is required to execute the contract by making sale of the estate, the rents and profits of which the master is to take an account. If the estate has fallen in value by reason of the neglect of the defendant to make sale thereof within a resonable time after two years from Nov. 9, 1837, when the contract was made, he is to be charged with the loss, thereby occasioned. If proof be made to the master, that the amount of sales has been increased by reason of the additions and improvements made by the defendant, he may be allowed to retain for his own use such excess, but no farther. The defendant is to be charged with such rents and profits, as the estate would have produced had no additions and improvements been made. From the amount of sales and rents, he should be allowed to apply sufficient to pay off the mortgage and interest thereon to the time, when he is charged with the rents; 2d to the payment of the sum due on the note of $1725 to himself up to the same time; and 3d, the balance is to be applied in extinguishment of the judgment in favor of Perkins against the plaintiff. And the decree is to be made accordingly.

Case reserved for further proceedings upon the coming in of the master's report.

GREENLIEF WING *versus* WILLIAM ABBOTT.

If a record of a judgment of a justice of the peace has been lost, the party who would avail himself of it must show, that he has exhausted, in a reasonable degree, all the sources of information and means of discovery, which the nature of the case would naturally suggest, and which were accessible to him, before other evidence is admissible.

STATEMENT of facts.

This is an action of debt on a judgment, as recovered 5th

Feb'y, 1831, before Wm. Morse, jr. who died about six years ago.

Defendant pleads "*nul tiel record*," and also payment. The plaintiff called Asaph R. Nichols, clerk of this Court, who testified that he had searched the clerk's office, and could not find the docket of said Morse; that the only papers he can find there, belonging to said Morse, were brought to the office by the plaintiff [in interest] in a trunk a few days ago, and that the docket cannot be found amongst them.

Wm. H. Clark, a nephew of said Morse, testified that he had sought for the docket a few days ago in the office of Wm. Clark, Esq. at the plaintiff's request, it being the place which he thought most likely to contain it, but could not find it, that he would have searched more, if the plaintiff had requested it.

On cross-examination he said Morse and Wm. Clark never were in partnership, nor did Morse ever occupy that office, or any other place, for justice business, to the witness' knowledge, except his dwellinghouse, and that he, the witness, had never heard of an administrator being appointed.

Hiram Fuller testified, that a few days ago, he made search at the house occupied by Morse's widow, for the docket in a trunk of papers pointed out as the papers of Morse, that there were other trunks or chests there which he did not search, one at one Palmer's store, but could not find the docket.

The plaintiff's Att'y, John Otis, who is assignee of the original note sued, made his own affidavit, stating that he had made diligent search for the docket and could not find it. This affidavit may be referred to. The admission of the affidavit was objected to. The plaintiff's attorney admitted that Morse used to keep a docket, and search had been made as before stated without finding it.

Plaintiff then introduced the following testimony and documents, all of which were objected to.

The original writ, signed by Morse, with minutes of the judgment on the back of it, corresponding with the declaration in the present suit, and a minute that execution issued 7th

Feb'y, 1831: — the original note with proof of defendant's signature: — and the alias execution signed by Morse.

James R. Bachelder, Esq. testified that he, being a deputy sheriff, served the original writ, also the said alias execution, both of which now contain his original return.

Plaintiff also introduced a copy of said original writ with the minutes aforesaid indorsed thereon, attested by said Nichols, clerk of the Court. The above papers may be referred to by either party.

No administration had ever been taken out on Morse's estate.

At this stage of the case the parties agreed that the Judge should report the facts, and that they would turn the same into an agreed statement of facts, the defendant to be defaulted, if the Court should be of opinion, that the plaintiff is entitled upon the above evidence to recover, in which event the clerk is, on a hearing, to fix the amount of debt; otherwise the plaintiff is to become nonsuit. Pursuant to that agreement, the report of the case is made by the Judge, and the parties hereby submit the matter to the decision of the Court as above agreed.

"Certificate of the Clerk, referred to in the statement of facts.

"Kennebec, No. 23, May Term, 1847. *Wing* v. *Abbott.*

"Minutes extracted from the original justice writ and execution on file in the clerk's office.

"Date of writ, Dec. 7, 1830, return day Jan'y 29, 1831. Judgment made up on the back of said writ as follows: —

"Writ, &c.	$1,07
"Service,	93
"Entry,	61
"Travel,	1,32
"Att.	33
	4,26
"Debt,	16,94

"Execution issued Feb'y 7, 1831.

"The first execution issued as above has not been returned to clerk's office. The execution on file is an alias execu

tion for the same amount of debt and cost as above made up, dated April 22, 1831, and purports to be issued on a judgment rendered by Wm. Morse, Jr. Feb'y 5, 1831.

"W. M. Stratton, Clerk."

H. W. Paine, for the plaintiff. This is an action of debt on a judgment.

The question is, did the plaintiff prove enough to maintain the issue on his part?

The plaintiff introduced the original writ signed by the justice; the minutes of judgment on the back of the writ; the minute of execution issued Feb'y 7, 1831; the original note with proof of defendant's signature; the alias execution signed by the justice; the testimony of Bachelder, the officer who served the writ and the alias execution; and an attested copy of the original writ, by Nichols, clerk.

Was the plaintiff bound to introduce the judgment extended in form, or an attested copy of it?

The statute passed in 1829, requiring justices of the peace to extend and perfect their records within 60 days was repealed in 1830.

Since the repeal of the act of 1829, justices of the peace in point of fact, have not been in the habit of making up their records.

And in *Pruden* v. *Alden*, 23 Pick. 187, it is said by the Chief Justice, "that the Court are to take notice how the records of their own and of other Courts are in fact made up and kept.

This case of *Pruden* v. *Alden*, is much in point. The tenant claimed under a sale by license from Court to an administratrix. The only proof of license was the recital of the same in the deed. No record thereof could be found in the Court, which was said to have granted the license. The Court held, after the lapse of 30 years, that the license was sufficiently proved.

It is decided in *Davidson* v. *Slocum*, 18 Pick. 464, that upon appeal from the judgment of a justice of the peace, if it appear that the justice died before extending his record, his

original minutes containing all the material facts, which the record would have comprised, will be regarded as substantially a record. To the same effect is *Baldwin* v. *Prouty*, 13 Johns. R. 430.

In the case at bar, the justice is dead, and a copy of record certified by him (if any extended record had been made) cannot be produced.

Of what avail would have been the docket of the justice?

The docket would have shown no more than is shown without it. It exhibits the names of the parties, so does the writ; the amount of the judgment, so do the minutes on back of writ; the time when execution issued, so does the minute on the back of writ.

"The judgment derives no additional verity from the entries on the docket, nor can it be impeached by them." *Southgate* v. *Burnham*, 1 Greenl. 369.

The recital in the execution issued by the justice, that judgment had been rendered, is quite as satisfactory, as any minute of that fact on the docket could be.

At all events the plaintiff has used due diligence to find the docket. The testimony of Clark and Fuller, recited in the agreed statement, abundantly show this. The affidavit of Mr. Otis, plaintiff in interest, was clearly admissible. *Donnelson* v. *Taylor*, 8 Pick. 390; *Adams* v. *Lealand*, 7 Pick. 62.

By the 24th sec. c. 116, it is made the duty of the administrator or executor of a deceased justice, to deposit his records and papers with the clerk of the courts. But here the case finds, there was no executor or administrator.

By 27th sec. c. 116, the copies of such papers certified by the clerk, are made good evidence.

The object of the Legislature was to preserve the papers of deceased justices, and to provide a new mode of authenticating copies of his papers, but the statute was not intended to prohibit the plaintiff from maintaining his case in any other competent way.

Bradbury, for the defendant. The plaintiff having declared upon a record, with a *profert in curia*, is bound to produce it.

He has neither done this, nor accounted for its absence; nor produced adequate secondary evidence.

By sect. 15, c. 76, of stat. of 1821, justices are required to keep a fair record of their proceedings; and by the stat. of 1829, they were required to extend them within sixty days. It is to be presumed, that magistrates do their duty.

1. The plaintiff has not accounted for the absence of the record declared on.

There has been no adequate search for it. On the decease of the justice his records are presumed to have been left in the charge of his wife. The case shows that she was residing at Hallowell, at the time of the trial, and yet she neither made search, nor was she called on to testify. For aught that appears she now has the docket, (with the justice's extended records,) which the plaintiff admits the justice kept.

The search proved, exhibits rather a desire to avoid finding than to discover the material papers of this magistrate.

Mr. Clark searches in his father's office, where Morse, the justice, never kept, and was never known to have a paper.

Fuller searched at Palmer's store, and "a few days ago searched at the house occupied by his (Mr. Morse's) widow, for the docket in a trunk of papers pointed out as papers of Morse, that *there were other trunks or chests there which he did not search.*"

Who pointed out this trunk does not appear; nor is it pretended that this trunk contained all the papers of Morse. The papers produced were not found in it. The other trunks were not examined; nor was Mrs. Morse inquired of, nor requested to search, nor to testify. No administrator had been appointed and the papers were in her custody. Mr. Otis was interested, as plaintiff of interest, and his affidavit is inadmissible. Nor does it state any one spot on earth that he did search.

2. The papers produced are not adequate proof of the record declared on. They are merely the original writ, in which the return day is Jan'y 29, 1831. And an execution dated April 5, 1831, reciting a judgment as rendered Feb'y 5, 1831.

On the back of the writ is a taxation of costs and a memorandum of the issuing of an execution Feb'y 7, but not in the handwriting of the justice. The taxation goes to show that there was no continuance of the action. The action was not entered until a week after the return day. Had the docket been produced the fact would have appeared. The execution issued Feb'y 7, if any such was issued, would show, if produced, that there was an utter abandonment of all claim under the pretended judgment. An alias execution could not issue in a regular judgment, until the return of the first execution.

The Court will not in such case, presume that the record cannot be found, when its presence would probably be fatal to the plaintiff's action, and he seems to have avoided making a suitable search.

The opinion of the Court was drawn up by

WELLS J. — Where an instrument or record is lost, the party is expected to show, that he has exhausted, in a reasonable degree, all the sources of information and means of discovery, which the nature of the case would naturally suggest, and which were accessible to him. 1 Greenl. on Ev. § 558.

It appears in the present case, that the widow of the justice is living, but neither her testimony, nor that of any member of his family was introduced. They would ordinarily have the best means of knowing whether the docket, which is said to contain the record, was lost, and the contents of it. No witness testifies to a sufficient examination of the places of deposit of the justice's papers.

And the secondary evidence is too loose and uncertain, to show a proper judgment. The writ was made returnable on the 29th of January, 1831, on which day the judgment should have been rendered. There is no minute of any continuance. The alias execution recites a judgment rendered February 5, 1831. A judgment, rendered on that day, is not evidence of one, which should have been rendered on another day. There is no evidence of a judgment on the 29th of January. In the case of *Davidson* v. *Slocomb*, 18 Pick. 464, the minutes of

the justice contained all the material parts, which the record would comprise. *In Pruden* v. *Alden*, 23 Pick. 184, there had been over thirty years possession, under the deed of the administratrix, to whom it was alleged the license had been granted. Here was sufficient time to authorize the application of the doctrine of presumption.

The present case is not equal in proof, to that of *Clap* v. *Clap*, 4 Mass. R. 520, where the judgment was reversed for error in the record.

According to the agreement of the parties, a nonsuit must be entered.

KENNEBEC FERRY COMPANY *versus* JOSEPH BRADSTREET.

Certain upland was conveyed adjoining easterly upon a river where the tide ebbed and flowed, one of the side lines running at right angles with the river, and the other so as to leave the land towards the river of less extent than at the other end, and the bank of the river at that place being convex,—"together with all the flats and water privileges adjoining to, being at and having the width of the easterly end of the said land, as bounded by the river aforesaid;" the extent and position of the flats are to be determined by drawing a straight line from the south-east and north-east corners of the land at high water mark, and extending lines from the ends of that line and at right angles with it from high to low water mark.

THIS was a writ of entry, brought to recover a piece of land in Gardiner, described as twenty-two feet wide on the street, and extending eastwardly a certain course and distance, and thence on a certain other course to low water mark.

The defendant disclaimed the residue of the demanded premises; and issue was joined upon the part claimed.

A plan on which are delineated the premises demanded, and the lands adjacent, though not taken for this case, was used at the trial and may be referred to by either party.

It was admitted that Henry Dearborn, under whom both parties derive their titles, was, prior to the 24th December, 1803, the owner of the land demanded, and of the parcel next north, now belonging to the defendant. The plaintiffs intro-

duced a deed from Joshua Wingate and wife, (who was the daughter of said Dearborn,) dated Dec. 31st, 1835, conveying to Arthur Berry a piece of land, twenty-two feet in width on the street, between land that belonged to the late Ebenezer Byram, and land supposed to belong to the heirs of the late Joseph Bradstreet, (admitted to be now the defendant's land,) thence to Kennebec river, together with the flats adjoining the same. Also a deed dated September 22d, 1845, from the said Berry, conveying the same land to the plaintiffs. Also, a deed dated December 24th, 1803, from said Dearborn, by his attorney, conveying to Joseph Bradstreet and Joshua Lord land lying on the river and north of the plaintiffs' lands. The north-east and south-east corners of the upland thus conveyed, were not in controversy, and are marked on the plan A and B. The flats appurtenant are conveyed in that deed in these words:— "together with all the flats and water privileges adjoining to, being at and having the width of the easterly end of the said land as bounded by the river aforesaid. The deeds before mentioned, may be used and referred to by either party.

The north line of the plaintiffs is the south line of the defendant. The counsel for the plaintiffs, contended that the defendant's south line over the flats, would depend upon the true location of their north line, and as there was northerly of the upland conveyed a convex sweep in the river, the north line would be coincident with the south line of the flats appurtenant to the lot above, which would depend upon lines to be accommodated to the sweep of the river. WHITMAN C. J. presiding at the trial, ruled that the southerly line of the Bradstreet purchase, would not be affected by the lines resulting from the convex of the river above. The plaintiffs offered to prove that the straight line between A and B (the north-east and south-east corners of the defendant's upland,) would not correspond with the margin of the flats at ancient high water mark, and that a line drawn at right angles with the ancient high water mark, according to the course of the river between the points nearest to A and B, would exclude the land described.

The Chief Justice ruled, that by the true legal construction of the deed to Bradstreet and Lord, the south line of the flats therein conveyed, must be at right angles with a line drawn straight between the points A and B, whether such line would be in conformity with the ancient high water mark or not.

Whereupon, it appearing by the plan used, that upon this construction of the deed under which the defendant claims, the premises defended would fall to them, the cause by consent was taken from the jury, in order that the legal principles applicable to the facts might be first settled, if the rulings of the Judge were erroneous, or if they were correct and the plaintiffs shall claim the right to show that by an actual location of the lines over the flats, according to said construction, the defendant would not be entitled to the premises defended, or that they had been in possession of any part of the land disclaimed, then a new trial shall be had; otherwise the plaintiffs to be nonsuit.

No plan or copies of deeds were found in the papers received by the reporter.

Evans, for the demandants, argued in support of the positions taken at the trial; and cited *Adams* v. *Frothingham*, 3 Mass. R. 352; *Treat* v. *Strickland*, 23 Maine R. 232; *Moore* v. *Griffin*, 22 Maine R. 350; *Emerson* v. *Taylor*, 9 Greenl. 42; 16 Pick. 441; *Valentine* v. *Piper*, 22 Pick. 95.

H. W. Paine, for the tenant, argued in support of the ruling of the Judge, at the trial.

N. Weston, for the demandants, replied.

The opinion of the Court was drawn up by

Tenney J.—The lands owned by the parties, lying on the western bank of Kennebec river, consisting of upland and flats adjoining, the north line of the demandants' upland and flats being the south boundary of those of the tenant, were once the property of Henry Dearborn, who conveyed it to the tenant and another person by deed dated in 1803, and that deed was prior to the conveyance to which the demandants trace their title. The line between the tenant's upland

and flats, and the termination of the same at the north-east and south-east corners of his upland are not in controversy; and it appears from the plan, which is admitted to be correct, that it makes with the north line of the tenant's upland an angle less than a right angle and less than it makes with his south line, and is longer than a line which may run in the shortest direction from the south-east corner of his upland to the north line thereof. After the description of the upland in the deed to the tenant, the flats are described as follows, "together with all the flats and water privileges, adjoining to, being at and having the width of the easterly end of said land as bounded by the river aforesaid."

The word end is defined to be the extreme point of a line or any thing that has more length than breadth. Webster's Dic. The end of a parallelogram is the line extending from one side line to the other at their extremities; and the width of the end is the length of such line. If the line connecting the extreme points of parallel side lines, make an angle with one greater than that made with the other, as for instance, one being ten and the other one hundred and seventy degrees, it might not be proper to regard this line the width of the end of the figure presented or even as the end itself. In figures having side lines irregular or not parallel with each other, a line connecting them where they terminate, may be the end, and its length the width of the end, or otherwise according to the peculiar shape of each figure. Hence the words end and width of the end, thus applied, are not terms of great precision, and the meaning of parties who may use them without any words in explanation may not always be apprehended with certainty.

All words used in the description of the premises in a deed, are presumed to be inserted from a belief in the parties, that they are material, and all must be so treated if possible; and nothing is to be considered redundant, if it can be avoided; and when the whole is taken together according to its common and ordinary signification, if it be free from ambiguity, and convey clear and distinct ideas to the mind, and if it can

apply to the subject matter of the conveyance, it is not to be controlled by any thing not found in the deed. In such a case, it is not competent to consider, whether one party or the other, or both conducted with the greatest discretion and wisdom or not; and in giving a construction, the description must stand, although the grantor thereby may have made a division of his land, ruinous to the portion retained by him; or the grantee may have a title to that, which from its location is worthless.

The description of the land in the deed to the tenant, embraces upland "lying on the river," and "all the flats and water privileges, adjoining to, and being at the easterly end of the same." Consequently the eastern boundary of the upland is the western boundary of the flats, and is identical with high water mark. The direction and *termini* of this boundary are agreed by the parties. The eastern boundary of the flats is low water mark, but the place of the extremities thereof on the earth must depend upon the direction of the side lines of the flats. Without the last clause in the description, it might perhaps be doubtful what was intended as the width of the easterly end of the upland, owing to its peculiar form. The flats are to have the width of the easterly end of the upland, and then follows the clause "as bounded by the river aforesaid" without being separated by any mark of punctuation. This clause could not have been intended to indicate the eastern in contra-distinction from the western end of the upland, because the words "easterly end" immediately precede, to, and at which easterly end, the flats are to adjoin and to be; and the flats could not by possibility adjoin the upland at any other place. Without the last clause every thing in the description is clear, and no misapprehension could arise, excepting in reference to "the width of the easterly end" of the upland; and this clause can be applied to no other part with any effect whatever. By rules of grammatical construction, this clause is supposed to be an explanation of the clause immediately preceding, and by regarding it as so intended, it makes that clear, which would otherwise be obscure, as we have already seen. The words "*as* bounded by the river aforesaid," import in what

manner the line is to be run in order to give the length of the line, which should be the measure of the flats. It is clear, that it was intended, that this line should be looked at without reference to any other line of the upland, or the shape of the upland, for the purpose of determining the breadth of the flats; but wholly as its length should be according to the course of the river; and this length was to be the width of the part between high and low water mark.

It follows geometrically, that this width can be had in no other manner than by extending upon the earth the side lines of the flats at right angles with the line of high water, between the north-east and south-east corners of the tenant's upland. Parallel lines drawn in any other direction must necessarily reduce the breadth below that of the length of the measure, which is to be conclusive.

Another question arises under the exceptions, upon the exclusion of certain evidence offered by the demandants. That point was not relied upon at the argument, and when it is examined in connection with the whole case, the ruling was not objectionable.

By the agreement of parties, under this view of the law, a nonsuit must be entered.

BENJAMIN GLIDDEN, JR. *versus* SAMUEL DUNLAP.

Where a large body of evidence, on both sides, contradictory in its character, has been laid before a jury, and they have found a verdict upon it, the Court ought not to revise their proceedings, on the ground, simply, that the evidence preponderated against the verdict. Verdicts should not be disturbed, where there is evidence upon which they may rest, unless the jury have been influenced by partiality, passion, prejudice, or some undue bias.

Cumulative evidence is additional evidence of the same kind to the same point.

Where the exceptions state merely, that "the witness was objected to," and admitted, without stating any cause of objection, no question is presented for the consideration of this Court.

THIS was a real action brought to recover lots numbered 10, 11, 12, and half of 12 in Windsor.

The case was heard on exceptions, and on one motion to set aside the verdict against the tenant, because it was against evidence, and on another, on account of newly discovered and material evidence.

At the trial before TENNEY J. as the exceptions state, "Leonard Cooper, called by the plaintiff and objected to by the defendant," testified to certain facts. Neither the grounds of objection, nor the ruling of the Judge thereon, appear.

The whole testimony at the trial is given, and the exceptions then conclude thus:—

Upon the foregoing facts the Court instructed the jury as follows: —

"That the deeds offered by the demandant exhibited a title in him, unless it had been shown that Solomon Bruce had title to the whole or part of the premises at the time the levy was made by the tenant. That if Solomon Bruce had such title, the levy transferred it to the tenant, if demandant had notice of S. Bruce's title when he took the conveyances. That the execution of the deeds from Cooper and Plumer to Solomon Bruce were ineffectual to pass the title without a delivery, and the jury would judge from all the evidence in the case, whether or not Solomon Bruce had received delivery of one or both of the deeds before the levy, and that on this question the testimony of Barnard Bruce, the declarations of Plumer and Cooper, of Benjamin Glidden, Sen., the acts of Bruce and in connection therewith the conversation when Waters made the deed to him; the copy of that deed, the deeds from S. Bruce of parts of the land connected with the premises, as also the testimony of Cooper, of Solomon Bruce and others, were important evidence for their consideration."

"It was insisted by the tenant's counsel, that the evidence showed, that the tenant had a title to the premises, by a disseizin by Solomon Bruce, and a continuance of an adverse possession by him to the time of the tenant's levy, and by the tenant since of more than twenty years before the commencement of this action.

"The Court instructed the jury that to give the tenant title on this ground, the possession must have been open, notorious and exclusive, and comporting with the usual management and improvement of a farm by its owner.

"That if Bruce was in possession of the premises in submission to the title of the true owners, acknowledging their right, the possession would not be adverse."

J. Baker argued for the tenant.

F. Allen, for the demandant.

The opinion of the Court was drawn up by

WELLS J. — The tenant moves for a new trial, because, as he alleges, the verdict is against the weight of evidence, and for the discovery of new evidence, since it was rendered.

On the 15th of January, 1836, the tenant caused an execution, in his favor against Solomon Bruce, to be levied upon the demanded premises.

The principal questions in the case were, whether Leonard Cooper and John Plummer, 3d, had made and delivered a deed of a portion of the demanded premises, and Benjamin Glidden of another portion, to Bruce.

There is very strong evidence to show, that both of the deeds must have been delivered to Bruce. But there is, on the contrary, the positive testimony of Cooper, that the deed made by him and Plummer was never delivered, but was to be kept by him, until Bruce paid for the land, that he did not pay, and the deed was subsequently canceled by the witness.

Samuel Kennedy deposes, that he took the acknowledgment of a deed from Benjamin Glidden to Bruce, and it was lodged with him, to deliver to either, upon the written order of the other, and that Oct. 10, 1828, by a written order of Bruce, he delivered it to Glidden.

Barnard Bruce testified, that he wrote the deed from Glidden to Solomon Bruce, that it was delivered to Solomon, but was not acknowledged, and was taken by Solomon "to be carried and lodged with Kennedy, and Glidden was there to acknowledge it."

This, with the other evidence in the case, was submitted to the jury, for them to determine whether the deeds were delivered. It was a matter of fact, within their province to decide, upon conflicting evidence. Where a large body of evidence, on both sides, contradictory in its character, has been laid before a jury, and they have found a verdict upon it, the Court ought not to revise their proceedings, on the ground, simply, that the evidence preponderated against the verdict. Verdicts should not be disturbed, where there is evidence, upon which they may rest, unless the jury have been influenced by partiality, passion, prejudice, or some undue bias. We do not perceive the operation of any improper influences upon the minds of the jury.

In relation to the other motion, the tenant introduces John Potter as a witness, who says he witnessed the deed from Cooper and Plummer, and saw the parties sign it, at Cooper's house. But he does not say he saw the deed delivered.

The evidence adduced by the demandant in the case, establishes the fact of its execution, and his testimony, if received, could not affect the result. It would only add to that which was not controverted.

Merrill Peaslee says, that twelve years ago, Waters showed him three deeds, from certain persons to Solomon Bruce, which he had taken of Bruce, and it is the impresssion of the witness that one of them was from Cooper and Plummer. He thinks some or all were recorded, and he thinks he read the deed from Bruce to Waters. He does not say that he read any other deed. His information appears to have been principally obtained from Waters. So far as it is hearsay, it would be inadmissible upon a new trial. Whether he actually saw a deed purporting to be from Cooper and Plummer to Bruce, or was informed so by Waters, is left altogether uncertain. The jury had testimony similar to this before them, at the trial. Jonathan Vining stated, that between 1826 and 1832, Bruce produced a deed from Cooper and Plummer of part of the demanded premises, opened and read it, and the names of the subscribing witnesses, and another person present

also read it. Vining's testimony did not appear to influence the determination of the jury, nor do we think that of Peaslee would, when met by legal evidence of a positive and absolute character. It would have been very easy for Bruce to have obtained a copy of the deed, and if Peaslee had seen it, he could not have known whether it was a copy or the original.

Nehemiah Ward, another witness, introduced by the tenant for the same purpose, says that 13 or 14 years ago Solomon Bruce was at the house of witness' son, and wanted to sell some timber. Bruce exhibited a deed, that he saw Cooper's name, that his learning was poor, that he asked whose the other name on the deed was, and he was told by Bruce that it was Jonathan Plummer's, and that the deed covered Nos. 9 and 10, being part of the demanded premises. Witness advised his son not to purchase the timber. Afterwards the witness asked Cooper about the timber, and he said there would be no difficulty in cutting it, if they did not take board logs, for he had a lease of them, and after he got them off Bruce was to have the land, and he thinks Cooper said Bruce had a deed.

This testimony tends to show, that Cooper did not testify correctly, in saying the deed had never been delivered.

Is this evidence cumulative? Cumulative evidence is additional evidence of the same kind to the same point. *Parker* v. *Hardy*, 24 Pick. 246. The point, which the defendant labored to establish was the delivery of Cooper and Plummer's deed to Solomon Bruce. Cooper's testimony negatived this fact. It was therefore material to contradict him. At the trial the testimony of Josiah Plummer and James Dunlap was admitted, a portion of which tended directly to contradict Cooper, by proving declarations made by him, on the same subject, in opposition to his testimony. Ward's evidence indicates, that Cooper said Bruce owned the land and had a deed of it. This was testimony of the same kind as that of Plummer and Dunlap, although expressed in a different way. It goes to contradict Cooper, as to the essential inquiry whether

the deed was delivered. It appears to us to be of the same kind and to the same point, as that introduced by the tenant at the trial.

The exhibition of the deed by Bruce, even if the witness' recollection of it can be relied upon, was very similar to other acts of Bruce adduced in evidence, and to which no great importance could be attached, for if the original had never been delivered to him, he could not have had it, but might have had a copy of it. The witness does not say he had any knowledge of the handwriting of Cooper.

It is true, that motions of this kind address themselves very much to the discretion of the Court, but in the exercise of it, the Court should be guided by well established rules of law, and be admonished by the evils, which spring from protracted litigation.

The evidence that the deeds in question were never delivered, is so strong, that notwithstanding the other evidence in the case, we cannot say the jury came to a wrong conclusion.

The case discloses, that the tenant objected to the admission of Cooper as a witness. But no reason was given for the objection, at the trial, and none is stated in the exceptions. In the argument, it is contended, he was interested, in consequence of the deed, which he gave to the plaintiff. It is unnecessary now to consider the question of his interest. The grounds of the objection should have been stated at the trial. If so, the objection might have been answered or obviated by the demandant. The Court could not rule upon a point, not presented to its notice.

We do not see any satisfactory reason, for disturbing the verdict; both the motions for a new trial and the exceptions are overruled, and there must be judgment on the verdict.

JESSE ELLIS *versus* JOHN HAM.

Where the only claim against a bankrupt, at the time of filing his petition, was a contingency, or possibility that a claim or debt might exist, it could not be proved as a claim against the bankrupt's effects, and is not discharged by his certificate.

If one became surety for another on his bond as constable of a town, the surety had no claim, which could be proved under the bankrupt act, until he had suffered an injury in consequence of so becoming surety.

A claim to recover damages for official neglect of duty as a constable of a town, is one for which an action in form *ex delicto* alone can be maintained, and is not discharged by a certificate in bankruptcy, unless a judgment had been obtained upon it before the petition was filed.

THIS case came before the Court on the following statement by the parties.

This is an action for money paid upon the following agreed statement of facts.

John Ham, the defendant, was duly elected constable of the town of Sidney, at the annual March meeting in 1840, and on the eleventh day of said month gave his bond, and was duly qualified; said bond was signed by himself as principal, and by the plaintiff and three others as sureties. On the 16th day of said March, a writ in favor of one John F. Childs against Isaac Cowan was delivered to said Ham for service; upon the same day he made service of the same by an attachment of certain personal property.

The action was entered at the April Term, District Court, 1840, continued to the Dec. Term of the same year, when judgment was rendered, execution issued and within thirty days delivered to the officer, Ham.

Said execution was returned unsatisfied. Ham was sued for his default in not keeping the property attached, and at the August Term, 1842, judgment was recovered in the action, *Childs* v. *Ham*, for said default, exceptions were filed and a decision given overruling the same at the October Term of the S. J. Court, 1843.

It is admitted, if the evidence is admissible, that Cowan removed the property returned upon the writ, Childs against him,

without the knowledge of said Ham, and appropriated the proceeds thereof to his own use.

The bond which said Ham gave as constable was sued Feb. 22, 1844, and paid by the sureties before judgment, of which the plaintiff was one, who paid as his proportional part on the 22d day of November, 1845, $43. To recover which this action is brought.

The defendant filed his petition to be declared a bankrupt, 19th Dec. 1842, and was declared one Jan'y 22d, 1843; petitioned to be discharged, March 14th, 1843, and obtained his certificate Jan. 27th, 1846. The bond, executions, writs, certificate of bankruptcy and all documents named may be referred to and made a part of the case, but need not be copied. Court to render judgment by nonsuit or default.

Vose, for the plaintiff, took two grounds of objection to the defence set up.

1. The defendant, Ham, was acting in a public capacity, and had the property in trust, as a constable of the town of Sidney. He is therefore expressly exempted by the bankrupt act from the operation of the discharge. *Morse* v. *Lowell*, 7 Metc. 152.

2. The bankrupt act was no discharge, because we had nothing which we could prove against him under the act. The judgment in favor of the town against the defendant, and the plaintiff also as his surety, first fixed the liability. He should have defended against that suit, if he had any defence. But the plaintiff had no claim against the defendant until he had paid the debt. *Kellogg* v. *Schuyler*, 2 Denio, 73.

Lancaster, for the defendant, said that the defendant never received either money or property of the debtor, and never had either in trust. He merely returned an attachment of property, which always remained in the possession of the debtor. The defendant was made liable merely on the ground of a neglect of duty, as constable. He did not "apply trust funds to his own use."

The claim of the plaintiff arises on an implied undertaking at the date of the bond, and was to be considered as a debt

contracted at that time. *Thompson* v. *Thompson*, 19 Maine R. 244.

Ham had become liable for a specific sum before he filed his petition in bankruptcy, and the claim might have been proved. It was therefore discharged. *Fowles* v. *Treadwell*, 24 Maine R. 377.

The opinion of the Court was drawn up by

SHEPLEY J. — The defendant having been elected a constable of the town of Sidney, executed a bond on March 11, 1840, with the plaintiff and others as his sureties, for the faithful discharge of his duties. John F. Childs recovered a judgment at the October Term of this Court, in the year 1843, against the defendant for damages occasioned by an official neglect of duty. Failing to obtain satisfaction of that judgment, he caused a suit to be commenced upon the official bond of the defendant. That suit was settled by the sureties, and the plaintiff paid for the defendant, on Nov. 22, 1845, his share of the damages. This action has been commenced to recover the amount thus paid.

The defence presented is, that the defendant on December 19, 1842, filed a petition to be declared a bankrupt, under the act of Congress, passed in 1841; that he was decreed to be a bankrupt on January 22, 1843, and that he obtained his discharge as a bankrupt on January 27, 1846.

This defence cannot prevail.

1. The plaintiff, when the petition was filed, had no claim, which could be proved against the defendant in bankruptcy. There was then no proof, that the defendant had not faithfully discharged all his official duties. There was no contingent debt due from the defendant to the plaintiff. There was only a contingency or possibility, that such a claim or debt might exist at some future time. Such a claim could not be proved or discharged, under the act of Congress. *Woodward* v. *Herbert*, 24 Maine R. 358.

2. The plaintiff had no claim against the defendant, until he had suffered an injury in consequence of becoming his

surety. He could not claim protection or indemnity merely, because Childs had recovered a judgment against the defendant for official delinquency; for the defendant might have satisfied that judgment, and thereby have prevented its being the occasion of injury to the plaintiff, who first acquired a right of action against the defendant by paying a sum of money to be discharged from the suit upon the bond. This was done in November, 1845, and until that time he had no claim, which he could enforce or prove in bankruptcy. It was decided in the case of *Wells* v. *Mace*, 17 Verm. R. 503, that a surety having paid a note, from which the principal had been discharged in bankruptcy, might recover the amount of the bankrupt, and that his discharge was no bar to the suit.

3. The claim of Childs to recover damages for an injury occasioned by official neglect, was one, for which an action in form *ex delicto* could alone be maintained. Such a claim would not have been discharged by the proceedings in bankruptcy, unless a judgment had been obtained upon it, before the petition was filed, thereby changing its character from tort to debt. *Graham* v. *Pierson*, 6 Hill, 247; *Williamson* v. *Dickens*, 5 Iredell, 259; *Spalding* v. *State of New York*, 4 Howard, 21. If the claim of Childs was such that it would not be discharged, that of the plaintiff arising out of it could not be.

4. If the claim of Childs had been such that it could have been proved in bankruptcy, that claim would have been extinguished by the judgment recovered upon it.

That judgment having been recovered since the petition was filed, would costitute a new debt, which would not be discharged. *Crouch* v. *Gridley*, 6 Hill, 250; *Kellogg* v. *Schuyler*, 2 Denio, 73.

It will not be necessary to consider, whether the official bond of a constable should be considered to be a fiduciary debt.

Judgment for the plaintiff.

DANIEL DENNY *& al. versus* JOHN METCALF *& Trustees.*

The same person cannot at the same time, in a suit at law, be a plaintiff and defendant, where a contract is to be enforced.

If an action be brought against two persons as partners, and one of the defendants and two others as partners in another concern, are summoned as trustees, they cannot be holden as trustees, and must be discharged.

THIS was an action of assumpsit, against John Metcalf and S. Wetherbee, as partners doing business in the name of Metcalf & Wetherbee, and the same John Metcalf, with Cushman & Lee, doing business in the name of Cushman, Metcalf & Lee, were summoned as trustees. These facts appeared on the answers of the alleged trustees. The district Judge decided, that the trustees should be discharged. The plaintiffs filed exceptions.

W. H. Clark, for the defendant, contended, that the trustees ought to be charged.

In his argument he cited 1 Gallison, 367; 25 Maine R. 256; 10 Mass. R. 346; 15 Mass. R. 123; 1 B. & P. 539; 1 East, 20; Cooke's Bankr. 521; 2 Fairf. 196; 3 Pick. 420; 5 Mass. R. 199; Cush. Tr. Pr. 336; 10 Mass. R. 345.

May, for the trustees, contended, that the law did not permit the same person to be both defendant and trustee; and cited 2 Fairf. 196; Gow on Part. 132; 5 Com. Dig. 85.

The opinion of the Court was drawn up by

TENNEY J. — This suit is against a firm consisting of John Metcalf and one Wetherbee, as principal defendants, and another firm consisting of the same John Metcalf and one Cushman, and one Lee, as trustees. It appears by the disclosure made by Cushman in behalf of the firm of which he is a member, that at the time of the service of the writ upon them, there was a balance in their hands, which was due to the firm of Metcalf & Wetherbee; they claim to be entitled to hold this balance for the purpose of discharging their partnership debts, the affairs of the firm not having been closed, and their liabilities being, as they believe, greater than the amount of

this balance. Their counsel insist also, that the relation which they hold to the principal defendants is such that they cannot be holden as trustees.

It is a general rule, that partners in their collective capacity are entitled to the same remedies, to be administered in the same way, as individuals have for the assertion of their rights and the redress of their wrongs. There are exceptions to this rule; one is, where the suit is between the firm and one of the partners; or between two firms, in each of which one and the same person is a partner; it is treated as an unjustifiable anomaly, if not an absurdity, that one and the same person should in the same suit at once sustain the twofold character of plaintiff and defendant, to enforce a right and redress a wrong. Story on Partnership, § 234. Gow, in his Treatise on Partnership, page 132, says, "the individuality of the person of the co-partner cannot be severed, no man can contract with himself, nor can he bind himself in the society of one set of persons, to another, in which he is also a partner. Neither the contract nor the negotiable security can be made the foundation of an action at law. It makes no difference, whether the action be brought in the lifetime or after the decease of the common partner, because as no legal contract ever existed, it cannot in any event be rendered available at law."

The firm of Cushman, Metcalf & Lee, are claimed to be holden on account of their contract with the firm of Metcalf & Wetherbee. The trustee process, is a mode of enforcing that contract by a suit at law. But it is insisted for the plaintiffs, that although the trustees are summoned into Court in a suit at law, yet after they have appeared, the proceedings touching the liability of the trustee are distinct from those between the plaintiffs and the principal defendants, the former being analogous to proceedings in equity. This proposition cannot be maintained. That a person may be holden as trustee, he must be liable to the principal by virtue of some contract, express or implied. Rev. Stat. c. 119, § 4. The process is a mode by which such contract may be enforced for

the benefit of the creditor of the principal debtor. The one summoned as trustee, being indifferent between the parties, is allowed to disclose under oath the state of dealings between him and the principal defendant. The disclosure cannot be directly contradicted in that suit. It is not conclusive between the principal defendant and the trustee, so as to preclude the former from enforcing his original contract, if the trustee has unlawfully and improperly discharged himself in the trustee process, when he was really liable. The original trustee suit, is a process in law; it can have no other effect upon the trustee, than to obtain a judgment charging him, without the specification of any sum, or of discharging him. If he is charged, the execution runs only against the goods, effects and credits of the principal debtor, in the hands of the trustee. If the trustee fails upon proper demand to expose the goods, effects and credits of the debtor, he is subject to the process of *scire facias*, which is an action at law; and upon a judgment thereon, he is liable in all respects as a debtor, for a certain amount and to have his lands or goods taken, or his body arrested on execution. For the purpose of enabling a creditor to avail himself of means which cannot be reached by a direct attachment, the proceedings in foreign attachment are provided. It could not have been contemplated by the Legislature that it could be construed to change the principle referred to, that the same person cannot at the same time in a suit at law, be a plaintiff and defendant, where a contract is attempted to be enforced.

Exceptions overruled.

Nathaniel M. Whitmore *versus* Michael Woodward.

By Rev. Stat. c. 114, § 73, "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," is liable to be attached and held, after as well as before the condition has been performed, where no valid conveyance of the title was made prior to the attachment.

The waiver of performance at the time specified in a contract for the conveyance of land, attaches to the contract and becomes a part of it, and the creditor takes it, by the provisions of the statute, as it belonged to the debtor.

Between the parties to such contract for the conveyance of real estate, no lien attaches to the land. But in relation to the creditor, the statute declares it to be an attachable interest, as if it "were tangible property." An attachment, therefore, of "all the right, title and interest of the said debtor in and to the said real estate described in said indenture," is a valid attachment of the right by virtue of the contract.

If the owner of the land contracted to be conveyed, without any fraudulent intention on his part, after an attachment thereof, conveys the land to a third person, who takes it for the purpose of defrauding the creditors of the debtor, a bill in equity may be maintained by the purchaser of the debtor's right against the fraudulent grantee, to obtain a conveyance of the land, without joining as a party, the original owner.

An assignment of the debtor's interest by virtue of a contract for the conveyance of land, made and received for the purpose of defrauding the creditors of the assignor, is void against creditors, subsequent as well as prior to the assignment.

If the fraudulent grantee has paid part consideration, and the plaintiff in equity is willing to admit, that the grantee holds in trust, and to convey to the plaintiff upon receiving such sum as was paid by him, no objection can arise to such an adjustment.

This case was heard upon a demurrer to the following bill in equity inserted in a writ.

"In a bill of complaint in equity wherein your orator, Nathaniel M. Whitmore, humbly shows your honors, that one Allen Crowell of Gardiner, in the county of Kennebec, did on the 13th day of June, A. D. 1835, make and enter into an indenture with Robert H. Gardiner, of the said Gardiner, wherein and whereby among other things the said Crowell, on his part, covenanted and agreed with the said Gardiner, to purchase of the said Gardiner a certain tract of land situate in said Gardiner (described in the bill) and to pay said Gardiner therefor

thirty dollars on or before the first day of June next following the date of said indenture, and the further sum of one hundred and fifty dollars in two equal annual payments with annual interest.

"And the said Gardiner, on his part, covenanted and agreed with said Crowell, among other things, that if the said Crowell should well and truly pay to said Gardiner the first payment as aforesaid and interest at the time above before mentioned, that he, the said Gardiner, upon demand of the said Crowell, would make and execute a good and sufficient deed of said premises, provided the said Crowell should immediately thereupon reconvey the same premises to him, the said Gardiner, by deed of mortgage, and make and execute a bond to said Gardiner, conditioned to pay him the sum of one hundred and fifty dollars in two equal annual payments, payable the first day of June each year from the date of said indenture annually, and that the said Crowell might enter upon the said premises in contemplation of the purchase, all of which will appear by said indenture, to which your orator craves leave to refer, when produced to the honorable Court; that upon the execution of said indenture by the said Crowell and Gardiner as aforesaid, the said Crowell did immediately enter upon the premises, and began to erect buildings and make improvements, and has continued to occupy the said premises to the time of the filing this bill of complaint.

"And your orator further shows that the said Crowell was justly indebted to one Lincoln Perry of said Gardiner, on and before the seventh day of August, A. D. 1846, in the sum of three hundred seventeen dollars and fifty-five cents, and for the purpose of securing and collecting his said debt against the said Crowell, the said Perry sued out his writ of attachment against the said Crowell on the said seventh day of August, A. D. 1846, returnable to the District Court for the Middle District, then next to be held at Augusta in and for said county of Kennebec, on the first Tuesday of December, A. D. 1846, and on the same seventh day of August delivered said writ of attachment to one Enoch Marshall, who then was and ever

since has been and now is one of the deputies of the sheriff of the county of Kennebec, directing said deputy to attach all the right, title and interest of the said Crowell in and to the real estate described in said indenture, on and by virtue of said writ in favor of said Perry against said Crowell. And the said deputy, Enoch Marshall, in virtue of said writ and in obedience to said direction did on said seventh day of August, A. D. 1846, in the forenoon of the same, attach all the right, title and interest of the said Crowell in and to the said real estate described in the said indenture, and duly returned his said writ with a certificate of his doings thereon.

"And your orator further shows that said Perry duly caused his said writ to be entered in the said District Court, for the Middle District as aforesaid, at the term when the same was returnable, and continued said suit against the said Crowell to the April term of said Court, at which said term said Perry, by the consideration of said Court, recovered judgment against said Crowell for the sum of three hundred seventeen dollars and fifty-five cents debt, and ten dollars thirty-four cents costs of suit, and afterwards on the 24th day of April, 1847, the said Perry took out his writ of execution on his said judgment against said Crowell and caused it to be delivered to the said Marshall, deputy as aforesaid, and the said Marshall on the 22d day of May, 1847, in virtue and by direction of said execution, seized all the right, title and interest of the said Crowell in and to the real estate described in said indenture, being within thirty days of the rendition of the judgment in favor of said Perry against the said Crowell as aforesaid. (Here the notices, &c. preparatory to the sale, given by the officer are particularly set forth in the bill.) And the said Marshall on the said 26th day of June, 1847, at the time and place specified in said notices and advertisement, and in pursuance thereof, and by virtue of said writ of execution to him directed as one of the deputies of said sheriff and of said seizure, did expose and set up for sale at public auction all the right, title and interest of the said Crowell by virtue of said indenture in and to the real estate therein described, and your orator then and there

bid therefor the sum of four hundred and sixty-nine dollars, which was the highest sum bid for the same, whereupon the same was struck off by said Marshall to your orator; and the said Marshall has executed, acknowledged and delivered to your orator a good and sufficient deed of the premises so by him purchased, which deed has been recorded in the registry of deeds for the county of Kennebec, within three months of the sale.

"And your orator further shows that the said Crowell on the 16th day of September, A. D. 1835, for the consideration of one hundred dollars alleged to have been paid by Michael Jackson Woodward of said Gardiner, by writing under the hand and seal of the said Crowell, demised, released, assigned and made over to the said Michael J. Woodward all the right, title and interest, which he, the said Crowell, had in and to the real estate described in said indenture, and the buildings and improvements thereon made by him, the said Crowell. Your orator further shows that the said Michael Jackson Woodward was then a young man not far from majority, unmarried and without a permanent place of work, but went from place to place as he found employment, that he was the brother-in-law of the said Crowell, and that he died in the year 1836, unmarried and intestate. That no letter of administration was ever granted upon his estate; that he never lived upon said real estate described in said indenture, and never paid said Gardiner any part of the purchase money for the same. And your orator further shows that the said Crowell at the time of said assignment to the said Michael Jackson Woodward, his brother-in-law, was embarrassed by and involved in debt, and continued to be so till some few months before the service of said Perry's writ of attachment as aforesaid, when he, the said Crowell, made an assignment of all his property for the payment of his debts under and in pursuance of the law of the State of Maine made for the benefit of insolvent debtors.

"Your orator further shows, that the said Crowell after said assignment of said indenture and his interest, right and title under and by virtue of it to the said Michael Jackson Wood-

ward, he conducted in all respects as he would or could have done, had he, the said Crowell, not made over his right, title and interest in and to the premises, he, the said Crowell, continuing to labor upon and finish the buildings and improvements, which he had begun before said assignment, and he, the said Crowell, paid the first payment to the said Gardiner, towards the purchase money of the said premises, in the year 1837, and other payments to him, the said Gardiner, from time to time, till he had paid the whole sum before the seventh day of August, A. D. 1846, to the said Gardiner, and the said Crowell has ever been in possession of the said premises and still is, up to the time of the filing of this bill of complaint.

And your orator further shows that the said Michael Woodward, this defendant, father of the said Michael Jackson Woodward, and father-in-law of the said Crowell, long before and ever since the date of the indenture of the said Crowell and Gardiner, did and has resided and lived in Gardiner aforesaid, and was well knowing and fully acquainted with all the circumstances, conduct and doings of the said Crowell in relation to the said real estate of the said Crowell, his payment therefor, and his residence thereon, and also that his son, Michael Jackson Woodward, never paid any part of the purchase money to the said Gardiner, nor ever lived in the buildings, nor upon the premises aforesaid. And the said Michael Woodward well knew and was fully acquainted with the fact of the pecuniary embarrassment of the said Crowell at the time of the assignment of the said indenture to the said Michael Jackson Woodward, and its continuance till the said Crowell made the assignment of all his property for the benefit of his creditors under the insolvent law of this State.

And your orator further shows that before any payment was made to said Gardiner, towards the purchase of said real estate, there was a forfeiture of said indenture on the part of said Crowell and his legal representative, of which the said Michael Woodward was fully apprised, and the said Michael Woodward was well knowing to the assignment of the said Crowell of his property for the benefit of his creditors under

the insolvent law of this State; and your orator further shows that said assignment became ineffectual by reason of the creditors of said Crowell refusing to become parties thereto, of which fact the said Michael Woodward was fully apprised, and that the said Michael Woodward well knew, that the time within which by the law of this State the creditors of the said Crowell could become parties to the assignment of his property for their benefit had expired on the eighth day of August, A. D. 1846, and the said Michael Woodward well knew that the said Gardiner had renewed his said indenture with said Crowell in favor of said Crowell after the decease of his son, Michael Jackson Woodward, by the acceptance from said Crowell of the purchase money after the forfeiture of said indenture, and the said Michael Woodward was fully apprised and well understood all the circumstances, objects and purposes of the said Crowell and the said Michael Jackson Woodward attending and in the giving by the said Crowell, and the receiving by the said Michael Jackson Woodward, the assignment of said indenture of him, the said Crowell and the said Gardiner, and the right, title and the interest of said Crowell to the real estate therein described and the buildings and the improvements of the said Crowell thereon made. Your orator avers and charges that the object and purpose of the said Crowell and the said Michael Jackson Woodward, in the giving by the said Crowell the assignment of the said indenture of him, the said Crowell and Gardiner, and all his right and title and interest in and to the real estate therein described and the buildings and the improvements made thereon by said Crowell, to the said Michael Jackson Woodward on the 16th day of Sept. A. D. 1835, and the receiving the same by the said Michael Jackson Woodward, was to defeat, delay and defraud the honest and *bona fide* creditors of the said Crowell; and your orator further avers and charges, that the said Michael Woodward, this defendant, being cognizant of and privy to the dealings and relations of the said Crowell and the said Michael Jackson Woodward in relation to said indenture, and their objects and purposes in regard thereto as aforesaid, did aid

and abet the said Crowell in the accomplishment of said object and purposes, and with the unlawful view of the said Crowell and Michael Jackson Woodward so by him countenanced and fostered, he, the said Michael Woodward, did by the consent and at the request of the said Crowell, with the intention and for the purpose of defeating, delaying and defrauding the honest creditors of the said Crowell, on the eighth day of August, in the year of our Lord, 1847, receive of the said Gardiner a deed of the real estate described in said indenture, the said Crowell having before that time paid said Gardiner the full sum mentioned in said indenture, and the said Gardiner having received the same of said Crowell in fulfilment of the conditions of said indenture. And your orator further shows that said Michael Woodward claims to hold and a right to hold said real estate by virtue of said deed from said Gardiner.

Your orator would present his case in another aspect, and humbly show, that the one hundred dollars alleged to have been paid by the said Michael Jackson Woodward to the said Crowell, as the consideration of and for the assignment of the said indenture between him, the said Crowell and Gardiner, and all his right, title and interest in the premises therein described and the improvements thereon made by the said Crowell, to the said Michael Jackson Woodward, was a loan of money by the said Michael Jackson Woodward to the said Crowell, and the assignment, though absolute in its terms, was in fact and truth conditional, and by the mutual understanding and agreement of the respective parties thereto, was given and received as collateral security for the repayment of said one hundred dollars, (so advanced as a loan) by the said Crowell to the said Michael Jackson Woodward, or his lawful representative, and upon such repayment with lawful interest said indenture, or the premises therein described, were to be reassigned to said Crowell or his lawful representative.

"And your orator further shows that the said Michael Woodward, this defendant, well knowing the character of the transaction between the said Crowell and the said Michael J.

Woodward relative to the premises, and the nature, object and intention of the said parties to said loan, and the assignment of said indenture and the right, title and interest of the said Crowell, and claiming to hold the same as heir-at-law of the said Michael Jackson Woodward by virtue of said assignment as aforesaid, and the said Michael Woodward having performed some services, furnished some materials for said buildings and improvements, and advanced some money out of his own proper funds, and pretending to hold said indenture and the premises therein described as collateral security to cover and protect and insure not merely the repayment of the loan of his son, Michael J. Woodward, to said Crowell as aforesaid, but also the claim he might have in his own right against the said Crowell for services, materials and moneys he, the said Michael Woodward, had rendered, furnished or advanced for the said Crowell, he, the said Michael Woodward, this defendant, did on the eighth day of August, eighteen hundred and forty-seven, by the consent and at the request of the said Crowell, take and receive a deed of the premises mentioned in said indenture of the said Robert H. Gardiner, and claims to hold the same absolutely.

"And your orator would further show that Lincoln Perry, a creditor of the said Crowell, before the institution of any suit against the said Crowell to enforce the collection of his debt, called upon the said Michael Woodward, and requested of him a statement and account of his claim upon the said premises, and the said Woodward refused to make any statement or give any account thereof to the said Perry.

"Your orator further shows, that the said real estate described in said indenture, at the time of the commencement of the suit by the said Perry against the said Crowell to recover his debt, was and ever since has been of the value of eight hundred dollars, that the said Michael Woodward has stated that he held said premises as security, and his claim was two hundred dollars against the said Crowell.

"Your orator would further show that ever since his purchase of the said premises at auction as aforesaid, he has been

willing to regard the interest of the said Michael Woodward therein as a trust, and his right thereto as a right in equity to receive the amount of any just account he might have against said Crowell, arising as aforesaid, and he, the said Woodward, this defendant, as entitled to hold the said premises as security for the same until his reimbursement, and accordingly your orator did on or about the fourteenth day of August last, and before the filing of this bill of complaint, tender to the said Michael Woodward, this defendant, the sum of two hundred dollars in the lawful coin of the country, and at the same time offered and proposed to him, the said Michael Woodward, to pay any further sum said Woodward had a just claim for, and did then request said Woodward to make and exhibit a statement of his claim, demand or debt, and give an account thereof to your orator, to the end that your orator might pay the same to said Woodward, and requested the said Woodward to give your orator a deed of the said premises upon the payment of the just debt or claim of said Woodward as aforesaid. And your orator avers, that the said Woodward wholly refused to receive the money so tendered him as aforesaid and to make and exhibit any account of his claim or upon the payment thereof to give your orator any deed of the premises aforesaid. And your orator further shows that he has not a plain and adequate remedy at law, and therefore seeks relief of this honorable Court as a court of equity.

"Whereupon your orator prays your honors, that the said Michael Woodward, this defendant, may be directed and required upon his corporal oath, according to his best recollection, knowledge and belief, to make full, true, direct and perfect answer to all, each, every and singular, the matters and things herein contained, as if specifically and specially interrogated thereof and thereto; and in case the said Woodward claims to hold said premises, he be directed and required upon his corporal oath to make a full, fair and just account of all and singular, his claims and demands against said Crowell and the balance which may be due him, if any, after deducting any and all claims and demands the said Crowell may have

against him for which he claims to hold the said premises as security; and that your honors would direct, require and decree that the said Michael Woodward, this defendant, make, acknowledge and deliver to your orator a good and sufficient deed of the said real estate, described in said indenture, without compensation or payment of any thing to the said Woodward, or upon payment of a certain sum of money to him, the said Woodward, as may be right, just and equitable in the case; and he prays for such other and further relief in the premises as is proper and is suited to his case, according to the principles and rules of equity.

"WILLIAMS EMMONS, Solicitor.

Evans and *Danforth*, for the defendant, after stating the facts, made these points in support of the demurrer.

Upon this state of the facts, it is quite obvious that the plaintiff is not entitled to maintain this bill in equity. The obstacles to it are numerous, and are not overcome by any of the allegations of fraudulent intent which are contained in the bill.

I. The plaintiff deduces his right to maintain it, from the statute of 1829, c. 431, § 1 and 2, re-enacted in the Revised Statutes, ch. 114, § 73, and ch. 117, § 50.

His right then is a *statute right*, as all our proceedings in equity are, and we must go to the statute itself, and to its letter, to ascertain whether or not he can maintain his bill.

By the statute then, ch. 114, § 73, "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 right, &c. to a deed of conveyance, must be contained in a *written contract*, as the words plainly imply, and as expressly required in ch. 117, § 50.

The case shows that long, very long before any debt accrued from Crowell to Perry, or any suit by Perry, or any attachment of any supposed right of Crowell, all his right and interest by virtue of the written contract with Mr. Gardiner, had been forfeited. The conditions had not been performed. There

was no right which any body could enforce against Mr. Gardiner. The right which is made attachable by statute is a *legal* right, for which an action at law may be maintained by the original party, though in the hands of a purchaser on execution, it may be enforced in equity. It is a right which cannot be resisted, a property protected by law, not depending upon the pleasure or good will of the obligor, in any degree. In this case the bill explicitly states, that before the payment of any money to Mr. Gardiner, all the right of Crowell and of his assignee, had been forfeited. There was, therefore, no existing interest by virtue of any written contract, which could be attached or enforced. The indenture was utterly at an end. Neither Crowell nor any body under him could enforce it, in law or equity, against Mr. Gardiner. There was nothing therefore which by statute was made attachable. The bill, however, seeks to avoid this inevitable consequence, by the assertion that the defendant "well knew that the said Gardiner had renewed his said indenture with said Crowell, in favor of said Crowell, after the decease of his son, Michael Jackson Woodward, by the acceptance from said Crowell of the purchase money after the forfeiture of said indenture," &c.

If it were true that Mr. Gardiner had renewed the contract in favor of Crowell, that fact should be distinctly averred, and then it should also appear, to render Crowell's interest attachable, that he held his right by virtue of a written contract, whereas all that appears is, if there were any renewal of Mr. Gardiner's obligation, it was merely by parol. All that the bill asserts is, that defendant knew, as a legal consequence of payment by Crowell, that the indenture was renewed. Now no such legal consequence resulted. If the indenture was renewed at all by such payment, it was in favor of the assignee or rightful holder of it.

II. Another objection, fatal to the bill, is, that at the time of Perry's attachment on his writ, Aug. 7, 1846, nothing was due to Mr. Gardiner. There were no "specified conditions" to be performed.

The bill asserts that Crowell paid the first payment in 1837,

and other payments, &c., till he paid the whole of said payments "before the 7th of August, 1846." Nothing remained to be done by Crowell, nor by any one else to obtain a deed. The "specified conditions," upon the existence of which alone, the personal right of the obligee is made liable to attachment, had all been performed. The relations of the parties to the bond or indenture had become changed. All that the statute has authorized to be attached on mesne process and execution, is the personal right of the obligee to have a deed of conveyance of the land, on *the performance of conditions.* The statute never intended to subject any other and different interest which a debtor might have in real estate, to this mode of disposal by a creditor. The statute contemplated that the creditor should be required to perform *some* conditions. If there were none to be performed by any body, then the right of the debtor was a different right, from that authorized to be attached. *Shaw* v. *Wise*, 1 Fairf. 119.

III. Another objection no less fatal to the maintenance of the bill by this plaintiff is, that Perry, the creditor, did not attach, and the sheriff who held the execution did not sell that, which by the statute they were authorized to do. The language of the statute is, " the right, &c. which any person has, &c. *to a deed of conveyance of real estate,*" *&c.* The right to have a deed, a personal right, and not an interest in real estate, is the attachable thing. But in this case, the bill says that Perry, the creditor, delivered his writ to Marshall, the deputy, directing him "to attach all the right, title and interest of the said Crowell *in and to the real estate, &c.*, and that the deputy did attach all the right, title and interest, &c. in and to the said real estate," &c. and again, that on the execution, he did expose and set up to public sale "all the right, title and interest of the said Crowell by virtue of the said indenture *in and to the real estate, &c.* and has made, executed, acknowledged and delivered to your orator a good and sufficient *deed of the premises* so by him purchased," &c.

Now according to the decisions already referred to, there is no right, title or interest in and to any real estate, by virtue of

such a bond or contract. There is a right to have a deed upon the performance of conditions, and that right is attachable, and whoever attaches it, must take care to attach that and nothing else. But when that right ceases, or becomes merged in a higher right, when the right to have a deed is changed into an interest in the land, then it is no longer to be treated as a right under that statute. The plaintiff has chosen to buy all the right of Crowell in and to the land, instead of his right to have a deed upon certain conditions. He must seek his remedy elsewhere than under the statute upon which he relies. It is not every *interest in* or right *to* land which may be sold on execution, none indeed unless authorized by some statute. Before the plaintiff can prevail he must show *such an interest or right* in and to the land, as may be taken on execution, and then frame his bill accordingly. *Stevens* v. *Legrow*, 19 Maine R. 95, is directly in point, and decisive on this point. There can be no escape from it.

IV. Another objection is, that this process does not lie against any but the obligor of the original bond. It is a *statute* remedy, and the statute carries it no further, for the obvious reason that no one can make another the assignee of an obligation. He may indeed convey the land subject to the contract, and perhaps in such case equity would find a mode of reaching it; but that is not this case. If an attaching creditor or a purchaser of a debtor's right wishes to secure his claim upon the obligor, it is easy to do so by giving notice to him not to convey to any other person. Perhaps an injunction might be obtained.

V. The plaintiff is not entitled to maintain his bill for another reason, viz: that long before Perry's attachment, all the right of Crowell had been assigned to M. J. Woodward, and upon his death descended to the defendant.

The argument hitherto has proceeded upon the ground that Crowell had retained the original indenture, and all his rights under it, whatever they were, up to the time of the attachment, but such was not the case. The bill states that on the 16th of Sept. 1835, Crowell assigned his interest to M. J.

Woodward. It seeks however to avoid the effect of this assignment, by declaring that it was done with a view to defeat and delay creditors, and was therefore fraudulent and void, and it is argued that this is admitted by the demurrer. The demurrer was taken with full knowledge of the consequences of such a step. As already remarked, the plaintiff's bill is to be taken together. The case which he presents, is that made out by the *whole* bill. Now we have to answer to the allegations of fraud with which the bill according to form abounds.

1. That the plaintiff is in no condition to complain of it. He was not a creditor of Crowell at the time nor at any time. He has been injured in no degree by any of the proceedings of Crowell or of the defendant, nor at the time of the transactions complained of.

But we answer to the allegation of fraud: —

2d. That the bill itself negatives the charge, or perhaps more properly speaking, waives it. It does not ask for relief on the ground that the plaintiff has been injured by the fraudulent assignment of Crowell to Woodward. It recognizes the assignment as good and valid, and only claims to hold the balance of the value of the land, after paying all defendant's just claims.

The transaction thus disclosed is a perfectly honest and fair one. Woodward, the son, advanced money and took the assignment as security. Woodward, the father, (defendant,) succeeded to the son's rights by inheritance, and also advanced money and materials, and finally to perfect his security took a deed. The plaintiff so regarded it, and is willing still to regard it in that light. Is there any fraud in all this? He asks relief not on the ground of fraud, but on the ground of a "resulting trust" in the premises.

VI. If, as has been shown, this is not a bill for relief against fraud, but in the "first part" of it, is a bill authorized by the provisions of the statute c. 117, § 50, and that only, and cannot be maintained as such, neither can it be on the ground of a "resulting trust." What right has this plaintiff to such a bill? He stands before the Court as merely a purchaser of some-

thing at auction. What is that something? By statute, if all things had been done correctly, he would have purchased a right to have a deed on conditions. He now claims to hold the interest of a *cestui que trust*, in the land purchased. What statute authorizes such an interest to be so disposed of, to be attached and sold? None. The mode of reaching a debtor's interest for the benefit of a creditor, is pointed out by statute, and the statute forms must be observed.

It is not intended to deny that the interest of a *cestui que trust*, may be reached by his creditors. The inference is not to be drawn, that because this plaintiff cannot prevail in this bill, creditors are without remedy, when the estate of their debtors is held in trust. The remedy in such cases is by a bill in the name of the creditor himself, what in equity is denominated a creditor's bill, setting forth the indebtedness, a judgment at law, want of property to levy upon, the estate held in trust for the benefit of the debtor, or conveyed fraudulently to delay the creditor. The books are full of such cases. *Gardiner Bank* v. *Wheaton*, 8 Greenl. 373, is exactly such a case; *same* v. *Hodgdon*, 14 Maine R. 453, is also of the same character.

If we have made ourselves intelligible to the Court, we contend that the plaintiff can have relief on neither ground. Creditors might have it, but the plaintiff is not a creditor.

He does not stand in a relation to authorize him to object to the validity of the transactions between Crowell and his assignee.

The plaintiff seems to have a confused idea that in some mode or other, he is entitled to relief, if any fraud is in the case. So he might be if he is likely to lose any right which he has, by reason of fraud. If any transaction has been interposed to prevent his acquiring a right, which transaction is invalid by reason of fraud, he may maintain his right, not however by a bill for relief against fraud, but by a bill setting up his right, his statutory right, and when the transaction is interposed to prevent him, he may expose the true character of it, and thus remove it out of his way.

To maintain the bill under either aspect, would be extending remedies in equity much farther than has yet been done, or than any rights of creditors, or public policy requires, would be to confound distinctions which are obvious and desirable to be preserved.

Emmons, for the complainant.

The defendant has by his counsel interposed a demurrer to the plaintiff's bill. He has a perfect right to do so. The books say, there are two reasons for a demurrer to a bill — the obtainment of delay and the avoidance of a disclosure; and it may be added, in some instances to save costs. In the present case, the two first are strong enough. In discussing this question it may be well to state, *in limine*, one or two settled principles which lie at the foundation of the argument. One is, that objections preliminary to the discussion of the merits of the case, do not receive favor from the Court, when by amendments or modifications of the bill, they can bring the questions involved in it, so as to adjudicate upon its merits, where they have jurisdiction. *Traip* v. *Gould*, 15 Maine R. 86. The other is, that the demurrer admits the facts properly alleged in the bill, to be true.

The first ground of the demurrer would seem to be, that the plaintiff has not that character, by reason of want of privity between him and the defendant, which qualifies him to maintain his bill.

The Legislature enacted in 1829, c. 431, § 1, 2, "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 conditions 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 on execution," &c. "That the purchaser of any such estate, right, title or interest, shall have the same remedies by bill in equity, before the Supreme Judicial Court or Court of Common Pleas, to compel the obligor or contractor to convey such real estate to him, &c., as mortgagors, or persons claiming under them, have to compel mortgagees or persons claiming under

them to convey mortgaged real estate. See also the 3d §. These enactments indicate what was the intention of the Legislature in reference to the subject matter involved and the remedies to be employed to cure the breach of the provisions; and if these enactments were now in force, there would seem to be no possibility of determining that in equity the plaintiff could not sustain this bill, for the reason above alleged. This matter is not omitted in the Revised Statutes. Provision in reference to it will be found in c. 94, § 50, as amended, and in c. 117, § 50.

By the law as it now exists, the purchaser of the right, &c. in question, shall have the same remedy to compel a conveyance as a mortgager has to compel, &c. Must this privileged purchaser be the creditor? No such restriction or qualification is imposed by law upon the purchaser. The plaintiff is a purchaser, and as such, by the statute he would have a right to institute this bill. By the purchase, plaintiff became in equity the assignee of Perry, the creditor. He has paid to Perry the amount of the debt due him from Crowell, and equity would substitute him for Perry. If Perry had bid off the right in question, would he not have had a right to institute a bill in equity, to enfore the remedy provided by the statute? He would have been a creditor. As the assignee of Perry, the plaintiff has all the rights, equities and remedies with which Perry was clothed. Within the fair interpretation of the 3d § of the law of 1829, Woodward, the defendant, may be regarded as the assignee of Crowell. Would not Perry have had a right in equity, to have reached Woodward, the fraudulent assignee of Crowell? Then would the plaintiff have the right. But let us look at this matter independent of the views and intentions of the Legislature, as collected from their enactments at different times, in relation to *the point* under discussion.

Privity between the parties is not indispensably necessary in equity. Story's Equity Pleadings, § 513, note 1. Same, § 514. Here is authority enough for our case. *Pomeroy* v. *Windship*, 12 Mass. R. 514.

Another objection raised by the demurrer, and insisted upon in the argument of defendant's counsel, is, that Crowell never had any title to the land, and of course plaintiff could not obtain any by his purchase.

By virtue of the contract between Crowell and Gardiner, the former acquired a right, interest or estate, which by law was liable to attachment and seizure on execution against him; this right, interest or estate the plaintiff obtained by his purchase and deed. True it was a personal right or estate in contradistinction to that of realty. *Shaw* v. *Wise*, 1 Fairf. 113. But the law has resembled it to a right of redemption and its transmission and acquisition are to be secured in the same manner as a right of redemption. Without a conveyance of the land the remedy provided by the statute for the benefit of the purchaser would be defective. Crowell had no interest and estate in the land, but a right to a deed of conveyance of the land, which in equity must be regarded as a right to the land. The plaintiff, by reason of the proceedings to enforce the debt of Perry against Crowell, acquired the right of Crowell under his contract with Gardiner, which right, it is alleged in the bill, has never been impaired by reason of any transactions between Crowell and others in consequence of fraud, of which the parties were cognizant, and the plaintiff seeks this conveyance of defendant, who holds a deed of the premises fraudulent as to the purchaser at the auction. In the suit of *Perry* v. *Crowell*, the right of Crowell under the contract was attached, and whatever may be the language of the bill or the return of the sheriff in reference thereto, such was the fact, and amendments can be made, if needful, to show and state the fact. The aforesaid right of Crowell was seized upon Perry's execution, and the process in relation to the disposition of it, was according to the provisions of the statute. It is true, between the attachment on Perry's writ and the seizure on his execution of Crowell's right under the contract, a deed was given to defendant. But that deed, so far as Crowell's creditors and the plaintiff who is by equity substituted for Perry, who was a creditor, are concerned, did not give the defendant

any title, which he can set up against the plaintiff. The demurrer admits, that Crowell from the first dealt with this right fraudulently, and Woodward, the son, and Woodward, the father, knew it, and were participators, because the bill so alleges. And as relates to the plaintiff the defendant has not and never has had any title, which he has a right to hold in opposition to the plaintiff; it is therefore immaterial so far as concerns the defendant, whether Crowell's right was acquired by attachment or seizure upon execution, even though defendant's deed was prior to seizure on execution. The proceedings under which the plaintiff acquired his right were such as the law prescribes in regard to the disposition of a right of redemption. These were sufficiently correct or are capable of being made so by amendment, and the deed held by plaintiff is unobjectionable. Besides the deed of defendant, being admitted to be fraudulent, he is estopped both at law and in equity, certainly the latter, to call in question the regularity of the proceedings under which the plaintiff obtained his deed. *Pomeroy* v. *Windship*, 12 Mass. R. 514. The title of defendant as against Crowell is perfectly good, a fraudulent deed as between grantor and grantee is unimpeachable. Crowell's right in and to the premises is gone forever. And if plaintiff were to obtain a deed by bill in equity of defendant, on the ground of fraud, Crowell could not afterwards call upon the plaintiff for the bond. He could not take advantage of his own wrong.

Another objection made by defendant's counsel is, that Crowell's right, if any existed that could be available to a creditor, should have been acquired by a levy upon the land, and not by sale of the right. It is a sufficient answer, that Crowell never had any right or estate in the land; but his right was to a deed of the land, which is in equity a right to the land. The law has prescribed the mode in which it can be acquired, and that is by sale as an equity of redemption. The title being by statute, the statute must be followed or the right cannot be acquired. The Court have settled this question. *Aiken* v. *Medex*, 15 Maine R. 157.

The plaintiff in this case, could not therefore have any remedy at law. A bill in equity is the only remedy. A bill in equity will lie in the Circuit Court to set aside a conveyance made in fraud of creditors, for there is not, in a proper sense of the term, a plain, adequate and complete remedy at law. *Bean* v. *Smith et al.* 2 Mason, 252. This Court has equity jurisdiction where the bill charges fraudulent conveyance of land, made to *defeat and delay* creditors. *Traip* v. *Gould et al.* 15 Maine R. 82.

The defendant's counsel further insists, that it cannot be fraudulent as regards the creditor, Perry, for his execution has been returned satisfied — nor as it respects the complainant, for he knew at the time what he was purchasing, and has obtained all he purchased, &c. This is a pretty remarkable argument to come from the defendant. Between the attachment on Perry's writ and the seizure on execution, the defendant colludes with Crowell and obtains a deed, and now says that Perry has received his pay, and the complainant has paid the debt by the purchase of something that cannot be realized. Suppose Perry had purchased Crowell's right under the contract, and had offered for the same at auction the amount of his claim against Crowell, and the officer had given Perry a deed, and returned the execution satisfied; and Perry had instituted his bill to obtain a deed according to the provisions of law, would it have been a good answer on the part of the defendant, to say, your execution is returned satisfied, and you have no claim to enforce against me or Crowell? If such an answer in such a case would be good, then it is in this, and not otherwise.

Another ground of demurrer taken by defendant's counsel, would seem to be inconsistency in the allegations of the complainant's bill.

The objection is *not* that the bill is *bad* for *multifariousness*. The complainant sets forth a case of fraud and seeks redress, on that account, in the first part of his bill. Then, in case his proof should fail to establish such a case, he claims to have the Court grant its aid and relief as a case of resulting

trust. The bill is framed, like a declaration at common law, containing different counts. The relief that the Court is desired to afford, is sought, so that both aspects of the case may be exhibited, and the relief can be granted, as either mode shall be established, by the Court, in pursuance of the prayer. The complainant asks the Court to decree, in case he satisfies them that he is entitled by reason of fraud, that the defendant give him a deed; in the event, he makes out a case of resulting trust, that the defendant give a deed upon the payment to defendant by plaintiff of a certain sum; so that there is no inconsistency and no difficulty, technical nor otherwise; we ask a deed, either without paying any thing, or with paying such a sum as the Court may order. And the case of *Scudder* v. *Young*, 25 Maine R. 155, is an authority.

That a resulting trust might be reached by a bill suitably framed in a proper case, we contend, upon the authority of the *Gardiner Bank* v. *Wheaton*, 8 Greenl. 373, and we regard this authority as important in the present case.

The ground of the allegation, that nothing could be attached, is, that the bond had run out. It is stated in the bill, that Woodward, the son's right, had gone, because he failed to make the payments according to the terms of the bond. But Gardiner in favor of Crowell and for *his benefit* waived the forfeiture, and by that means made it good to Crowell. And it was good in him, at the time of the attachment.

If Crowell had an interest by the bond, and the complainant has legally purchased that interest, upon the allegations of fraud in the bill, which so far as well laid, are admitted by the demurrer to be true, that gives the complainant a valid claim against Woodward, the defendant. True Woodward was no party to the bond, and, as we say, had no derivative title to or interest in it; but the complainant purchased no claim upon Gardiner. Gardiner fulfilled his contract by giving a deed to the defendant, innocently, in compliance with the wishes of Crowell, growing out of collusion between Crowell and defendant. The whole title to the land passed from Gardiner to Woodward, the defendant, by the deed of the former to the

latter. This title was and is good in defendant against every person, except the creditors or their legal and equitable representatives, assignees or privies of Crowell, whom Crowell and defendant intended to defraud, delay or defeat. The complainant falls into the number of those embraced in the above named exception.

We contend that the complainant, by a fair construction and interpretation of the laws in reference to this subject, has a right to bring and sustain this bill, as he is a purchaser and the defendant is assignee of Crowell; that in equity privity is not essential to render one party amenable to another, in all cases; that this is one of the cases where it is not indispensable; that Crowell's right under the contract was attached, that it was seized on execution, that the mode of disposing of it was such as is adopted on the seizure and sale of an equity of redemption; that it was duly purchased by complainant; that he has the officer's deed conveying the right under the contract of Crowell in due form. That the proceedings were sufficiently regular, and the irregularities and vagueness in description, are not so great, if any exist, as to vitiate; are, if *necessary, amendable;* and at any rate, are not open to defendant, against complainant, who has an unexceptionable deed.

That unless the complainant can maintain this bill, he is without remedy; that all has been done, and in a manner prescribed by law, to enforce the collection of Perry's debt, and by the confession of the demurrer, the title of the land is fraudulently in defendant.

The prayer of the bill is suited to the two modes of stating the plaintiff's case, and there is no difficulty, as defendant's counsel suggests, of knowing what answer to make, and in the one mode or the other, either on the ground of fraud, or the ground of a resulting trust, it is confidently believed the Court can grant relief to the plaintiff. If there were any technical difficulty in embracing in the bill the two grounds of possible claim, so that if the answer of the defendant or the proof in the case, should be more fitted for the one or the other and

either should be good and be sustained, the plaintiff could have relief, then, I say, if there were any difficulty the Court might order one stricken from the bill. But it is confidently believed, there is no possible objection to the bill as it now stands on the score suggested. That the demurrer should be overruled and the defendant be required to file an answer to the bill, that in case the merits of the case should be with the plaintiff, the Court may give such relief as may be just and proper.

The opinion of the Court was drawn up by

WELLS J. — Several objections are made to the plaintiff's bill.

1. It is denied, that the debtor, Allen Crowell, had any attachable interest in the land, because the whole amount, due on the contract, had been paid to R. H. Gardiner, before the attachment was made.

The Rev. Stat. c. 114, § 73, provide that rights of redemption and the "right, title and interest which any person has, by virtue of a contract, to a deed of conveyance of real estate, on specified conditions, may be attached on mesne process, and the same lien thereon shall be thereby created by such attachment, as if they were tangible property."

The right becomes perfected, by the payment of the money, mentioned in the contract, and may be enforced by a bill in equity. Rev. Stat. c. 96, § 10. The more the debtor has paid, the more valuable is his interest, and the greater reason why creditors should have the benefit of it, in satisfaction of their debts.

The statute does not limit the right to be attached, to a time, before the conditions have been performed. It describes it, and the mode, in which it accrues, and consequently authorizes its attachment, during its existence, and at any time, after its inception, and before its consummation, by a conveyance of the title. *Whittier* v. *Vaughan*, 27 Maine R. 301.

2. It is contended, that the right of the debtor had been forfeited, by a failure to comply with the terms of the contract.

But the bill alleges, that the time had been extended, by

the reception of payments from Crowell. Payments made, after the time specified in the contract, would have that operation. Gardiner was at liberty to extend the time, and by doing it, he gave to Crowell the same right, which he would have had, by a strict compliance with the conditions. The waiver of performance, at the time, specified in the contract, attaches to it, and becomes a part of it, and the creditor takes it, by the provisions of the statute, as it belonged to the debtor.

3. It is objected, that the officer, in making the attachment, in advertising and in giving the deed, did not properly describe the debtor's right.

The bill alleges, that he did "attach all the right, title and interest of the said Crowell, in and to the said real estate described in the said indenture." The same language is used in relation to seizing the right, on execution, and advertising it for sale. It is also stated, that the right, &c. by virtue of said indenture, in and to the real estate therein described, was sold at public auction, and that the officer "has executed a good and sufficient deed of the premises," &c.

Between the original parties to the contract, no lien attaches to the land. But in relation to a creditor, the statute declares it to be an attachable interest, as if it "were tangible property." It is not the contract, which is attachable, but the right under it, and in the language of the statute, a "lien" is created on the land, by the attachment.

It is not such an interest, as would give the purchaser a seizin in the land, so that he could maintain a writ of entry, as was decided in *Shaw* v. *Wise*, 1 Fairf. 113. But the statute makes it an attachable interest in the land.

In the case of *Stevens* v. *Legrow*, 19 Maine R. 95, it is stated, that there was attached "all the right, title, interest, estate, claims and demands of every name and nature," &c. It was considered by the Court, that these terms were broad enough to effect an attachment of the debtor's right, under the contract. But as the officer, in that case, advertised and sold the right, describing it as an equity of redemption, the sale was considered inoperative.

In the present case, it is understood, from the allegations in the bill, that the officer, in his proceedings, refers to the indenture; by an examination of which, the exact nature of the debtor's interest could be ascertained.

The allegations in the bill are sufficiently specific, to warrant the conclusion, upon the present exhibition of the facts, that there has been, in the attachment, advertisements, sale and deed, a compliance with the statute.

4. The defendant holds the land by a conveyance from Gardiner, and it is contended, that he being the party contracting with Crowell, the plaintiff should have brought his bill against him. The statute does not prohibit the owner of real estate, who has entered into a contract, to convey it, upon conditions, from alienating it. But his liability to damages, for a breach of his contract with the original party, would not cease, upon such an alienation.

When the defendant took his deed, the attachment was made, and by the record, he had constructive notice of its existence. He is charged with taking it, for the purpose of aiding Crowell, to defraud his creditors. But Gardiner not being a party to the fraud, and having power to convey, the title passed from him, by his deed to the defendant. Between him and Gardiner, it is vested in the defendant, notwithstanding he took it, with the design to defraud the creditors of Crowell.

Gardiner has not the title, and the plaintiff can derive no benefit from a conveyance, except from one having the title.

Unless creditors can sustain a bill against the assignees of the party contracting to convey, their rights would be defeated, in every case, where such conveyance should be made.

The Legislature has given to creditors the right to take this species of property, and by section 50 of chapter 117, the purchaser "shall have the same remedy by bill in equity to compel a conveyance of it, as mortgagers have to compel mortgagees to convey to them, on performance of, or offer to perform the condition of a mortgage.

By chap. 125, sect. 16 and 17, Rev. Stat., the remedy of mortgagers extends, not only to mortgagees, but to those claiming under them.

But the statute, in giving the remedy by bill in equity, does not enact against whom it shall be brought; it does not state the persons who shall be made parties to it.

The right, existing as a lien on the land, whoever purchases it, with a knowledge of the right, must take it *cum onere*, and must respond to the claim, in the broadest extent, to which a bill in equity can reach.

The creation of a "lien," by the attachment, must have been intended, to preserve the right of the creditor from a conveyance by the owner of the fee to the debtor, or any other person.

Although this point was not decided in *Aiken* v. *Medex*, 15 Maine R. 157, the opinion there expressed upon it, adds strength to the present conclusion.

5. Several years before Lincoln Perry's debt accrued, Crowell assigned the contract, made with Gardiner, to Michael J. Woodward, the defendant's son. If this assignment had been *bona fide*, it would defeat the plaintiff's claim, because Crowell could have had no interest in it, after the assignment of his entire right under the contract; there would be nothing remaining, for a creditor, afterwards to attach.

But it is alleged in the bill, that this assignment was made by Crowell, to defraud his creditors, and that he afterwards made the payments on the contract, in the same manner as if no such assignment had been made.

It is contended, that Perry, not having been a creditor, when the assignment of the contract was made, cannot impeach it as fraudulent.

The law, existing at the time, when the assignment was made, was similar, in relation to this species of property, to the present one, and made it available to creditors. Debtors then could not make a conveyance of it, valid against creditors, if done to defraud them.

The stat. 13 Eliz. c. 5, is not confined in its operation, to

creditors, existing at the time of the commission of the fraud, but embraces those, who subsequently become such. It is not necessary to prove, that the fraud was meditated against those who might become creditors, at a subsequent period.

If the transaction is actually fraudulent against any creditor, any and all creditors may impeach and resist it, and are entitled to the aid of the law, in appropriating the property, fraudulently conveyed, to the payment of their debts. The uniform construction of that statute includes subsequent, as well as existing creditors. *Anderson* v. *Roberts*, per Spencer C. J., 18 Johns. R. 513; *Clapp* v. *Leatherbee*, 18 Pick. 131; *Parkman* v. *Welch*, 19 Pick. 231; *Clark* v. *French*, 23 Maine R. 221.

6. The plaintiff is willing to consider the defendant, as holding the premises in trust, and to allow him such sum, as his son, from whom he is alleged to claim as heir the assignment from Crowell, paid to Crowell, or any sum, which the defendant, himself, has paid, to acquire the estate.

What would be the effect of the transaction, if the son took the assignment from Crowell, as collateral security, for money loaned, Crowell retaining a valuable interest in the contract, it is, at present, unnecessary to determine.

If the defendant is willing to admit, that he holds in trust, and to convey to the plaintiff, upon receiving such sum, as is justly due, no objection can arise to such an adjustment.

The plaintiff succeeds only to the right of the debtor, under the contract with Gardiner, and having purchased that right alone, he must be confined to it. He can hold nothing more than what he has purchased. The creditor might have other modes of obtaining his debt; but it does not appear, that he has asssigned his debt to the plaintiff, or that the latter has any other right, than that, purchased by him, at public auction.

Demurrer overruled.

SAMUEL QUIMBY *versus* CYRUS PUTNAM.

Under the provisions of the Revised Statutes of this State, (c. 146, § 24) a payment made by one of two joint promisors, in the presence of the other, will not be evidence of a new promise made by both.

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

This was an action of assumpsit, commenced April 24th, 1847, upon a joint note signed by the defendant and one Ira Putnam, bearing date November 7th, 1839, and payable on the 24th of May, then next, with interest. On the back of the note is an indorsement of $30,71, dated Jan'y 11th, 1842. Ira Putnam deceased, Oct. 15th, 1843. The defendant pleaded the general issue (which was joined) and filed a brief statement, alleging that the cause of action did not accrue within six years before the commencement of the suit.

There was evidence tending to prove that the indorsement was made when both the signers were present, and also tending to prove that the defendant was not present; and also evidence tending to prove that the payment was by way of an account receipted, which Ira Putnam had against the plaintiff. There was also evidence to show, that since the commencement of this action, the defendant said that the indorsement or payment on the note, was made by way of the settlement of an account which they had against the plaintiff, and that the indorsement was made by his brother Ira, for he was present and saw him write it. The original papers are on file and may be referred to by either party, but are not to be copied. The jury returned a verdict for the defendant.

The principal question in this action was, whether the promise or cause of action was or was not barred by the statute of limitations.

The presiding Judge instructed the jury that if they found that the payment was made out of the funds of the defendant, with his knowledge and consent, or out of the joint funds of the promisors, with the knowledge and consent of the defendant, then the plaintiff was entitled to recover; but if they found

that the payment was made by Ira Putnam, the deceased promisor, as indorsed, from his individual means, though defendant was present, still he is not to be charged. To which instructions and directions the plaintiff excepted.

Fuller & Gile, for the plaintiff.

The exceptions filed and allowed in this case show, that this was an action commenced April 24th, 1847, on a joint note, made to the plaintiff by defendant and one Ira Putnam (since deceased) bearing date Nov. 7th, 1839, for $87,36, payable May 24th, 1840, with interest; and on the eleventh day of January, 1842, $30,71 paid and indorsed by one of the signers, but not certain which. Ira Putnam died October, 1843. This action was commenced against Cyrus Putnam, the surviving promisor. Both defendant and deceased were present at the time of the indorsement, which was made on a settlement of accounts by the parties.

But for this indorsement the note would have been barred by the statute of limitations, and the only question before the Court and jury was, whether this indorsement, made by one of the promisors, both being present when made, did or did not revive the promise or cause of action against both for the term of six years, from the date of the indorsement, or create a new promise for the balance then due. And this would seem to depend entirely on the construction to be given to the statute of 1841, chapter 146, sections 23 and 24, which are an exact copy of the Revised Statutes of Massachusetts, chapter 120, sections 17 and 18; and in every essential particular a copy of the English statute commonly called Lord Tenderden's bill — and this bill or act having received a judicial construction in England, by their most eminent jurists, prior to its adoption or passage in Massachusetts, it is a fair presumption of law, that in adopting the language of the English statute, they also intended to adopt the construction which had there been given to it; and that our Legislature in making an exact copy in this respect from that of Massachusetts, adopted the same rule of construction. If so, the effect of actual payment and indorsement on notes of hand by one of two or more joint

promisors, remains the same as at common law, and unaffected by the statute; and more especially, when made with the privity or acquiescence of the other promisors.

If this be a correct construction, the instructions given to the jury by the presiding Judge, were clearly wrong, and the plaintiff ought not to be prejudiced by it. If the defendant did not make the indorsement with his own hand, he was present and privy to the transaction and shared equally with the deceased in the benefits. The indorsement being made on a joint note with the privity of the defendant, was a joint indorsement, and the jury should have been so instructed. *Sigourney* v. *Drury*, 14 Pick. 387, and cases there cited. *Sigourney et al.* v. *Wetherell et al.* 6 Metc. 553; *Williams* v. *Gridley*, 9 Metc. 482; *Commonwealth* v. *Dudley*, 10 Mass. R. 403.

H. W. Paine, for the defendant.

The fact of payment, as evidenced by the indorsement on the note, is not denied.

Was it such a payment as should deprive the defendant of the benefit of the statute?

It is conceded, that before the revision of our statutes, payment made by one of several joint promisors, would prevent the operation of the statute as to the others. But it is submitted, that sections 23 and 24 of c. 146, Revised Statutes, have entirely changed the law.

The 23d section provides in substance, that payment of a part shall have the same effect which it did have before the revision.

But section 24 provides that no one of two or more joint contractors shall lose the benefit of the provisions of this chapter, so as to be chargeable, by reason only of any payment made by any other or others of them.

This defendant then, is not to lose the benefit of the statute, by reason of a payment made by his co-promisor. If the payment was made by his co-promisor, then the case is within the provisions of the 24th section, and the defendant is not chargeable.

The jury were instructed, that if the payment was made by Ira Putnam from his individual means, though defendant was present, still he is not to be charged.

Does the presence of the defendant affect his liability? Whether he were present or absent, it was a payment made by the other joint contractor — not by him. If present he would have had no authority to interpose and prevent the payment. He had no right even to object. The other promisor pays his own money — pays when he had agreed to pay — pays when he might then have been compelled by law to pay.

If then the defendant could not have prevented the payment, it is difficult to see how the simple fact of his being present, should affect his rights or liabilities.

The Judge further instructed the jury, that if the payment was made out of the funds of the defendant with his knowledge and consent, or out of the joint funds of the two promisors with the knowledge and consent of the defendant, then the plaintiff was entitled to recover.

The plaintiff in his argument would seem to have raised no objections to this part of the charge. And indeed if he would contend that the ruling had placed his right to recover upon too narrow a ground, he should have called for other rulings, and made the refusal to give them, matter of exception.

The principles involved in the instruction given are clearly correct.

The cases cited by the plaintiff, do not seem to bear at all upon the question under consideration. They do show that payment may be proved by parol, which was not denied at the trial; and is not denied now. But in the cases referred to, the point here raised was not mooted.

The opinion of the Court was drawn up by

Shepley J. — The suit was commenced on April 24, 1847, upon a promissory note made by the defendant and Ira Putnam, since deceased, on November 7, 1839, payable to the plaintiff on May 24, then next, with interest. The defendant by a brief statement presented the statute of limitations as a

defence. There was an indorsement of $30,71 made upon the back of the note as paid on January 11, 1842.

The question for consideration as presented by a bill of exceptions is, whether a payment made by one of the two joint promisors in the presence of the other will be evidence of a new promise made by both. Such would have been its effect before the Revised Statutes were in force. *Dinsmore* v. *Dinsmore*, 21 Maine R. 433.

The counsel for the plaintiff contend, that the Revised Statutes of Massachusetts and of this State, are on this subject in every essential particular copied from the statute, 9 Geo. IV. c. 14; which was decided not to prevent a payment made by one of several joint contractors being considered as evidence of a new promise made by all. *Wyatt* v. *Hodson*, 8 Bing. 309. But in this they are in error.

The English statute made provision, that an acknowledgment or promise made in writing by one should not affect the rights of his co-contractors; but it made no provision respecting the effect of a payment made by one upon the rights of the others. The effect of such a payment was left to be determined by the common law, by which it had been already decided.

By the Revised Statutes of Massachusetts and of this State, the effect of such a payment was not left as before to be determined by the common law. Rev. Stat. of Mass. c. 120, § 18; of this State, c. 146, § 24. These sections provide, that one of several joint contractors shall not lose the benefit of the provisions of the statute by reason of a payment made by another. It has accordingly been decided, that a payment by one joint contractor made before the enactment of the Revised Statutes would not, since they were in force, have the effect to prevent the operation of the statute upon the contract, as it respected others. *Pierce* v. *Tobey*, 5 Metc. 168.

The payment in this case was made since the Revised Statutes were in force, and they must determine its effect. The fact that it was made in the presence of the defendant, cannot alter its effect, for its full effect with respect to him, as

a payment, is determined by the statute. His presence might show, that he admitted the debt to be due, but such an admission, not made in writing and not arising out of a payment made by himself, can have no effect upon his rights since the Revised Statutes were in force.

The instructions appear to have been entirely correct.

Exceptions overruled.

SAMUEL N. TUFTS & *al.* v. JAMES Y. MCCLINTOCK.

An officer is not authorized by a precept against one person to take the property of another. But a previous demand upon the officer may be necessary, before an action can be maintained, when the goods of the plaintiff, taken by the officer, were so intermingled with those of the debtor, as not to be distinguishable therefrom. It is not, however, necessary that the property should be so distinctly marked, that an officer, by his own observation, would be able to perceive, that it did not belong to the same individual, in order to make him liable.

THIS case came before the Court upon the following exceptions to the ruling of GOODENOW, District Judge.

This is an action of trespass. Writ is dated July 6th, 1847, and the general issue with a brief statement was pleaded and joined.

The action is brought against the defendant, who is the sheriff of the county of Waldo, for the act of one George W. Webster, his deputy, in attaching a lot of boots and brogans and shoes, as set forth in the writ, which may be referred to by either party. The fact that the defendant was sheriff of the county of Waldo, and Webster his deputy duly appointed and qualified, was admitted.

It was proved, that on the 10th day of March, 1847, the plaintiffs left with one Stephen S. Gerrish the articles sued for, to sell, valued at $70,36, taking his receipt therefor, the same "to be accounted for at the above prices, when sold," (the prices of each kind being named in the receipt,) or returned when called for.

The plaintiffs proved by said Gerrish, that when said property was left with him, the boots were in a case, and at the time of the attachment had not been taken out, although the cover had been removed and the boots exposed for sale, and two pairs sold; the brogans and shoes had been taken out and placed in a drawer and on a shelf with other shoes belonging to said Gerrish. It appeared that the plaintiffs also had another box of boots at said store, which were not taken, because said Gerrish told the officer and the attorney of the attaching creditors that they belonged to the plaintiffs, and they took no property which said Gerrish pointed out as not his, and said Gerrish said that at that time he had the impression he owned those which were taken by virtue of his receipt given to the plaintiffs, when he took them, and did not think or state to the contrary at that time, and he knew of no way the officer could distinguish these goods from the rest of his stock of goods, except what information he derived, or could have derived from him, the witness. Gerrish further testified, that after said goods were carried away, he notified the plaintiffs, and one of them came down and called on him to get said boots and shoes and other property; that he then settled with plaintiffs for what he had sold, and they agreed to look to the officer for the remainder, being those which are described in the plaintiffs' writ.

George W. Wilcox was also called by plaintiffs and testified that he was the attorney of the attaching creditors, — that he was with the officer at the time the attachment was made, and directed him to attach all the goods in the store belonging to said Gerrish; that said goods were removed to the store of one Clary, about a mile and a half from Gerrish's store; they were attached on the 27th day of March, 1847, and shortly after this one of the plaintiffs called upon him, the said Wilcox, and claimed said goods as his; that said Wilcox said he did not feel authorized to give them up, but would write to his clients and see what they would do about it. Plaintiffs then exhibited to him the receipt given by said Gerrish for the goods on the 10th of March preceding; and he would take the

goods where they then were, if the creditors would give them up, as he did not wish any law about it, and said, if they would give them up he would send one Rollins to get them; that said Wilcox promised to write to his clients and see what they would do about it; that he wrote to their attorneys in Bangor, who wrote back that he might give up the said property. The said Wilcox further testified, that he did not give any notice of this answer to the plaintiffs or to said Rollins and that he expected Rollins would call on him for the goods.

It appeared that said Gerrish had settled with the attaching creditors about the first of May, and they took all the other goods attached, except the goods sued for in this writ, and they were not to have them.

Whereupon the Court directed a nonsuit. To which the plaintiffs by their counsel excepted.

May, for the plaintiffs, said that the reasons for ordering the nonsuit did not appear, but it seemed to be admitted, that it was founded upon a supposed intermingling of the goods with those of Gerrish, the debtor, that they could not be distinguished. But here was no confusion of goods, and there was no difficulty in ascertaining, by proper inquiry, what belonged to the debtor, and what to the plaintiffs. The only reason why the deputy did not know the facts, was because he received erroneous information. The same would have happened, had the articles of the plaintiffs, taken by the deputy, been of an entirely different description of goods. The officer must ascertain at his own risk, whether the property belongs to the debtor, and may require an indemnity, if there be doubt. If he take one man's property on a writ against another, the owner may maintain an action against such officer without making any demand. *Lothrop* v. *Arnold*, 25 Maine R. 136; *Stickney* v. *Davis*, 16 Pick. 19; *Hobart* v. *Hagget*, 3 Fairf. 67; *Galvin* v. *Bacon*, 2 Fairf. 28; *Woodbury* v. *Long*, 8 Pick. 543. From these cases it is clear, that the intent of the officer is of no consequence in determining whether the taking was tortious or not. And it is equally clear, that if the property taken be-

longs to any other person than the debtor, the precept gives no authority whatever for the taking.

The plaintiffs have done nothing to forfeit their rights to their property. They did not intermingle it with that of the debtor. And besides, the doctrine of confusion of goods is not applicable to such property as this was. 2 Kent, 364; 2 Campb. 575; 1 Verm. R. 286; 7 Mass. R. 123.

But if any doubt remained originally, the officer made himself liable as a trespasser *ab initio* by his subsequent acts, showing an abuse of his authority. 3 Cowen, 506; 4 Pick. 249; 14 Maine R. 44.

The demand made on the attorney of the attaching creditor under the circumstances, was the same as if made upon the officer.

J. Baker, for the defendant, said that the plaintiffs made Gerrish their agent, and they were bound by his acts. He pointed out to the officer, all the property which he said belonged to the plaintiffs, and gave up the rest. The officer did not interfere with the property claimed as the plaintiffs' by their agent.

Here the goods of the plaintiffs were so intermingled by their agent, for whose acts they are responsible, with the goods of the debtor that they could not be distinguished. In such case no action can be maintained against the officer; certainly not without first making a demand. 7 Mass. R. 123; 8 Pick. 443; 5 N. H. Rep. 364; 6 Pick. 478.

There was no after misconduct of the officer in relation to the goods. After the action was settled, an agent of the plaintiffs was to go for the goods, but before he called, the suit was brought.

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

TENNEY J. — The jury would have been authorized by the evidence introduced in the case, to have found the goods in question to be the property of the plaintiffs, at the time they were taken by the defendant's deputy; they had been pre-

viously left with Gerrish to be sold, the avails to be accounted for, or the goods returned on demand. The boots were in a case by themselves, two pair having been sold, and the cover of the case removed. The brogans belonging to the plaintiff were the only ones in the store, and they together with some shoes of the plaintiffs were in drawers and on shelves with shoes belonging to Gerrish. The officer who made the attachment, and the creditors' attorney, who directed it, had no means of distinguishing the goods of the plaintiffs from those of Gerrish at the time of the taking, excepting from information derived from Gerrish, the plaintiffs not being present. No goods, which Gerrish pointed out as not belonging to him were taken; and he testified, that at the time, he had the impression that he owned those belonging to the plaintiffs, by virtue of the receipt which he gave to the plaintiffs, when he received them, and that he did not think or state to the contrary, when they were taken. The officer acted under an honest but mistaken belief, that he took nothing which did not belong to Gerrish. There is no evidence tending to show, that both parties, and all those concerned in the property previous to and at the time of the taking, did not conduct in good faith touching the goods.

An officer is not protected in taking property belonging to one against whom he has no precept, unless the owner has so conducted, in reference to it, that he has forfeited his legal rights. An action may be maintained against the officer by the owner without any previous demand or notice. It is no defence that he acted under a mistake. He, as a public officer, can avail himself of his own mistake, no more, than could a private individual. *Hobart* v. *Haggett*, 3 Fairf. 67; *Lothrop* v. *Arnold*, 25 Maine R. 136. But a previous demand upon the officer may be necessary for the maintenance of an action, when the plaintiffs' goods are so intermingled with those of the debtor, as not to be distinguishable. *Bond* v. *Ward*, 7 Mass. R. 123. It is only under such a condition of the property that the officer may be regarded by the law, as without fault, though guilty of no moral wrong. If the confusion be by

consent of, or without the fault of either party, the proprietors would have an interest in common, in proportion to their respective shares. But if the mixture were caused by one party without the consent of the other, knowingly and wrongfully, and it were impossible to distinguish what had belonged to one, and what the other, the one who had caused the confusion would under the common law forfeit the portion, which was previously his. *Shumway & al.* v. *Rutter*, 8 Pick. 443; 2 Blacks. Com. 405; 2 Kent's Com. 364 (2d Ed.); *Lupton* v. *White*, 15 Vesey, 442; *Hart* v. *Ten Eyck*, 2 Johns. Ch. 108. "But," Chancellor Kent remarks, "this rule is carried no farther than necessity requires; and if the goods can be easily distinguished, and separated, as articles of furniture for instance, then no change of property takes place." In *Shumway & al.* v. *Rutter*, the Court say, "if the owner of a part can distinguish and point out to the officer what belongs to him, the officer would be a trespasser if he should take it."

It is not necessary, that the property should be so distinctly marked, that an officer, by his own minute observation, would be able to perceive that it did not belong to the same individual, in order to make him liable; if such were the law, he would be excused for taking cattle belonging to a stranger, when found in the same herd with those, against whom he had a precept, but it must be such a confusion, and the character of the articles must be such, that they are not distinguishable by those, who from their interest or situation, have full opportunity of making and pointing out the distinction, if one exists.

In the case at bar, the boots could not be considered as intermingled with those of Gerrish, so that they could not be distinguished as easily as any two parcels of goods, which are found in shops; the brogans were the only article of the kind in the shop; and the shoes although in the same drawers or on the same shelves with other shoes belonging to Gerrish, still it does not appear from the evidence, that they were not distinguishable therefrom. The case presents nothing, which discloses, that the plaintiffs, or Gerrish, or others, might not have made and pointed out a clear distinction at the time. After the

plaintiffs were informed of the taking, they satisfied those interested in the attachment, that the goods were theirs, so far that they did not insist upon retaining them as legally holden. The mistake of the officer did not arise, from a confusion of the goods, as the term is understood in law, but it arose from the omission of Gerrish to inform him what goods belonged to the plaintiffs, on account of an erroneous impression in reference to the plaintiffs' legal rights, he supposing, that the goods in question were his, under the receipt which he had given therefor, when they were not.

It is insisted, that the plaintiffs had waived the right to commence and maintain the action by his agent, Gerrish, who did not point out these goods as not belonging to him, when they were taken by the defendant. Gerrish was the agent of the plaintiffs to sell the goods for them, and the evidence exhibits no other agency. He could not by virtue of that authority have surrendered these goods to the officer, to be attached as his, and consequently the simple omission to assert the plaintiffs' ownership could have no greater effect to the prejudice of the owner. Neither is it certain that the plaintiffs themselves waived their rights, by what is shown to have taken place, when they called upon the creditors' attorney, as it is contended that they did. They called upon the attorney, exhibited their receipt from Gerrish, and claimed the goods, then in the custody of the officer, at considerable distance from the place, where he had left them; and offered to take them where they then were, if they should be given up; and would send their messenger for them. The attorney declined to give them up, for want of power from the creditors; but said he would write to his clients for instructions. This he did, and received authority to give up the goods, but no communication of this was proved to have come to the plaintiffs' knowledge, and it does not appear that the attorney wrote by his request; and it is difficult to perceive how, by these facts, he relinquished any rights before existing. His offer to take the goods could have no effect, so long as he was not permitted to take them.

The facts relied upon by the plaintiffs, we think, should have

been submitted to the jury, as there was evidence, from which the jury might have found the trespass to have been committed; and there was nothing in the proof adduced by them, which conclusively showed, that they had waived their right to maintain the action. *Exceptions sustained, and nonsuit taken off.*

Dissenting opinion by

WELLS J. — Not being able to agree with the other members of the Court, in the conclusion, to which they have arrived, upon this case, I deem it proper to state the grounds of my dissent. This action is trespass for boots and shoes, which the plaintiffs had left with one Gerrish for sale. The boots were in a case, and at the time of the attachment, the cover of the case had been removed, and two pairs of them had been sold. The shoes had been taken out and placed in a drawer, and on the shelf, with other shoes belonging to Gerrish. The plaintiffs had another box of boots, in the store of Gerrish, but they were not taken, because he informed the officer, that they belonged to the plaintiffs. Gerrish states, that he had the impression, that those, which were taken by the officer belonged to him, and that the officer did not take any property, which was pointed out, as not belonging to him. He also testifies, that the officer could not distinguish the goods attached, from the rest of his stock, except from information derived from him.

The question arises in this case, whether an officer is liable to an action until a demand has been made upon him, for attaching the goods of a stranger, when intermingled, by his consent, with like goods of the debtor in possession of the latter, and the officer has no notice, that they belong to the stranger, or they cannot be distinguished upon due inquiry, from those of the debtor.

In the case of *Bond* v. *Ward*, 7 Mass. R. 123, Parsons C. J. says, "Goulding's (the debtor's) furniture was in his actual possession, in his dwellinghouse; he, (the officer) ought therefore to have attached that furniture; and if he attached some furniture of other persons, which was in Goulding's house and

mixed with his, when the right owner claimed his part, the deputy sheriff might have restored it, without subjecting himself to an action by the plaintiff. And if the goods of a stranger are in the possession of a debtor, and so mixed with the debtor's goods, that the officer, on due inquiry cannot distinguish them, the owner can maintain no action against the officer, until notice and a demand of his goods, and a refusal or delay of the officer to redeliver them."

Ordinarily, where one interferes with the property of another, without his consent, he is liable to an action of trespass. But there are exceptions to this rule. In cases of an ownership of chattels, by tenants in common, the officer, having a precept against one tenant, may seize the whole chattel, and is not a trespasser, but he can only sell on execution the interest of the one against whom he has the precept. When the corn of the debtor is mingled with the corn of a stranger, and cannot be distinguished, an officer for attaching the mass, as the property of the debtor, is not liable to an action. And the same result must follow in all cases of confusion of property. *Lewis* v. *Whittemore*, 5 N. H. Rep. 364. The law does not require of officers what is impossible or unreasonable.

There is not the same difficulty of distinguishing furniture, or boots or shoes, belonging to one person, from the same kind of property of another, as exists in the case of corn; but still the difficulty is intrinsically great. In one case, the officer is not considered in fault, because it is impossible to separate the property of the different owners. In the other, if he finds the property in the possession of the debtor, and has no knowledge of the intermixture, or cannot make the separation, by due inquiry, he would also appear to be without fault. It is unreasonable to consider him a trespasser in either case. The same principle, although in different degrees, applies to both; it is, that he conducts without fault. The law requires him to take the debtor's property, and in doing so, he unavoidably takes that of a stranger with it.

Where the owner of property consents to have it placed with that of another, and his own conduct has induced the

belief, that it belongs to the possessor, he ought to be required to make a demand for it, before commencing an action against an officer, who attaches it as the property of the possessor. In those communities where attachments are frequent, the owner must know, that his property is liable to be taken with that of the possessor, and it is no great inconvenience to subject him to the trouble of demanding it. When whole stocks of goods are attached, usually some portions of them belong to persons, other than the debtor, and cannot be distinguished by due inquiry; or the officer may have no reason to suppose they are not the debtor's, and he ought not to be held a trespasser, while acting with fidelity, in the discharge of his official duty.

In *Shumway et al.* v. *Rutter*, 8 Pick. 443, reference is made to the case of *Bond* v. *Ward*, without any disapprobation. And it is said, by Parker C. J., that the principle of that case, applies to the taking, but if the officer sells, knowing the property to be the plaintiff's, the sale is a conversion.

In *Sawyer* v. *Merrill*, 6 Pick. 478, it was decided, that if an officer, having attached goods of a debtor, suffers them to remain intermingled with other goods of the debtor, and makes claim to the whole, so that another officer having a writ against the same debtor, cannot distinguish which have been attached, the latter officer will be justified in attaching the whole. The property was household furniture. The officer making the first attachment had a right to hold what he had taken, if the officer making the second one could have distinguished between what furniture had been and what had not been attached. It is said by the Court, that the same principle applies, as in the case of a stranger's goods, intermixed with those of the debtor. And such is the ground of the decision. The officer, making the second attachment, not being able to distinguish what had been previously attached, was justified in taking the whole. He was in no fault, and was not a wrongdoer. The case of *Bond* v. *Ward*, is supported by the doctrine, promulgated in the two cases last cited.

And in my judgment, as it appears that the plaintiffs con-

sented to the mingling of their goods, with similar ones of the debtor, in his possession, and the deputy of the defendant had no notice, that any portion of them which he took was the property of the plaintiffs, or upon due inquiry, he could not distinguish them, that this action for the taking cannot be maintained.

MEM. — This and the next case, *Eaton* v. *Elliot*, were Cumberland cases, and were accidentally placed with those in Kennebec. The error was not discovered until after the Cumberland cases were printed.

ANDROSCOGGIN & KENNEBEC RAIL ROAD COMPANY *versus* ISAAC T. STEVENS.

Where a rail road passes over parts of two counties, the Rail Road Corporation may maintain an action of assumpsit in that county wherein they have an office which is "made the depositary of the books and records of the company by a vote of the directors, and a place where a large share of the business is transacted," although the company may at the same time have another office in the other county, where the residue of their business is transacted, and in which the treasurer and clerk reside.

THIS case came before the Court upon the following statement of facts: —

This is an action of assumpsit on a note of hand, given by the defendant to the plaintiffs, for the amount of sundry assessments laid upon his stock in that company, and which at the date of said note were due and unpaid. The plaintiffs are a corporation, duly established in this State. Said note was made payable at the office of the Treasurer of said company at Waterville. The writ is dated Feb'y 22d, 1848, and may be referred to. The plaintiffs were organized as a corporation on the 6th March, 1847, by the choice of directors, some of whom reside in the county of Kennebec, some in the county of Cumberland, and others in the counties of Lincoln, Somerset, Franklin, and Penobscot. The clerk, who keeps the records of said company, resides in Winthrop, but keeps no office there, but is required by vote of the directors to keep the books and records of the corporation, at their office

in said Danville, for the transaction of business. The treasurer of said company resides in Waterville, and has his office there. The company have an office in Waterville, and one also in Danville in the county of Cumberland, both of which are established places of business of the company. A large share of the business of said company is transacted at the company's office in Danville, where the agent of said company resides. The residue of the business of the company is transacted at their office in Waterville. One quarter part of the stockholders live in the county of Cumberland, and the residue in the counties of Kennebec, Franklin, Somerset, Oxford, York, Lincoln, Penobscot and Piscataquis. The assessments are all made payable to the Treasurer of the company at his office in Waterville. The directors hold their meetings sometimes at Winthrop, sometimes at the company's office in Waterville, and sometimes at the company's office in Danville. The rail road which the company are constructing lies partly in the county of Cumberland and partly in Lincoln and Kennebec counties.

It is agreed, that if upon the foregoing facts this action is not rightly commenced in the county of Cumberland, the plaintiffs shall become nonsuit, otherwise the defendant shall be defaulted. And it is further agreed, that the above agreed statement of facts shall have the same effect as if a plea had been filed to the jurisdiction of the Court, and an issue made thereon.

W. Goodenow, for the plaintiffs.

E. Noyes, for the defendant.

The opinion of the Court was drawn up by

Tenney J. — The only question presented in this case is, whether the action being commenced in the county of Cumberland can be maintained. Every corporation instituted under the authority of this State, shall keep the office of its clerk, together with its records and papers at some place within this State. Rev. Stat. c. 76, § 2. When one of the parties is a corporation, not a town, parish or school district,

an action may be brought in any county in which such corporation shall have a place of business. Rev. Stat. c. 114, § 11, 12, and 13.

The residence of the plaintiffs' clerk and treasurer is in the county of Kennebec, but the clerk has no office in that county, but is required by a vote of the corporation to keep the books and records at their office in Danville in the county of Cumberland, for the transaction of business, where the corporation have such office, at which a large share of their business is transacted, their agent having his residence there. Another office is established at Waterville in the county of Kennebec, where the residue of the business is done. The directors hold meetings at Winthrop, and also at the company's offices in Danville and Waterville.

The plaintiffs are a corporatian under the authority of this State, duly organized; the office at Danville, being made the depositary of the books and records of the company by a vote of the directors, and the place where a large share of the business is transacted, is "an established place of business" of the corporation, and the action is maintainable in the county of Cumberland. By the agreement of the parties the defendant is to be defaulted.

MARY EATON *versus* DANIEL ELLIOT.

The District Courts, by the Revised Statutes, have power, after verdict and before judgment, on motion and without any additional evidence, to set aside the verdict of a jury in a bastardy process, because in the opinion of the Court against evidence, and grant a new trial.

ON the following exceptions from the Western District Court, GOODENOW J. presiding, this case came on for hearing.

This was a complaint under the Bastardy Act, and was tried upon the general issue at the last June Term of this Court. The usual evidence preliminary to the admission of the complainant, as a witness, was offered, and the Court thereupon permitted her to be sworn and examined as a witness. The

defendant introduced and examined several witnesses in defence. Upon the whole evidence the jury returned a verdict for the complainant. And the defendant thereupon duly filed a motion to set aside the verdict as against evidence; of which motion the counsel for the complainant took due notice. The consideration of this motion was continued from term to term until this term. And now the complainant, among other objections to setting aside the verdict, objects that this Court has not power by law to set aside a verdict by summary motion in cases of this description, it being a process or proceeding not according to the course of the common law, but exclusively by virtue of statute provisions, and that in this case the Court have no power at common law or by virtue of any statute provision to set aside the verdict and grant a new trial, and that the proper and only remedy for the defendant, if aggrieved, was by application to this court, or to the Supreme Judicial Court, for a review pursuant to the statute in such case made and provided. But the Court overruled the complainant's objections and positions, sustained the defendant's motion, set aside the verdict, and granted a new trial, upon a review of the whole evidence submitted to the jury, without any additional evidence. To the aforesaid rulings, opinion and directions of the Judge, the complainant excepts, &c.

Codman & Mitchell, for the complainant, argued in support of the grounds taken in the District Court, as stated in the exceptions; and cited *Gowen, ex parte*, 4 Greenl. 58.

They also contended, that even if the other objections could not prevail, that the District Court has no power to set aside a verdict, in a case like this, merely because the Judge differed from the jury, as to the effect of the evidence, on a mere motion, and without any additional evidence.

Deblois and *Barrows*, for the respondent, said the Court had power to set aside verdicts in all cases where justice had not been done. Rev. Stat. c. 97, § 23. This process comes within the general provision of all actions. 2 Conn. R. 357; 11 N. H. Rep. 158; 1 Greenl. 304; 2 Greenl. 172; 13 Pick.

284; 12 Maine R. 29; 18 Maine R. 274; 2 Dane, 517; 3 Metc. 210.

There can be no further evidence allowed, when the verdict is set aside as against evidence.

The opinion of the Court was drawn up by

TENNEY J. — It is denied by the complainant's counsel, that the District Court have authority, after verdict and before judgment, to grant a new trial by virtue of Rev. Stat. c. 97, § 23, which is relied upon by the other side. The language is, "The District Court, before rendering judgment, shall have power to grant a new trial of any action and for any cause for which by the common law a new trial may be granted, or when in the opinion of the Court, justice has not been done between the parties." Did the Legislature intend to embrace within that provision the process for the maintenance of bastard children? If the power does thus extend, the complaint must be included in the term "action." Noah Webster defines the meaning of the word when used in a legal sense, thus: "In law, literally, urging for right; a suit or process, by which a demand is made of a right; a claim made before a tribunal." "Action is the form of a suit given by law, for recovery of that, which is one's due; or it is the legal demand of one's right." Co. Lit. 285. Bracton defines it, "*Actio nihil aliud est quam jus prosequendi in judicio quod alium debetur.*

The process is criminal in its form, but it is well settled, that in substance it is a civil remedy having all the incidents of civil processes. It is made upon the complaint only of the one to be benefited; the bond required of the accused is to be given to her; she may settle the claim in any manner she may deem proper, if sole, unless for the protection of towns the selectmen thereof interfere. If she be a married woman, her husband must be joined with her in the proceedings, as in civil actions, and he can exercise the same control over them, and is subject to the same liabilities; issue upon a written plea is necessary before questions of fact intended to

be raised can be put to the jury. Without any express provision of the statute, depositions are admissible in evidence; and costs are allowed to the prevailing party. In the decisions upon various points raised in proceedings of this kind, they have been called and treated as actions. *Foster* v. *Beaty*, 1 Greenl. 304; *Mariner v. Dyer*, 2 *ib.* 165; *Wilbur* v. *Crane*, 13 Pick. 284. The Rev. Stat. clearly show that this process was intended to be comprehended in the term "actions." In c. 123, § 1, giving power to the Supreme Judicial Court to grant reviews, the words "civil actions," are made to include prosecutions for the maintenance of bastard children; and the next section confers concurrent power upon any Judge of the District Court to grant reviews of "actions" of the kind and in the circumstances mentioned in the preceding section, &c.

But the exceptions are attempted to be sustained principally on the ground, that the proceedings are not according to the course of the common law, and therefore the power to grant a new trial does not exist; and the case of *ex parte Gowen*, 4 Greenl. 58, is relied upon as a decision upon this point, and also as having been adopted by the Legislature in the Rev. Stat. by the use of language in the section before quoted, which it is contended is substantially similar to that in the act of 1822, establishing the Court of Common Pleas, § 8. That was a petition for a mandamus to the Court of Common Pleas, for refusing to grant a new trial after verdict and judgment in a bastardy case, and the prayer was denied. But no decision upon the point like the one here presented was made, though it was discussed by C. J. Mellen, who held that the power was not given to the Court of Common Pleas. It is the opinion of an enlightened and distinguished Judge, under the law as it then was, and is entitled to great respect; and we do not intend to say that his views were erroneous. He says, "the statute of this State and that of Massachusetts, giving power to the Supreme Judicial Court to grant reviews in civil actions never embraced prosecutions for the maintenance of bastard children, and constant usage and constructions confirm this. The 8th section of the act establishing the Court of

Common Pleas does not in its terms embrace such a case; and I consider that section as only giving to that court in certain cases a concurrent power with this Court to grant a new trial after judgment, a power which prior to that time was vested exclusively in this Court; but I consider that no greater or broader power is given to that Court, than this possesses; and that of course it does not extend to the case of a prosecution of this kind, which is not a proceeding according to the course of the common law." At the time of the consideration of the case referred to, the law was different from that under the Revised Statute upon this subject; and the reasons, given as above for the refusal of the rule, favor the the existence of the power exercised by the District Court, under the present statutes. By c. 123, § 1, this Court can grant reviews in their discretion in prosecutions for the maintenance of bastard children; and by § 2, any Judge of the District Court has concurrent power where judgment was rendered in that court, or by a justice of the peace, or by a municipal or police court. This shows a design in the Legislature to extend to the parties in a bastardy process, the same rights which are enjoyed by parties to actions at common law. And as the Revised Statutes all took effect at the same time, one part is not to yield to another, but operation is to be given to the whole. By a fair construction of the language of the 23d section of chapter 97, this process will be embraced. Before judgment, the Judge of the District Court can grant a new trial *in any action*, and for any cause for which by common law a new trial may be granted. The power is not confined to common law actions, but the *causes* which would authorize a new trial in actions at common law may be applied to "any action." The succeeding clause confirms this view. The subject matter in the second clause is still "any action," and the power may be exercised, when, in the opinion of the Court, justice has not been done between the parties. It is very clear that the District Judge can grant a review of such process, after judgment. It cannot be supposed to have been the intention of the statute to require that the Court should be

restricted in the exercise of its discretion after verdict, and before judgment, when the parties were before the Court, and the facts which had been adduced at the trial well known and understood, which facts after the delay and expense of entering up judgment, giving notice on a petition for a review, and recalling and examining the witnesses, would authorize it to grant a review, when the review after is to effect the same purpose as the new trial before the judgment.

The construction contended for by the complainant's counsel cannot be considered as adopted by the Legislature, in the Revised Statutes. The point was not decided, and the new statute was manifestly intended to be different in this respect from the old. In the Revised Statutes, the power of the District Court to grant the new trial, by chapter 97, § 23, is to be exercised before rendering judgment. In the statute of 1822, it is limited to a term of one year from the rendition of judgment; notice is required in the statute last referred to, whereas under the other, it is not necessary and is not provided for. By sustaining the motion made by the respondent in this case, the District Court did no violence to the language of the statute, and by granting the new trial, secured the object contemplated, in the most ready and direct manner.

Exceptions overruled.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF FRANKLIN,

ARGUED MAY TERM, 1848.

Simon W. Putnam *versus* Andrew M. Oliver.

In *scire facias* against a supposed trustee, and it would seem in all actions commenced originally before a justice of the peace, where the pleadings are closed by a demurrer and joinder, and the action is carried by appeal to the District Court, *no appeal* lies from the decision of that Court, upon the same pleadings, to the Supreme Judicial Court.

"STATE OF MAINE.

"Franklin ss. — At a justice court held before Charles Pike, Esq. one of the justices of the peace within and for said county, at my office in Kingfield in said county, on the 8th day of April, A. D. 1846, Simon W. Putnam, late of New Vineyard, county of Franklin, against Andrew M. Oliver of Freeman, in the county of Franklin, in *scire facias* against said Oliver as trustee of John Reed, as per writ on file with said justice, will appear.

"The said action was entered before me, the said justice, on the 28th day of March, 1846, by John H. Webster, Esq. Att'y to plaintiff, at which time the said Oliver appeared by W. S.

See Stat. 1848, c. 49, "relating to the duties of the Reporter of the decisions of the Supreme Judicial Court."

Marshall, Esq. his att'y, and moves the Court for leave to make a new disclosure, which motion the plaintiff resisted, and after hearing all the matters and things and arguments offered and urged by the parties, I have determined to deny the said motion, and thereupon the said Oliver comes into Court and defends, &c., where, &c., and for cause why said plaintiff should not have judgment rendered against him for any goods, effects or credits in his hands and possession as of his own proper goods and chattels, and execution issue against him accordingly in favor of said plaintiff for the amount due him from the said John Reed, says, that he had not at the time of the service of the plaintiff's writ, in the original action aforesaid, against said Reed, on him, any goods, effects or credits in his hands and possession, belonging to said Reed, and has not had any since that time, nor has any at the present time, and submits himself to examination on oath touching the same, and also submits himself to the following interrogatories, and tenders to this Hon. Court, the answers to the same, duly sworn to according to law, and prays he may be discharged, and for his costs, and this he is ready to verify.

"Andrew M. Oliver."

"Unless I shall be adjudged trustee from the following abstract: — Reed and myself logged together in the winter of 1842, without any permission from the proprietors; we were to share equally in expenses and profits only; if no stumpage was called for by any one, before the logs arrived at the Forks near Noah Staples', I was to relinquish to him my right to a piece of land called the Johnson lot, of which I once had a bond which was forfeited or run out. The stumpage was called for before the logs left the landing, by Joshua Gazlin, who said he had bought the soil of Col. Herrick, who had reserved the timber and left it in his care. I have expended money for labor and materials and supplies, more than Reed, about $147, and by said agreement I was to have so many of said logs as would pay the extra advances. Stewart, the surveyor of the logs, had told me that Ira Crocker had called on him to know how much he had scaled for us,

and said he was going in to take the mark of the logs, and should seize them. The said Oliver further says, he does not nor never did owe the said Reed a cent, and voluntarily submits himself to interrogations upon oath. The amount of lumber cut, by the surveyor's bills, was 141,142 feet. A copy of the aforementioned agreement is hereunto annexed.

"Andrew M. Oliver."

"FRANKLIN, ss. — Sworn to before me,

"Charles Pike, Justice of the Peace."

Copy of said agreement.

"Kingfield, January 1st, 1842.

"Articles of agreement entered into between Mr. Andrew M. Oliver and John Reed, both of Kingfield. The said Oliver and Reed agree to haul logs on Dead River, into the south branch, the present winter, and further agree that each one shall pay an equal share of the expenses for hauling said logs. If either one fails of paying one half of the expenses, the other shall take the amount of the failure from the logs; now the said Oliver on his part, further agrees that if the logs run down the river to the Forks, at Noah Staples', there is no call from any one for stumpage until they arrive at the place in the river above mentioned, he, the said Oliver, is to sell and convey to said Reed, all the right, title and interest he has by bond of a certain lot or parcel of land, called the Johnson place, situated in said Kingfield; the conveyance of the right in said land is in consideration for the privilege said Oliver received by running in with said Reed to log. If there is any call for stumpage before the logs arrive at the Forks above mentioned, then the said Oliver is not to convey his right in the land to said Reed. (Signed.) "Andrew M. Oliver,

"John Reed.

"Witness, John B. Wellcome."

"And the said Putnam, as to the said plea of the said Oliver, by him above pleaded, says, that the same and the matter therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar and preclude him, the said Putnam, from having and maintaining his

aforesaid action thereof against him, the said Oliver, and that he, the said Putnam, is not bound by the law of the land to answer the same, and that he, the said Putnam, is ready to verify. Wherefore for want of a sufficient plea in this behalf, he, the said Putnam, prays judgment and execution by reason of said Oliver not exposing to be taken on execution issued on original judgment, the goods, effects and credits of the principal debtor, in his, said Oliver's hands, and possession to be adjudged unto him, &c.

"And the said Putnam according to the form of the statute in such cases made and provided, states and shows unto the Court here, the following causes of demurrer to the said plea, that is to say, that the said plea is a special plea in bar, and gives no color or right, or title to the plaintiff.

"2d. The plea is not adapted to the nature or form of the action, nor conformable to the count.

"3d. The plea does not answer the whole declaration or count, although it assumes so to do.

"4th. The plea does not answer or deny a single allegation, in the plaintiff's writ or declaration.

"5th. The plea is special but does not confess or admit the facts alleged in the plaintiff's declaration, and justify or excuse them.

"6th. The plea is not single, but double, and is double in this, that it alleges that defendant had not at the time of the service of the original writ upon him, goods, effects and credits of the principal defendant, in his hands, nor has he had any since, nor has he any now, and he adds an agreement of his dealings with the principal defendant, which by reference, becomes a part of the plea.

"7th. The plea is by way of rehearsal, reasoning and argument, and not direct and positive, as it alleges facts, from which the conclusion is to be drawn, that at the time of the service of plaintiff's original writ upon him, he had not goods, effects or credits of principal defendant, in his hands and possession.

"8th. The plea is not so pleaded as to be triable, as the facts are complicated with law.

"9th. The plea alleges matters only which existed at the time of the original judgment, and which were pleaded on the original action.

"10th. The plea has not the proper commencement as it does not say that the plaintiff ought not to have and maintain said action against him, the said defendant.

"11th. The plea has not the proper conclusion.

"12th. The defendant in said plea only appears to verify his prayer of judgment and not the facts alleged in his plea.

"13th. The plea is an attempt to do indirectly, what the Court have denied to this defendant's direct motion. And also the said plea is in other respects uncertain, informal and insufficient, &c. By his attorney,

"John H. Webster."

"And the said Oliver says that his plea above pleaded and the matter therein contained, in manner and form as the same above pleaded and set forth, are sufficient in law, to bar and preclude the said Putnam from having and maintaining his aforesaid action thereof against him, the said Oliver, and that he, the said Oliver, is ready to verify and prove the same, when and where and in such manner as the said Court here shall direct and award thereof, inasmuch as the said Putnam has not answered the said plea, nor hitherto in any manner denied the same, the said Oliver prays judgment, and that said Putnam may be barred from having or maintaining his aforesaid action thereof against him, the said Oliver.

"By his attorney, Wm. S. Marshall."

"Which action having been then continued to the present time and the parties having before me the above plea, demurrer and joinder, being fully heard, by me, the said justice, I adjudge that the plea of said Oliver as above pleaded, and the matter therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar and preclude the said Putnam from having and maintaining his aforesaid action thereof against the said Oliver.

"It is therefore considered by me, the said justice, that the said Putnam do receive of the said Oliver the sum of seven-

teen dollars and seventy-two cents damages, and the sum of $6,59, costs of suit.

"From which judgment the said defendant appealed to the District Court, for the western district, next to be held at Farmington, within and for said county, on the last Monday of September next, which appeal is allowed by me, the said justice.

"Given under my hand the day and year first above written.

"Charles Pike, Justice of the Peace.

"A true copy, Attest, Charles Pike, Justice of the Peace.

"Fees for copy of Judgment, $2,00.

"A true copy, attest, A. B. Caswell, Clerk."

Declaration, inserted in a common blank writ of attachment.

"Whereas Simon W. Putnam, late of New Vineyard, county of Franklin, at Kingfield, in said county, before Chas. Pike, Esq. one of the justices of the peace within and for the county of Franklin, on the 27th day of June, A. D. 1842, by consideration of said justice, recovered judgment for the sum of seventeen dollars seventy-two cents, damages, and costs of suit taxed at $6,59, against the goods and effects of John Reed, of Dead River, in the hands and possession of Andrew M. Oliver of said Kingfield, as agent and trustee of said Reed, and whereas the said Putnam afterwards at said Kingfield, on the 9th day of July in the year 1842, purchased out of the office of our said justice, one writ of execution upon that judgment in due form of law, returnable to our said justice, at the end of three months next coming, directed to the sheriff of the county of Franklin, or his deputy, or to any constable of either of the towns of said county, commanding them to serve, execute and return the same according to the precept thereof. And whereas the said writ of execution was afterwards at said Kingfield, on the same day delivered to A. C. Thompson, then one of our deputy sheriffs for aid county of Franklin, who thereafterwards on the same day, and within thirty days of the rendition of said judgment, required said Oliver to disclose and expose and subject the goods, effects and credits of the said Reed, in his hands to be taken on execution for the satisfaction of said judgment, which the said Oliver

then and there refused to do; whereupon said Thompson returned said execution to the office of said justice unsatisfied; and thereafterwards, to wit, on the 28th day of June, 1844, said Putnam sued out from the office of said justice, an alias execution upon that judgment in due form of law, returnable to our said justice at the end of three months next coming, directed to the sheriff of the county of Franklin, or to his deputy or to any constable of either of the towns of said county, commanding them to serve said execution and return the same according to the precept thereof.

"And whereas the said execution was afterwards at said Kingfield, on the 20th day of July, in the year 1844, delivered to said Thompson, then a deputy sheriff of said county of Franklin, who thereafterwards on the same day, requested said Oliver to discover, expose and subject the goods, effects and credits of said Reed, in his hands, to be taken on execution, for the satisfaction of said judgment, which the said Oliver then and there refused to do. Whereupon the said Thompson returned said execution into the office of our said justice, and returned thereon that he had made diligent search after the goods, chattels, rights and credits of said Reed, whereon to levy this execution, and could not find in his possession, nor in the hands of the said Oliver, nor could said Oliver show, or disclose any to him, whereon to levy said execution, by means of all which the said Putnam is in danger of losing all benefit of said judgment, so recovered as aforesaid, and having supplicated us to grant a remedy in that behalf, willing, therefore, that justice should be done to all our citizens, in the name of the State of Maine, you are required to attach, &c., to show cause, if any he have, why judgment should not be entered up against him for said sums, as of his own proper goods."

The foregoing is a copy of all the papers in the case received by the Reporter. It appears from the opinion of the Court and the arguments of counsel, that the above was entered in the District Court, judgment there rendered for the plaintiff, and an appeal there claimed and allowed, and entered by the defendant in this Court, as an appealed case.

This case was argued in writing.

John H. Webster, for the plaintiff.

This is an action of *scire facias* against the defendant to recover judgment against defendant's own proper goods, &c. for the amount of a judgment obtained by the plaintiff against one John Reed, and also against the goods, &c. of said Reed in the hands and possession of the present defendant. To this *scire facias*, he pleads the plea on file, to which plea the plaintiff demurs specially. And some of the causes of demurrer I propose now to consider.

The 1st cause of demurrer I pass over, by simply referring the Court to 1 Chitty's Pleading, 500 ; as also the 2d by quoting *ib.* 507.

The 3d and 4th causes are, that the plea does not answer or deny all or a single allegation, in the plaintiff's writ and declaration.

The declaration alleges a judgment to have been obtained against Reed's goods, &c. in the hands of this defendant, that execution duly issued, and that the proper demand was made, by a deputy sheriff, in due season upon this defendant. The defendant's plea alleges matters relative to the dealings between this defendant and John Reed prior to the former judgment, but does not deny the matters alleged by the plaintiff, nor admit and avoid them. It in fact says nothing about the allegations, although it professes to answer them all. The law requires that the plea should answer all the material allegations. 1 Chitty Plead. 509; Gould's Plead. c. 6, § 98 ; *Underwood* v. *Campbell*, 13 Wend. 78.

As to the 5th cause of demurrer, I barely refer the Court to 1 Chitty, 511.

We allege that the plea is double, as stated in cause 6th and refer to 1 Chitty, 511.

As to the 7th cause of demurrer, the Court are referred to 1 Chitty, 518 ; and as to the 8th, refer to *ib.* 519.

The 9th cause of demurrer is, that the plea alleges matters only which existed at the time of original judgment and which were pleaded to the original action.

The law is clear that nothing can be plead in bar to a *scire facias*, which existed at the time of the original judgment, and which were pleaded or pleadable in the original action. 1 Chitty, 354 and 481; Com. Dig. Plead. 2 W. 39; 3 C. 10, 11, 12, 15; *Thatcher* v. *Gammon*, 12 Mass. R. 268; *Flint* v. *Shelden*, 13 Mass. R. 443.

This defect is a matter of substance and available upon a general demurrer, and the plea is fatally defective, whether it allege matters that were actually pleaded, or were only pleadable to the original action.

If the magistrate decided wrongfully on the disclosure in this case, provided, there was one in this case, the defendant should have appealed to the District Court, and then have had an adjudication of the District Court upon his disclosure, and it is not competent for him to lay by and allow a judgment to be rendered against him, and then try the matter over again in a suit founded on that judgment. It is the every day practice to appeal from the decision of a magistrate upon trustee disclosure, and to except to the decision of the District Court upon such disclosure, which affords the trustee ample protection of his rights.

The decision of the magistrate upon the disclosure, is as much a judgment as any other judgment rendered by him, and governed by the same principles.

Our Revised Statute differs from the Massachusetts statute, in force there, until their statutes were revised. Our Revised Statute c. 119, § 31–2–3–4, makes the decision of the Court a judgment, the same as any other adjudication by him made in the case. But if it be such a judgment we say it is governed by the same principles precisely. And the authorities are clear that nothing can be plead to a *scire facias* that existed at the time of the trial had in the action, in which the judgment was rendered, upon which the *scire facias* is sued out.

As to the 10th and 11th cause of demurrer, the Court are referred to 1 Chitty's Pleading, 533 and '7; Gould's Pleading, c. 6, § 120.

As to the 12th cause, to the plea itself.

13th cause. The plea does attempt to accomplish indirectly what the Court deny to the defendant's direct motion, which we say it is not allowed him to do. The Court denied to him the privilege of making a new disclosure, upon argument had, for good and sufficient reason, and if the defendant has any remedy from that adjudication (which is very uncertain) it was by an appeal from that decision, and by pleading over after that decision, he waived the motion, and it is now too late for him to have that decision corrected, either by appeal or plea. But we say the defendant cannot as matter of right, when sued on *scire facias* founded on a former judgment against the goods, effects, &c. of a third person in his hands and possession, make a new disclosure. It is in the discretion of the Court to allow or require a new disclosure as they may think it right. Ch. 119, sec. 79, Rev. Stat. provides that "the Court may permit or require him to be examined anew in the suit," plainly indicating that it did not intend to give to either party a right to a new disclosure otherwise than in the discretion of the Court. The language is the same as that used with reference to amendments, which has always been considered as placing the matter of amendments in the discretion of the Court. If then the matter of making a new disclosure is a matter in the discretion of the Court, a decision of Court once made is final, and not revisable either in the same form or any other, either in the same Court or any other. This argument is not now addressed to the Court, because it is supposed that this question now is, or hereafter can be open, but to show the appropriateness of the 13th cause of demurrer, for if the former decision of the Court is final, the attempt to procure the reversal of that decision indirectly, or the attempt to do indirectly what the Court have refused certainly, will not be sustained, and the plea on that account must be bad.

W. S. Marshall, for the defendant.

It appears from the papers in this case that the plaintiff commenced an action against one John Reed, in which the defendant was summoned as the trustee of Reed, which ac-

tion was returnable before Charles Pike, Esq. on the 31st of May, 1842, at which time the said Oliver appeared and made his disclosure in writing, and was adjudged trustee of the said Reed by the said justice, though it is obvious from the disclosure he cannot be held as trustee of the said Reed and ought to have been discharged, and execution was awarded to the plaintiff against the goods and effects of the said Reed in the hands and possession of the said Oliver, the present defendant.

The present action is brought to obtain execution against the defendant, for the amount of the judgment recovered by the plaintiff against the said Reed, and it appears that the writ was returnable on the 28th of March, 1846, and before the said Charles Pike, Esq. and judgment rendered on the 18th of April, 1846. It appears from the record of said Pike, that the defendant appeared on the 28th of March, 1846, and moved to be allowed to make a new disclosure, which was denied by the said justice, and the record of the said justice also shows the further proceedings before him.

The defendant did then proceed to make, and did make in writing a *new disclosure*, in the form of a *plea* or brief statement, which is set forth in the record, and showing cause sufficient why judgment should *not* be rendered against him. *Special pleas* or pleadings are inadmissible before justices of the peace. Rev. St. c. 116, § 30.

What is called the defendant's special plea in bar, is nothing more than a *new disclosure* showing why he should not be adjudged trustee. The plaintiff had no right to put in what he called a demurrer, to what he calls the defendant's plea. The justice had no right to allow it to be done. It was superfluous. The judgment that the plea of the defendant, as it is called, was adjudged bad, and therefore, judgment for debt and cost against the defendant, is nothing more or less substantially, then that the defendant was adjudged trustee by the justice, on the facts stated by the defendant in his statement, to which the plaintiff undertook to demur, with a great array of causes assigned, and from this judgment the appeal was taken.

The Court will not, I think, allow the informalities of the proceedings before the magi te, or on merely *technical* objection, to deprive the defendant of the benefit of good reasons why he should not be ad udged trustee of Reed, &c. when these reasons appear in the case substantially, though perhaps not in the most approved form.

It is contended, 1st. That special pleas and pleadings are not allowable before a justice of the peace, and all that resembles special pleading in this case is mere surplusage. Rev. St. c. 116, § 30.

2. That the defendant's statement before the justice was substantially a new disclosure, which he had a right to make under § 79 of c. 119, Rev. St. or a reiteration of his disclosure, in the original action.

3d. That the whole matter by the appeal is open in this Court, and this Court is no way restricted by the proceedings before the justice.

4th. That the real question is, whether the defendant is chargeable as trustee of Reed. From what appears in the record of the justice, *he is not*, and this *has been already decided* by this Court, as by the copy of the disclosure hereunto annexed, marked B, in the case of *Solomon Stanley & al.* v. *John Reed*, and this defendant as trustee, Sept. Term, 1842, appears.

5th. That this Court has power to allow and receive a new disclosure and to render such judgment as law and justice require upon the whole matter. Rev. St. c. 119 § 79; 21 Pick. 109; 1 Metc. 426. And this should have been done in the District Court.

The case shows that the defendant did appear and did disclose in the original action, and his disclosure there made and hereunto annexed, marked A, shows that he was not trustee of Reed, such being the fact, that he had been examined in the original suit; if he had been defaulted judgment must have been rendered upon the facts stated in that disclosure; Rev. St. c. 119, § 77, and if rendered according to the law of these *facts it would have discharged the defendant.*

But the facts stated in the defendant's plea, if so it might be called, constitute a good defence to the plaintiff's having judgment against the defendant. The original suit and the *scire facias* under the trustee process constitute one connected and continued course of proceedings.

The original judgment does nothing more than declare the trustee liable on his answer. It fixes no amount *for which he is liable*, and the decision of the justice on the defendant's disclosure in the original action, that he was trustee, was merely an interlocutory decision not definitively binding on trustee. 21 Pick. 111, 113. In this suit the defendant is called in to show cause why the plaintiff should not have execution against him for the amount of his judgment against Reed, and the defendant says he had no goods, &c., of the plaintiff. This, so far as the same is properly set forth by the defendant, the plaintiff admits by his *demurrer*.

The whole proceedings in the trustee process are regulated by statute, there are not in the books any prescribed forms of pleadings in this process, and causes of demurrer assigned by the learned counsel of the plaintiff to the defendant's plea, do not and cannot apply to proceedings in the trustee process. The 79th § of the Rev. S. authorizes the defendant to prove any matter proper for his defence on the *scire facias;* this the defendant by his plea offered to do and was refused by the justice, because the plaintiff, admitting the facts, objected to the form, and the same section provides that the Court may render such judgment as law and *justice require upon the whole matter appearing on such examination and trial.*

Did the magistrate render such a judgment? Did the District Court by affirming the judgment of the magistrate? It is not even pretended that the defendant had any goods, &c. of Reed's in his possession. Yet the judgment from which this appeal is taken, is, that the paintiff recover of the defendant the *full amount of his judgment against Reed and all costs.*

If the judgment had been, that defendant was chargeable only for nominal amount and costs of *scire facias*, there would have been less appearance of gross injustice.

Webster replied.

The opinion of the Court, SHEPLEY J. taking no part in the decision, was drawn up by

WHITMAN C. J. — This action, by the docket, appears to have been brought into this Court by appeal from the decision of the District Court. It is *scire facias* against a supposed trustee; and was originated before a justice of the peace, upon preliminary proceedings had in a court before him. Before the justice the defendant made a plea, to wh ch the plaintiff thought proper to demur; and the defendant joined in demurrer. The justice adjudged the plea to be bad; and the defendant thereupon appealed to the District Court. The statute c. 116, § 9, authorized him to do so; but in reference to any further appeal this statute is silent; and appeals cannot be made from one tribunal to another, but by express provision of law.

It must have been supposed by the parties in this case, however, that c. 97, § 13, authorized a further appeal, in cases of this description, to this Court. Was such a supposition well founded? That act was made for the purpose of defining, with precision, the powers to be exercised by the District Court, as c. 96, in juxtaposition with it, was intended to prescribe with competent precision, the powers to be exercised by this Court; so that the jurisdiction between the two courts might not conflict with each other. The right to an appeal from a justice's court is nowhere alluded to in c. 97. When the attention of the Legislature was occupied in fixing the limits to the judicial powers of this Court, and the District Court respectively, it may well be believed that they did not take into view an appeal to be subsequently authorized in an act authorizing justices to take cognizance of a certain description of actions of minor importance.

When the act conferred jurisdiction in such cases upon justices of the peace, it is obvious, that it was done with a view to prevent vexatious litigation, in reference to actions in which the matter involved was far short in amount of the expense of a protracted lawsuit. An appeal, however, was specially authorized in such cases to the District Court. No

express provision was made for any further appeal therein. Could it have been intended, after giving justices exclusive original jurisdiction in such cases, that an appeal should first be allowed from their decisions to the District Court; and then from that court to this?

If the case at bar is appealable into this Court there is nothing to prevent every cause, instituted before a justice, from being brought into this Court by a demurrer, which the parties may agree to waive, when it shall have been carried through the District Court to this Court; thus making an affair of little moment become important by the accumulation of costs. The policy of the law is surely adverse to such a proceeding. And it has been decided by this Court, in *New Gloucester* v. *Danville*, 25 Maine R. 492, that § 13, c. 97, had reference merely to actions originated in the District Court.

In *Seiders* v. *Creamer*, 22 Maine R. 558, we held that a cause originated before a justice of the peace, and appealed to the District Court and there tried, was not appealable. The case at bar, however, comes before us upon a demurrer and joinder thereon, before the justice; and seems to be within the literal import of the language of the statute, c. 97, § 13. But sections 15 and 16 of the same statute, seem clearly to show that such was not the intention of the Legislature; and that in providing for appeals from the District Court, it had in view only appeals from that Court in cases originally cognizable there. Those sections provide, that any party appealing from that court, in any action except actions of trespass on land, replevin against some town, writs of entry and dower, demurrers filed by consent of parties, with an agreement to waive the same, or from judgments on agreed statements of facts, if he be the plaintiff, and shall not recover more than two hundred dollars debt or damage, he shall not recover any costs, after such appeal; but the defendant shall recover his costs on such appeal. And if the defendant appeals in such cases, and the damage shall not be reduced, he is to incur double costs; unless the District Court shall certify that there was reasonble cause for appealing.

The case at bar was not one in which the parties had agreed on a demurrer and joinder, to be afterwards waived; and it is not such a case as could have been in the contemplation of the Legislature to be affected in its results as to costs. And the three sections (13, 15, 16) clearly show that no action could be affected, unless it were one of those specifically exempted, without being of the description liable to be affected with the provision as to costs. It is preposterous to suppose that the provision as to costs could apply to an action like the one at bar.

A similar question seems to have occurred in Massachusetts, both before and since our separation from that State. In *Commonwealth* v. *Messenger*, 4 Mass. R. 462, which was a criminal prosecution, an appeal had been taken from the decision of a justice of the peace to the Court of Common Pleas, and from the latter to the Supreme Judicial Court, where a second verdict was returned against the defendant. The right to an appeal from the Common Pleas Court was given by statute in general terms, as in our own statute from the District Court. But the Court held that no appeal lay in such case from the Court of Common Pleas, although a trial had been had in the Supreme Judicial Court, and a verdict of guilty had been returned, and dismissed the appeal. Chief Justice Parsons remarked in that case, that "a right to appeal is a privilege granted to an aggrieved party, which does not involve in it a right further to appeal from the Court to which he has applied for relief from an inferior jurisdiction." The case at bar falls precisely within the scope of this position.

The next case that occurred in Massachusetts was an action of assumpsit, (*Belcher* v. *Ward & al.* 5 Pick. 278,) in which a plea in abatement was filed, and which was demurred to, and upon judgment thereon the defendant appealed to the Court of Common Pleas; and upon judgment there the plaintiff appealed to the Supreme Judicial Court; from which the appeal was dismissed. Another case occurred there (*Adams* v. *Adams*, 15 Pick. 177,) which was an action of replevin, which was first carried by appeal from a justice court to the

Court of Common Pleas, and from thence by appeal to the Supreme Judicial Court, where a trial was had, and judgment rendered, which was reversed on error, because no appeal lay from the Court of Common Pleas. The reasoning of the Chief Justice in *Commonwealth* v. *Messenger*, doubtless was considered decisive in the two latter cases.

It appears to me, therefore, that reasoning, a fair construction of our statute, c. 97, § 13, 15, and 16, and authority require that this appeal should be dismissed.

SOLOMON STANLEY *& al. versus* ALDEN REED *& al.*

It was the duty of the creditor selecting a justice, under the Rev. Stat. c. 148, § 46, as well as under the Stat. 1848, c. 85, § 1, to procure the attendance of the justice, selected by him, at the time and place appointed in the citation for hearing the disclosure of the debtor.

STATEMENT of facts: —

"This is an action brought upon a poor debtor's bond, dated the 16th day of May, 1846.

"Writ is dated the 27th day of January, 1847.

"The defence in this action is, that Reed, the principal defendant, performed one of the conditions of the bond by taking the poor debtor's oath, before two justices of the peace and quorum within and for the county of Kennebec, within which county he was arrested and gave the bond in suit, within six months from the date of said bond; the certificate of the administration of the oath by said magistrates is all regular, if they were regularly and duly organized as a court.

"It is agreed, that the time appointed for the disclosure was ten of the clock in the forenoon; that said Reed, the principal defendant, appeared in due season and selected and procured the attendance of Fred. A. Fuller, a magistrate duly qualified to act in that capacity, in said county of Kennebec, and that the plaintiffs, by their attorney, appeared then and there and selected John Smith, who, it is agreed, was at that time a magistrate duly qualified to act in that behalf, and who

resided at that time in a town adjoining the town wherein the disclosure was had, but declined to go after him, or in any other way to procure the attendance of said Smith; and thereupon, said Fuller decided, that it was incumbent on the creditor to procure the magistrate, by him selected, and as the creditor declined to do that, said Fuller continued said proceedings to four of the clock in the afternoon of the same day, to allow said Reed time to cause another magistrate to be selected by an officer; and at said time, M. A. Chandler having been selected and his attendance procured by a competent officer, proceedings were had in the disclosure by said Fuller and Chandler, the creditor appearing and putting interrogatories, without waiving his former selection, but insisting upon it. The proceedings were regular, except as above named.

J. H. Webster, for the plaintiffs, contended that no court consisting of two justices, legally selected, was organized. The plaintiffs had done every thing, which the statute required of them, to have a justice. They had made the selection of a suitable person, and they were not required by law, as it then was, to do any thing more, or to be at any further expense. The expense of the debtor's discharge is to be borne by him. The statute 1848, c. 85, § 1, was passed since that time, and shows such was not the law before.

The contingency on which an officer was authorized to make a selection, had not happened, and the whole proceedings are void.

Bronson, for the defendants, said that the debtor had no power to compel the attendance of the magistrate selected by the creditors. And a justice might be selected, that the creditor knew, well enough, would not attend, although he might not have exchanged a word with him on the subject.

Had there been any objection, as the attorney of the creditors was there, he should have made it then.

Attending the examination, and putting interrogatories, was a waiver of any irregularity in making the selection.

The opinion of the Court, SHEPLEY J. not present at the argument, and taking no part, was drawn up by

WELLS J. — The question presented in the statement of facts is, whether it is the duty of the debtor, to procure the attendance of the justice, selected by the creditor.

By c. 148, § 46, Rev. Stat. it is provided, that "one of the justices may be selected by the debtor, one by the creditor, his attorney or agent, if the same can conveniently be done, otherwise by the officer, &c. And such officer may also select, in case the parties or either of them decline so to do. In case said justices so selected, do not agree, they may select a third, &c. And if said two justices are unable to agree on a third, he may be selected by the officer," &c.

The debtor appeared at the appointed time, which was at ten of the clock in the forenoon, and selected a justice who was present; the creditor also appeared and selected one, residing in an adjoining town, but declined to procure his attendance. The justice present adjourned the examination, until four of the clock, in the afternoon, of the same day, and an officer duly qualified, selected another justice who attended, and the proceedings were closed, by the discharge of the debtor. The creditor appeared and put interrogatories, without waiving his former selection.

In the case of *Williams* v. *Burrill*, 23 Maine R. 144, it was decided that one justice could not adjourn, before the organization of the court, for until that took place, it could have no legal existence.

But by the act of 1846, c. 215, passed subsequent to the decision of that case, power was given, to the justice selected by the debtor, to adjourn, not exceeding twenty-four hours. But this power to adjourn is only given "whenever a creditor shall neglect, refuse or unreasonably delay to select a justice," &c. So that if the mere nomination of a justice is a selection, then there was no neglect, refusal or delay, on the part of the creditor, and the adjournment was not authorised.

In what sense did the Legislature use the word, *select*? No power is given to coerce the attendance of the justices. The officer has no authority to compel them to appear. *Burnham* v. *Howe*, 23 Maine R. 489.

The mere nomination of a justice by a creditor, without any measures taken, to inform him or solicit his attendance, after the debtor had appeared, at the time and place, of which notice had been given fifteen days before, with a justice by him selected, could not have been intended, as the ordinary action, embraced in the word *select*. Upon such a construction there could be no power of adjournment. The creditor, by naming a justice residing in a distant part of the county, would be enabled to defeat entirely the proceedings.

And if an adjournment could take place, it might be that the debtor could not find the justice named by the creditor or he could not attend, when called upon by the debtor.

If such an act is a selection by the creditor, then the debtor could proceed no further, for he has no authority, given him to compel the attendance of the justice, and the contingency has not happened, in which the officer can make the selection. Such a construction would be altogether subversive of the rights of the debtor.

The most satisfactory evidence of the selection of the justice is his presence, at the time and place designated, and if he does not appear, it may be considered, that the selection has not been accomplished. *Selection*, in the statute, implies something more than nomination, it looks not to words only, but to action. The Legislature must have intended a selection, which would be complete and effectual by attendance, and where there was no attendance of a justice, that then there was not a full and perfect selection, and the proper officer could make one.

Under the act of 1846, before cited, if a creditor appeared and chose a justice although he might be many miles distant, if that is a selection, then the creditor has not neglected, refused or delayed to select, and the justice present has no power to adjourn. Such a construction would defeat the manifest intention of the law.

If then we are to understand, that in the act of 1846, the word select implies the attendance of the justice, we are at liberty to infer, that it was used in the same sense in § 46, c.

148, Rev. Stat. Both statutes relate to the same subject matter, and are therefore to be construed together.

If it had been the intention of the Legislature to require the debtor, to procure the attendance of the justice, selected by the creditor, it might reasonably be supposed, that some legal authority would have been given to the debtor, to effect that object. But none having been given, is an indication that there was no such intention, and that each party was to procure the attendance of some justice.

Since the argument in this case, the Legislature has provided, by the act of Aug. 11th, 1848, that it shall be the duty of the creditor to procure the attendance of the justice, selected by him.

The present case must be decided independently of that act, but our opinion is, that the former law is in harmony with its requirements, and that its provisions do not alter, but more fully explain the law.

The attendance of the creditor at the examination and the interrogatories put by him, according to the case of *Williams* v. *Burrill*, before cited, do not give jurisdiction, and therefore do not affect the decision of this action. The defendant's case derives no aid from those circumstances. And without reference to them, they are entitled to a judgment in their favor. *According to the agreement of the parties, a nonsuit is to be entered.*

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF SOMERSET,

ARGUED MAY TERM, 1848.

THOMAS RICHARDSON *versus* IDDO KIMBALL.

The property in a vessel may be legally transferred without a bill of sale or other written evidence of it. In such case, there must be proof of an agreement to sell and purchase, and of a valuable consideration also, when the title is asserted against creditors of the vendor.

An absolute conveyance of personal property cannot be legally proved in a court of common law, to have been made only to secure the purchaser for liabilities assumed, and be good against the creditors of the vendor.

A delivery of a vessel, *in port at the time of sale*, is as necessary to perfect the title against creditors, as it is when any other description of personal property is sold.

A sale of goods, made by an officer on execution, must be regarded as a legal transfer of the property, although he may not have kept it four days after the taking on the execution and before the sale.

Repairs made upon a vessel by the owner, after he became the purchaser, cannot be set off against her earnings prior to the purchase.

A sale of a vessel by an officer on execution, conveys nothing but the vessel as it existed at the time of the sale.

If a part of a vessel be attached, and the officer takes a receipt therefor, and she is sent to sea, the receipter is not liable to the officer for any earnings of the vessel.

If a bill of sale is in the form of an absolute conveyance, and is made without any other consideration than to secure the purchaser for liabilities assumed, it is still valid so far as it does not come in conflict with the rights

of creditors of the vendor. And such sale will transfer all the right and interest of the vendor to the purchaser, although the property was under attachment at the time of the sale.

Although a bill of sale be made on the Lord's day, one who is not a party to the sale, and who has no interest in the property, which is the subject of contest, cannot prevent a recovery by the purchaser, by showing that he violated the statute in acquiring his title.

The purchaser of personal property under attachment, may maintain an action against the attaching officer, for an injury done by him to it after the purchase.

And the purchaser may waive the tort, and recover, in assumpsit, any money in the hands of the tort-feasor, as the fruits derived from the wrongful act.

An agent is liable for misfeasances to the owner of the property injured, whether he acted by the direction of his principal or not.

THESE two actions, the one trover for one half of schooner Emeline, and one quarter of schooner Tremont; and the other assumpsit for the earnings of the same vessels between the time of the defendant's attachment on the writ, and the sale on execution. These actions appear to have been tried in September, 1843. At that term an agreement was made by the parties of which a copy follows: —

"Supreme Judicial Court, Somerset Co. Sept. Term, 1843.

"Thomas Richardson *v.* Iddo Kimball.

"In this case a nonsuit was entered by consent, which is to be confirmed or set aside, and such judgment rendered as the Court may order, upon the report of all the evidence in the case, the Court to draw all inferences from the evidence which a jury might legally. The plaintiff's affidavit is admitted so far as the statements are competent evidence. All the evidence offered in the other case tried in this Court, at this term, so far as competent, is to form a part of this case, reference to be had to the bill of exceptions in that case, for the recital of the evidence, and such other evidence is to be introduced as either party may choose to take in depositions, giving legal notice to adverse party, touching the transfer of property from John Thompson to the plaintiff.

"Henry C. Lowell, defendant's attorney.

"John S. Abbott, plaintiff's attorney."

From the arguments of counsel it appears, that there was a bill of exceptions filed in the action of assumpsit by the defendant, and a motion by the plaintiff to set aside the verdict because the verdict was for too small a sum. The opinion of the Court was at the June Term, 1849.

No copies of the case came into the hands of the Reporter. The facts, as understood by the Court, sufficiently appear in the opinion.

The written and printed arguments of the counsel, were mainly in relation to the facts of the case; but still the portions bearing on the questions of law, are too full to admit of publication.

Some of the points made and authorities cited will be given.

J. S. Abbott, for the plaintiff, in the action of trover, said, that on Oct. 27, 1836, the vessels were the property of John Thompson, who on that day gave bills of sale of the portions claimed, to the plaintiff. The validity of that sale cannot be inquired into, nor impeached by the defendant, unless he was at the time a *bona fide* creditor of John Thompson, and unless he has obtained a valid judgment, honestly and without fraud or collusion; and legally caused the vessels to be sold upon the execution issued on such judgment.

The judgment was obtained fraudulently upon a note which had been paid.

The sale by the officer to the defendant, on the execution, was illegal, and no title passed thereby. Four days were not allowed between the time of the taking and of the sale, without including Sunday. Stat. 1821, c. 60, § 5; 4 Pick. 354.

The sale to the plaintiff should take precedence of that to the defendant, if the latter was legal. If the bills of sale were lost or destroyed, that would not render the sale invalid.

No grand bill of sale of a vessel is necessary here, as in England. Even a parol bill of sale is sufficient.

It is sufficient, if possession be taken within a reasonable time after the sale. 4 Mass. R. 661; 8 Mass. R. 287; 15 Mass. R. 528; 9 Pick. 4; 2 Metc. 350; 2 Kent, 501.

In relation to the action of assumpsit, it was said, that if the title of the plaintiff was prior to that of the defendant, and valid against creditors, as it was insisted was the fact, then we are entitled to recover the earnings of the portions of the vessels belonging to us.

But even were it otherwise; and were the attachment and sale on execution sufficient to pass the vessels to the defendant still we are entitled to recover in this action. The defendant, has not shown the slightest ground for retaining the earnings, until the sale on execution. The attachment gave him no such right. The title, as between the plaintiff and Thompson, was unquestionably in the plaintiff. And that is all which is necessary for our purpose.

H. C. Lowell, for the defendant, said that he held and should endeavor to maintain the following legal propositions. The statement of them, alone, without the arguments thereon, is all which can be given.

1. The defendant's title is prior in point of time, taking its inception from the time of the attachment on Saturday morning, Oct. 29, 1836; while the plaintiff's title, such as it is, takes its date from Sunday, Oct. 30, 1836, when the bills of sale were made and executed, but falsely dated as of Thursday, Oct. 27, 1836. The citations were — 1 Shep. Touchst. 70, 71; 2 H. Black. 259; 1 N. H. Rep. 9; 1 Greenl. Ev. 302, 303, and notes.

2. The Sunday bills of sale, the only evidence of the plaintiff's title, are void as against the defendant, having been executed and delivered in direct contravention of the laws of the land, and of the positive provisions of the statute of Massachusetts, c. 50, § 1, prohibiting all manner of labor and business under a penalty. *Pattee* v. *Greely*, Law Rep. Vol. 1, No. 6, p. 253; *Webster* v. *Abbott*, Law Rep. Vol. 1, No. 3, p. 117; 26 Maine R. 469.

3. But if these bills of sale had been made on Thursday, instead of Sunday, still there is no sufficient consideration in law, to uphold them. They were all absolute bills of sale, and were given to secure the plaintiff against a contingent lia-

bility as Thompson's indorser. It is universally true, that such contingent liability is not sufficient consideration for an absolute bill of sale, as against creditors; as against such it is void. 4 N. H. Rep. 176; 3 N. H. Rep. 415; 2 Greenl. 87; 19 Maine R. 167.

4. But suppose, that the bills of sale of Thursday had never been destroyed, they could not avail the plaintiff as against Kimball, because no delivery had been given, or possession taken until after the attachment. 14 Martin, 97; 7 Martin, 318, and 707; 12 Mass. R. 57; 17 Mass. R. 110.

5. Four week days were allowed between the taking and the sale on execution. But were it otherwise, the plaintiff is not in a situation to contest the regularity of the officer's proceedings on his execution. As to the title to the property, the return of the officer is conclusive. 26 Maine R. 197; 24 Maine R. 395; 26 Maine R. 195; 1 Fairf. 265.

6. In turning to the action of assumpsit, there would seem to be but little to do, for whether the plaintiff's title be good or bad, he cannot maintain this action. If bad, he can sustain no action whatever, and if good he will recover in the appropriate action of trover, the value of the property at the time of the conversion, and interest thereon. And nothing can be clearer than the fact, that if there has been a conversion of the property by the defendant, it dates by relation back to the time of his attachment, Oct. 29, 1836, before any earnings accrued. The plaintiff has a full and adequate remedy in his action of trover, and the law hates multiplicity of actions. 21 Pick. 559; 24 Maine R. 343.

7. There is no privity between the parties, and assumpsit will not lie.

8. The defendant is clearly entitled to judgment in his favor on the verdicts rendered. In issues presenting mixed questions of law and fact, the Court will send the cause to the jury under such instructions as shall give them an opportunity to settle the facts in the case; and then the Court will render such judgment, as their findings and the whole record before the Court may require. Stephen's Pledge, (5 Am. Ed.) 92, 94, 104,

120, 143; 2 Roll. Ab. 99; 1 Wils. 63; 5 Pick. 181; 24 Maine R. 25; 18 Johns. R. 14; 16 Johns. R. 343; 17 Pick. 252; 12 Pick. 324; 2 Stark. Ev. 83; 10 Pick. 231; 3 Fairf. 15; 14 Maine R. 395; 23 Maine R. 345; 8 Taunt. 413.

9. The most favorable construction for the plaintiff, if the bills of sale are not to be regarded as utterly void, is to regard them in the light of mortgages, subject to a prior attachment; and if so to be considered, then the plaintiff's liability or debt is the principal, and the mortgage the incident, and therefore on payment of the debt or discharge of the liability, the property revests in the mortgager, without canceling the mortgage, or resale, or redelivery, the mortgagee no longer having any cause of action against any one, and the mortgager is restored to all his rights and remedies, the property continuing, however, under and subject to the attachment. 2 Pick. 206; 1 Porter, 423; 2 Greenl. 322; 23 Maine R. 345.

10. The jury were instructed, "that they were bound to return a verdict for the plaintiff, who was entitled to recover as trustee for Thompson's creditors." This was erroneous in fact and in law. From a fair view of the evidence, there is not the slightest pretence, that the plaintiff acted for any creditor; and no pretence in any state of the case, that the law would hold the plaintiff a trustee.

The eleventh and twelfth positions relate to the motion for a new trial.

J. S. Abbott, for the plaintiff, replied.

At the June Term, 1849, in this county, the opinion of the Court, SHEPLEY C. J. and TENNEY, WELLS and HOWARD Justices, was delivered by

SHEPLEY C. J. — The first of these cases is an action of trover, brought to recover the value of one half of the schooner Emeline and of one quarter of the schooner Tremont. At the term of this Court holden in this county in the month of September, 1843, a nonsuit was entered by consent. At the same time the counsel made and signed a written agreement, that the nonsuit might be confirmed, or set aside and such

judgment rendered, as the Court might order upon certain evidence named, "and such other evidence is to be introduced, as either party may choose to take in depositions, giving legal notice to the adverse party, touching the transfer of property from John Thompson to the defendant." Difficulties have arisen between the parties and their counsel, and the cases, after delay of several years, have been recently submitted to the Court for decision upon the testimony originally introduced and since taken, accompained by written or printed arguments.

It has not been considered necessary to decide, whether all the testimony could be properly received under the agreement, without a motion to have the nonsuit set aside for newly discovered evidence; for if a part of it were to be now excluded a further and longer continued contest might be expected under a petition or motion, and the result will be the same, whether a part only or the whole of the testimony be received.

John Thompson was the owner of the shares of those vessels since claimed by these parties, each asserting a title derived from him.

The plaintiff claims by virtue of two bills of sale, bearing date on October 27, 1836; and the defendant by virtue of an attachment made on October 29, 1836, and a sale made by the sheriff on execution on June 10, 1837.

1. The testimony of John Thompson, the former owner, introduced by the defendant, and that of his son, John H. Thompson, introduced by the plaintiff, clearly proves that bills of sale of the shares of the vessels now claimed by each party were made on October 27, conveying them to the plaintiff. That those bills of sale were regarded as defective, and that others were signed and substituted for them on Sunday, October 30; and that those formerly executed were subsequently destroyed. The testimony of William A. Wellman, stating that he wrote the parts in manuscript on the day of their date, is not necessarily in conflict with their testimony; and if it were to be so regarded, it is apparent, that he had no recollection at the time, when his testimony was taken, of the day when he wrote them, but relied upon a

former affidavit, made by him on August 6, 1837, stating that fact; and whether that rested upon any other foundation than the dates of the bills of sale is quite uncertain. While John H. Thompson states, that he heard the plaintiff and his father speak at different times of the transaction, as he states it, and once as late as the week before the trial. Both of the Thompsons speak of the facts as within their own knowledge and recollection, and they must have testified falsely, or have been under some unaccountable influence or mistake, if their testimony does not truly state those occurrences. The plaintiff does not appear to have complained, that their testimony in this respect was not correct, while he did complain, that John Thompson in other respects made incorrect statements, and that he had documents, by which he could convince him of it.

The counsel for the plaintiff contends, that if the bills of sale be regarded as taking effect only on a day subsequent to the attachment, yet they are only one kind of proof of a sale, which is proved without them, to have been made on October 27.

The property in a vessel may be legally transferred without a bill of sale, or other written evidence of it. In such cases there must be proof of an agreement to sell and purchase, and of a valuable consideration also, when the title is asserted against creditors of the vendor.

In this case there is no proof of such an agreement, except so far as it is found in the bills of sale. The title depends upon them as a conveyance taken to indemnify the plaintiff for liabilities assumed for John Thompson; not upon a purchase and payment made by the plaintiff. There is therefore no title established by proof of a sale made at any time before the bills of sale now produced were signed and delivered.

2. The bills of sale purport to convey those shares of the vessels absolutely and not as security for liabilities assumed. There is no satisfactory proof of any payment made by the plaintiff to John Thompson, or of the discharge of any claim, or that Thompson was relieved from payment of the paper on

which the plaintiff had become his surety or indorser. An absolute conveyance of personal property cannot be legally proved in a court of common law to have been made only to secure the purchaser for liabilities assumed, and be good against the creditors of the vendor. *Gorham* v. *Herrick*, 2 Greenl. 87; *Coburn* v. *Pickering*, 3 N. H. Rep. 415. *Whitaker* v. *Sumner*, 20 Pick. 399.

3. It appears from the testimony of Elkanah Spear, Jr. that the vessels were at East Thomaston when he made the attachment, on October 29, and that they had been there from three days to a week before that time. There is no proof of a delivery from Thompson to the plaintiff before the attachment. If they had been at sea at the time of sale, the purchaser's rights would have been preserved by taking possession within a reasonable time after their arrival in port. A delivery of a vessel in port at the time of sale is as necessary to perfect the title, as it is when any other description of personal property is sold. *Brinley* v. *Spring*, 7 Greenl. 241; *Ludwig* v. *Fuller*, 17 Maine R. 162.

4. The counsel for the plaintiff contends, that the defendant did not obtain a prior title by relation to the time of the attachment, because the sale made by the officer was not legal, the Lord's day having been reckoned as one of the four days between the seizure and sale on execution. But it has been decided, that the legal title will pass by virtue of such a sale. *Tuttle* v. *Gates*, 24 Maine R. 395.

5. It is further contended, that it appears by the newly discovered testimony, that the defendant's judgment against Thompson was obtained by fraud or collusion, when nothing was due.

That judgment was recovered upon a promissory note made by Thompson on Nov. 23, 1832, for $1800, and payable to the defendant on demand with interest. John Thompson testified on the trial of this action, that "he was still owing Mr. Kimball a large sum of money besides the amount named in the execution." No explanation of the testimony since

discovered can be obtained from him, for he had deceased before that time.

William Morton testifies, that he was formerly Thompson's clerk, that he finds an entry made in his handwriting in a book formerly kept by Thompson as a record of bills and notes payable, of a note payable to the defendant, dated Nov. 23, 1832, numbered 52, payable on demand, for $1800, marked "settled per W. B." These letters he explains as denoting the waste book. He does not recollect any thing respecting that entry or the occasion of it. He states that there appear to have been large dealings between the defendant and Thompson after the date of that note, and large amounts of money paid. The waste books of Thompson appear to have been destroyed by his son after his father's decease, among many other papers esteemed to be of no value. The entry made by Morton can be received as legal testimony only for the purpose of impairing the confidence reposed in the testimony of John Thompson. An entry made by order of the debtor in his own books, can of itself have no effect to impair the rights of the creditor, or to show that his debt has been paid. If the testimony of John Thompson respecting the debt due from him to the defendant were disregarded, the defendant would continue to be the holder of the note unimpaired by any other testimony, and that would be sufficient to enable him to recover a judgment upon it. It is not difficult to perceive, that Thompson might, if now alive, be able to explain that entry and all their subsequent dealings respecting their vessels and the repair of them, consistently with the truth of his testimony. However this may be, there is no satisfactory proof, that the defendant's judgment was recovered by fraud or collusion, or that it was not recovered upon a demand justly due to him. *The nonsuit is confirmed.*

The second case is an action of assumpsit brought by the plaintiff against the defendant to recover the amount of money received by the defendant as the earnings of one half of the schooner Emeline, and of one quarter of the schooner

Tremont from the time of their attachment on October 29, 1836, to the time of their purchase by the defendant at the sheriff's sale on June 10, 1837.

It appears that the defendant receipted to the officer for those shares of the vessels and permitted them to continue to pursue their accustomed course of business, and that he received their net earnings. The objections made to the plaintiff's right to recover the amount of money thus received by the defendant are to be considered.

The first is, that the expense of repairing them, between the time of the attachment and the time, when they were lost at sea, exceeded the amount of their earnings, during the same time. If this be so, it constitutes no defence. Repairs made upon them, after the defendant became the purchaser, were made upon his own vessels, and for his own benefit. The earnings received before, or earned before he became the purchaser, belonged to the owner of the vessels.

2. It is said that such earnings were purchased and passed to the defendant with the vessels.

The officer had no legal right to sell any thing but the shares of the vessels, as they existed at the time of sale. If he attempted to do so, he could convey nothing else. It does not satisfactorily appear, that he made any such attempt.

3. That if the defendant be liable he is liable only to the officer, whose agent and keeper he was.

The defendant, by producing the vessels to the officer for sale, performed all his duty as a receipter for them, and was discharged from his contract. The officer in his official character, can have no claim upon the money in the hands of the defendant. No suit has been commenced against the officer, for any alleged misfeasance in permitting them to go to sea, and be subjected to use while under attachment, and no such suit can at this late day be maintained against him.

4. That the plaintiff acquired no title either to the vessels or their earnings, by his bills of sale.

A conveyance of real or personal estate, may be invalid as it respects the vendor's creditors, and yet valid as it respects the

parties and others not claiming rights as such creditors. In this case although the bills of sale were in form absolute, conveyances made without other consideration than to secure the plaintiff for liabilities assumed, they were valid so far, as they did not come in conflict with the rights of the creditors of the vendor. The title of Thompson, was not divested by the attachment. Until a sale on execution, the debtor has full power to sell or dispose of the property attached, so far as he can do it without disturbing the possession or rights acquired by the attachment. A purchaser can legally acquire and take all the rights of the debtor in that property, subject to those acquired by the attachment.

This right to sell and to purchase cannot be affected by knowledge or the want of it, that the property is at the time under attachment. Those rights arise out of the fact, that the debtor still continues to be the owner of the property, with the legal right to convey it, and not out of his knowledge of the actual condition of the property at the time.

The rights of the seller and purchaser as it respects their claims upon each other, may be greatly affected and varied by the fact, that the sale was made with or without a knowledge, that the property had been attached. But as it respects the right of the purchaser to obtain all the benefit possible from others under such a sale, there would seem to be no doubt, unless the vendor's title or right to sell, can be considered as destroyed by an attachment. That his title or right to sell is not destroyed by an attachment is fully established by the decided cases. *Blake* v. *Shaw*, 7 Mass. R. 505; *Fettyplace* v. *Dutch*, 13 Pick. 388. In the latter case the sale and purchase was made with a knowledge of the attachment upon the property. Such knowledge appears to have been exhibited rather to destroy than to establish the validity of the sale. In the opinion of the Court, it does not appear to have been considered as a fact of any importance, further than it might have a bearing upon the proof of delivery. If the plaintiff acquired nothing by the bills of sale, then Thompson while alive, and his legal representative since his decease, would be the person

legally entitled to the earnings of the shares of the vessels. If on the contrary those shares passed from Thompson to the plaintiff, so far as that title was not defeated by the attachment, it remains with the plaintiff accompanied by all the fruits flowing out of it. There can be no doubt, that the plaintiff by those bills of sale, would have been entitled at any time before the shares were sold, to have taken possession of them, and to have claimed all their earnings, if the defendant had failed to recover judgment, or if his attachment had been dissolved by payment of his debt or otherwise. And if those shares had sold for more than sufficient to pay the debt and costs, the plaintiff would have been entitled to recover of the officer, any balance remaining in his hands, and to recover the earnings of those shares from the persons who had received them.

The mere fact, that no such balance remained, cannot affect the plaintiff's right to recover for that, which does remain, and to receive whatever benefit he can obtain from his purchase not destroyed by the enforcement of the attachment. The idea, that the plaintiff's purchase was wholly defeated by the sale of the whole of those shares upon the execution, arises out of the position, that the plaintiff acquired by his purchase nothing but the property in those shares, while he had in fact acquired before their sale, not only such right of property, but a right to all their earnings, subject to have those rights defeated or diminished so far, as they could be by the proceedings under the attachment.

5. The objection that the bills of sale were executed and delivered on the Lord's day cannot prevail. One who was not a party to that sale, and who has no interest in the property, which is the subject of contest, cannot prevent a recovery by showing, that the plaintiff violated some statute provision in acquiring his title. If such were the law, the owner of goods introduced in violation of the revenue laws could not recover their value from a trespasser.

6. A further objection is interposed, that the officer was guilty of misfeasance in permitting the vessels to go to sea and to be used in their accustomed business, and that the earnings

received by the defendant are the fruits of that tortious act; and that the plaintiff cannot maintain assumpsit against the officer, and if he could, he cannot against his agent and servant.

If the purchaser of personal property could not maintain an action against an officer for an injury done to the property after he became the owner, no one could, for the original owner could not recover for an injury done to the property after he ceased to be the owner of it. Any person injured by the misconduct of an officer may maintain an action against him and recover damages for such injury. *Tuttle* v. *Gates*, 24 Maine R. 395. And he may waive the tort and recover by an action of assumpsit any money in the hands of the tort feasor as the fruits derived from the wrongful act. *Webster* v. *Drinkwater*, 5 Greenl. 319; *Whitwell* v. *Vincent*, 4 Pick. 449; *Berley* v. *Taylor*, 5 Hill, 577. The law is well settled that an agent is liable for misfeasances to the owner of the property whether he acted by the direction of his principal or not. *Perkins* v. *Smith*, 1 Wilson, 328; *Bush* v. *Steinman*, 1 B. & P. 410; *Fairbrother* v. *Ansley*, 1 Camp. 343. The defendant being thus liable, the plaintiff may waive the tort and recover for the fruits of that tort the amount received by the defendant in money.

There is a motion filed by the plaintiff to have the verdict in his favor set aside on the ground, that the jury made a mistake in calculating the amount received by the defendant, or decided against full evidence showing that amount. Upon an examination of the testimony it appears, that the verdict was rendered for a less sum than the amount actually received according to the testimony.

The verdict is set aside and a new trial granted.

REUBEN KIDDER *versus* NEHEMIAH FLAGG.

Where the declaration is upon a special contract, the contract must be proved as set forth, or the plaintiff cannot recover. If, therefore, the evidence, in reference to the contract and the supposed breach thereof, is altogether variant from what is set out in the declaration, a verdict for the plaintiff, not being warranted by the evidence, must be set aside and a new trial granted.

ON report of the presiding Judge, and on motion for a new trial because the verdict was against the evidence.

The evidence at the trial was all given in the report, but is wholly unnecessary to be seen, in order to understand the questions of law. The following is the conclusion of the report: —

"Upon the foregoing evidence, which is reported with reference to the motion for a new trial, the defendant's counsel contended that even if the jury should find, that the defendant was a forwarding merchant, the plaintiff could not recover against him by reason of his not having forwarded the starch by any vessels which sailed prior to the 26th Nov. unless he also proved that it was known to the defendant that such vessels were about to sail, and also that they could have taken the same, if they had been applied to. On this point, the Court instructed the jury, that to charge the defendant with neglect, in not forwarding the starch, or a part thereof, earlier, they should be satisfied that the defendant knew that a seaworthy vessel or vessels which could have taken it, sailed earlier than the Zephyr. Or if such vessel or vessels were filled with freight, over which the defendant had no control, when he had the first knowledge, that such was in port and about to sail, or with freight put on board by him, which the owners thereof were entitled to have carried before that of the plaintiff, he was not guilty therein of neglect; but submitted to the jury as a question of fact, whether they might not infer, that such vessel or vessels were not so filled or were seaworthy, if there were no facts showing the contrary, and it were proved to them the defendant had full opportunity to know the condition of such vessel or vessels.

"The defendant's counsel also contended, that if the jury should be of opinion that the defendant was justified in sending the starch by the Zephyr, on 26th of Nov. and might have forwarded it by an earlier vessel, he would only be liable for the damage sustained by the delay in its not reaching Boston at the time such vessel arrived, and the time it would have reached there if the Zephyr had not been lost, and that he was not liable for the value of the starch.

2. "The Court instructed the jury that if the defendant was guilty of neglect in not sending the starch, or any part of it, earlier, so as to be liable, the damages would be the loss which was caused to the plaintiff directly by such neglect. The defendant's counsel also contended that the defendant was not a forwarding merchant, nor liable as such, but at most was a gratuitous agent in the shipment, not responsible except for gross negligence.

3. "But I instructed the Jury that to constitute a forwarding merchant, he is one who holds himself out to the public as a receiver of goods generally, to be forwarded for a compensation; the compensation may be by direct payment, or by commissions, or by performing the service without charge therefor by name, but in consideration that the owners of the goods patronize him in storing their goods in his store house or permit them to be carried in vessels in which he is interested.

"If any of the foregoing instructions were erroneous in any material respect, the verdict, which was for the plaintiff, is to be set aside and a new trial granted, otherwise judgment to be rendered on the verdict unless the motion for a new trial should prevail. "JOHN S. TENNEY."

There was no copy of the declaration among the papers, which came into the hands of the Reporter, nor of any paper showing, that any verdict had been rendered, except the mere statement that a motion for a new trial had been made. The opinion supplies this omission.

Evans and *North* argued for the defendant, contending that the defendant was entitled to a new trial on account of the

errors in the instructions by the Judge, and also because of the error of the jury in returning the verdict they did, under those instructions.

They cited 1 Greenl. Ev. § 74, 78, 81; 12 Pick. 177; 10 Metc. 365; 2 Pick. 621; Chitty on Con. 870; 2 Fairf. 504; 17 Mass. R. 31; 5 B. & A. 171; 9 Pick. 59; 2 Greenl. 8.

Bronson and *J. S. Abbott*, for the plaintiff, in their arguments, insisted, that there was no error, either in the instructions of the Judge or in the finding of the jury.

The opinion of the Court, SHEPLEY J. not being present at the argument, and taking no part in the decision, was drawn up by

WHITMAN C. J. — According to the report of the case the verdict was found for the plaintiff on the fifth count in the writ. That count is on a special contract. It avers, that on the first day of October, 1846, the plaintiff delivered to the defendant fifty-nine casks of starch, to be forwarded to the consignee of the plaintiff in Boston, which the defendant agreed to forward by the first vessel sailing, thereafter, for that place from Augusta; and for breach of the contract it is alleged, that, from said first day of October, till the twenty-seventh day of November following, the defendant neglected to forward the same; and that the starch was then put on board of a vessel call the Zephyr, which, on its passage from Augusta, was, with the cargo on board, totally lost; and that other vessels sailed from Augusta to Boston after the said first of October and prior to the sailing of the Zephyr.

It is quite a familiar principle of law, that a contract must be proved as set forth. Yet it was not pretended at the trial that it was proved, that any starch had been delivered on said first day of October by the plaintiff, or any one in his behalf, to the defendant. All the evidence of any delivery of starch was, that fifty-nine casks were forwarded, by the plaintiff to the defendant, in small parcels, of from four to six casks each, on different days, from Oct. 23d to the 21st of November following, when the last parcel was delivered. And the first

direction of which there was any evidence to ship the starch to Boston, was contained in a letter from the plaintiff to the defendant, under date of Nov. 3, 1846. In it the plaintiff merely expresses a wish to have the starch sent to Boston as soon as there might be an opportunity; and concludes by saying, "I shall have fifty casks in all at your place in the course of ten days, which I want sent as soon as it arrives." "It," here would seem to refer to the fifty casks; and hence the defendant would not be liable to the imputation of negligence, if, before shipping any to Boston, he had waited till the fifty casks had arrived. By whom this letter was sent, or when it reached the defendant, does not appear. When the last parcel was sent, on the 21st of November, it was accompanied with a letter, in which the plaintiff directed, that it should be "put on board, with the rest" of his starch, for his consignee in Boston. Thus, the first letter, and this clause in the second, indicate a wish to have the several parcels sent together to the consignee. Yet in the last he, in conclusion, requests to be informed how much starch had been shipped, and by what vessels as he wished to draw on his consignee in anticipation of the avails from sales. This proof has no tendency to establish the contract set forth. The contention on the part of the plaintiff now is, that the defendant was bound to have shipped the parcels as they were received as soon after receiving them as might be practicable. The contract set out in the fifth count, is to no such effect; and the breach set out is, that the defendant did not send the fifty-nine casks as soon after the said first of October as might have been practicable.

The evidence therefore, in reference to any contract, and the supposed breach thereof was altogether variant from what is found to be set out in the count relied upon; and therefore a new trial must be granted, the verdict not being warranted by the evidence.

NATHANIEL W. MORSE *versus* SHELDON REED.

In an action of replevin for cattle impounded, when the defendant justifies the taking, he must show a full and entire compliance with the requisitions of the statute, or he becomes a trespasser *ab initio*.

The certificate left with the pound keeper should state the town in which the impounder resided, and also the town in which the enclosure, wherein the damage was alleged to have been done, was situated, or the justification will not be made out. And the advertisements should state the time of impounding.

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

"Somerset ss. — District Court, January Term, 1848.

"Nathaniel W. Morse *v.* Sheldon Reed.

"This is an action of replevin for cattle impounded, commenced before a justice of the peace. The general issue only was pleaded, before the justice. At a former term of the District Court, the defendant had been permitted to file the brief statement, though objected to by plaintiff, and now the action coming on for trial, plaintiff still objects to the brief statement being used, and to any evidence given under it, but the Judge overruled the objection. The plaintiff also filed a counter brief statement.

"The defendant admitted that cattle described in plaintiff's writ, were the property of plaintiff, and were of greater value than ten dollars. And defendant further admitted, he took and impounded the cattle on the 16th of August, 1843.

"John K. Morrison, was called and objected to, but was admitted, and testified that he saw the cattle, with cattle of other people, in the defendant's field on the 16th, at about 10 o'clock, certainly as early as 12 in the day, that the fence on the road was partly down, only two rails being up, at the place where he thought, by the tracks, the cattle entered the field. The bars were up; that defendant went for a field driver, and came back with Rowell, who acted as field driver; that defendant and Rowell took the cattle out of the field, and at about one o'clock started with them towards the pound.

"Abel Morrill, was admitted to have been the legal pound keeper for that year, presented a book in manuscript, labelled "*Pound Keeper's Book, of Cornville,*" and testified as follows: "That book is the book of records which I kept as pound keeper. It is the only pound keeper's record, that I have ever seen in the town." The defendant then offered to read the document marked A, being what is contained on the first page of the book, and which is to be copied, and made part of this case.

"The plaintiff objected to the same, but the Judge overruled the objection, and permitted it to be read.

"Morrill further testified: — "I suppose the original is among the other papers in the case." Plaintiff objected to the introduction of said document, because the original was not produced; and to the effect thereof, because it does not state the residence of the impounder, or the cause of impounding, or that the cattle were doing damage; nor does it state the town or place, where they were taken up, and in which was the impounder's enclosure. The Judge overruled the objection, and permitted it to be read to the jury.

"Defendant then offered said records, to show that a copy of the advertisement was inserted therein. The plaintiff objected thereto, because it did not purport to be certified as a copy. But the Judge overruled the objection and permitted to be read from said book, the document marked B, which is to be copied and made part of this case.

"Plaintiff objected to the admission of the advertisement, and the record thereof, because it does not show that the pound keeper complied with the statute, in regard to advertising, in this, that the advertisements were not inserted in a newspaper, or that public notice was given by the town crier.

"Plaintiff objected to the sufficiency of the advertisements, because the time of impounding is not stated therein, and because the cause of impounding is not stated, nor the town or place in which is the defendant's enclosure. It was admitted two weekly newspapers were published in the county in 1843, but that no newspaper was published in the county on the 16th, 17th or 18th of August, 1843.

"The Judge instructed the jury, that the testimony of Morrison would be considered by them in finding whether plaintiff's cattle were in defendant's enclosure, and if they found that fact, then, that the pound keeper's records, and the certificate of the impounder, and advertisements being sufficient, they would return their verdict for the defendant. The Jury thereupon returned a verdict for the defendant.

"To which rulings and instructions of the Judge, the plaintiff excepts."

A.

"To the Pound Keeper of Cornville.

"The undersigned, Sheldon Reed, herewith commits to pound, one yoke of oxen about five years old, (and several other animals, all described,) taken in the enclosure of Sheldon Reed; and the said Sheldon Reed demands eight dollars for damages, and the unpaid charges of impounding the same.

"Witness my hand. Sheldon Reed, Impounder.

"Cornville, August 16, 1843.

"The above is a true copy of the certificate.

"Abel Morrill, Pound keeper."

B.

"NOTICE.

"Sheldon Reed, impounder, took up in his enclosure, doing damage on the sixteenth inst. and were committed to pound, one yoke of oxen about five years old, (and several other animals, described particularly.) The owner or owners are notified to pay the damage and costs of impounding and keeping, and take the cattle away.

"Abel Morrill, Pound keeper.

"Cornville, August 17, 1843."

The case was argued in writing.

Leavitt, for the plaintiff, contended that the District Judge erred in his rulings and decision, in relation to the pleadings. This objection was not taken into consideration by the Court.

The other objection is to the proceedings of the impounder and pound keeper.

The 3d and 6th sections of the 30th chapter of Rev. Stat.

relating to "pounds and impounding beasts," define the "cause of impounding." The 3d section, for animals being at large in the highways, &c. of the town; and the 6th section, for injury to one's land. In this case the cause of impounding, is alleged to be an injury done the defendant's land by the plaintiff's cattle, and that mentioned in the 6th section of the 30th chapter. The 10th section of the same chapter, provides, that before the pound keeper shall be required to receive any beast into pound, the impounder shall furnish said pound keeper a certificate under his hand, containing certain requisites, and these are: — "a brief description of the beasts; the cause of impounding; the amount of damages claimed, and the charges of impounding, then accrued."

And the same section goes further, and gives the form of the certificate to be furnished, which sets out the above requisites, and making, if possible, the construction to be given the statute and certificate more certain, about which no doubt could be entertained before.

The first objection made, was to the *non-production* of the original certificate, which the pound keeper, Morrill, testified was amongst the papers in the case; perhaps however the record of it, read by defendant, may be sufficient.

The next objection raised to the certificate was, that the impounder's residence is not stated. And in one view this objection is deemed important; and that is, that the town or place in which the impounder's enclosure was, is made less certain.

The next objection, that the certificate "did not state the cause of impounding, or that the cattle were doing damage, nor the town or place, where they were taken up, and in which was the impounder's enclosure." These objections, however, amount to this, in whatever different form, they may be expressed, that the cause of the impounding, as required by the express words of the statute, and by the form of the certificate given, is not stated in the certificate, and if so, the defendant utterly fails in his justification.

Now what is the cause of impounding in the case at bar?

It is for damage done by the plaintiff's cattle on the defendant's land in the town of Cornville. Nothing less, or different from this can be a cause of impounding. The cattle were impounded in Cornville. The cause is not for doing damage on, or to, his land in any other town than Cornville; nor could defendant justify for it; for it will not, for an instant, be contended, if the damage was done in one town the defendant would be justified in impounding in another.

If then, such be the cause of impounding; and if the statute, and form of the certificate given in the 10th section, requires it to be stated in the certificate left by the impounder with the pound keeper, the next inquiry is, is the cause of impounding stated?

We contend that it is not.

There is a fatal defect or omission in it.

What does the defendant state in his certificate? Why that the cattle were "taken in his enclosure;" without stating where, in what town or place his enclosure was situated. And this is the real objection to these proceedings. Every fact stated in the defendant's certificate may be strictly true, and yet the plaintiff's cattle not be liable to be impounded. Because if the defendant's land was not in Cornville where the cattle were trespassing they could not be impounded there.

Now on what principle is the defendant to proceed to justfy himself?

The plaintiff contends he must clearly and distinctly state in his certificate, certain requirements of the statute; that he must leave nothing to be guessed at, nothing to inference or presumption; that as he attempts to justify himself under the statute, he must bring himself clearly within its provisions. It is well settled the law will presume nothing in his favor.

Certain analogous principles deduced from a class of cases in the Massachusetts and Maine Reports, may well enable the Court to settle the construction of the tenth section, and the certificate given in it. *Smith* v. *Gates*, 21 Pick. 55; *Davis* v. *Maynard*, 9 Mass. R. 242; *Wellington* v. *Gale*, 13 Mass. R. 483; *Lancaster* v. *Pope*, 1 Mass. R. 86; *Perry* v. *Dover*, 12 Pick, 206; *State* v. *Williams*, 25 Maine R. 561.

If the true construction of the statute (section 10) is, that the impounder shall state the cause of impounding, and that it shall be clearly and fully stated, and not left to be inferred or presumed, the defendant must fail. True he states, that the plaintiff's cattle were in his enclosure, but they might have been in his enclosure without trespassing. For, unless the enclosure is in Cornville, the impounding cannot be justified. There must appear on the face of the certificate itself, enough to show where, in what town, the land is situated.

The advertisement does not locate the defendant's land. It is entirely silent as to the town in which it is situated. He went further and looked at the certificate left with the pound keeper by the impounder. This certificate gave him no information — no notice where the damage was done. It did not point out to him, that the mowing field was in Cornville, that he might go, and ascertain if upon the 16th day of August, his cattle did damage to the amount of $8, there. If the certificate or advertisement had stated that the land was in Cornville, the plaintiff by proper inquiry, could have ascertained the amount of damage, paid it, and liberated his cattle, or had appraisers on, "to view and estimate it upon oath."

The 10th section has, in the case of *Palmer* v. *Spaulding*, 17 Maine R. 239, received a construction, similar to that contended for in this case. I would also refer to the case of *Green* v. *Haskell*, 24 Maine R. 180.

The next objection relates to the proceedings of the pound keeper. And if it should be objected, that the impounder is not accountable for the pound keeper's doings, the answer is, that, as the impounder left with him a defective certificate, he is only suffering the consequences of his own wrong. And besides, the 20th section of c. 30, expressly provides, the action of replevin shall be brought against the impounder, and not the pound keeper.

The first objection is, that the pound keeper's records, do not show that a copy of the advertisement, is inserted therein, according to the requirement of the 8th section of the 30th chapter.

It was then objected, when defendant was permitted to read the record, that it did not show a compliance with the statute, in regard to advertising, in this, that the advertisements were not inserted in a newspaper, or public notice given by the town crier.

The other objections, in this part of the case, are similar to those made to the proceedings of the impounder, and the same remarks apply.

D. Kidder, for the defendant.

The first objection made by the plaintiff is, that the defendant in the court below had been permitted to file a brief statement.

It is conceived, that the liberty granted by the court below to file a brief statement was a mere matter of practice, entirely within its jurisdiction and that the Court here will not disturb it. If authority is necessary I think that the cases *Strout* v. *Durham*, 23 Maine R. 483; *Magoun* v. *Lapham*, 19 Pick. 419; and *Gerrish* v. *Train*, 3 Pick. 124, are directly in point.

The plaintiff also objects to the introduction and effect of the pound keeper's book, because the original certificate is not produced. In answer to this, I have to say, that, by the 8th section of the 30th chapter of the Revised Statutes, the pound keeper's book with its records are made legal evidence of all doings thus recorded. And to this point also I would cite 1 Greenl. on Evidence, sections 483, 484 and 485. When the books themselves are produced, they are received as evidence without further attestation, but they must be accompanied with proof that they come from the proper repository.

The plaintiff objects to the certificate, &c., because the impounder's residence is not stated; because it does not state the town or place where the cattle were taken, nor the time when; because the cause of impounding is not stated, and because the town or place in which the defendant's enclosure is, is not stated in it.

By the 10th section, it is provided, that before the pound keeper shall be required to receive any beast into pound, the

impounder shall furnish the pound keeper with a certificate under his hand, briefly describing the beasts, cause of impounding, the amount of damages or forfeiture claimed, charges of impounding then accrued, of the following purport; then follows a form.

I think, from an examinination of the certificate, that the purport of all the requirements substantially appear. To the objections that the pound keeper's residence is not stated nor the town or place in which the cattle were taken up, nor the town or place in which the defendant's enclosure is, I would observe that the certificate is directed to the pound keeper of Cornville, and that the same is dated Cornville, Aug. 16, 1843. *Id certum est, quod certum reddi potest.*

The cause of impounding is sufficiently stated in the certificate, " taken in the enclosure of Sheldon Reed."

The plaintiff further objects to the pound keeper's advertisements, &c. because the day of impounding is not stated, nor posted up in season; because not published in a newspaper; because the town or place of impounder's inclosure is not stated, nor where his residence was, and because the cause of impounding was not stated in said advertisement.

From an inspection of the advertisement it appears that Sheldon Reed, impounder, took in his enclosure and doing damage on the 16th instant, and were committed to pound, and thus the cause of impounding, and the time when, both appear.

To the objection that the advertisement was not posted up in season, the delay being too great, I would say, that the statute requires that the pound keeper shall forthwith post advertisements, &c. The time implied by the word *forthwith* is matter of law and all the circumstances attending the act to be performed should be taken into consideration. It may be worthy of remark, that in a former statute the pound keeper was to advertise within twenty-four hours, and it is not to be presumed that the Legislature intended to impose a more *onerous* duty on the pound keeper.

In this case it appears, that a large number of cattle were impounded at the same time, and from an inspection of the pound keeper's records, it appears that the act of impounding was not completed until half past five o'clock in the evening of the 16th of August, 1843. The pound keeper was under the necessity of furnishing the cattle the same evening and the next morning with proper food and drink.

It became his duty, after performing that service, to write three long advertisements and post them up at three several places.

I think, under all the circumstances of the case, that the Court will have no hesitation in deciding, that the advertisements were seasonably posted up.

To the objection, because the town or place of the impounder's enclosure is not stated, nor where his residence was, I would answer, that the statute does not require it. The name of the impounder only is required, which appears in the advertisement.

To the objection that the advertisement was not published in a newspaper, I can only say, that it appears in the case that no newspaper was published in the county on the 16th, 17th or 18th of August, 1843, and that the cattle were replevied on the same 18th of August at nine o'clock in the forenoon. What object there could have been in advertising in a newspaper, after the cattle were replevied, I cannot see except to enhance the expense, which must have been paid by the pound keeper for his folly.

There is another objection, and that is, that the statute language as to claim is not used. In the advertisement it appears that the owner or owners are notified to pay the damages and costs of impounding and keeping and take the cattle away, which embraces, as I conceive, all that is required by the statute.

The opinion of the Court, present WHITMAN C. J. and TENNEY and WELLS Justices, was drawn up by

WELLS J. — This was an action of replevin, for cattle im-

pounded. It was commenced originally before a justice of the peace. *Non cepit* was pleaded before the justice, and the action was removed, by appeal, to the District Court, in which a brief statement was filed, avowing the taking, in the enclosure of the defendant, damage feasant. A counter brief statement was made, denying, that the place, where the cattle were taken, was the enclosure of the defendant. The statement of the pleadings, in the District Court, we gather from the arguments of the counsel.

Whether the permission was properly granted, to file the brief statement, from the view we have taken of the case, it is unnecessary to determine, and we give no opinion upon that part of it.

The defendant justifies the taking, and must sustain that justification by the law. He must show a full and entire compliance, with the requisitions of the statute.

If he does not do it, he becomes a trespasser *ab initio*. *Smith* v. *Gates*, 21 Pick. 55; *Adams* v. *Adams*, 13 Pick. 384.

By c. 30, § 10, R. S., the impounder is required to furnish the pound keeper with a certificate, the purport of which is given in a form, contained in said section. The form indicates, that the certificate should state the name of the impounder, and the town in which he resides, the owner of the enclosure, and the town in which it is located.

In the certificate, which was furnished, neither the town in which the defendant resided, nor the town in which the enclosure was situate, were mentioned. The certificate is dated at the bottom, at Cornville, and signed by the defendant. But that could indicate nothing more, than the place, where the certificate was made. It did not declare the residence of the impounder, nor the location of his enclosure.

The Legislature must have deemed it essential, that the owner of the cattle should be able to ascertain, from an inspection of the certificate, the residence of the impounder, and the location of the enclosure.

The impounder claims damages and charges, which he might remit or reduce upon a conference.

The owner of the cattle might desire to examine the enclosure, if in the town, in which they were impounded, and ascertain the damages actually sustained, and also to whom the enclosure belonged. If the enclosure was in a town, other than that, in which the impounding took place, the certificate would disclose that fact to the pound keeper, and guide him in his duty, or if, in such a case, the impounding took place, the owner could ascertain, at once, the illegality of the proceeding.

By § 12, the appraisers are to give notice to the person impounding, if known and resident in the same town. If it appeared by the certificate, that he did not reside in the same town, they would be under no obligation to make inquiry for him.

But it is enough for us to ascertain, the existence of the enactments, without exploring the reasons of them.

The requirements of the statute are very general, probably as much so, as was thought would comport with the interests of the community, and ought not to be made more so, by construction. But they are plain, and easily to be followed.

By § 15, the pound keeper is required to state in the advertisements, the "time and cause of impounding."

In the copy of the advertisements furnished to us, the time of the taking up, by the defendant in his enclosure, is stated to be "on the 16th inst." and the advertisement bears date, "August 17, 1843."

The advertisements do not exhibit whether the impounding was on the sixteenth or seventeeth day. Probably it was on the day, when they were taken up, but it is not so stated as the statute requires. The defendant having failed, in our opinion, in establishing his justification, the exceptions must be sustained.

SAMUEL PARKER & *al. versus* DANIEL C. EMERY.

Where on motion of the defendant, it was ordered that the plaintiff should file a bill of particulars or specification of his claim, and the bill filed was merely thus: — "To bill for cutting and hauling logs on Brassua in winter of 1841 and 1842, $3248,65" with credits reducing the amount to $810,65, *it was held*, that if objection had been taken at the trial, the plaintiff could not have recovered upon money counts, but that as no such objection was made on the offering of evidence pertinent only under those counts, the defendant must be considered as having assented thereto.

If the plaintiff declares only upon an implied contract for services performed, and the proof is, that they were performed under a special contract and for a person other than the defendant, who had no connection with the transactions until long afterwards, the plaintiff cannot recover by proof of a promise by the defendant to pay such debt. To recover upon such evidence, there should have been a count upon the promise to pay the debt of the other person.

ASSUMPSIT. The writ contained two counts, one for money had and received, and the other on an account annexed, of which a copy follows: —

"Daniel C. Emery to Samuel Parker and Maximilian J. Webb, Dr. — To balance due for cutting and hauling logs on Brassua in winter of 1841 and 1842, $1000,00."

On motion of the counsel for the defendant, the Court ordered a "bill of particulars to be filed," and thereupon the following was filed by the plaintiff: —

"Daniel C. Emery to Samuel Parker and M. J. Webb, Dr.

To bill for cutting and hauling logs on Brassua in winter of 1841 and 1842,			$3248,65
Contra Cr.			
Rec'd on the same	1843, July 9,	$600,00,	
"	" August 16,	1676,00,	
"	" Oct. 24,	162,00,	2438,00
			810,65"

No other bill of particulars or specifications was in the case.

After all the evidence of the respective parties had been introduced, by consent of parties: — "The case was taken from the jury, and the Court are to enter such judgment as the facts proved, by legal evidence or that are not objected to, shall

legally require, and the same inferences may be drawn from the evidence, which a jury would be authorized to make."

The facts considered by the Court to be proved, and thought to be material, are found in the opinion.

The case, both as to the facts and the law, was argued in writing.

Leavitt, for the plaintiffs, said that the plaintiffs claim to recover on the following grounds: —

1. That the defendant assumed the place and liability of Irish under the contract, took complete possession and control of the lumber after it came to market, induced the plaintiffs to relinquish their lien upon it, by promising to pay them for cutting and hauling, and converted it to his own use.

2. That the defendant has received a large amount of money from the sales of logs, and articles manufactured from them, which is now in his hands, and which in equity and good conscience belongs to the plaintiffs to the amount of their claim.

3. That he has in writing promised the plaintiffs to pay them the balance due for cutting and hauling the logs under the contract with Irish.

The counsel argued in support of each of these propositions.

J. S. Abbott, for the defendant, said that the claim set forth in the bill of particulars was the only one, which legally could be considered in this case. The plaintiffs are to be restricted to the claim set out. *Babcock* v. *Thompson*, 3 Pick. 448. If this be correct, it becomes unimportant to consider, whether the defendant has or has not made himself liable by any special promise, and equally so to consider, whether he has received money which in equity and good conscience should be paid to the plaintiffs. There is but one charge, which in substance is, that the defendant was liable as an original contractor.

But the defendant is not liable, because the plaintiffs have not performed their contract.

The plaintiffs never had any lien upon the logs, and there is no proof whatever in the case, that he had. And what is said to have been a lien was abandoned. If possession is

surrendered, the lien is gone. 8 Pick. 73; 24 Maine R. 214; Story on Agency, (2d Ed.) § 366, 371.

If the plaintiffs were entitled to go into evidence under the money count, they could not recover. They never owned the lumber, and had no lien upon it.

The defendant never had any money in his hands, beyond what he was entitled to retain as his own.

The counsel examined the evidence, and gave his views as to what facts were proved.

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

WHITMAN C. J. — This case was taken from the jury by consent of parties, and a report made of the evidence by the presiding Judge; and we are called upon to ascertain the facts and to determine whether the plaintiffs are entitled to recover or not. And the cause has been elaborately argued both as to the law and facts of the case.

The defendant now insists upon an objection, which does not appear to have been taken at the trial, viz, that the plaintiffs' specification was incomplete, so that they cannot recover upon their count for money had and received. If this were the only ground upon which the plaintiffs could recover, the cause should not have been suffered to proceed, without the express or tacit consent of the defendant. But as no objection was made at the trial to the plaintiffs' proceeding under their count for money had and received, the defendant must be held to have assented thereto.

The plaintiffs declare against the defendant, upon a contract as implied by law, for services performed; and also for money had and received. As to the first count, it is evident that they cannot recover upon that. The services, for which their charge is made, were performed under a special contract, and for a person other than the defendant. It is not pretended that the defendant had any connection with the transactions, out of which the claim of the plaintiffs originated, till

more than a year after the services were performed. If, therefore, the defendant is under any liability, in reference thereto, it must be under a promise to pay the debt of another person; or for money had and received to the plaintiffs' use. But there is no count in the plaintiffs' writ upon any promise to pay the debt of another person, and, therefore, they cannot recover upon that ground. And if there were any such count, on looking through the evidence, it is not perceived that any such promise was made. It is true that the defendant often speaks in his letters to the plaintiffs and to their agent, of their claim for services performed, in cutting and hauling timber, of which he had taken possession; and of his willingness that they should have their pay out of the proceeds from it; and often expresses his determination that they should be so paid. But he nowhere promises to pay them from his other resources. In one instance, however, he expresses a willingness to do so from his other resources, if he could; but this was far from making an absolute promise so to make payment.

The claim of the plaintiffs, under their count for money had and received, might be sustained, if there were evidence that the defendant was in funds from the sales of the timber; for he evidently took charge of it under an understanding that he should, with the proceeds from it, first pay the claim of the plaintiffs. His letters, above referred to, abundantly show this to have been the case. And the testimony of the witness, Webb, is to the same effect.

The case, however, as reported, does not furnish satisfactory evidence, that the defendant has received any money for the timber. The testimony of Webb, that the defendant received any portion of the five thousand and eighty-two dollars, contracted to be paid to James Irish, by the Bowdoinham Steam Mill Company, is manifestly erroneous. Irish's deposition, referred to in the argument of the counsel for the defendants, shows that the defendant never received any portion of that sum; and Webb himself says he did not see it paid to him. And it is equally evident that Webb was mistaken in saying that six thousand dollars were paid by that company; and that

three thousand of it was paid to the defendant. It was not proved, that the defendant was in funds from the sale of timber cut by the plaintiffs, to any one else. The sale spoken of by Webb to Williams & Co. it seems from Williams' testimony, cited by the defendant's counsel, was not of lumber cut by the plaintiffs; and this is not controverted by the counsel for the plaintiffs in his argument. And the testimony of Webb, that the defendant told him he had sold some of the lumber to Humphreys, on cross-examination, was corrected, by testifying, that it was Humphreys who told him he had purchased some of the timber; and this was properly objected to as not being evidence of any such sale. It appears further, from the testimony of Webb, that the defendant had advanced, towards the cost of getting the timber down to Cathance, the sum of three hundred dollars. It does not therefore appear that the defendant is in funds to any amount on account of the timber cut by the plaintiffs, who must therefore, become nonsuit.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF PISCATAQUIS,

ARGUED MAY TERM, 1848.

HORACE BROWN *versus* PETER STAPLES.

The covenant of warranty in a deed of land, if not released or annulled, ordinarily runs with the land to the last purchaser, even by a deed of release.

Where land is conveyed by deed of warranty, and the same premises, at the same time, are reconveyed in mortgage, with like covenants, the covenants in the mortgage deed will not operate to preclude the maintenance of an action on the covenants of the absolute deed.

The grantee of land by deed with covenants of warranty, while he continues the owner of the land, may release or annul the covenants. But if the covenants be not discharged or annulled, and pass with the land by another conveyance, the first grantee cannot release or annul them, unless, he has been called upon and has paid damages to his grantee for a breach of his own covenants.

A covenant of warranty does not include an incumbrance which the grantee, by an instrument of as high a nature as the deed, has engaged to discharge; and the grantee cannot, therefore, nor can a second grantee with notice enforce such covenant as an estoppel, against a covenant of warranty, by himself, of the same premises to his grantor.

When the grantee in a deed with covenants of warranty, who has given to his grantor a bond covenanting to remove and discharge a mortgage thereon, has deceased, and his estate is insolvent, all claims existing between the estate and the obligee in the bond must be settled before the commissioners of insolvency; and the covenants of warranty in the deed will be thereby rendered inoperative.

SEE Rev. Stat. c. 115, sections 16 and 17.

Brown *v.* Staples.

THIS was a petition for a writ of review, of the action, *Peter Staples* v. *Horace Brown.* That was a writ of entry, declaring upon two mortgages, one by Elliot Staples to John Welles, July 7, 1825, and the other by Winthrop Allen to Peter Staples, June 26, 1841. The conditional judgment was rendered for the amount due on both mortgages, and the petitioner for the review contends, that the judgment should have been rendered only for the amount due on the latter mortgage. The review sought was for the purpose of correcting that supposed error.

The facts were to be ascertained, by a reference to certain writings. All the material facts are stated in the opinion of the Court. The case came before the Court upon a statement of facts agreed to by the parties.

The arguments were in writing.

J. Appleton, for the petitioner.

Peter Staples, as the holder of a mortgage given by Winthrop Allen to him, dated June 26th, 1841, and as the assignee of a mortgage given by Elliot Staples to John Welles, dated 7th July, 1825, brought an action upon both these mortgages. The clerk rendered conditional judgment for both these mortgages. The plaintiff in review claims that it should have been rendered only for the amount due on the mortgage, Winthrop Allen to Peter Staples.

The state of the title to the premises was as follows: —

John Welles to Elliot Staples, 7th July, 1825, warranty. — Elliot Staples to John Welles, 7th July, 1825, mortgage, assigned to Peter Staples, 29th Aug. 1845. — Elliot Staples to Peter Staples, June 2, 1837, warranty. — Peter Staples to Winthrop Allen, 6th May, 1841, warranty. — Winthrop Allen to Peter Staples, 26th June, 1841, mortgage and warranty. — E. H. Allen, Administratrix of W. Allen, to N. H. Allen, June 12, 1843, quitclaim. — N. H. Allen to Horace Brown, July 19, 1844, quitclaim.

Now from this state of the title it is evident, that, Peter Staples having on 6th of May, 1841, conveyed these premises by deed of warranty, to Winthrop Allen, was bound to remove

all precedent incumbrances upon the title, and that if he paid or took up any incumbrances he cannot enforce them against the covenants of his deed. Brown, claiming under this deed, is entitled to its benefits, and to enforce those covenants by way of estoppel, or in any other way, against Staples. The law is too well settled on this point, to require even the citation of an authority.

The bond given by Allen does not change the rights of the parties. Brown was bound only to regard the record title. This bond was merely a personal contract. It was no security binding on the real estate.

Besides, Staples relied upon the bond, presented it before the commissioners on Allen's estate, and received or was entitled to receive, whatever dividend the estate paid; and if that dividend was nothing, it is his misfortune, that he trusted to the contract of an insolvent person, but he must bear it. The bond is therefore discharged, and cannot affect Brown.

Knowledge of this bond on the part of Brown, does not affect his legal rights. If he knew its existence, he knew it had been presented before the commissioners of insolvency on the estate of Allen, and that Staples relied on the estate for payment, and not on the land. He further knew it was *no lien* on the land.

Nor can any erroneous view of the law on the part of Brown affect his legal rights, nor any admissions made in consequence of such erroneous views. The plaintiff, Brown, has a right to hold Staples to his covenants, and to enforce them against him, either by suits or estoppel.

This course of petition for review, was taken at the suggestion of the Court — and is believed to be the only effectual one.

The petitioner submits respectfully, whether the clerk did not err in rendering judgment for the amount on the mortgage, Elliot Staples to John Welles, which was assigned to him long after Brown's title accrued.

S. H. Blake, for Staples, the demandant in the original action.

In behalf of the original demandant his counsel submits, that "it is not reasonable and for the advancement of justice," for the Court to order a review in this case.

1. No fraud, surprise, new evidence, or other accident, ordinarily urged, when a new trial or a review is prayed for, can be set up here; no error, or mistake. The only apology that can be made for the Court, if they reverse their opinion, will be, that they have changed their minds, and that, without new light. For no new fact, or authority will be invoked.

The argument at July Term, 1847, was upon an agreed statement of facts; no question was made as to plaintiff's right to recover on the Winthrop Allen mortgage; his right to do so was not restricted. The only question was, whether he was entitled to recover also on the Elliot Staples mortgage. This question was fully argued by Appleton & Morrison for defendant, and by myself, for plaintiff, and Judge SHEPLEY pronounced the opinion of the Court in his usually clear and forcible manner, alluding to all the facts in the case. The counsel for defendant were both in Court, when the opinion was given, and now, for the first time, manifest that surprise, that eminent counsel often show, when unsuccessful in the attempt to maintain an erroneous position. Now under these circumstances shall the Court further interpose; after judgment rendered exactly in conformity to the opinion, and possession taken upon the writ of possession, that issued upon that judgment? I trust not.

2. The opinion of the Court was well founded. 1st, Because the deed of Peter Staples of 6th May, 1841, was a warranty. So was the mortgage deed of Winthrop Allen a warranty deed, 25th June, 1841. These two deeds both still subsist, the covenants of warranty in both of them are still alive and operative.

Winthrop Allen covenanted, 25th June, 1841, that premises were free of all incumbrances. Those claiming under him are estopped by this covenant while it is in force and cannot allege, as against Peter Staples, the covenantee, that there were prior incumbrances.

The two covenants of warranty in the two deeds, under the circumstances of this case, operate to mutually offset and cancel each other; so that the estoppel does not apply against plaintiff as assignee of the first mortgage.

Further, Winthrop Allen gave plaintiff a bond to assume and take care of this, then, outstanding mortgage, so that Winthrop Allen in his lifetime could not have pleaded the warranty in plaintiff's deed to him, as an estoppel, to bar this claim now made by plaintiff as assignee of that mortgage. If Allen could not avail himself of the estoppel, neither could those, claiming under him, for they claim title by a naked release, stand in his shoes, with a knowledge prior to buying, of his title and bond back.

3. Under equity powers of Court over mortgages, c. 96, 395, the Court did right in enforcing both mortgages as against defendant, Brown; for, first, he bought knowing of both mortgages, and knowing, therefore, if he got title through one, he must necessarily cheat the holder of the other out of its amount, and 2d, contemplating no such wrong I will assume, for charity's sake, he intended to assume both and paying for both.

J. Appleton replied.

The opinion of the Court was drawn up by

Shepley J. — The original action was commenced upon two conveyances in mortgage of the premises described. A conditional judgment was rendered for the amount due upon both the mortgages. By the agreed statement it appears, that John Welles, on July 7, 1825, conveyed the premises to Elliot Staples, who at the same time reconveyed the same to Welles in mortgage, to secure the payment of his notes given for the purchase money. On June 2, 1837, Elliot Staples conveyed the same to Peter Staples, who on May 6, 1841, conveyed the same by a deed containing a covenant of warranty to Winthrop Allen, who, on June 25, 1841, reconveyed the same in mortgage, with a covenant of warranty, to secure the sum of $360, and who also made a bond, by which he obliged him-

self to Staples to pay and take up the notes given by Elliot Staples to John Welles and secured by the first mortgage. These conveyances were all recorded in due season. Winthrop Allen died without having paid or discharged either the mortgage made to the demandant, or that made by Elliot Staples to Welles. His estate was insolvent. The demandant proved his claim arising out of the bond, but nothing was paid upon it. The administratrix on the estate of Winthrop Allen, having obtained license, sold and conveyed in her official capacity, whatever interest her intestate had in the premises, on June 12, 1843, to Nathan H. Allen, who by a deed of release, made on July 7, 1843, conveyed all the right acquired by that conveyance to the tenant. When Nathan H. Allen purchased of the administratrix, he knew, that there were two existing mortgages upon the premises, and had been informed of the existence of the bond; and he states, that he has no doubt, that he informed the tenant of all the particulars connected with that transaction. Another witness states, that the tenant told him, that he knew of that bond when he bought.

The counsel for the tenant contends, that the covenant of warranty, made by the demandant to Winthrop Allen, ran with the land, and that the tenant by the subsequent conveyances made without such a covenant, acquired a title to the equity of redemption and to the benefit of that covenant; and that the demandant is thereby estopped to claim payment of the first mortgage, which had been assigned to him.

The covenant of warranty, if not released or otherwise annulled, does ordinarily run with the land to the last purchaser, even by a deed of release. *Clark* v. *Swift*, 3 Metc. 390; *Beddoe* v. *Wadsworth*, 21 Wend. 120; *Young* v. *Triplett*, 5 Litt. 248.

In answer to this position it is said, that the estoppel thus insisted upon is neutralized or avoided by the covenant of warranty contained in the mortgage deed from Winthrop Allen to the demandant. But the covenants in those two deeds are not considered to be thus mutually acted upon, each by the other, and their operation thereby destroyed. *Hardy* v. *Nel-*

son, 27 Maine R. 525; *Hubbard* v. *Norton*, 10 Conn. R. 422; *Haynes* v. *Stevens*, 11 N. H. R. 28.

It therefore becomes necessary to inquire, whether the facts existing at the time, and intervening between the conveyance made to Winthrop Allen and the conveyance of the equity to the tenant, were such as to prevent the tenant from acquiring any right to enforce against him the covenant made by the demandant. A purchaser of land may not always be entitled to the benefit of such a convenant made to his grantee, for such grantee while he continued to be the owner of land, may have released or annulled it. This he could rightfully do. *Middlemore* v. *Goodale*, Cro. Car. 503. But if the covenant be not discharged or annulled, and pass with the land to the grantee of the covenantee, it cannot be discharged by him, unless he has been called upon and has paid damages to his grantee for breach of his own covenants. *Thompson* v. *Shattuck*, 2 Metc. 615; *Chase* v. *Weston*, 12 N. H. Rep. 413.

The assignee of such a covenant, acquiring it with the land, will not be affected by any equities existing by parol between the covenantor and covenantee, even when their existence is known to him, before he becomes the purchaser of the land. *Eveleth* v. *Crouch*, 15 Mass. R. 307; *Suydam* v. *Jones*, 10 Wend. 181. Such a covenant can be discharged or annulled only by an instrument of as high a nature as the deed containing it. *Kaye* v. *Waghorne*, 1 Taunt. 428.

In this case Winthrop Allen could maintain no action upon the covenants of the deed made to him by the demandant for a breach occasioned by his being deprived of the land by virtue of the mortgage made by Elliot Staples to John Welles, for he had by an obligation of as high a nature obliged himself to discharge that mortgage; and had thereby annulled the operation for such purpose of those covenants. It has been decided, that a covenant of warranty would not include an incumbrance which the grantee had engaged to discharge. *Watts* v. *Welman*, 2 N. H. Rep. 458. The tenant purchased the interest in the land after the covenant of warranty had been for such purpose annulled between the covenantor and

covenantee while the covenantee was the owner of the equity, and did so with a knowledge of the facts; he would not thereby acquire more extensive rights, than the covenantee had. A right to the benefit of that covenant would be secured to him only by the action of the law. And the law would not transfer to him the right to enforce a covenant, which no longer had a vital or operative existence against the covenantor. The tenant cannot, therefore, present that covenant of the demandant as an estoppel to prevent his recovery upon the mortgage assigned to him, because he could maintain no action upon it to recover back from the demandant the amount, which he had been compelled to pay to procure a discharge of it.

There are other facts presented in this case, which will prevent the tenant from deriving any beneficial interest in that covenant for such a purpose. The estate of Winthrop Allen, the covenantee, was settled as an insolvent estate, under the statute c. 109. In such cases all claims existing between the intestate and other persons arising out of or dependent upon obligations, covenants and contracts, which are mutually affected by or connected, each with the other, must be exhibited and finally settled before the commissioners of insolvency, at least so far, as it respects such mutual action of each upon the other. The covenant of warranty in the deed to the insolvent intestate, was affected by the bond made by the intestate to him. He was obliged to present and prove that bond, if he would obtain any benefit from it; and the covenant, whose vitality depended upon it, was necessarily to be considered and the rights to arise out of it adjusted and discharged by the discharge of the bond, so far as its force depended upon the bond. *Petition dismissed with costs.*

JOSEPH MOULTON *versus* ARETAS CHAPIN.

If the property attached by an officer has gone back into the hands of the debtor, he has no claim upon the officer for it, and if the attaching creditor has released the officer from his liability to him, then, as neither creditor nor debtor has any claim upon him, the officer can maintain no action upon a receipt given for the property attached.

In an action of assumpsit, if another person be made a co-plaintiff, by amendment of the writ by leave of Court, the attachment of property upon the writ is thereby dissolved.

If there be a good cause of action against the receipter at the time of the commencement of the suit, but the right of action is taken away by a neglect to preserve the attachment afterwards, it seems that nominal damages may be recovered; but where no cause of action upon the receipt existed when the suit was commenced, the action must fail.

STATEMENT of facts, and appeal from the District Court.

"District Court, Eastern District, March Term, 1848.

"JOSEPH MOULTON *v.* ARETAS CHAPIN.

"Writ 23d Oct. 1847. Assumpsit on following receipt.

"Piscataquis ss. — Oct. 22d, 1844.

"Received of Joseph Moulton, Deputy Sheriff, fifty-two yards and three-quarters of broadcloth, and two horses, taken on writ, William T. Pearsons against Peabody H. Rice and John H. Rice, which property we promise to redeliver to the said Moulton, or the bearer of this receipt, on demand, for the consideration of two dollars paid by the said Moulton for the safe keeping of said property, and we are to keep said property free from any further expense, to the said Moulton or the plaintiff.

"Aretas Chapin."

"Plaintiff, subject to objection, introduced writ, William T. Pearson & al. *vs.* Peabody H. Rice & al. upon which original attachment was made and officer's return thereon, returning thereon the property specified in above receipt. Also the execution that issued on the judgment in said suit, rendered April 3, 1849, with return thereon as follows, viz: — "Piscataquis ss. April 30, 1847. By virtue of this execution, I have demanded of Aretas Chapin, two horses and 52¾ yards of broadcloth, which was attached on writ, he receipted for same, and he refused to give them up. Joseph Moulton, Deputy Sheriff."

"All subject to objection.

"Also evidence, that said receipt and execution were placed in hands of Thomas Pullen by plaintiff, with instructions to demand the property on receipt, and if turned out, take it for said plaintiff, or if the money was paid, to take it and cancel the execution for him, and that he did demand the property of defendant, at Monson, between the 26th and 30th of April, 1847, having the execution and receipt in his hands, which the defendant declined delivering over to him. Said papers may be referred to. Said Pullen was not a deputy sheriff.

"The defendant then introduced, subject to objection, the docket of this Court, of March Term, 1847, which has under the original action, this entry: — "Nov. Term, 1846. Leave to insert name of Charles B. Johnson, in his writ. Plaintiff to have cost after last day of November Term, 1846." "1 d. Def'd. Judgment was $102,27. $2,64 cost.

"Likewise copy of record objected to.

"Also John H. Rice.

"He was one of the defendants in original suit, who testified that the property attached, never was removed from their store and stable, by defendant, but remained in their hands, that defendant is now secured for his liability in this receipt, but whether fully so or not he could not say — that property attached, was worth $200, and that the agreement that plaintiff might amend his writ, by inserting said Johnson's name, was upon condition of his claiming no cost, as per docket.

"Nonsuit or default to be entered according to the opinion of the Court, subject to appeal by either party.

"S. H. Blake, attorney for plaintiff.

"Appleton & Flint, for defendants."

Blake, for the plaintiff, contended that every act required by law to be done, to make the receipters liable, had been performed.

"The return of the officer is *prima facie* evidence of the demand for the property attached. 13 Maine R. 245.

No authority can be found, which will sanction the position, that the introduction of a new plaintiff, by leave of Court, will

vacate an attachment of property, when at the time there has been no conveyance or attachment. This is not a case where third persons are interested. 7 Greenl. 348; 14 Pick. 180; 15 Maine R. 400; 16 Maine R. 265; 3 Pick. 413.

J. Appleton, for the defendant, said the suit, when the property was attached, and the receipt in suit given, was in favor of Pearson alone. Afterwards, another plaintiff was introduced, which is a new and different action, and of course dissolved the attachment. 1 Pick. 204; 4 Greenl. 277; 3 Conn. R. 157.

Amendments are unknown to the common law, and can be authorized only by statute. And when made under it by introducing a new party, it is a new suit. No judgment was ever rendered in the suit, in which the attachment was made. And the officer, making the attachment when the suit was commenced, was not liable to the creditor, for the attachment had been dissolved; and was not liable to the debtor, for the property was never taken out of his hands. 1 Pick. 192; 17 Mass. R. 603.

The opinion of the Court, WHITMAN C. J., TENNEY and WELLS Justices, was prepared by

WELLS J. — A deputy sheriff having made an attachment of property, is answerable for it, either to the creditor or debtor. If it has gone back into the hands of the debtor, the officer is released from any claim, to be made by him.

It appears by the evidence, in the present case, that the property attached was never removed from the possession of the debtors. They cannot therefore, have any claim for it, upon the plaintiff.

And if the attaching creditor has released the officer from his liability to him, then, as neither creditor nor debtor has any claim upon the officer the latter can maintain no action against the receipter. *Norris* v. *Bridgham*, 14 Maine R. 420.

After the action of Pearsons, the creditor, was entered in Court, an additional plaintiff was inserted in the writ, by leave of Court.

Any action, brought against the plaintiff, for a violation of his duty, in relation to the property attached, after judgment upon the demand claimed, in the amended process, must necessarily be in the name of the creditors, mentioned in the judgment. But the plaintiff might very properly answer to such action, that he never made service of any writ for them. He could not be answerable to a person, towards whom he had never sustained the relation of an officer, nor for whom, he had performed any official duty. No obligation could rest on the plaintiff, in relation to a person with whom he had had no official intercourse.

The amendment, having united the creditor, originally named in the writ, with the new party, creates a union, fatal to any claim upon the plaintiff, for the property attached. He cannot make the officer liable to another, with whom he has associated himself, and for whom the officer never acted.

The Rev. Stat. c. 115, § 11 and 12, authorize amendments in relation to defendants, and the officer who served the writ would continue liable to the defendant, whose property he had attached, in the same manner, as if no amendment had been made.

It results that the plaintiff not being liable to the creditors or debtors, the liability of the defendant to him has terminated.

In the case before cited, the plaintiff recovered nominal damages, because there was good cause of action, when the suit was commenced. The receipter was sued, before judgment was rendered, in the action, in which the property had been attached, a previous demand for it, having been made on him. But by a subsequent neglect, to demand the property attached, of the officer making the attachment, it was released, and his claim to full damages was defeated.

When the present action was brought, the plaintiff was entirely exonerated from any claim of the creditors or debtors, and no ulterior proceedings could revive or continue it. He, therefore, had no cause of action, when it was commenced.

Plaintiff nonsuit.

Molly Carter *versus* Chase Parker.

In an action of dower, the marriage of the demandant may be inferred from proof of long cohabitation, continued until the death of the alleged husband, being received and treated as his wife, and their bringing up and educating a family of children as their own.

Proof of the conveyance of the premises, wherein dower is claimed, to the husband by deed of warranty, and his conveying the same to another person during the coverture, in the absence of all evidence to the contrary, is sufficient to prove the seizin of the husband.

The widow is entitled to have such part of the land set out to her as dower, as will produce an income equal to one third part of the income which the whole estate would now produce, if no improvements had been made upon it since it was conveyed by the husband.

The facts in the case, which came before the Court on an agreed statement, are found in the opinion of the Court.

J. S. Holmes, for the demandant.

A. Sanborn, for the tenant.

The opinion of the Court was drawn up by

Shepley J. — The demandant by this action claims, as the widow of Jonathan Carter, to recover her dower in seventy-five acres of land, being part of lot numbered five in the first range of lots in the township of Foxcroft.

The death of Jonathan Carter, and a demand of dower made in due season were admitted.

The marriage of the demandant with Jonathan Carter, was denied. A witness testified, that he had known her more than sixty years, that she lived during that period and until his death with Jonathan Carter as his wife, that they had and reared a numerous family of children; that he knew her at Concord, N. H. where it was said, she was published and married. In the absence of any testimony tending to rebut it, this testimony would authorize the conclusion, that they were legally married.

In the case of *Birt* v. *Barlow*, Doug. 174, Lord Mansfield is reported to have said, "an action for criminal conversation is the only civil case where it is necessary to prove an actual

marriage." The remark was in substance repeated by Lord Kenyon in the case of *Leader* v. *Barry*, 1 Esp. R. 353. In other civil cases a marriage may be inferred from long cohabitation as man and wife, and other usually attending circumstances, unless such cohabitation appear to have been illicit in its origin. *Fleming* v. *Fleming*, 4 Bing. 266; *Cram* v. *Burnham*, 5 Greenl. 213; *Newburyport* v. *Boothbay*, 9 Mass. R. 414; *Hammick* v. *Bronson*, 5 Day, 290; *Fenton* v. *Reed*, 4 Johns. R. 52; *Senser* v. *Bower*, 1 Penn. R. 450. Such proof has been held to be sufficient in an action of dower. *Chambers* v. *Dixon*, 2 S. & R. 475.

The seizin of the husband during coverture was also denied. The demandant introduced a deed containing covenants of warranty from Daniel Wentworth to Jonathan Carter, made on September 1, 1821, acknowledged and recorded on June 3, 1824, purporting to convey the lot including the premises. It also appears by the report of the presiding Judge, respecting the value and income, that Carter conveyed the premises. There is no testimony presented in the case tending to prove, that Carter did not acquire and convey a perfect title. The proof of his seizin is sufficient.

The widow is entitled to have such part of the land set out to her as dower, as will produce an income equal to one third part of the income, which the whole estate would now produce, if no improvements had been made upon it since it was conveyed by the husband. *Mosher* v. *Mosher*, 15 Maine R. 371.

The damages must of course be assessed upon the same principles. The whole income being by the proof and report, fifteen dollars annually, the demandant is entitled to a judgment for damages at the rate of five dollars per annum from one month after the time of demand to the time of judgment.

Judgment for the demandant.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF PENOBSCOT,

ARGUED JUNE TERM, 1848.

EPHRAIM SEVERANCE *versus* WILLIAM C. HAMMATT, *Ex'r.*

All claims against an insolvent estate, except claims entitled to a preference, should be presented to and adjusted by the commissioners of insolvency, when no suit had been commenced upon them during the life of the debtor, and when the estate had been represented to be insolvent within one year after administration had been granted. An action, therefore, so commenced within one year, not founded on a demand entitled to a preference, and not otherwise authorized by Rev. Stat. c. 109, § 28, cannot be sustained.

Any person entitled to a lien upon a house, building or land, under the provisions of Rev. Stat. c. 125, § 37, is not entitled to a preference over the general creditors, when the debtor has deceased and his estate has been rendered insolvent within one year from the time of granting administration.

THIS case came before the Court, on the following statement by the parties.

"Penobscot ss. — District Court, May Term, 1848.

"Ephraim Severance *v.* Wm. C. Hammatt, Ex'r.

"This action was assumpsit on an account annexed to the plaintiff's writ, in which plaintiff claimed pay for work and labor, stated as follows: —

"William C. Hammatt, Executor of William Hammatt, to Ephraim Severance. Dr.

"To work and labor on Wm. Hammatt's house or block of houses, on Exchange Street, Bangor, to wit: —

May 13th, 1846,	4	days	work at	9s.	$ 6,00
June 2d, "	22	"	"		33,00
July 1, "	25½	"	"		38,25
August 1, "	24	"	"		36,00
September 1 "	3½	"	"		5,25
					$118,50

"The declaration contained two counts, as follows: — "for that said Wm. Hammatt, on the 4th day of September last, being indebted to the plaintiff in the sum of one hundred eighteen $\frac{50}{100}$ dollars for labor on his block on Exchange Street in Bangor, according to the account annexed, then and there in consideration thereof, promised the plaintiff, to pay him the same sum on demand. Yet the said Wm. Hammatt, never paid the same, nor has his executor since his decease.

"The second count was:—"Also for that said William being at the time of his decease in September, 1846, indebted to the plaintiff in the sum of $118,50, for work and labor done on his house or block of houses on Exchange Street, according to the account annexed, in consideration of said indebtedness the said William C. his executor, at said Bangor, on the 25th day of March, 1846, promised plaintiff to pay him the same sum on demand. Writ was dated, Nov. 25, 1846.

"On the back of the writ was the following: —

"Mr. Officer, attach all the real estate of the deceased, particularly his right of redemption of the lot on Exchange street mortgaged to H. P. Mitchell, by deed recorded in Penobscot registry, vol. 159, p. 454, on which he built a block of houses on which plaintiff worked as charged in the writ."

"The attachment compared with the directions. Writ and return may be referred to by either party.

"In the summer of 1846, said Wm. Hammatt, then living,

hired the plaintiff to work on a block of houses, which he was building on Exchange Street in said Bangor, at 9s. per day, at his usual business of a house carpenter and joiner. Plaintiff did perform the work as set forth in his writ, and a balance of seventy-three dollars and $\frac{17}{100}$ is now due to him for said labor, with interest from the date of the writ. Said William deceased on the 24th day of September, 1846, and William C. Hammatt was appointed executor of his will, and was qualified as such on November 24, 1846, and on the 26th day of January, 1847, he represented the estate of said William insolvent, and commissioners were appointed to receive and examine the claims against said estate. It is admitted that said estate is insolvent and will not pay more than fifty per cent. of the debts proved and allowed against it.

"Plaintiff contends, that he has a lien on the block of houses for his labor, and prosecutes this action to impose that lien. He has never presented his claim to the commissioners of insolvency. The defendant admits, that the above sum is due to plaintiff, and that he is entitled to a dividend with other creditors, but contests the lien of plaintiff upon the houses.

"On the foregoing statement, the parties agree to submit this case to the Court, and judgment is to be entered therein according to the legal rights of the parties, and disposition shall be made of the case as the Court deem legal.

"Plaintiff reserves a right to move to amend his writ in the same manner as if on trial.

"The Court are to draw all inferences from the testimony and facts admitted which a jury might legally draw from them.

"It is admitted that the deceased, William Hammatt, had an attachable interest in the premises at the time of his death.

"Prentiss & Rawson, for plaintiff.

"Kelly & McCrillis, for defendant."

Prentiss & Rawson, for the plaintiff.

The plaintiff worked on the house under a parol contract; the man he worked for died within the 90 days insolvent. The

executor appointed by the will, was commissioned, gave bond, took the oath before the suit, and the suit was before the expiration of the 90 days.

Revised Statutes, chap. 125, § 37, provides that he shall have a lien on the buildings to secure the payment of his labor. It is designed for this very case. The statute contemplates this case, it anticipates insolvency and provides that the laborer on the house shall not be affected by it.

The statute requires, that the lien shall be secured by an attachment within 90 days. It was then necessary to commence the suit, and it is necessary that the Court should give us judgment and execution upon it, in order that we may levy on the property on which we have a lien.

The statute in regard to insolvent estates provides for an equal distribution, but here the design is not to distribute equally, but that the workman shall have his pay out of the house.

Section 28 provides that any action entitled to a preference may be brought, or continued; this is one of them. Chapter 120, § 21, provides that an action not affected by insolvency may be brought within a year.

The Legislature provide for the lien and that is to be secured by attachment, and if in any case the usual form of judgment or execution requires altering, to carry into effect the law and attain the object, the Court must direct the alteration.

The plaintiff will give bond, if thought proper, with satisfactory sureties to levy the execution only on the property on which he has a lien.

The suit having been commenced before the declaration of insolvency, is rightly prosecuted to determine the amount due, and also to determine all other questions relating to the suit.

By chap. 109, § 28, if the demand is disputed the action is to go on. Here the demand is disputed still; though the amount of the wages was agreed on the day the statement of facts was signed.

Kelley & McCrillis, for the defendant, contended: —

1st. That the statute contemplates only labor performed un-

der a special contract, so that the employer may know that the workman relies on his lien, as well as on the solvency and ability of the employer.

If the labor is performed without any such contract, the laborer must look to his employer only, and waives all specific claims on the building. This is the fair inference from the provision in chap. 125, § 37, that the lien shall continue in force for ninety days after the time of payment for the labor has arrived, not for ninety days after the labor is performed, or the building completed; but for ninety days after the time of payment as specified in the contract of the parties.

The language of section 37, is very different from that of sect. 35, giving a lien to ship carpenters, &c. on vessels; that section does not require a special contract, and the lien is extended to four days after the vessel is finished. Two provisions in the same act giving similar rights, would have been in the same language, if it was intended that there should be no distinction between the cases. The phraseology of section 37, is so marked that we can hardly escape the conclusion that something was meant by it; and giving a fair and reasonable construction to the language made use of, to wit, "contract with the owner," "person who had contracted," and "time when such payment becomes due," we hold that the letter and spirit both refer to a special contract, because these terms are not applicable to a case of labor performed without such contract, and where no time is specified for payment. How can the owner of the building, or a purchaser or creditor, know when that lien determines by law, if no time is set for payment. Nor is there any hardship in this construction; if the laborer is not satisfied with the liability of his employer at common law, but seeks a statute provision to aid him, he must conform to the terms and conditions imposed by the statute; then the parties will all act with a perfect understanding of the rights and position of each other, and honest purchasers will be safe in their transactions with the owner of the building. But the construction contended for by the plaintiff, leaves things vague and uncertain, giving those who are so disposed, an opportunity to practice frauds, and set traps for the unwary.

2d. If this view be correct, there is an end of the case, but if the Court do not adopt it, we then contend, that where there is no special contract, but the laborer is employed by the day, as was the case here, the time of payment is the end of each and every day. He is under no obligation to labor more than one day; then he is entitled to payment, and has a cause of action.

Plaintiff has ninety days after his cause of action accrues, that is, after the time of payment, to enforce his statute lien.

If a man be hired by the day, we contend, that he can have no lien for labor performed more than ninety days before suit and attachment. If he would preserve his lien, he must make a special contract, and have the time of payment set by that contract. Nor can plaintiff take the ground that his labor was all in one lump, that it was one entire unbroken transaction, and that he had no cause of action till the whole work was completed, for two reasons, *first*, because he has not so made his charges, and on examining his account, it will be seen that he did not work the entire period of time for the deceased. *Secondly.* He is precluded from taking that ground because it is at fatal variance with his whole position and pretensions before the Court. He repudiates any special contract fixing times and terms of payment. It follows then of necessity, that the time of payment was the end of each series of days' labor.

We thus see that only $5,25 of plaintiff's claim is entitled to a privilege over other claims; and as he has united that with other claims he forfeits all rights by his attachment. No rule is better established than that, where plaintiff unites in one action a claim which is privileged with one which is not, he places them both on the same footing, and waives or abandons all pretensions as a privileged creditor. 12 Pick. 388; 22 Pick. 540.

3d. We say, that plaintiff cannot maintain his action because the estate is insolvent. Rev. Stat. c. 109, § 28, provides that no action shall be maintained against an insolvent estate, except for a preferred claim; plaintiff insists that his is

a preferred claim, within the meaning of the statute; but we reply, that the Rev. Stat. c. 109, § 1, have settled and established what claims are to be preferred in cases of insolvent estates, and so far from embracing plaintiff's claim, it is expressly excluded from the list. It goes on to specify four classes which are to be preferred, not including claims like the plaintiff's, and then in the fifth class says all other claims. As plaintiff's is not in either of the four first, it is necessarily in the fifth. Suppose plaintiff had made his attachment in the lifetime of the testator, by our insolvent laws, c. 114, sections 83, 84, 85 and 86, the attachment would have been dissolved because all attachments are thereby dissolved in case of insolvency. There is no exception in favor of such claims and attachments as the plaintiff's.

The remedy provided by the statute is an attachment; and § 38, c. 125, gives the attachment the precedence of all other attachments, and this is the whole effect and scope of the statute law on the subject. We are not now discussing the question, whether plaintiff may or may not have some remedy under the equity jurisdiction of the Court. We are examining the question as to his legal rights, as an attaching creditor. He has precedence of other attachments, and can claim nothing more than that precedence, but as all attachments are dissolved in these cases without exception, we submit to the Court if this suit can be maintained without doing violence to well established legal principles, and to the positive provisions of the statute laws of the State.

Nor are the difficulties of plaintiff's position in any manner obviated by his proposal to file a bond, for statute c. 120, § 4, prescribes the form of execution, which is to run against all the estate of the deceased. The Court has no power to limit the process. If the law is defective and has made no provision for cases like the plaintiff's, his application should be to another tribunal. We hold that the great principle here involved has been settled in *Bullard* v. *Dame*, 7 Pick. 239. That was a case of manifest hardship, but the Court refused to interfere, for reasons which we hold are conclusive on the legal rights of the parties in this case.

Plaintiff pretends that he may maintain his action because he avers that his claim is contested within the meaning of c. 109, § 28. This we utterly deny. We have never contested or resisted his claim. We object solely to his manner of prosecuting that claim; and even if we did resist it he would only have a judgment to be laid before the commissioners of insolvency, but would have no right to any process to enforce that judgment.

That it was not the intention to apply this law to insolvent estates is manifest from the fact, that no provision is made in cases where the executor is not qualified within ninety days from the death of testator, and also from the fact that no other remedy is prescribed but an attachment. No branch of the law is better understood than that concerning attachments; and by the Revised Statutes themselves all attachments are dissolved in such cases. This enactment was made by the same body, and at the same moment of time too, as was that, the aid of which plaintiff invokes. It really seems hardly respectful to the Legislature to say, they intended to give the remedy as plaintiff insists they have, when they have in so many words declared that no action shall be maintained, &c.

In conclusion, we repeat, the only question involved is as to the rights of plaintiff, as an attaching creditor. So far as this suit is concerned he has no higher rights, and we submit whether this action can be maintained without an interpolation into the law of attachments, changing their whole character, and that based upon a supposed defect in the law, an omission to provide for such cases as the present, when it is more than doubtful whether it was ever designed to apply the remedy as is contended by the plaintiff. If the Court have any power to assist the plaintiff, it must be in some other form, and by some different process. When he claims the aid of the Court simply by virtue of his attachment, with all sincerity we say, it appears to us that the obstacles in his way are insurmountable.

Prentiss & Rawson in reply: —

It is said that there must be a special contract! What is a

special contract? How is it distinguished from another contract? Is there any such distinction either in common or statute law? A contract under seal is a specialty; all contracts not under seal are by parol. The plain language of the statute is not to be controlled by an argument founded on such loose notions.

The statute says any contract, and requires no particular provisions. It gives a lien for ninety days from the time when the payment becomes due, whether it becomes due by particular agreement, or by implication of law.

But the first clause of section 37, chap. 125, gives the lien to any person who performs labor or furnishes materials, without requiring any contract; and the other provision for the case of any contract is in the disjunctive.

This provision is similar to that in section 35, which gives a lien on a vessel to those who have furnished labor and materials, without requiring any contract.

2. The statement of facts does not find that plaintiff was at work by the day; he was to work on the building, at a certain price per day, and it may be inferred, that he was to work while wanted, or until the building was finished, which was prevented by the death of the testator.

3. The Legislature have provided for the payment of the laborer by this lien; it is intended to apply to the case of insolvent estates, as it is not necessary in other cases. The old law provided a petition as the mode of enforcing the lien; the Rev. Stat. provide an attachment. The death of the contractor or owner insolvent, did not affect the lien under the old law, and certainly was not intended to under the new. The insolvent law, chap. 109, sect. 1, neither provides for this claim nor excludes it.

This is not an ordinary attachment, such as is meant in the former statutes. It is a mode of enforcing a lien, which lien is intended to exist till the labor is paid for, and is particularly designed for the case of insolvency; there is nothing in any statute dissolving this lien; only one mode of dissolving it is provided, by tendering the amount due. Chap. 125, § 39.

Section 38, provides that this attachment shall have preference of other attachments. Not that this attachment shall share the fate of other attachments, or that this remedy is to be destroyed by a general provision of the attachment law never intended to be applied to it.

Our Rev. Stat. c. 96, § 5, expressly empower the Supreme Court, to issue all processes and writs which may be necessary for the furtherance of justice, and the due execution of the laws. Sect. 8 gives some indispensable requisites of these writs. Chap. 114, § 1, provides that alterations may be made by the Court, in writs, "to adapt them to changes in the law, or for other causes."

So this "insurmountable obstacle" vanishes — this very case is provided for.

The opinion of the Court was drawn up by

SHEPLEY J. — The plaintiff performed labor upon houses built by the testator, upon lands supposed to have been conveyed by him in mortgage. It is admitted that he had an attachable interest therein, at the time of his decease. The statute provides, that persons performing certain labor, "shall have a lien to secure payment of the same, upon such house or building, and the lot of land, on which the same stands, and on the right of redeeming the same, when under mortgage; and such lien shall continue in force for the space of ninety days from the time, when the payment becomes due." Ch. 125, section 37.

Provision is made by the following section, for the enforcement of such lien, by an attachment of the estate within the ninety days. Soon after the labor was performed, the testator deceased, the defendant having assumed the trust of executor, represented the estate to be insolvent, and commissioners of insolvency were appointed. It is admitted, that the estate was in fact insolvent.

The plaintiff caused the suit to be commenced against the executor within ninety days, after the last charge for labor performed was made, to preserve and enforce the alleged lien.

No executor or administrator can be required to defend a suit, commenced against him within twelve months after he has assumed the trust, unless the same be brought for the recovery of a demand, not affected by the insolvency of the estate, or by way of appeal from a decision of the commissioners of insolvency. Ch. 120, § 21.

Provision is made by statute c. 109, for the disposition of the whole assets of an insolvent estate. No part of it is appropriated to the payment of claims secured by lien, while provision is made in the tenth section, for the adjustment of the rights of those, who hold collateral security by mortgage or pledge of real estate or personal property, including notes or other evidences of debt. No provision is made by statute authorizing the recovery of a judgment against an estate, actually insolvent, which is not to be added to the list of claims, returned by the commissioners, unless the judgment be rendered upon a demand entitled to a preference. If this action could be maintained, no judgment could be rendered against the goods and effects of the testator, in the hands of the defendant. It could be rendered only against the right or interest which the testator had, when the lien attached, in a certain estate, which must be described in the judgment. It would be a judgment *in rem* rendered by a court of common law, not based upon any process against the property.

And there is usually no definite description of the bounds of such estates, by the act, so that the Court could describe, in a judgment, the estate to be sold or levied upon, to satisfy the judgment.

If the plaintiff could be allowed to enforce his alleged lien by the recovery of such a judgment, and execution issued thereon, authorizing the debt to be collected only out of the estate subject to the lien, the effect would be to take so much from the assets, and prevent its application to the payment of the expenses of the funeral, or to the allowance authorized to be made to the widow and children, or to the expenses of the last sickness, or to any of the other preferred claims.

Among the considerations suited to lead to the conclusion, that it was not the intention of the Legislature to have such a lien enforced, against an insolvent estate, are the following.

The omission to provide for the maintenance of an action, and for the entry of a special judgment to enforce it. The omission to notice and to provide for it, in the section regulating the rights of mortgagees and pledgees; the appropriation of the whole estate to other purposes than the payment of such claims; the improbability that the Legislature would designedly have given to such claims a preference, over those for funeral expenses, for expenses of the last sickness, and over all other preferred claims.

It must, at least, be regarded as doubtful, whether such was the intention of the Legislature; and if such an intention could be discerned, no provision has been made to carry that intention into effect. In such case the Court would not be authorized to supply the enactments necessary, to enable one to maintain an action, and to recover a judgment only against the estate, subject to the lien.

It was the intention as disclosed by the enactments of the Legislature, that all claims against an insolvent estate, except claims entitled to a preference, should be presented to, and adjusted by the commissioners of insolvency, when no suit had been commenced upon them during the life of the debtor, and when the estate had been represented to be insolvent, within one year after administration had been granted.

This suit does not appear to be one authorized to be prosecuted by the statute, c. 109, § 28, as founded on a demand disputed, and having been commenced within one year, and not upon a claim entitled to a preference, it cannot be maintained. *Plaintiff nonsuit.*

The following dissenting opinion was by

WELLS J. — The plaintiff by c. 125, § 37 and 38, Rev. Stat. had a lien upon the house of the defendant's testator, for work and labor performed by him.

The estate of the testator has been rendered insolvent, and a commission of insolvency has issued, and it is contended by the defendant, that the insolvency in such case puts an end to the lien.

The statute secures the benefit of such lien by an attachment of the property, upon which the labor is performed, in an action against the debtor.

The statute declares, that the person performing the labor "shall have a lien to secure the payment of the same," and "such person may secure the benefit of such lien by an attachment."

The first acts containing provisions similar to the one now in force, were passed on the 25th and 29th of March, 1837.

The law of 1821 provided for the dissolution of attachments by the death and insolvency of the debtor.

If the Legislature had intended, that the lien should cease upon the death and insolvency of the debtor, one would suppose that such provision would have been inserted in the acts passed in 1837, or in the Revised Statutes, when these several subjects underwent a revision.

The lien is created before the attachment. It is a vested interest in the property, upon which the labor is performed, and the attachment is given as a mode of perfecting such interest. The lien is created under the law by the labor and the materials. And the laborer or material man has a property in the house, upon which he has bestowed his labor, or for the repair or erection of which, he has furnished materials.

Those liens, which are dissolved by death and insolvency are created by the attachment only. Such creditors have no other priority than merely causing the property of their debtors to be attached. Their debts are not more meritorious than those of other creditors.

But the lien under consideration, is as much a vested interest in the subject, to which it is attached, as a mortgage would be.

Suppose the Legislature had provided that mortgagees of personal property should perfect their title by suit and at-

tachment, within 90 days, after the time of payment had elapsed, would a commission of insolvency defeat their claim? There would appear to be as much reason for affirming that it would, as in the present case to say that the lien is destroyed by such an event.

The death of the mortgager or pledger does not defeat the pledge, nor should it have that effect upon the lien of the plaintiff. The very object of the lien is to protect the holder of it against insolvency. The necessity of it is increased where the debtor dies insolvent. Nor is it just, that the labor and materials, which are not the property of the deceased insolvent, should be devoted to the payment of his debts generally, or to the support of his wife and children.

But it is said that no provision is made for rendering judgment against the administrators or executors of insolvent estates, in such cases. When the Legislature declares a right to exist, it confers all necessary means, by which such right can be established. The Legislature declares the lien to exist, "shall have a lien to secure the payment of the same," and has pointed out the course to be pursued to render the lien effectual. It is by an action at law, and it would necessarily follow that an appropriate judgment could be rendered in such action.

Under the late bankrupt law of the United States, liens are secured, arising from attachments, though no mode for so doing is pointed out in the law itself.

Although the bankrupt is discharged from all his debts, and is not ordinarily to be subjected to have executions against him, yet to preserve the lien, and to give effect to the provisions of the act, it is necessary that there should be a special judgment and execution, so as to enable the creditor to levy upon the property attached.

In form it is a judgment *in personam*, in substance a judgment *in rem*, binding the specific property attached. *Davenport et al.* v. *Tilton*, 10 Metc. 320. The plaintiff can have such judgment and execution as will enable him to secure the lien upon the property attached.

I cannot bring my mind to the conclusion that it was the purpose of the Legislature to annul the lien upon the death of the debtor and a commission of insolvency, nor that the law is so defective, as not to furnish a remedy to the plaintiff.

Calvin Copeland *versus* Royal Copeland.

If a purchaser had notice of an existing unrecorded mortgage, as between him and the mortgagee, it must be considered the same as if the mortgage had been recorded.

At law, as well as in equity, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring, against the latter, a different state of things, as existing at the same time.

But several things are essential to be made out in order to the operation of the rule: — the first is, that the act or declaration of the person must be wilful, that is, with knowledge of the facts upon which any right he may have must depend, or with an intention to deceive the other party; he must at least, it would seem, be aware that he is giving countenance to the alteration of the conduct of the other, whereby he will be injured, if the representation is untrue; and the other must appear to have changed his position by reason of such inducement.

Where the instructions to the jury are too general, but the party is not aggrieved thereby, this furnishes no sufficient cause for exceptions.

If the instructions of the presiding Judge are such as to withdraw from the decision of the jury a question exclusively for their decision, and not for that of the Court, still, it would seem, that if in the opinion of the Court, there was no evidence in the case from which the jury would have been authorized to decide the question in favor of the party complaining of the instruction, that such erroneous instruction will furnish no sufficient cause for granting a new trial.

On the following exceptions to the ruling of Tenney J: —

"This was an action of ejectment for an undivided half of a farm in Dexter.

"The plaintiff introduced a warranty deed of the premises, Royal Copeland to Joseph T. Copeland, dated May 10, 1836, acknowledged July 5, 1836, recorded April 7, 1837; mortgage deed, Joseph T. Copeland to Calvin Copeland, dated July 5, 1836, acknowledged July 6, 1836, recorded July 11,

1836; warranty deed, Joseph T. Copeland to C. Copeland, dated Sept. 11, 1840, acknowledged Sept. 11, 1840, recorded Sept. 16, 1840.

"The tenant then introduced a mortgage deed of the premises, Joseph T. Copeland to Royal Copeland, dated June 10, 1836, acknowledged June 1836, and recorded April 6, 1841; likewise a note of $600, and two notes of two hundred each, secured by said mortgage, said notes having been signed by said Joseph T. Copeland.

"The tenant then called Joseph T. Copeland, who was objected to as interested, but the objection was overruled, and he was permitted to testify, and did testify, that when he gave the mortgage deed to the demandant, he informed him of the prior mortgage given to the tenant, his father, and that prior to the giving said mortgage he had informed him of said previous mortgage.

"On cross-examination he testified, that there was a mortgage on these premises to the town of Dexter, to secure $500, of which he had made no mention to the demandant. The plaintiff held notes against him to the amount of about $900, all of which were given up when the $1000 note mentioned in the plaintiff's mortgage was given. All his personal property was in the hands of the demandant; that he had a horse and chaise which were in his hands to secure him; and that he thought his father's name was on none of the notes given up when the mortgage to the demandant was executed. That when he purchased the premises he gave therefor, the Pressey place, and a note for $600, and that that note, and the other two, which were for debts justly due his father, were included in the mortgage given to his father. That to make up the $1000 note to the plaintiff he received of him personal property to make up, with what he owed him before, that sum; that he helped build his father a house near the Pressey mill, in doing which he received aid from the demandant. That the demandant let him have personal property, (horse and wagon) with which he paid the joiner, that he sold a part of the personal property on which the demandant had a claim to the

amount of 2 or 300 dollars, to one Safford, that all his personal property was mortgaged to the demandant, and that when he gave the mortgage of the real estate to the demandant, there was no other name than his own on any notes given up. All his personal property was discharged from mortgage, if there was a mortgage, but not certain whether there was any.

"The witness further testified that Sept. 11, 1840, he settled with plaintiff and gave the warranty deed of that date; that he was owing the demandant 400 or 500 dollars beside the mortgage note; that at the time of the settlement the plaintiff allowed him $900 for the premises in dispute, and that he gave his note for $600, being the balance due him after being credited as above stated for the farm; that at this settlement nothing was said about the mortgage to the tenant as he recollected. Said Copeland further testified, that the place in 1836 was worth $2200 or $2500, that there was no agreement that what he did in building the house should go in payment of the farm, and that he owed his father a considerable sum, on account, and that there had been no settlement between them; that his father had paid out for him, for which he has received nothing, $460.

"Samuel Copeland, testified that in June, 1836, the plaintiff met the defendant — that they had a conversation about the trade between Joseph T. Copeland and the defendant — that the defendant told the plaintiff that Joseph had given the Pressey mill and his note for the farm, and that a mortgage was given — that the plaintiff inquired if the mortgage was on record, and was informed it was not.

"Comfort Spooner testified that he was present at a conversation in the spring of 1840, between the demandant and one McCrillis, in which, as he said, the demandant stated to him that Joseph T. Copeland told him when he gave him the mortgage, that he had given his father one, but that there was but little due on it, and he was going to take it up in a few days.

"Hiram Spooner was present at the same conversation, and testified substantially to the same facts.

"The demandant then called Hiram Safford, who testified he resided on the premises in dispute, 3 years, from April 1837, to 1840, that he had originally a lease from Joseph T. Copeland and Royal Copeland, that Joseph T. Copeland's interest was assigned to the plaintiff, that the whole farm in 1836, was worth from $1000 to $1500 and was now worth less, that the first year he paid rent to Royal, some to Calvin, paid no more than one-half to defendant, paid other one-half mostly to demandant, paid to Joseph T. a part the first year, all after first year paid to demandant; that the tenant said when he sold the farm to Joseph, he was to have one-half the Pressey mill, and Joseph was to build a house. Joseph caused the house to be built. Joseph T. told me that was the bargain. He further testified that there were no objections by defendant, to plaintiff's receiving half of the rent, that the tenant hired the farm one year (1840) of this demandant, and paid him rent for the same; that in December, 1839, the plaintiff and defendant talked of dividing the place, went on the farm and made a parol division of the same; this last was in Dec. 1840; witness went with them.

"Defendant said after the division agreed to meet at the defendant's for the purpose of bidding for choice; that the defendant told him a day or two afterwards, that Calvin bid $90, and he bid $95 for choice, and that he took the north half, and that they could not exchange deeds till Calvin should get a deed from Joseph T. Copeland.

"The witness further testified, that he talked of purchasing of Calvin, his half the farm. The defendant knew of it, and told him he thought it would be a good plan, and talked of buying defendant's half. Next year after witness carried on the whole place; defendant was to have one-fourth of the proceeds.

"In spring of 1841, first heard of mortgagee's claim.

"Witness further testified that Joseph T. Copeland told him that he had bought the premises in dispute, of his father, and was to pay him by the Pressey place, which was deeded to him, and by building the house near the mill, and that he, Joseph, did work on the house.

"Witness further testified that in 1836, he purchased a horse and chaise of said Joseph, which he learned was under mortgage to plaintiff, that he so informed Joseph T. Copeland, who denied it, that he went to see the plaintiff and there saw a mortgage signed by Joseph T. Copeland, and two if not three notes signed by him, and his father; he did not read them, but the filling was over 200 dollars; told Joseph of this, and he said he would make arrangement.

"Luther Copeland, called by the demandant, testified that he was the brother of the parties, that he lived within 130 rods from the tenant, that the tenant told him before 1841, he had sold half of his farm to Joseph T. Copeland, and purchased half the saw mill in payment of the farm, he did not say how the rest was to be paid — he said Joseph was to build him a house, and let him have one half the saw mill towards the place; that he was present when both parties talked about a division 2 years ago last fall; that they asked his opinion about dividing; that both told him they had divided the land verbally, that the tenant told him that they bid for choice, the demandant bid $90, he bid $95, and there it remained, that the defendant said they could go no further, till some writings were fixed between Joseph and plaintiff; value of whole farm in 1836, was $1600. That defendant carried on the farm 3 years ago; that Royal Copeland always spoke of his brother as owning half and that he never heard of the mortgage claim till 1841. Joseph told me the expenses of the house and the mill, would pay or overrun the farm; the house not completed; said his bills which he had expended and the mill would pay for one-half the old farm, which he bought of his father. Defendant helped build the house at the mill, he worked there himself; did not know who paid the hands; defendant was there most of the time, and took charge of it; Joseph was there occasionally off and on; place was bonded in 1836, for $2400; house underpinned with cedar; witness sold cedar to defendant. Witness worked one half day planting; Joseph paid him for 2 or 3 day's work.

"Upon this evidence, the counsel for the demandant requested the Court to instruct the jury, that if the demandant had notice of the prior mortgage, when he took the warranty deed of Sept. 11, 1840, still if the jury should be satisfied that the demandant was led by the acts, conduct, or declarations of the tenant, to believe that he did not claim by virtue of his mortgage, or that the same had been paid by the mortgager, and the demandant took said deed of Sept. 11, and paid or allowed said Copeland, for the land, in consequence of such belief, so induced by the tenant, that he was entitled to recover.

"This instruction the presiding Judge declined giving, but instructed the jury that there could be no waiver by the tenant of his rights by parol; that if the demandant had notice of the first mortgage, prior to the time of taking his mortgage, the mortgages to the defendant would take precedence; that any account towards building the house, by Joseph T. Copeland, not settled, or agreed to be allowed or indorsed, on the notes to the tenant, or the notes given up, would not be payment thereon; and that nothing short of actual payment of the mortgage notes, by Joseph T., or a deed of release from the defendant, could make out a good title in the demandant; and directed the jury to find if the demandant was proved to have had notice of the prior mortgage, and if so, to render a verdict for tenant, unless the notes secured by mortgage to tenant, were paid; if no such notice was proved, verdict was ordered to be for demandant.

"The jury returned a verdict for the tenant.

"To the above ruling the demandant excepts.

"John Appleton, for plaintiff.

"The foregoing exceptions having been shown to me, before the final adjournment of the Court, and found conformable to the truth, are allowed. "John S. Tenney, Justice presiding."

At the June Term in this county, 1848, this case was said to have been argued in writing, and was continued *nisi*. The opening argument was by

John Appleton, for plaintiff.

The counsel for the demandant requested the Court to instruct the jury that if the demandant had notice of the prior mortgage to the tenant when he took the warranty deed of Sept. 11, 1840, still if the jury should be satisfied that the demandant was led by the acts, conduct or declarations of the tenant to believe that he did not claim by virtue of his mortgage, or that the same had been paid by the mortgager and the demandant took said deed of Sept. 11th, and paid or allowed said Copeland for the land in controversy in consequence of such belief so induced by the tenant, that he was entitled to recover.

This instruction the presiding Judge declined giving, but instructed the jury that there could be no waiver by the tenant of his rights by parol; that if the demandant had notice of the first mortgage prior to the time of taking his mortgage, the mortgage to the defendant would take precedence; that any account towards building the house by Joseph T. not settled or agreed to be allowed on the notes to the tenant, or the notes given up, would not be payment thereon; and that nothing short of actual payment of the mortgage notes by Joseph T. or a deed of release from the defendant, could make out a good title in the demandant; and directed the jury to find if the demandant was proved to have had notice of the prior mortgage, and if so, to render a verdict for the tenant, unless the notes secured by the mortgage to tenant were paid, &c.

These instructions substantially were, that a mortgage could not be discharged by any thing short of actual payment, or waived by parol, and that though the mortgagee had by acts, conduct or declarations, held out to the world that he had no claim upon the premises mortgaged, and others had acted upon a belief by him induced that such was the fact, that still he might retain his rights as a mortgagee.

I think the Court on the instructions given and withheld erred.

1. A mortgage may be waived or discharged by parol, and without actual payment.

In *Martin* v. *Mowlin*, 2 Burr. 969, Lord Mansfield says,

"that the mortgage is a charge upon the land; and whatever will give the money will carry the estate on the land to every purpose. The assignment of the debt or forgiving it, will draw the land after it as a consequence. Nay it would do it though the debts were forgiven only by parol, for the right to the land would follow notwithstanding the statute of frauds."

In *Wents & ux.* v. *Dehaven*, 1 S. & R. 312, Yeates J. says, "the forgiving the debt will draw the land after as a consequence. It will do it though the debt be only forgiven by parol." See Pow. on Mortgages, 144; *Richards* v. *Sims*, Barn. 90.

2. The defendant admitted the validity of our mortgage, offered to divide, and the division was delayed at his suggestion till the plaintiff could procure a discharge of the equity; the defendant not setting up nor claiming any interest adverse to the demandant.

Now the tenant, by his acts and conduct is estopped *in pais*, to setting up his mortgage as against the demandant, having held out to him that it was paid or that he did not claim under it. *Dezel* v. *Odell*, 3 Hill, 220.

A party will be concluded from denying his own acts or admissions, which were designed to influence the conduct of another and did so influence it, and when such denial will operate to the injury of the latter. *Welland Canal Co.* v. *Hathaway*, 8 Wend. 483; *Presb. Cong. of Salem* v. *Williams*, 9 Wend. 147; *Pickard* v. *Sears*, 6 Ad. & Ellis, 469; *Gregg* v. *Wells*, 10 Ad. & Ell. 90.

So too, concealing his claim and recognizing ours, and advising others that they had better purchase he is not now to assert any claim. *Lee* v. *Hume*, 7 Cranch, 366; *Brinkerhoff* v. *Lansing*, 4 Johns. Ch. 65.

Knowles, for defendant.

The plaintiff claimed the demanded premises by virtue of a mortgage deed from Joseph T. Copeland to him, dated July 5th, 1836, and recorded the 11th of the same month, and also by a warranty deed from said Joseph T. to him, dated Sept. 11th, 1840, and recorded Sept. 16th.

The defendant claimed to hold the premises by virtue of a mortgage deed from the same grantor, Joseph T. Copeland, to him, dated June 10th, 1836, being prior to the plaintiff's deed, but not recorded until subsequently to the recording of the demandant's, to wit: on the 6th of April, 1837.

Joseph T. Copeland, the grantor of both parties, derived his title from Royal Copeland by deed dated May 10th, 1836, and gave back to him the mortgage of June 10th to secure the payment of the purchase money, being one note of $600, and two other notes of $200 each.

The recording of the defendant's deed, being subsequent to that of the plaintiff's, gave rise to the question of notice to the demandant of the deed to Royal Copeland and which was fully proved and settled by the verdict of the jury.

The question of the payment or discharge of defendant's mortgage was also inquired into, and the fact, that it had never been paid or satisfied in any way, not only found by the verdict of the jury, but expressly admitted on the trial by the plaintiff's counsel.

There was no suggestion of any unfairness in any of these transactions or of fraud or collusion between the parties, but it appears by the evidence reported that at one time, there were conversations about a division of the place and some steps taken to effect it, and it was this testimony which gave rise to the question presented to the Court in this case, to wit: whether the defendant by what then took place waived or relinquished his claim to the property secured by his mortgage.

It will be seen by recurring to the testimony reported upon this point, that the evidence upon the trial falls very far short of the facts assumed in the instructions requested of the Court. Nor is there any thing in that testimony inconsistent with the validity of the defendant's mortgage at that time, or his subsequent assertion of his rights under it. No language is imputed to him indicating any intention of relinquishing or waiving any right or claim. He did not intimate that it was paid or in any way satisfied, or that he did not intend to claim by it, or that he would relinquish his rights to the de-

mandant or hold them subordinate to his. It appears that at the time the demandant took his deed, he was informed by Joseph T. Copeland that he expected to be able to settle up the prior mortgage to the defendant, and the plaintiff was content to take it and run his risk, either that this would be done or that he could hold by getting his deed recorded first, (he knew defendant's deed was not recorded,) or that he might obtain a division of the place and make his title good. The movements for a division originated with the plaintiff, no doubt with this view, and though the defendant talked with him about it, it appears that he finally declined altogether to complete any division, for what particular reason does not very clearly appear, most probably because his mortgage had not been satisfied, which is about as good a reason as could well be imagined. It may be too, that the defendant, ignorant and unacquainted with business, fell into the very common error of supposing that he had lost his rights by the prior recording of the plaintiff's mortgage, until he was better advised. (*The plaintiff no doubt had such in impression.*) Suppositions that fully explain all that was done or said about a division, and with a much greater degree of probability than the pretence that he ever intended to relinquish rights so important to him without motive or consideration.

Upon this evidence of the acts and declarations of the defendant, the plaintiff's counsel contend that the defendant is estopped "*in pais*" to setting up his mortgage as against the demandant, having, as it is said, held out to him that it was paid and that he did not claim under it, and that the demandant had acted upon that representation, to his prejudice.

This is assuming what the case does not show and what is not true in point of fact. The defendant never held out to the demandant, that his mortgage was paid or satisfied, or that he did not claim under it. Nor did the plaintiff ever act upon any such representation; nor could he ever have been prejudiced by any representations or acts of the defendant, as the case clearly indicates. He was fully apprised of the existence of the defendant's mortgage, when he took his from Joseph T.

Copeland. Every thing done or said by the defendant respecting the mortgage or division of the place, was subsequent to that time, and could not therefore have influenced him in taking his mortgage. When he took his deed of Sept. 11, 1840, the relations of the parties were in no respect changed, his mortgage was not thereby discharged, nor were any new liabilities assumed, or created against the demandant. The plaintiff, too, has his remedy against Joseph T., on his covenants of warranty.

There is nothing in the case upon which to predicate an estoppel. The question of notice to the plaintiff of the defendant's mortgage, was settled by the verdict of the jury. The demandant is thus shown to have been put upon his guard, being acquainted with all facts in the case, necessary for him to know, for the preservation of his rights, as fully as they were known to the defendant. It is where important information in possession of one party, is suppressed or concealed from another, and such other party is induced to act thereby to his prejudice, that an estoppel can be set up. In a question of title to real estate, there can be no estoppel where there is a registry of the deed, or what is equivalent in law, notice to the party interested, which is the case here.

Upon this point see the case cited by plaintiff, of *Brinkerhoff* v. *Lansing*, 4 Johns. Ch. 65. See also, *Parker* v. *Barker*, 2 Metc. 423.

It is contended by the plaintiff, that a mortgage may be waived or discharged by parol, without any actual payment, and authorities are cited to show that the forgiving the debt secured by a mortgage, or assigning it, will draw the land after it as a consequence ; assigning the mortgage would convey the mortgagee's interest in the land ; the assignee would stand in the place of the mortgagee, and thus the assignment would draw the land after it ; so too, as between the mortgager and mortgagee, the forgiving the debt secured by the mortgage, would operate in the same manner as payment, thus extinguishing altogether, and discharging the incumbrance, and the land which was conveyed conditionally, would revest, the con-

dition having been performed; and thus the forgiving the debt would draw the land after it. An examination of the authorities cited by the plaintiff, will show that this is the manner in which this principle is to be understood, and this comes within the instructions actually given by the presiding Judge in this case. He instructed the jury to find if the debt had been paid or discharged, and who by their verdict, found that it had not. The foregoing then, has no applicability to the case under consideration, which is between the demandant and tenant, and relates to their interest, under their different mortgages, and who stand in very different relations from a mortgager and mortgagee. It was in this sense, that the instruction was asked and refused by the Judge presiding. He was requested to instruct the jury, that if the tenant, who was the prior mortgagee, had done certain acts or made certain parol declarations to the demandant, who was the subsequent mortgagee, that then, &c. Thus presenting the simple question, whether any thing was said or done by the defendant to the plaintiff; the defendant's mortgage being undischarged and the debt remaining unpaid and "unforgiven," amounts in law to a discharge, or waiver of his mortgage.

Or to state it as the counsel for the plaintiff would contend, whether any "acts or parol declarations," by a prior to a subsequent mortgagee are valid and binding in law, and have the effect of discharging or postponing such prior mortgage, there being a registry or notice of the same.

This is meeting the question fully and on much broader ground than the case warrants and the defendant contends that no such consequences could follow any such acts or declarations.

Suppose the defendant in this case had made a specific parol agreement, with the plaintiff, that his mortgage should stand discharged and that be would never claim under it. It would certainly be a much stronger case than this, which the plaintiff endeavors to raise by implication. Yet such an agreement would not be binding, being clearly within the statute of frauds. It would be a contract for "an interest in or concern-

ing lands," and all such contracts are void by that statute. See Revised Statutes, chap. 136, section 1; *Bliss & al.* v. *Thompson*, 4 Mass. R. 488—491; *Sherburn* v. *Fuller*, 5 Mass. R. 133; *Boyd* v. *Stone*, 11 Mass. R. 342; *Kidder* v. *Hunt*, 1 Pick. 328; *Hunt* v. *Maynard*, 6 Pick. 489; *Adams* v. *Townsend*, 1 Metc. 483.

To make the title to real estate dependent upon the "acts, conduct" or "parol declarations" of parties would be unavoidably attended with the utmost uncertainty and inconvenience, and would open a way for all that fraud and uncertainty which the law has so wisely and carefully guarded against. No man is obliged to take any thing upon trust in relation to the title to real estate, the law has provided ample means of knowledge to every one taking a title to lands, and he can only suffer by a culpable negligence, in not availing himself of those means.

In the case under consideration the demandant has never been misled or subjected to any loss or prejudice by any acts or agreements of the tenant; he has at most, according to his own showing, only failed to obtain an advantage to which he was not entitled, by making his second mortgage available against the rights of the defendant as secured by his prior mortgage, and it should not surely be imputed to the law as a fault, that it cannot aid him in this undertaking.

J. Appleton, for the demandant, replied.

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

WHITMAN C. J. — The action is in a plea of land, and of course is of proceeding at law, and not in equity The plaintiff therefore must make out a legal title to the demanded premises. His claim is under Joseph T. Copeland, the son of the defendant; first under a deed of mortgage bearing date July 6, 1836; secondly, under an absolute deed, containing a general warranty, under date of 11th of September, 1840; both recorded soon after their dates. If Joseph had a clear

title to the premises at the time he executed these deeds, the plaintiff's right to recover would be unquestionable.

But it appeared in evidence, that, before Joseph made his mortgage to the plaintiff, he had made one of the same premises to the defendant, to secure the payment of a *bona fide* debt due to him ; and of which the plaintiff, when he took his mortgage was apprised though it was not then recorded. The defendant's mortgage, therefore, must be considered as taking effect, in preference to the plaintiff's claim, the same as if it had been previously recorded; so that the defendant's title as security for the amount due to him, was paramount to that of the plaintiff.

The title standing thus at law, it would seem to be difficult for the plaintiff to entitle himself to recover, unless, as ruled by the Judge at the trial, he can show, that the debt so secured to the defendant, had been discharged by payment or release.

The case is now before us upon exceptions; and to those our attention must be confined. The plaintiff, at the trial, supposed he might rely upon certain acts and declarations of the defendant, which he alleges were of a tendency to deceive him, and which had the effect of inducing him to believe, that the mortgage to the defendant had become a nullity; and thereupon to enter into other negotiations with his son Joseph, whereby great injury will accrue to the plaintiff, if the defendant's mortgage is to be allowed to be set up in defence in this action.

The acts and declarations, thus relied upon, are stated to be as follows : — For several years prior to December, 1840, the plaintiff was allowed by the defendant to enjoy the rents and profits of the demanded premises, as tenant in common with the defendant, who owned the other half of the farm, without any objection on his part; and in December of that year he agreed with the plaintiff, verbally, on a division of it, in which a line separating the one half of it from the other was determined upon; but that it was thereupon concluded to suspend making partition deeds, in conformity to their agreement, till

a deed or some writings could be obtained by the plaintiff from Joseph; and once, when an individual was known by the defendant to have contemplated buying the demanded premises of the plaintiff, he said to that individual, it would be a good plan; and the defendant did not cause his mortgage to be recorded until 1841.

Upon these facts, which the evidence tended to establish, it appears that the counsel for the plaintiff, at the trial, requested the Judge to instruct the jury, that, although they might believe the plaintiff had notice of the defendant's mortgage, when he took his deed of September 11th, 1840, yet, if they should be satisfied that he was led by the acts, conduct and declarations of the defendant to believe that he did not claim by virtue of his mortgage, or that the same had been paid by the mortgager, and the plaintiff took said deed of September 11th, 1840, and paid or allowed said Joseph for the premises, in consequence of such belief, so induced by the defendant, that he was entitled to recover. This instruction the Judge declined to give; and one of the questions made is, did the Judge err in not giving it?

We have before seen that the title, anterior to any of the acts and declarations relied upon, was conditionally in the defendant by virtue of his mortgage. Have those acts and declarations, so far as the plaintiff is concerned, deprived him of it? It seems to be well settled at law, as well as in equity, that where "one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter, a different state of things, as existing at the same time." *Pickard* v. *Sears & al.* 6 Adol. & El. 469; *Gregg* v. *Wells*, 10 *ib.* 90; *Hearn* v. *Rogers*, 9 B. & C. 577; *The King* v. *The inhabitants of Batterton*, 6 T. R. 554; *Welland C. C.* v. *Hathaway*, 8 Wend. 480; 9 *ib.* 147; *Dezell* v. *Odell*, 3 Hill, 215; *Reynolds* v. *Loundsburg*, 6 *ib.* 534; *Barnard* v. *Pope*, 14 Mass. R. 437; *Thomson* v. *Sanborn*, 11 N. H. Rep. 200.

In this position thus established, it must be observed, that several things are essential to be made out in order to the operation of the rule; the first is, that the act or declaration of the person must be wilful, that is, with knowledge of the facts upon which any right he may have must depend, or with an intention to deceive the other party; he must, at least, it would seem, be aware that he is giving countenance to the alteration of the conduct of the other, whereby he will be injured, if the representation be untrue; and the other must appear to have changed his position by reason of such inducement.

In *Storrs* v. *Barker*, 6 Johns. C. R. 166, the rule in equity seems to have been laid down in accordance with these views. It was held in that case, that one knowing certain facts, which had the effect to create a title in himself to property, though unaware of such effect, if active in inducing another to buy the same, every one being bound to know the law, he should not be permitted, afterwards to allege his ignorance of it in attempting to recover the same from the buyer.

Upon this rule, as first stated, or as extended in *Storrs* v. *Barker*, we must suppose, the requested instructions were predicated. We must now look into the case, and see if they should have been given. In the first place, it does not appear that, in the call for instructions, any regard was to be had to whether the conduct, acts and declarations of the defendant were done or uttered with a design, or even with the knowledge, that they could or would influence the conduct of the plaintiff; or that they were done or said with a design that they should come to his knowledge; or with any reason on the part of the defendant, to suppose that they could or would influence the conduct of the plaintiff. The request itself, therefore, was defective.

Secondly; the facts set forth in the bill of exceptions, are not such as would warrant a call for instructions, under the rule referred to. Such is clearly the case, with regard to the plaintiff's mortgage. None of the acts relied upon, took place till long after that was made.

The next question is, would the requested instruction, if it had come within the rule, have been applicable, as to the other branch of the plaintiff's title, derived under the absolute deed from Joseph, made in September, 1840. To make it so applicable it should appear, that the facts relied upon occurred at the time, or before the making of the deed, as, otherwise, they could have formed no inducement to the plaintiff to take it. The verbal agreement to make partition would seem, from the evidence, set forth in the bill of exceptions, presented by the plaintiff, and allowed by the Court, to have been made in December after the date of that deed; and, therefore, could have formed no inducement for him to take it. The rents and profits, which the defendant allowed the plaintiff to receive, accrued before the taking of that deed. But that was nothing more than occurs between mortgager and mortgagee, in almost every instance of a mortgage; and the plaintiff was but in the place of the mortgager, in reference to the defendant; he having become seized merely of the right in equity of redeeming from him.

And it is of every day's occurrence for the mortgagee to forbear, for years, even, to enter on the mortgaged premises, against the mortgager or his assigns. The existence of the defendant's mortgage, must be regarded as having been well known to the plaintiff, from the time the latter took his mortgage, in 1836. There could, therefore, be no concealment or misrepresentation as to that fact. The plaintiff, thereafter, should have looked for something more than equivocal acts, merely admitting a possible inference, that it had been discharged. In doing otherwise, he must be considered as having acted without due precaution, and as liable to the imputation of gross negligence, in paying Joseph the full value of the demanded and mortgaged premises. As to the defendant's omission to record his deed, till 1841, it must be remarked, that, it had become, as to the plaintiff, the same as if it had been seasonably recorded. The title had vested under it in the defendant. This the plaintiff must be deemed to have understood, whether the deed was ever recorded or not. This, then, was not a circum-

stance which should have thrown him off his guard, when he took his absolute deed.

As to what passed between Safford and the defendant, in reference to the purchase of the part claimed by the plaintiff, it does not appear, that the plaintiff was apprised of it, before the taking of that deed. Moreover, it does not appear that the defendant was present, when the plaintiff took it. Indeed it does not appear that the defendant knew any thing of the nature of the bargain, which the plaintiff made with Joseph, in taking it.

There was then no act or declaration, done or made, in the presence of the plaintiff, by the defendant, which could fairly have been taken to be an inducement, intentionally held out to the plaintiff to make the bargain with Joseph, which resulted in taking from him his absolute deed of the premises; and of course, nothing that could have authorized a call for instructions, of the nature of those contemplated by the counsel for the plaintiff; and they were therefore properly refused.

We now come to the consideration of the instructions, which the Judge, at the trial, did give; and it must be admitted, that, abstractly considered, they were of an import, somewhat too general.

And it is not unusual for a Judge to express himself in general terms, having, at the moment, only the case before him presented to his mind, and having a view to that alone. The instructions were, that there could be no waiver by the tenant of his rights by parol; that nothing but a deed of release, or evidence of actual payment of the debt to the defendant, would avail the plaintiff. We have seen that the conduct and declarations of the defendant might have been such, that it would have been otherwise; and that, if those acts and declarations had been proved, so as to bring the case within the rule to which they would be applicable, the plaintiff might have recovered; but as they did not, the plaintiff is not aggrieved, in this particular, by the generality of the terms of the charge, and, therefore, is not entitled to maintain exceptions on account thereof.

Furthermore, it is urged, that, by the generality of the terms of the instructions, the jury were precluded from considering whether the debt due to the defendant had been forgiven; and it is true that such was the case. But then, the question again recurs, was there any evidence in the case, which could have authorized the jury to find that the debt had been forgiven.

This was a question between Joseph and the defendant. The position, that a debt may be forgiven, even by parol, is supported by authority. *Martin* v. *Mowlin*, 2 Burr. 969; *Mentz & ux.* v. *Dehaven, Executor*, 1 Serg. & Raw. 312. And it may well be conceived, that one may give up a personal security, he may hold for a debt, to his debtor to be canceled, with a declaration of his forgiveness of the debt; and that the debt would thereupon be extinguished. In the case of *Wentz* v. *Dehaven*, the creditor had given a writing under his hand, witnessed by two witnesses, to his debtor, his son-in-law, containing a declaration, that he never intended to call for the amount due by a bond and mortgage, which he held against him; nor for the interest thereon; and that he intended to give up the same; and over twelve years thereafter had elapsed, when the creditor died without any call for, or payment of either principal or interest; and the wife of the debtor, being the daughter of the creditor, the Court thinking it might be considered as an advancement to her, held the debt to have been forgiven.

But what have we in this case, tending to show a forgiving of the debt to the debtor? It is obvious, that, to be available to the plaintiff, it should be such a forgiving of the debt, as would enable the debtor to oppose a recovery of the debt of him, or that should tend to that effect. On looking into the bill of exceptions, we do not find the slightest evidence tending to show, that the debtor could ever have had any pretence for such a defence. On the contrary, he himself was a witness, and disclosed no ground for any such defence; but testified that the debt was justly due. The plaintiff, then, cannot be aggrieved because the charge of the Judge precluded the consideration of such ground of defence by the jury; and besides,

the case does not exhibit any attempt at the trial to set up any such ground as tending to defeat the defendant's claim; and of course the attention of the Court, was not brought to the particular consideration of any such exception, to the generality of its ruling.

It is further insisted, that the jury were precluded, by the charge, from giving their attention to a question of fraud as imputable to the defendant, affecting his rights, which it is contended the case presents. The reply to this must, in a great measure, be the same as to that in relation to the supposed forgiving of the debt. No question of fraud seems ever to have been brought to the notice of the Court, otherwise than is contained in the requested instructions, in reference to which we have seen that the pretence of actual fraud, on the part of the defendant, had no foundation in any of the evidence, supposed to have a tendency to support it. In fact the case as exhibited, could scarcely have involved the consideration of any other question, than that of actual payment of the debt to the defendant; and the jury, under proper instructions upon that head, found that the debt had not been paid; and it is also distinctly admitted by the counsel for the plaintiff, in his argument in writing, that the amount due is not paid.

It may be remarked that the conduct of both parties has been singular; and seems inexplicable upon any other hypothesis than that they had both labored under the impression that the recording the plaintiff's mortgage, before that held by the defendant, had vested the title in the plaintiff, to the exclusion of all right remaining in the defendant. The defendant may well be supposed to have been under such impression, as it does not appear that he was apprised of the fact, that the plaintiff, when taking his mortgage, knew of the existence of that of the defendant. The plaintiff being unlearned in the law, may also have been under the same impression. When the defendant discovered his mistake, he of course altered his conduct. In this view there would not seem to be the slightest ground for the imputation of a fraudulent intent on either

side. The plaintiff cannot be regarded otherwise, than as having been unaccountably remiss in taking his second deed and making additional advances upon the supposed strength of the title thereby acquired, without concerning himself at all with the title of the defendant, under his mortgage, and without the slightest inquiry, so far as appears, concerning it.

Exceptions overruled.

Ezra Trull *versus* Timothy Fuller.

A "clapboard machine and a shingle machine," fastened into a saw mill to be there used, are to be considered a part of the realty, and pass to the creditor or purchaser by a levy upon the real estate, or a sale thereof.

If such machines, remaining in the saw mill, and being used with it, during the whole time, are mortgaged to another, and the mortgage is recorded in the town clerk's office, but not in the registry of deeds for the county, and afterwards a levy is legally made upon the land, mill and appurtenances, the machines pass with the mill as real estate.

To convey that which constitutes a part of the real estate, but which by a severance may become a chattel, so as to be effectual against those who are not excepted in the statute, the same formalities are required as to convey the land, unless a severance first takes place.

This case came before the Court, upon the following statement of facts: —

"Trover for a shingle machine and clapboard machine. The conversion was alleged to have been on July 15, 1844. The general issue was pleaded and joined.

"To maintain the issue, the plaintiff introduced a mortgage from one Jacob Chamberlain to him, dated April 21, 1840, and recorded in the records of the town of Lincoln, where said Chamberlain lived, and where said machines were situated on the 24th April, 1840.

"It appeared, that the plaintiff made a demand on the defendant for the machines in July, 1844, before the commencement of the plaintiff's action. Said mortgage, or a copy thereof made on a former trial, may be referred to as part of the case without being copied.

"The defendant, on his part, introduced the record of a levy of an execution in favor of one William Ingalls, under whom he claimed, against said Chamberlain, from which it appeared that judgment was rendered on the first day of October, A. D. 1840, and execution was issued on October 5th, 1840, and a levy on the 24th October, 1840, on a certain saw mill in Lincoln, and said shingle machine and clapboard machine, situate in said saw mill, and as part of the real estate so levied upon. The record of said levy may be referred to by either party, without being copied. A copy of the writ, declaration and specifications in *Ingalls* v. *Chamberlain*, on which said judgment was founded and execution issued, with the officer's return thereon, also a copy of his return on said writ, left in the office of the register of deeds for the county of Penobscot, may be referred to, by either party, and so far as they are admissible evidence, may be considered by the Court as part of the case.

"Joseph M. Kimball, called for the defendant, testified as follows: —

"I put up the clapboard machine for Jacob Chamberlain in 1834, in the lower story of the saw mill. It was fastened at one end by two knees, and at the other by a knee or stick of timber. It was fixed so that it would rise and fall, but it could not be taken away without prying up the knees. The shingle machine was fastened to the floor by spikes, or nails, and keys. I put it up in 1838.

"On cross-examination he testified as follows: —

"The knees were not fastened to the clapboard machine. The shingle machine set on three sticks of timber, sixteen inches deep, which were made fast to the floor, and some spikes or nails were driven in at one end of the frame, and some keys upon the side to fasten the machine to the timber, and by taking out the nails or spikes and keys, the machine could be removed; and the witness further said, that he has known shingle machines to be removed from mills, and a clapboard machine could be taken out by raising it over the knees without removing the knees.

"Franklin Mussey, called for plaintiff, testified as follows:— I have known machines to be moved from one mill to another.

"On cross-examination, he said: — I knew it in one instance from Orland to Carmel. I did not take it out of the mill, and do not know how the mill referred to, was fastened, but I presumed it was fastened in the usual way. I sold this clapboard machine to Doct. Chamberlain.

"The main body of a clapboard machine is placed on wooden screws for the purpose of raising and falling it, and adjusting it to the log or cut to be sawed. There are two pieces of timber, three or four feet long on which the saw shaft runs. These are fastened to the floor. The saw shaft is fastened by the boxes in which it runs. The boxes are fastened by lead run into the timber. The shaft may be removed without the boxes. The boxes are a part of the machine.

"It was admitted that the clapboard machine in controversy was fastened in the same manner. Both machines were geared in the usual way.

"The witness further said, that the machines could not be taken out, without taking up the timber.

"If, in the opinion of the whole Court, the action is maintainable upon the foregoing evidence, or so much thereof as is legally admissible, the defendant is to be defaulted and judgment is to be entered for the sum of $70,60, with interest thereon from the 4th day of January, 1846; but if in their opinion the action is not maintainable, the plaintiff is to become nonsuit.

"J. S. Rowe, for plaintiff.

"Fred. Hobbs, for defendant."

No copies of any of the papers referred to in the statement came into the hands of the Reporter.

Rowe, for the plaintiff, contended that the attachment in the suit which was the foundation of the levy, under which the defendant claims, was void, because there was no such specification of the claim as the statute requires.

The making and recording of the mortgage of the machines,

operated as a severance of the machines from the land, and made them personal estate.

Hobbs, for the defendant, said that it had already been decided in this case, that the machines were real estate. The mortgage could not make real estate personal. Being of a portion of the real estate, and not being recorded in the registry for the county, and no notice to the defendant pretended, the mortgage can have no effect whatever.

It is wholly immaterial whether the attachment was good or not. The real estate, and the machines as a part of it, passed by the levy.

The opinion of the Court, SHEPLEY, TENNEY and WELLS Justices, was drawn up by

TENNEY J. — It is competent for the owner of real estate to sell upon good and sufficient consideration, fixtures thereon, which would pass under a conveyance of the realty, if they were not excepted. The purchaser would be entitled to sever the same within the time stipulated, or if no time was agreed upon, within a period, which under all the circumstances, and according to the character of the subject of the purchase, would be deemed reasonable. But without a severance, or some indication, actual or constructive, that they had been sold, they would, as between the purchaser and attaching creditors, or subsequent purchasers of the real estate to which they attached, be considered as still a part of the freehold.

A conveyance of real estate to be valid, excepting against the grantor, his heirs, devisees and those having actual notice, must be by deed acknowledged and recorded in the office of the Register of deeds in the county where the estate is situated. Rev. St. c. 91, § 1, 24 and 26. These provisions are substantially the same as those of the statutes of 1821, c. 136, § 1.

It follows, that to convey that which constitutes a part of the real estate, but which by a severance may become a chattel, so as to be effectual against those who are not excepted in the statute, the same formalities are required, unless a

severance takes place. Against those who can legally insist upon these formalities, the interest attempted to be sold does not become personal property, till there is a severance in fact, or until all that is required to convey real estate is perfected; before its former character can be changed by a sale, the sale must be such, as is necessary to convey property of that character; by a performance of a part only of what is required to pass a title to real estate, it does not cease to be what it was, prior to the first steps taken towards a conveyance.

This construction is not only necessarily inferred from the provisions of the statute, but upon a different construction, the registration law would be but an imperfect security to the grantees of real estate. It is often the case, that the most valuable portion of the estate referred to, in a deed of conveyance, are the buildings and fixtures thereon; and it is understood, that the title which a grantee obtains by a deed of land, is whatever the registry shows to be that of the grantor, unless he has actual notice of a different state of the title. This embraces not only the soil, but whatever is attached thereto, making a part of the freehold. If the owner could without a severance and without the forms required, for the transfer of real estate, transmit machines in a mill or factory, as personal chattels, when they are so situated as to make a part of the freehold, while held by him, he could in the same manner convey the mill or factory or any buildings standing upon the land described in the deed by which he should subsequently convey the land to another, having no notice of the previous sales of the buildings.

The registry in the town clerk's office of mortgages of personal property, is intended to be of that property which was personal before it was mortgaged; it is unnecessary that the instrument which is the evidence of an absolute sale of chattels should be recorded at all; and it could not have been designed that a mortgage of that, which was a part of the realty, before the mortgage was executed, should be recorded in the office of the town clerk, instead of the registry of deeds;

nothing short of the latter could be constructive notice to attaching creditors or subsequent purchasers.

The machines which are in controversy, in this suit, have been decided to be a part of the real estate in a former hearing of this case. There is no evidence, that they were severed from the freehold, before the levy, under which the defendant claims, or that he was notified of the mortgage to the plaintiff. The mortgage was not recorded in the office of the register of deeds of the county where the land was situated, but it was recorded in the town clerk's office, in the town where the mortgager resided, before the levy. In every respect, the plaintiff treated the machines as personal chattels, and not as partaking of the character of a part of the real estate on which they were placed. The steps taken were insufficient to give him title as against the creditor, who made the levy upon the real estate.

This view renders it unnecessary to consider whether there was a valid attachment upon the writ in the action, which resulted in the judgment on which the levy was made.

Plaintiff nonsuit.

HIRAM CORLISS *versus* SAMUEL SHEPHERD.

A debt discharged under the United States bankrupt act of 1841, is a sufficient consideration for a promise, made after the decree of bankruptcy, to pay the same demand.

A new promise to pay a debt, which otherwise would have been discharged by proceedings in bankruptcy, made after the decree of bankruptcy, and before the certificate of discharge, is valid and binding upon the party making it.

EXCEPTIONS to the Eastern District Court, REDINGTON J. presiding. A copy of the exceptions follows: —

"The writ may be referred to. Plea the general issue, with a brief statement setting forth the bankruptcy of defendant and his discharge by the District Court of the United States, &c.

"There was evidence tending to show a new promise since the bankruptcy. Whereupon the Court instructed the jury,

that it was necessary to show a new promise since the discharge of the defendant in bankruptcy; and that no prior promise would be effectual. To this ruling the plaintiff excepted."

Dinsmore, for the plaintiff, contended that the instruction of the District Judge was erroneous, because it went to the extent, that no promise could be availing, made prior to the final discharge in bankruptcy. If made after the decree of bankruptcy, the promise could not be filed as a claim against the effects of the bankrupt, and would not be barred by the discharge.

A promise, made after the decree in bankruptcy, and before the discharge, to pay a debt which might otherwise have been barred, is founded on a sufficient consideration, and is binding upon the party making it. He cited Eden's Bankr. 429; Cowper, 544; 2 H. Bl. 116; 1 T. R. 715; 1 Bingh. 281; 1 Stark. R. 370; 8 Mass. R. 127.

J. A. Poor, for the defendant, contended that the promise, being made before the discharge, if it amounted to any thing, could be proved as a claim, and therefore was barred by the statute. As the original claim could be proved, the new promise could not affect the question. The instruction, therefore, was correct. He cited, 1 U. S. Dig. 267; and 6 Hill, 246.

The opinion of the Court, SHEPLEY, TENNEY and WELLS Justices, was drawn up by

WELLS J. — This case comes before us, by exceptions to the ruling of the Judge of the District Court. The question arising in this case is, whether the action can be maintained against the defendant, upon a new promise, made by him after he was decreed to be a bankrupt, but before his discharge. If the promise had been made, after the discharge, the action is maintainable, the defendant being bound in equity and conscience to pay the debt. This obligation is a sufficient consideration for the new promise. *Besford* v. *Saunders*, 2 H. Black. 116; *Maxim* v. *Morse*, 8 Mass. R. 127.

The original debt, being proveable under the bankrupt act, the defendant was discharged from it. But the new promise, having been made after the bankruptcy, could not be affected by the discharge. That promise remains in full force.

In the case of *Thompson* v. *Hewitt*, 6 Hill, 254, and *Groule* v. *Gridley*, *ib.* 250, it is said, that the bankrupt is discharged from all debts, which he owed, at the time he presented his petition. From which we understand that debts, contracted afterwards, would not be embraced in the discharge.

If then a party would be liable, upon a new debt, arising after the petition, he would also be, upon one, accruing after bankruptcy, and neither of them would be proveable, and thereby not discharged.

A promise, to pay an existing debt, adds no new obligation, imparts no new vitality to it, but may prevent, by its recognition, any limitation from attaching to it.

But the defendant, when his promise was made, had been declared a bankrupt, and by the consummation of the proceedings, already in progress, obtained a discharge from this debt. A suit at that time by the plaintiff, to recover his debt, would have been, in all probability, unavailing. Had the promise been made before the petition was filed, it would have added nothing to the debt, or if it did, it would have been discharged with the debt. But the defendant's promise was not discharged nor was he then discharged from the original debt, but was expecting to be, and was so eventually.

The bankrupt act of 1841, allows the bankrupt the property acquired by him, after he has been decreed to be a bankrupt. *Ex parte Newhall*, 2 Story's R. 360. He may, therefore, have the means of redeeming his promises, made after bankruptcy.

By the English statutes of bankruptcy, the assignee takes all the property, which the bankrupt may acquire, before he obtains his certificate. Still he is liable, upon a new promise, made before or after his certificate is obtained, although the debt was proveable under the commission. Chitty on Con. 11, 52, 267.

In the case of *Birch* v. *Sharland*, 1 D. & E. 715, a bond and warrant of attorney to confess judgment, given by a bankrupt after bankruptcy, was held to create a new debt.

A debt due by the bankrupt before bankruptcy, is a good consideration for a subsequent promise, whether made before the certificate or afterwards, and that in the former case, it would not be barred by the certificate, and in both, the debt is revived, and is available against the bankrupt. Eden's Bankruptcy, 429. Lord Mansfield says, in *Trueman* v. *Fenton*, Cowp. 544, "a bankrupt may undoubtedly contract new debts, therefore if there is an objection to his reviving an old debt by a new promise, it must be founded on the ground of its being *nudum pactum*."

As to that, all the debts of a bankrupt are due in conscience, notwithstanding he has obtained his certificate, and there is no honest man who does not discharge them, if he afterwards has it in his power to do so.

The defendant, not having been discharged from a new promise, and the pre-existing debt being a sufficient consideration for it, is liable in this action. When the new promise was made, the ability of the creditor to collect his debt, so far depended upon the will of the debtor, as to render the probability of success, very remote. But the case does not disclose the precise nature of the new promise. We must suppose, that it was potential in its character, as all such promises must necessarily be, to have effect, if the defendant was finally discharged. For if there were no discharge, then there could be no need of a new promise. The promise then must have been intended, to be operative only, after the discharge.

It results, that the consideration is perfected by the discharge.

The Judge of the District Court, having instructed the jury, that no promise, made prior to the discharge, would be effectual, a new trial must be granted. *Exceptions sustained.*

Rufus Dwinel *versus* Timothy Barnard *& al.*

If one person had acquired a lawful right to float his logs over the land of another, without his consent, through an artificial channel made by the latter, and is resisted and obstructed in the use of it, by the owner of the land, and makes a contract with him to pay a sum of money for the removal of such obstruction, and for the permission to float his logs, such contract is unlawful and void.

Should a person obstruct the flow of the waters of a river or stream over their accustomed bed, so that they could not be used as formerly, for the purposes of boating, or floating rafts or logs, and should turn them into a new channel, he would thereby authorize the public to make use of them in the new channel, as they had been accustomed to use them in their former channel.

But if a person without right should open a sluice or channel on his own land, and thereby divert the waters of a stream, river, or lake, from their natural and accustomed course, without causing any obstruction elsewhere, the public would not thereby become entitled to their use over his land. They would not be entitled to enter upon his land, and to use the waters in his canal, channel, or sluice, made perhaps for the purpose of operating valuable machinery, because some other person had obstructed the flow and egress of the waters, from a distant point of such stream, river, or lake.

Although the law may not require the lapse of any particular time, to authorize the inference of a dedication to the public for use, there must be evidence, that the owner offered it and designed to do so, for public or common use.

To establish a toll, the channel, way, passage, or other easement, must be exposed and offered for the use of all, who may have occasion to use it, for a settled and established compensation. It must have become such a common channel, way or passage by the consent or act of the owner, that he cannot maintain trespass against any person, who may use it, paying the established toll.

Report of the trial before Shepley J.

"This is an action of assumpsit on a contract signed by the defendants, dated May 4th, 1846, which is to be copied.

"It appeared in proof, or was admitted, that before the year 1846, a dam had been built at the outlet of a lake, called by the parties Chamberlain lake; that the waters which formerly flowed from the Allegash stream passed into that lake, and that the waters passed out of the lake at that outlet before the dam was built and onward to the river St. John, and that logs could be run from above the lake through such waters into

the St. Johns river; that a cut or channel had been made through a part of the township named in the contract by which the waters being obstructed by the dam before named were turned from their natural channel and caused to run through such "cut" or channel into the waters connected with the Penobscot river, so that the logs could be run from the above lake into the Penobscot river, which formerly could be run only into the St. John or its waters.

"The defendants and several other persons, caused logs to be cut and hauled into the waters above the lake during the winter of 1845-6, with the expectation and design of floating them through the waters before named into the Penobscot river. There being several millions of lumber prepared for such purpose, the plaintiff apprehending that it was the design of the owners to float them through that cut or channel, made on his land, without making any agreement with him to pay any toll or compensation therefor, employed about fifty men and sent them up to that cut or channel, with directions to obstruct the outlet thereof and to prevent it, unless a contract was made to pay him therefor, and with directions that if any attempt was made to run the logs through by force, to prevent by force its accomplishment. The logs of the defendants, on the arrival of the men there, were found in the waters above and approaching the cut and were the first (except those of the plaintiff) which were to pass it. Notice was given that their logs could not be passed through it unless they signed the contract above named, and they thereupon signed it, and their logs were passed through. The men sent up were there detained some days after the defendant's logs were passed through to prevent other persons' logs from being passed through, without coming to some agreement to make compensation therefor.

"The grounds of defence will be perceived by the brief statement; and it was contended that if the defendants were liable on the contract, that they were not liable to pay any portion of the wages and support of the men after they had signed the contract. These being matters which were considered proper for the decision of the Court, the case was by

consent taken from the jury, and is submitted to the Court to decide, whether the defendants are liable on their contract to pay the plaintiff, and to what extent they are liable, and a default or a nonsuit is to be entered according as the rights of the parties may require. If a default be entered, the damages are to be assessed by a jury, if the parties do not agree upon any other mode of ascertaining them."

A map of the country was introduced, and may be referred to.

Copy of the contract referred to in the report.

"Memorandum of an agreement made this 4th day of May, A. D. 1846.

"In consideration of permission granted to us by Rufus Dwinel of the city of Bangor, proprietor of township No. 6, Range 11, to run through his cut in said township from Telos lake to Webster pond a certain lot or lots of logs, cut by us during the past season, scaling about 800 M. feet, we hereby agree and promise to pay said Dwinel for each and every thousand feet logs which shall pass through said cut the present season the sum of two shillings per thousand feet, and promise further to pay one half of all expenses incurred by said Dwinel in bringing up to said cut from Bangor, about fifty men, to protect and guard said cut, and all expenses in connection therewith, and to pay or satisfactorily secure the same in thirty days after said logs shall have been driven to Penobscot boom.

"Telos, May 4, 1846. "Timothy Barnard,

"Witness, Tho's F. Myln." "S. L. Hunt.

Copy of the brief statement of defendants.

"And for brief statement, the defendants say, that the contract declared on and on which this suit is founded was wrongfully and illegally obtained by the plaintiff. The defendants say further, that at the time said contract was executed they were floating their logs on the public and navigable waters of this State for boats, logs, rafts and other lumber from Lake Telos to Penobscot pond, or Webster pond; that their logs

had been put into the Allegash waters, or the Allegash river, a public river of this State, and navigable for boats, logs, rafts and other lumber, and were floating the same from the place they were cut on the waters of the Allegash to said Penobscot pond or Webster pond; that they were met on the way near the entrance of the sluice which leads from Telos lake to said Penobscot or Webster pond, by a large number of armed men, armed and sent up to said sluice by the plaintiff, who then and there threatened the defendants with force and violence, if they attempted to enter said sluice unless they first signed the contract aforesaid; that regarding the great loss of property to them consequent on a failure to come through said sluice and bring their lumber into a place of safety they signed said contract. And they say that the Allegash river in its natural channel flows east into the St. John's waters, but that the plaintiff or those under whom he claims, in 1841, turned the whole current of said river to flow west into the lake Telos and through said sluice into said Penobscot or Webster pond; and that without turning said Allegash said sluice would be of no use; that said plaintiff or those under whom he claims have since 1841 used said sluice and the public have used it for rafting and floating logs and other lumber. And the defendants say, that being on the waters of said Allegash they have a right to float their logs on the same in the current of said river, whether it flowed in its natural channel or an artificial one made without the authority of the Legislature of this State. The defendants further say, that they were floating their logs through Telos lake to Penobscot pond or Webster pond, under the belief and expectation, that they should come through said sluice without hindrance or resistance from any one by paying, or agreeing to pay a reasonable sum per thousand, and that they formed such belief and expectation from the plaintiff's own conduct and declarations before they went up to drive said logs, and that they were met at said sluice by a large number of men armed and sent there by plaintiff to prevent them from coming through said sluice, unless they first signed said contract; that they

were compelled to sign said contract to secure their lumber from danger and bring it to a place of safety.

"The defendants say further, that said contract was extorted by means of fear, at said sluice, and through the anxiety of the defendants to save their property.

"They declare said contract to be unconscionable, and the claim made under it."

Rowe, in his argument for the plaintiff, said that this action was brought upon a contract of the defendants, and for a sufficient consideration. That consideration was the privilege of passing their logs over the land of the defendant, so that thereby, they might have the benefit of the Penobscot river market, far better than the St. John would have been.

If any other person stopped the passage into the waters, which might otherwise have afforded a much more distant and far inferior market, that has nothing to do with the present question. The case does not show by whom that obstruction was caused. It is enough, that it was not caused by the plaintiff, or any one under whom he claims. In point of fact, it was caused by the very persons of whom the defendants purchased their logs, well knowing, that after paying the small sum charged by the plaintiff towards his expenses in making the channel, their logs would be doubled in value.

No injury was done by the plaintiff in opening this communication between the waters of lake Telos and the Penobscot river. It did not destroy or abridge any right before existing, but merely gave new facilities to the owners of timber in making sale of it.

The only question in the case seems to be, how much shall the plaintiff recover; and this depends upon the construction to be given to that part of the contract relating to the payment of the men.

Ingersoll and *I. Washburn* argued for the defendants.

The points made in defence, are stated in the opinion of the Court. They cited 7 Greenl. 273; 5 Pick. 199; 2 Fairf. 278; 19 Pick. 405; 10 Pick. 59; 7 Greenl. 134; Rev. Stat. chap. 164; 10 Mass. R. 65; Story's Conf. Laws, § 247; 2

Kent, (5th Ed.) 466; 11 Wheat. 298; 2 Fairf. 381; 15 Maine R. 428.

In this case, WHITMAN C. J. was not present at the argument, and took no part in the decision. The opinion of a majority of the Court, SHEPLEY and TENNEY Justices, WELLS J. dissenting, was drawn up by

SHEPLEY J. — This case is presented on a report, which states, that it was proved or admitted, that before the year 1846, a dam had been erected at the outlet of a lake called Chamberlain lake; that the waters of the Allegash stream flowed into that lake and out of it, before the dam was erected at the outlet of that lake, and thence onward to the river St. John; and that logs could be floated by such waters to the river St. John; that the waters being obstructed by that dam, were turned from their natural channel, and caused to run through a "cut" or channel, which had been made through a part of township numbered six, in the eleventh range, into the waters connected with Penobscot river; so that logs could be floated from the waters above the lake, into the Penobscot river.

A map of the country makes a part of the case, and from that it appears, that the lake and streams referred to, are at that place at a great distance from tide waters. Chamberlain lake, on the map, appears to be a large body of water, some fifteen to eighteen miles in length, and from one to two miles in breadth. The Allegash stream appears to connect with the north-westerly end of that lake, and its distinctive waters to be entirely lost in it. The dam, which obstructed the flow of the waters out of that lake, and onward to the river St. John, appears to have been erected at the outlet some three miles south-easterly of the north-westerly end of the lake. From the south-easterly end of Chamberlain lake, there called lake Telos, an artificial "cut" or channel from one to two miles in length appears to have been made, to connect those waters with waters flowing into the Penobscot river. It does not appear, by whom the dam at the outlet of the lake had been

erected, nor who was the owner of the land, upon which it was erected. Or that the plaintiff had at any time any interest in it, or in the land, upon which it stood, or any connexion with it, or control of it. So far as it appears, he was wholly unconnected with it. It does not appear how long before the year 1846, it had been erected. Nor does it appear by whom the "cut" or channel was made, nor when it was made. It is stated in the brief statement filed by the defendants, "that the plaintiff or those under whom he claims, in 1841, turned the whole current of said river, to flow west into lake Telos and through said sluice, into said Penobscot river or Webster pond." The plaintiff was the owner of the land in the year 1846, upon which that "sluice," "cut" or channel had been made.

There is no proof, that the plaintiff or any former owner of township numbered six, had at any time before the year 1846, or before the contract between these parties was made, permitted logs to be floated through the "sluice," or channel; or had ever before that year proposed, that any person should use it for that purpose upon payment of a toll or fixed compensation.

The defendants and other persons had during the winter of 1845 and 6, caused logs to be cut and hauled into the waters above Chamberlain lake, with the expectation and design of floating them through that "cut" or channel into the Penobscot river. The plaintiff, apprehending that such was their design, without making any agreement with him to pay him any toll or compensation therefor, employed about fifty men and sent them to that "cut" with directions to obstruct the outlet of the waters from the lake into the "cut," unless a contract was made with him to make compensation for such use of the "cut." Notice was given to the defendants, that their logs could not be floated through it without making compensation therefor. And on May 4, 1846, a written contract signed by the defendants was made, by which they obtained permission from the plaintiff to make use of that "cut" to float their logs into waters connected with the Penobscot river, upon certain terms therein stated. Upon that written contract this suit has been commenced.

If the defendants had acquired the right to float their logs in the channel made upon the plaintiff's land without his consent, the resistance and obstruction made by the plaintiff to such use of his land was unlawful, and the contract made with him to remove that unlawful obstruction must be considered as procured by duress and therefore invalid.

If on the contrary they had acquired no such right, they would become trespassers by such use of that channel without the consent of the plaintiff; and if they purchased of him a license to do such an act upon his land, a contract made to obtain that license would be a lawful contract. It would also be made for a valuable consideration, for it would impart to the defendants a right, to which they were not before entitled, and it would deprive the plaintiff of a right, to which he was entitled.

To be relieved from the performance of their contract the defendants must show, that they had before acquired a legal right to the use of that channel to float their logs over the plaintiff's land. The acquisition of such a right is asserted upon three separate and distinct grounds.

1. That by the erection of the dam at the outlet of Chamberlain lake and the obstruction of the flow of the waters to the river St. John, and by the opening of a "cut" or channel to permit them to flow into the Penobscot river, all persons entitled to the use of the waters as they formerly flowed, were equally entitled to the use of them, as they flowed on May 4, 1846.

2. That the owners of the land, on which that "cut" or channel was made, by making it and causing the waters to flow through it, dedicated it to the use of the public.

3. That the "cut" or channel was offered to the public for use, upon the payment of a toll, and that the owner having no right to establish a toll without a grant from the Legislature therefor, any citizen might make use of it, without the payment of toll.

1. In the consideration of the first position, it will be assumed, that the defendants had a right to use the waters of

the Allegash stream and of the lakes, to float their logs to a market.

Should a person obstruct the flow of the waters of a river or stream over their accustomed bed, so, that they could not be used as formerly, for the purposes of boating or of floating rafts or logs, and should turn them into a new channel, he would thereby authorize the public to make use of them in the new channel, as they had been accustomed to use them in their former channel.

If such were not the law, the public might be wholly deprived of their use by such wrongful act; for it might be impossible to cause the waters to return, and to flow again over their former bed.

But if a person without right should open a "cut," "sluice" or channel on his own land, and thereby divert the waters of a stream, river, or lake, from their natural and accustomed course, without causing any obstruction elsewhere, the public would not thereby become entitled to their use over his land. They would not be entitled to enter upon his land and to use the waters in his canal, channel, or sluice, made perhaps for the purpose of operating valuable machinery, because some other person had obstructed the flow and egress of the waters from a distant point of such stream, river, or lake. If this were not the law, the person who had opened such channel or sluice, on his own land, could never be relieved of the burden and liability to pay all damages occasioned by it, without repairing the wrong and removing the cause of injury occasioned by others, as well as that occasioned by himself. This would make him suffer for injuries occasioned by others, for whose conduct he had never become responsible. He might with little expense, be able to fill up or obstruct the channel made by himself, and thus be relieved from all liability to the payment of damages, for making it. But this he could never do, if the public immediately became entitled to its use.

And he might never become lawfully entitled to enter upon the lands of others, and to remove obstructions, occasioned by them at a distant point on such stream, river, or lake; for no

person could lawfully enter upon the lands of others, to remove such obstruction as a nuisance, who was not injured by its existence.

The person who diverts the waters of a stream, river, or lake, from their natural bed, is held responsible for all damages occasioned by his own acts. But the law does not make him responsible for the acts of others performed at a distant point on the same stream, river or lake. And he can no more be made responsible for them by being obliged to yield to the public the use of his private channel, than he can by an action at law. The injustice of it would be as great and glaring in the one case as in the other.

The application of these principles of law to the facts presented in this case, shows, that the defendants had not acquired a legal right to float their logs over the plaintiff's land without his consent, by reason of the dam and obstruction of the waters at the outlet of the lake and of the opening of the channel across the land of the plaintiff.

The plaintiff did not erect that dam. Did not own the land, upon which it stood. Did not obstruct the natural flow of the waters at that outlet. Cannot be held responsible for acts, which he did not perform or cause to be performed. Cannot be required to make compensation for such unlawful acts of others by allowing the defendants or others to use or enter upon his own lands, any more, than he can be required to do it by an action at law.

The defendants or others injured by the erection of the dam at the outlet of the lake, or by the opening of the channel on the land of the plaintiff, may obtain redress by an action at law to recover damages of those, who have occasioned such injury. Or they may remove the dam and obstruct or fill up the channel as nuisances. The right to abate the channel as a nuisance does not authorize the use of it for the accomplishment of valuable purposes of a very different kind. If a person could in all cases use a channel made and used by another on his own land for the diversion of the waters of a stream or river from their natural bed in the same manner

and for the same purposes, for which he might lawfully use them in the stream itself, the most valuable mills and manufactories might be thereby immediately destroyed.

2. The facts presented are entirely insufficient to prove, that the channel made upon the plaintiff's land had been dedicated to the public for use. It does not appear to have been used by any person for any purpose before the year 1846. The law does not require the lapse of any particular time to authorize the inference of a dedication. But there must be evidence, that the owner offered it and designed to do so for public or common use. There is no testimony tending to prove that the channel on the plaintiff's land was at any time offered for public or common use without compensation.

3. To establish a toll, the channel, way, passage, or other easement, must be exposed and offered for the use of all, who may have occasion to use it, for a settled and established compensation. It must have become such a common channel, way, or passage, by the consent or acts of the owner, that he cannot maintain trespass against any person, who may use it paying the established toll. Even such a use of property and exaction of compensation, is not regarded as illegal by the owner of a wharf. But there is no proof of such an exposition of the channel for public use, at an established price. No proof, that the plaintiff or the former owners of the land, ever offered the use of the channel to all persons disposed to use it, or to any persons, except those, who had caused logs to be cut upon the presumption, that they might in some way be enabled to float them through that channel. No toll, in the sense in which that word is used in the law, has been established or exacted or attempted to be; while compensation has been claimed, and that claim has been enforced for a license to float logs through the channel. In the case of *Wadsworth* v. *Smith*, 2 Fairf. 278, this Court decided, that "a proprietor may open a passage through his land for his own accommodation and may permit others to pass it under an agreement for compensation, which agreement being founded on a valuable consideration, to wit: the injury done to the freehold, may

be enforced at law. He may improve his watercourse by dams, locks or otherwise, and withhold their use from all, who will not make him a reasonable compensation." Upon the same principles he may make a new watercourse upon his land and withhold its use from all those, who will not make compensation, and authorize its use by those, who will. And contracts for such use will be lawful and valid. Those, who may be injured by the opening of such new watercourse, may abate it as a nuisance, or recover damages for that injury in an action at law. But they cannot become legally entitled to use it, because the owner of the land had no legal right to open it.

It is only by the misapprehension or by the confounding of principles, which distinguish one class of cases from another in some respects similar, that the defendants can be relieved upon the facts presented from the performance of their contract. To relieve them from its performance, the Court should be able to state clearly the principle, upon which their contract was held to be illegal, but no such principle has been presented.

The defendants by their contract, among other stipulations, promised "to pay one half of all expenses incurred by said Dwinel, in bringing up to said cut from Bangor about fifty men to protect and guard said cut, and all expenses in connexion therewith." The report states, that the men were there detained some days after the defendants' logs were passed through, to prevent others' logs from being passed through. And the Court are by the agreement to determine to what extent, the defendants are by their contract liable to pay those expenses.

It could not have been the intention of the parties to make the defendants liable for the payment of the time and expenses for the support of men, for an indefinite and unlimited time after their own business had been fully completed.

It doubtless was the intention to make them pay one half of all expenses, so long, as it became necessary to watch their operations. They will not therefore be responsible for any expenses incurred for the compensation or support of the men,

or for their detention after their own logs had been floated through the channel.

The defendants are to be defaulted, and the action is to be continued for the assessment of damages.

The following dissenting opinion was delivered by

WELLS J. — The facts of this case are very imperfectly presented. It does not appear, by whom, nor when the dam obstructing the passage of the water into the river St. John, was erected, nor who was the owner of the land upon which it was erected. Nor does it appear, who made the "cut" or channel on the plaintiff's land, nor when it was done. The case is so bald and barren of those facts, which should be known, to lay the foundation for a decision, that it would be more satisfactory, to have it presented to a jury, to ascertain them.

But there are facts enough to show, that the plaintiff is claiming to himself all the benefit of the dam and the channel. In the contract, upon which the action is based, the channel is called "his cut," and a person must be extremely incredulous, who does not believe that the plaintiff not only claimed the benefit of the "cut" but also of the dam. The "cut" and dam were made for each other, one being useless without the other, and while the plaintiff claims the benefit of the "cut" or channel, he does effectually claim that of the dam. He cannot shield himself upon the ground, that he has nothing to do with the dam, while he is claiming toll for the flow of waters, caused by the dam.

But assuming that he did not make either, and only succeeds to those who did, how does his claim stand? He owned the channel when the contract was made, claimed the right to take toll for its use, and was, therefore, availing himself of the use of the dam. He musters fifty men to maintain his claim, and compels the defendants either to fight their way through, to sacrifice their lumber, or to enter into a contract, the terms of which were dictated altogether by himself. Had he the right so to do?

There was a vast body of water, stopped by the dam, com-

prising Allegash and Chamberlain lakes, and the Allegash river, the outlet of those lakes. The natural flow of these waters was into the St. John, but they were turned by means of the dam and the channel, into the Penobscot river.

1. The first question which arises is, are the waters thus turned from their natural course, public or private? The public may acquire a right of servitude, in streams not considered navigable, at common law, by long user. *Berry* v. *Carle*, 3 Greenl. 269. And fresh water rivers, though in point of property, they are *prima facie* private, yet they may be of public interest, and belong to the people, as public highways. *Spring* v. *Russell*, 7 Greenl. 290; *Palmer* v. *Mulligan*, 3 Caines, 307; 3 Kent's Com. 27. The magnitude and capacity for public use of our great rivers and lakes, proclaim them as the highways, made by nature, to promote intercourse and commerce among mankind. *The People* v. *Platt*, 17 Johns. R. 195. It is well settled that the public may acquire a servitude in waters, not navigable, at common law. The Allegash is a fresh water river, not affected by the tides. It appears by the case, that it has been used by the public for floating logs, without any interference on the part of those claiming property in it. If the owners of its bed, allow the public to use the waters which flow over it, the right, to do so, is for the time being, equally as available to the defendants, as if it had been secured by a long user. No one questions the public right to use these waters, and it is unnecessary to inquire whether that right is gained by their extent and magnitude and natural fitness for commerce, or by long use, or by dedication on the part of the owners, of their bed to the public.

The waters are unquestionably subject to public use. Both parties have treated them as such, have floated their lumber on them, without any claim or objection made by any one.

2. Has the plaintiff a right to appropriate these waters to his use, and claim compensation from those, who pass through his channel? If the waters are public, he can only have a concurrent use with the citizens generally; he cannot be entitled to the exclusive use. The waters are not his, and cannot

be made so, by a mere change in their course. It is quite immaterial, whether he produced the change, or it was done by another, so far as the present action extends.

Here is not a case of the appropriation of water, for mills or manufactories, which even in such cases cannot be done, to the detriment of public rights, without the sanction of the Legislature, but an entire change of the outlet of a vast body of water, for the very purpose of turning it through a new channel, to float lumber into the Penobscot, instead of the St. John. The question does not depend upon who has done this act, but upon the right in the *waters* themselves. The *land*, in which the channel is cut, is the property of the plaintiff, but the waters are not. They belong to any one, who may desire to use them, to float lumber. When flowing through the plaintiff's channel, they are still the waters of the Allegash, and the property of the public is not divested. If one should change an arm of the sea, so that it should pass through his land, or should succeed by purchase of the land to one who did, the common law right of navigation would not be taken away, nor would the right depend upon who made the change, but upon the public nature of the waters. A claim to toll, in such a case, would hardly be tolerated on the ground, that the person, claiming it, was not the one, who made the change. Such waters would still be navigable, and it is that quality, which gives the right to their use, notwithstanding the change of location, by whomsoever effected.

A person, who might divert the Kennebec, Penobscot or any other public river, turning it through his own land, could not by such usurpation acquire exclusive control over those waters, and preclude the public, who had a previous right, from following and using them in their new courses. Nor could he by a conveyance to another, assign a right, which he did not possess. If the assignee could be permitted to say that he was not the wrongdoer, and therefore he had a just claim to prohibit any one from passing, the public would be entirely deprived of its property in those rivers.

Supposing the plaintiff had no agency, in erecting the dam, he would not be responsible for its consequences, and if the flow of the water through his channel was any detriment to him, he might cause the dam to be abated as a nuisance. But he does not object to the present course of the water; his conduct indicates that he considers it a valuable right, and is solicitous to secure the profits of it. If it had been made against his wishes, it would have been very easy for him, to have proved an invasion of his property.

How could the defendants be trespassers in passing their lumber through the channel? The water upon which that lumber floated, was theirs in common with all others. The plaintiff had the power to stop its flow there, but did not do it. He must therefore be considered as assenting to it. One has a right to follow his property, of which he has been wrongfully deprived, into the close and possession of another, if he commit no breach of the peace. But here was a continuity of property in the defendants, by means of the existing servitude, from the lakes and the river, through the channel, and it is not apparent, how one can be a trespasser in such a use of his own property.

The owner of land, through which a public river has broken and found a new bed, holds the same relation to the public as did the owner of the land over which it had previously flowed. He cannot claim the whole river as his property, because the waters are not his. Nor are those who use it trespassers. It is said in Angell on Watercourses, 221, "by what was said as to those rivers which are public highways, it will appear, that a river of this kind, by constituting to itself a new channel, may convert a private field into public property; that is, the new channel becomes public for use and accommodation, and cannot be impeded or obstructed."

This principle is derived from the civil law. "If a river, entirely forsaking its natural channel, hath begun to flow elsewhere, the first channel appertains to those, who possess the land close to the banks of it, in proportion to the extent of each man's estate next to such banks; and the new channel

partakes of the nature of the river, and becomes public. And, if after some time the river returns to its former channel the new channel again becomes the property of those who possess the lands contiguous to its banks." Just. Insti. Lib. 2, Title 1, § 23. And this doctrine does not appear to be at variance with that of the common law, but it is believed that it can be clearly inferred from the principles of that law, applicable to public rivers.

If the river has been changed by artificial means, which are still existing, and the owner of the new bed, though he did not cause the change, suffers it to continue, he cannot thereby acquire entire dominion over it. He might as well say in the one case as in the other, that those who have a right to the use of it, should restore it to its ancient channel.

The beneficial use and right is in the waters, and the owner of the substratum, upon which they rest, cannot draw to himself an exclusive property in them.

It is manifest, that there was a concurrent action between those who built the dam, and those who made the channel, and the plaintiff, if he was not one of those, is the owner of the land where the channel was made, and succeeds to the property, in the position in which they placed it; their wrongful acts can confer no right upon him; as they could not acquire the control of the water, he cannot be in any better situation by their misfeasance. If they could not hold the defendants as trespassers, the sale of the land to the plaintiff would not render them such. He took the land with the property of the public, and can acquire no rights superior to theirs.

In *Arundel* v. *McCulloch*, 10 Mass. R. 70, it is said, that no individual can appropriate navigable waters to his own use, or confine or obstruct, so as to impair the passage over them, without authority from the Legislative power.

The same principle must apply to those waters, in which a public easement exists, for floating boats, rafts or logs.

The defendants having a right to follow the waters of the lakes and the Allegash, through the channel made on the

plaintiff's land, the contract, which was entered into by them, is void for want of consideration.

3. The power of taking toll is a part of the sovereignty, and the exercise of it must be derived from the government. A person cannot erect a bridge or make a road, holding them out to public use, and taking toll, without authority from the State. But he may erect a bridge or open a passage through his own land for his own accommodation, and may permit others to pass them under an agreement, for compensation, yet he cannot take a settled or constant toll, even in his own private land. The distinction consists in the dedication, or holding out of the franchise to public use, and in the reception of toll; and in a private use, in which others are allowed to participate for compensation. *Olcott* v. *Banfield*, 4 N. H. R. 537; *State* v. *Olcott*, 6 N. H. Rep. 74; *Wadsworth* v. *Smith*, 2 Fairf. 278.

The plaintiff, and those under whom he claims, must have contemplated, that the owners of lumber over a vast extent of territory, would be under the necessity of running it through the "cut" or channel to market, and that compensation would be obtained for the transit. The plaintiff claimed a toll of two shillings per thousand feet. Apprehending an attempt would be made to pass through the channel without payment, he sent fifty men with instructions, to prevent by force, the accomplishment of such purpose. The defendants entered into the contract declared on, agreeing to pay the toll demanded, and one-half of the expenses, incurred in the services of the men.

There were several millions of feet of lumber, cut by the defendants and others, lying in the waters, and intended to be passed through the channel, at the time, when the contract was made. Indeed there was no other way to run lumber from the Allegash and its tributary waters, into the Penobscot river, but through it.

He manifestly held the channel out to public use, claiming a toll for it. The defendants offered to pay what the Legislature should establish or the law allow, but the plaintiff would not permit the logs to pass, without an agreement to pay the toll, which he had fixed.

No doubt any one may make a road over his own land, and erect a gate, and refuse to let persons pass, unless compensation is made for the use of the road. And if the road is really made and intended for his own use, he would have a right to receive compensation for the license. But if the road is made for the use of the public, or one already existing so appropriated, with the intention to derive toll from a public use, such a franchise cannot be established without authority from the government. A partial and limited use by the owner himself, in concurrence with the public, could not alter the real nature of the franchise. So also a person may make a canal and locks to improve the navigation of a private river, for his own use, and receive compensation for the use of them by others, but if the great and paramount object is public and not private use, to obtain tolls or profit from the public, such a course cannot be pursued without a charter from the Legislature.

Unless so plain a distinction is observed, it would be easy for any one, to establish a lucrative franchise, without application to the proper authorities, and numerous evils and impositions would flow from such assumptions, on the part of individuals, claiming such powers, which would be restrained only by their own interest or will. The present case is a fit illustration of the wisdom of the law, in establishing the principle under consideration. The plaintiff causes a band of fifty men, to march many miles, for the purpose of preventing by force of arms, the use of the channel without the payment of a toll, which he has established, thus endangering the public peace, and the lives of those who might enter into the conflict. And the defendants, to save their property, which would have been worthless, unless it could have been got to market, were under the necessity of entering into the contract, prescribed by the plaintiff, not only to pay the toll, but one-half of the expenses incurred by the plaintiff in the alleged employment of his men, to protect and guard the channel; thus swelling his claim to an enormous amount. While there is no evidence of any preparation, on the part of the defendants, to obtain by force, the use of the channel.

This case is submitted to the Court, for its decision, upon the facts, without the intervention of a jury. It is a question of fact, whether the plaintiff held his channel out for public use; or whether he kept it for private use; and the public use was but incidental. But the whole bearing of the facts most clearly shows, that the channel was kept for public use. It was evidently intended for the passage of lumber, to be cut on an immense extent of territory, and there is no evidence the plaintiff owned any more than the township, through which it was made. His own lumber must have been of small amount, in comparison with that of all other owners.

At the time when the defendants entered into the contract, there were several other persons' logs passed through the channel, and of whom compensation was claimed, and the men were detained to prevent their passage without some agreement to make compensation.

No length of time is necessary for the continuance of such claim, to render it illegal. The first act of claiming toll, under a franchise, set up without authority, is as objectionable, as a subsequent one. How long prior to 1846 such claims had been made is not exhibited, but there is sufficient evidence, in that year, of those made, to show the extent and purpose of them, and to prove the paramount object to have been to keep the channel for public use.

The plaintiff being prohibited by law, from taking toll under such circumstances, the contract was in violation of law, and cannot lay the foundation of an action.

4. But there is another ground of defence to this action, even if the claim were not in direct violation of the law and prohibited by it. It is true a contract obtained by menace of a trespass to lands or goods, by the common law, is binding, because redress may be obtained, if such injuries be inflicted. Chitty on Con. 55. But in *Chase* v. *Dwinal*, 7 Greenl. 134, the plaintiff recovered back the money, he had paid for boomage of logs, which were not subject to it. As the loss of property would have been very great to him, if he had resorted to an action for damages, or to recover his logs, detained under a

claim, illegally made, he was allowed to recover the money paid, on the ground of extortion, and that the payment was not voluntary.

The contract, which the defendants made, is inoperative for a like reason, the logs not being subject to the demand of the plaintiff. No threat of injury to their property was made, but to save themselves from an impending loss, they signed the contract. The same principle, which would have enabled the defendants to recover back the money, if it had been paid, furnishes a defence to the action.

In my opinion, there are no legal grounds upon which this action can be sustained.

A TABLE

OF THE

PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.

AMENDMENT.

See ATTACHMENT, 8. USURY.

APPEAL.

1. Where an action, commenced before a justice of the peace, has been defaulted, no appeal lies thereupon to the district court.

Harris v. *Hutchins*, 102.

2. And if, in such case, there is an entry of the action in the district court, and it is continued, it may be dismissed, on motion of the plaintiff, at the second term. *Ib.*

3. If the defendant procures an appeal, from a justice of the peace, to the district court, in a case where he is not entitled to it, and the record which he introduces, exhibits a bar to his proceeding, it will be dismissed on motion of the plaintiff, with costs for the plaintiff as the prevailing party. *Ib.*

4. In *scire facias* against a supposed trustee, and it would seem in all actions commenced originally before a justice of the peace, where the pleadings are closed by a demurrer and joinder, and the action is carried by appeal to the District Court, *no appeal* lies from the decision of that Court, upon the same pleadings, to the Supreme Judicial Court.

Putnam v. *Oliver*, 442.

ASSIGNMENT.

1. An assignment of the debtor's interest by virtue of a contract for the conveyance of land, made and received for the purpose of defrauding the creditors of the assignor, is void against creditors, subsequent as well as prior to the assignment. *Whitmore* v. *Woodward*, 392.

2. If the fraudulent grantee has paid part consideration, and the plaintiff in equity is willing to admit, that the grantee holds in trust, and to convey to the plaintiff upon receiving such sum as was paid by him, no objection can arise to such an adjustment. *Ib.*

ASSUMPSIT.

See ACTION, 6. ATTACHMENT, 8. CORPORATION.

ATTACHMENT.

1. Where an attachment was made on mesne process, the action entered in Court at the regular term, defaulted, judgment entered up and execution issued; and where at the next succeeding term of the Court, "on motion of the plaintiff, it was ordered by the Court, that the judgment and execution aforesaid be annulled, and that the execution aforesaid be returned into the clerk's office; and the action was thereupon brought forward to" that term, — *It was holden*, that the attachment was dissolved, and that another attachment, made after the time when the first suit was brought forward, and before the time of the last judgment, had the priority.

Leighton v. *Reed*, 87.

2. The Rev. Stat. c. 114, § 38, does not exempt *machines* from attachment or sale on execution. Articles correctly designated by the use of that term, *in popular language*, cannot be considered as exempted by the words of the statute, "*the tools of any debtor.*" *Knox* v. *Chadbourne,* 160.

3. A "*peg machine*" is not exempted from attachment, or sale on execution, under that section of the statute. *Ib.*

4. By Rev. Stat. c. 114, § 73, "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," is liable to be attached and held, after as well as before the condition has been performed, where no valid conveyance of the title was made prior to the attachment. *Whitmore* v. *Woodward,* 392.

5. The waiver of performance at the time specified in a contract for the conveyance of land, attaches to the contract and becomes a part of it, and the creditor takes it, by the provisions of the statute, as it belonged to the debtor. *Ib.*

6. Between the parties to such contract for the conveyance of real estate, no lien attaches to the land. But in relation to the creditor, the statute declares it to be an attachable interest, as if it "were tangible property." An attachment, therefore, of "all the right, title and interest of the said debtor in and to the said real estate described in said indenture," is a valid attachment of the right by virtue of the contract. *Ib.*

7. If the owner of the land contracted to be conveyed, without any fraudulent intention on his part, after an attachment thereof, conveys the land to a third person, who takes it for the purpose of defrauding the creditors of the debtor, a bill in equity may be maintained by the purchaser of the debtor's right against the fraudulent grantee, to obtain a conveyance of the land, without joining as a party, the original owner. *Ib.*

8. In an action of assumpsit, if another person be made a co-plaintiff, by amendment of the writ by leave of Court, the attachment of property upon the writ is thereby dissolved. *Moulton* v. *Chapin,* 505.

See OFFICER.

ATTORNEY AND COUNSELOR.

In an action by two counselors and attorneys, as partners, they cannot change the appropriation of money paid to them after the partnership existed, and credited at the time on the partnership account, after the lapse of years, to an appropriation to the payment of a prior claim of one of the partners, rendered in the same suit. *Codman* v. *Armstrong,* 91.

BAILMENT.

In the trial of an action to recover damages for an injury to the plaintiff's *gondola*, occasioned by the negligence of the defendant, to whom it had been bailed, in suffering it to be frozen in the ice, where the defence was that it had been delivered up to the plaintiff, before any injury to it had taken place, the Judge rightly declined to instruct the jury, that the testimony of certain witnesses, if believed, would prove that the gondola had been so delivered up to the plaintiff, that being for the determination of the jury, and not of the Court. *Alley* v. *Blen,* 308.

BANKRUPTCY.

See REPLEVIN, 4.

BASTARDY.

See District Court.

BILL OF PARTICULARS.

See Action, 3.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

See Surety.

BRIDGE.

1. If a grant of a charter be made, authorizing the building of a bridge, and there is contained in it a reservation or condition, with a view to the particular interest of an individual, such as exhibiting in view the rates of toll, he may avail himself of the omission, in defence of a suit against him to recover the penalty incurred by passing the bridge with the intent to avoid the payment of toll. *S. W. Bend Bridge* v. *Hahn*, 300.

2. But if such grant be made on conditions which would not be for the particular benefit or accommodation of an individual, such as building the bridge in a different manner from that stipulated in the charter, the Legislature alone can interfere and inquire whether the condition has been performed; and an omission to comply strictly with the condition, cannot be set up by an individual as an excuse for his own violation of the provisions of the act. *Ib.*

3. Where one acts as toll-gatherer, and as such, demands toll of a person passing the bridge, and his acts are adopted by the corporation, such person passing the bridge, with the intent to avoid the payment of toll, cannot object in defence, that the toll-gatherer was not legally chosen or appointed. *Ib.*

4. In an action to recover such penalty, if the plaintiffs are described in their writ, as the "Pro. S. W. B. Bridge, a corporation established by law, in Lisbon, in our county of Lincoln," in which county the action is brought, such statement must be taken to be true, on the trial of the action, where the general issue only is pleaded. *Ib.*

CERTIORARI.

See County Commissioners.

CONSTABLE.

See Bankruptcy, 7, 8.

CONSTRUCTION.

See Deed, 1, 2, 3, 4, 5. Will, 1.

CONTAGIOUS SICKNESS.

A town is not liable to pay a physician, for his services, in attending upon persons sick with a contagious disease, who have ability to make payment themselves, without his being employed by the selectmen of the town;

although they have, under the provisions of Rev. Stat. c. 21, taken measures to prevent the access of others to the place, and have appointed a person to superintend the house, and take care of its inmates. To make the town liable, the physician must be employed by the selectmen; their knowledge and assent to his performing the services is not enough.

Kellogg v. *St. George*, 255.

CONTRACT.

See ACTION, 2, 4. ATTACHMENT, 4, 5, 6. DEED, 2. NEW TRIAL, 2. RIPARIAN RIGHTS, 1. TRUST, 1.

CONVEYANCE.

See DEED. LEVY ON REAL ESTATE, 8. MORTGAGE.

CORPORATION.

Where a rail road passes over parts of two counties, the Rail Road Corporation may maintain an action of assumpsit in that county wherein they have an office which is "made the depositary of the books and records of the company by a vote of the directors, and a place where a large share of the business is transacted," although the company may at the same time have another office in the other county, where the residue of their business is transacted, and in which the treasurer and clerk reside.

Androscoggin & Kennebec Rail Road Co. v. *Stevens*, 434.

COSTS.

Where an action was commenced in the District Court, and a verdict was there rendered in favor of the plaintiff for eighty dollars as damages, and the defendant appealed; and on the trial in this Court the verdict was for the plaintiff for twenty dollars, damages; and exceptions to the ruling of the presiding Judge were filed by the plaintiff, and the action was continued; *it was holden*, that in entering up judgment, the plaintiff must be restricted to the recovery of costs equal to one quarter part only of the amount of damages found by the jury. *Forbes* v. *Bethel*, 204.

COVENANT.

See DEED, 6, 7, 8, 9, 10. MORTGAGE, 4, 5.

COUNTY COMMISSIONERS.

1. There is no provision of law, by which the Atlantic and St. Lawrence Rail Road Company, can be compelled, by an order of the County Commissioners, to pay for the "services of the commissioners and for their expenses, incurred while they were employed on petitions presented by the company to have the damages assessed, sustained by persons, by the location of that rail road over their lands.

Atlantic & St. Lawrence R. R. Co. v. *Cumberland County Com'rs*, 112.

2. A *certiorari* will not be granted to quash the proceedings of the county commissioners relative to the assessment of damages occasioned by the

DAMAGES.

See REPLEVIN, 2, 3, 4.

DEED.

DEPOSITION.

cause of taking, no longer exists, but also that the witness, is within thirty miles of the place of trial and able to attend the trial in person. *Ib.*

DEMURRER.

See APPEAL, 4.

DISTRICT COURT.

The District Courts, by the Revised Statutes, have power, after verdict and before judgment, on motion and without any additional evidence, to set aside the verdict of a jury in a bastardy process, because in the opinion of the Court against evidence, and grant a new trial.

Eaton v. *Elliot*, 436.

See APPEAL.

DOWER.

1. In an action of dower, the marriage of the demandant may be inferred from proof of long cohabitation, continued until the death of the alleged husband, being received and treated as his wife, and their bringing up and educating a family of children as their own. *Carter* v. *Parker*, 509.
2. Proof of the conveyance of the premises, wherein dower is claimed, to the husband by deed of warranty, and his conveying the same to another person during the coverture, in the absence of all evidence to the contrary, is sufficient to prove the seizin of the husband. *Ib.*
3. The widow is entitled to have such part of the land set out to her as dower, as will produce an income equal to one third part of the income which the whole estate would now produce, if no improvements had been made upon it since it was conveyed by the husband. *Ib.*

See ESTOPPEL, 1.

EQUITY.

1. Although an administrator of an insolvent estate may be entitled in proper cases to the aid of this Court, as a court of equity, to obtain property conveyed by the intestate to defraud his creditors, for the purpose of appropriating the same to the payment of the debts against the estate, yet one creditor cannot maintain a process in equity for that purpose.

Caswell v. *Caswell*, 232.

2. The plaintiff in equity must do all which the law will enable him to do, to obtain the object of his pursuit; and until he has exhausted his legal remedies, he is not entitled to the aid of a court of equity. *Ib.*
3. When it is attempted to reach the avails of property fraudulently conveyed, by a process in equity, it should appear that a judgment has been obtained of some description, which cannot be impeached by the party to be affected by the relief sought; and that every thing has been done therewith, which the law requires, to obtain satisfaction of the same. *Ib.*

ESTOPPEL.

2. At law, as well as in equity, where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring, against the latter, a different state of things, as existing at the same time. *Copeland* v. *Copeland*, 525.

3. But several things are essential to be made out in order to the operation of the rule: — the first is, that the act or declaration of the person must be wilful, that is, with knowledge of the facts upon which any right he may have must depend, or with an intention to deceive the other party; he must at least, it would seem, be aware that he is giving countenance to the alteration of the conduct of the other, whereby he will be injured, if the representation is untrue; and the other must appear to have changed his position by reason of such inducement. *Ib.*

See DEED, 9.

EVIDENCE.

1. In an action to recover the amount of a tax assessed in the town of C. upon the defendant, as an inhabitant thereof, and where the defence was that he had removed from that town prior to the first day of May of that year, a copy of the record of an assignment of a mortgage to him, from the registry of deeds, wherein he was described as of C. without any other evidence to connect the defendant with such assignment, is not admissible in evidence against him. *Bennett* v. *Treat*, 212.

2. If a record of a judgment of a justice of the peace has been lost, the party who would avail himself of it must show, that he has exhausted, in a reasonable degree, all the sources of information and means of discovery, which the nature of the case would naturally suggest, and which were accessible to him, before other evidence is admissible. *Wing* v. *Abbott*, 367.

3. Cumulative evidence is additional evidence of the same kind to the same point. *Glidden* v. *Dunlap*, 379.

See DEED, 2. DEPOSITION. DOWER, 1, 2. ESTOPPEL. INNHOLDERS, &c. LIMITATIONS. NEW TRIAL. POOR DEBTORS, 3, 6, 7, 10. SCHOOL DISTRICT, 1, 2. SURETY, 1, 3.

EXCEPTIONS.

1. Exceptions will not be sustained, on the ground that the presiding Judge erred in declining to give a certain instruction to the jury on request, unless the exceptions show, that the instruction requested was applicable to the case. *Thomaston* v. *Warren*, 289.

2. If a part of an instruction requested by counsel, upon a particular point at a trial, be correct, and a part erroneous, it is not the duty of the Court to give such part as may be correct, but the whole request may well be declined. *Ib.*

3. Where the exceptions state merely, that "the witness was objected to," and admitted, without stating any cause of objection, no question is presented for the consideration of this Court. *Glidden* v. *Dunlap*, 379.

2. Where the declaration, in such case, alleges, that the selling took place on the twenty-fifth day of December, in a certain year, and "on divers other days, from said 25th day of December and the first day of June following, and only one act of selling is proved, not on the 25th of December, the declaration is sufficiently specific as to time. It is irregular to insert the words following the first day mentioned, but those words are unimportant and it is not necessary, that the act proved should be on the precise day alleged. *Ib.*

3. And if the declaration alleges, that the defendant "did sell a quantity of spirituous liquors, to wit: one glass of rum, one glass of wine, one glass of brandy, one glass of gin, and one glass of spirituous liquors, or a part of which was spirituous, to certain persons unknown," and the selling, proved, is of one glass of gin, to a certain person named, an objection on this ground, can be taken advantage of only on demurrer to the declaration. *Ib.*

4. Where the statute provides, that the penalty to be recovered shall be from one to twenty dollars, and the parties agree, that the jury shall ascertain the amount to be recovered, and the presiding Judge admits evidence, with a view only to enhance the penalty to be recovered, the defendant objecting thereto, of selling at other times than the one relied upon, the defendant cannot be considered as aggrieved by the admission of such evidence. *Ib.*

5. On the cross-examination of a witness, introduced by the defendant, the presiding Judge, in the exercise of a sound discretion, may rightly permit an inquiry of the witness for his reasons why he did certain acts, to test the accuracy of the recollection of the witness, or to affect his credibility, although it may have no direct tendency to support or disprove the issue. *Ib.*

6. Where the declaration alleges that the plaintiffs, being the inhabitants of a town, "prosecute this action by" certain persons named, one of the persons so named does not thereby become a party to the suit, and is not in consequence thereof rendered incompetent as a witness. And even if he were to be considered a party, he is still made a competent witness in such case by stat. 1846, c. 205, § 6. *Ib.*

7. The declarations of the defendant, that he had kept, and would keep spirituous liquors for sale, although they did not immediately accompany the act of selling as proved, are admissible in evidence on the trial of such action. *Ib.*

8. It is sufficient, if the evidence will warrant the jury in finding that the defendant actually sold spirituous liquors as alleged, although disguises might have been put in practice to make it seem otherwise. *Ib.*

9. There is no prohibition, either at common law or by statute, of the service of process, in criminal cases, on the Lord's day, except in so far as the service of the same might be unnecessary on that day. *Keith* v. *Tuttle*, 326.

10. A warrant, issued upon a complaint under the statute of 1846, c. 205, to restrict the sale of intoxicating drinks, may be lawfully executed on the Lord's day; although, perhaps, subject to the limitation, that it should not be an unnecessary act, to be performed on that day. *Ib.*

2. And if the officer making the levy, as a coroner, held at the time one commission, as a coroner, and another, as a justice of the peace, that will not render the levy void. *Ib.*

3. A levy of an execution on real estate not recorded within three months, will be invalid, except against the debtor and his heirs, and those having actual knowledge thereof. *Stevens* v. *Bachelder*, 218.

4. The record of the conveyance or the deed, or levy on real estate, itself, left in the registry for record, was the only legal notice by registry of the conveyance of real estate, recognized by our statutes before the enactment of the provisions contained in Rev. St. c. 91, § 25, and perhaps still is. If therefore, before that statute, the deed or levy was left with the register of deeds, and he made a certificate thereon that it had been recorded, and it was then withdrawn and taken from the office by the grantee or creditor before any record thereof was actually made, such proceedings furnish no legal notice to subsequent purchasers or creditors of such conveyance. *Ib.*

5. The record of the return of the officer of the levy of an execution on real estate without his signature to the return to authenticate it, cannot be considered such a record as the statute required to make the levy effectual against subsequent purchasers. *Ib.*

6. A "clapboard machine and a shingle machine," fastened into a saw mill to be there used, are to be considered a part of the realty, and pass to the creditor or purchaser by a levy upon the real estate, or a sale thereof. *Trull* v. *Fuller*, 545.

7. If such machines, remaining in the saw mill, and being used with it, during the whole time, are mortgaged to another, and the mortgage is recorded in the town clerk's office, but not in the registry of deeds for the county, and afterwards a levy is legally made upon the land, mill and appurtenances, the machines pass with the mill as real estate. *Ib.*

8. To convey that which constitutes a part of the real estate, but which by a severance may become a chattel, so as to be effectual against those who are not excepted in the statute, the same formalities are required as to convey the land, unless a severance first takes place. *Ib.*

LIEN.

See Bankruptcy, 1, 2. Insolvent Estates, 2.

LIMITATIONS.

1. The Rev. Stat. c. 146, § 25, does not make the twenty years a bar, but creates a presumption of payment. It is like the common law provision, presuming a bond to be paid, after a lapse of twenty years, and may be rebutted. Testimony, therefore, tending to rebut the presumption is admissible in evidence. *Brewer* v. *Thomas*, 81.

2. Where there appeared in evidence, — the poverty of the debtor, — a demand of payment, by the creditor, — and an answer by the debtor, to the demand, "that he would come up soon, and do something about it," — *it*

2. Where the declaration is upon a special contract, the contract must be proved as set forth, or the plaintiff cannot recover. If, therefore, the evidence, in reference to the contract and the supposed breach thereof, is altogether variant from what is set out in the declaration, a verdict for the plaintiff, not being warranted by the evidence, must be set aside and a new trial granted. *Kidder* v. *Flagg*, 477.

3. If the instructions of the presiding Judge are such as to withdraw from the decision of the jury a question exclusively for their decision, and not for that of the Court, still, it would seem, that if in the opinion of the Court, there was no evidence in the case from which the jury would have been authorized to decide the question in favor of the party complaining of the instruction, that such erroneous instruction will furnish no sufficient cause for granting a new trial. *Copeland* v. *Copeland*, 525.

See District Court.

OFFICER.

1. An officer is not authorized by a precept against one person to take the property of another. But a previous demand upon the officer may be necessary, before an action can be maintained, when the goods of the plaintiff, taken by the officer, were so intermingled with those of the debtor, as not to be distinguishable therefrom. It is not, however, necessary that the property should be so distinctly marked, that an officer, by his own observation, would be able to perceive, that it did not belong to the same individual, in order to make him liable. *Tufts* v. *McClintock*, 424.

2. If the property attached by an officer has gone back into the hands of the debtor, he has no claim upon the officer for it, and if the attaching creditor has released the officer from his liability to him, then, as neither creditor nor debtor has any claim upon him, the officer can maintain no action upon a receipt given for the property attached.
Moulton v. *Chapin*, 505.

3. If there be a good cause of action against the receipter at the time of the commencement of the suit, but the right of action is taken away by a neglect to preserve the attachment afterwards, it seems that nominal damages may be recovered; but where no cause of action upon the receipt existed when the suit was commenced, the action must fail. *Ib.*

See Action, 5, 6. Bankruptcy, 2, 3. Levy on Real Estate. Sale, 2. Shipping, 6, 7.

PARTNERSHIP.

If an action be brought against two persons as partners, and one of the defendants and two others as partners in another concern, are summoned as trustees, they cannot be holden as trustees, and must be discharged.
Denny v. *Metcalf*, 389.

See Attorney.

PAUPER.

If supplies are furnished, by the overseers of the poor of a town, to a person alleged to be a pauper having a settlement in another town, their opinion or adjudication that the supplies furnished were necessary, although made in good faith, is not conclusive of that fact in a suit to recover the value of such supplies. *Thomaston* v. *Warren*, 289.

PHYSICIAN.

See CONTAGIOUS SICKNESS. SURGEON.

POOR DEBTORS.

1. The certificate required by Rev. Stat. c. 148, § 2, to authorize the arrest of the debtor, is defective, unless it states not only, that the debtor "is about to depart and reside beyond the limits of this State, with property or means, exceeding the amount required for his own immediate support," but also, that he is about "to take with him, property or means as aforesaid." *Bramhall* v. *Seavey*, 45.

2. To authorize an arrest under the provisions of that statute, the affidavit required by the second section thereof, must be made before a justice of the peace, deriving his power to act, under the authority of *this State*, or the arrest will be considered as made without authority of law; and a bond given to procure a release from such arrest, will be illegal and void. An affidavit made before a justice of the peace of another State, is not sufficient. *I*

3. In an action on the case, claiming damages against the present defendant for the rescue of a debtor of the plaintiff from an officer, when arrested on a writ in favor of the present plaintiff against such debtor; *the return of the officer*, on such writ, that he had arrested the body of the debtor and that he was rescued from his custody by the present defendant, is not conclusive evidence of the facts stated in the return, on the trial of the present action. *Francis* v. *Wood*, 69.

4. By the use of the term "*accounts*" in the poor debtor act (Rev. St. c. 148, § 29,) the Legislature probably intended to describe such claims as the debtor might have against other persons which were the proper subjects of charge as book debts, and for the payment of which no written contract or security had been taken; and by the use of the terms *notes*, *bonds* or *other contracts*, to include all other securities and evidences of debts due. *Robinson* v. *Barker*, 310.

5. That could not properly be denominated an account, in the sense of the statute, upon which nothing was due, any more than that could be considered a note or bond, which might exist in that form, but had been previously paid. *Ib.*

6. When the debtor discloses accounts or claims to a considerable amount against other persons, and states that they have not been settled, that he does not know the amount of them, or of the counter claims against him, but that he thinks there is nothing due to him, he must have them ap-

praised, in manner provided by law, or the proceedings will not be considered as evidence of the performance of the condition of the bond. *Ib.*

7. If the debtor was not legally entitled to take the poor debtor's oath within the time limited in the bond, and a suit is brought upon it, testimony is not admissible on the trial, to show that evidence might have been introduced which would have authorized the taking of the oath. *Ib.*

8. And if during the pendency of a suit upon the bond, there is another action against the debtor, alleging that he made wilfully false disclosures, it cannot affect the rights of the parties to the suit on the bond. *Ib.*

9. And where a law question, in a suit upon a poor debtor's bond, was pending at the time of the act of August 11, 1848, arising on a statement of facts agreed by the parties, the Court will give an opportunity, if the condition of the bond be forfeited, for the defendant to have an opportunity to have the damages estimated by a jury. *Ib.*

10. If the breach of the condition of a poor debtor's bond be caused by the omission to appraise a note, disclosed on the examination, the amount of damages, under the statute of 1848, c. 85, § 2, is not to be limited to the value of the note; but any legal proof, going to show the ability of the debtor to have paid the debt, or some part thereof, is admissible, and should be taken into consideration by the jury in the assessment of damages.

Call v. *Barker*, 317.

11. It was the duty of the creditor selecting a justice, under the Rev. Stat. c 148, § 46, as well as under the Stat. 1848, c. 85, § 1, to procure the attendance of the justice, selected by him, at the time and place appointed in the citation for hearing the disclosure of the debtor. *Stanley* v. *Reed*, 458.

PRACTICE.

1. When a case comes before the Court, on exceptions to the rulings or instructions of the Judge presiding at the trial, the Court must consider them to be correctly presented by the bill of exceptions; and must give effect to the plain and obvious meaning of the language used.

Codman v. *Armstrong*, 91.

2. The law having been stated to the jury for their guidance, they may in all cases judge of the reasonableness of charges made in an account. When there is proof of an agreed price or compensation, or of an usage which might affect it, or from which an agreement might be inferred, it would not be correct to authorize them to judge of the reasonableness of the charges, irrespective of such agreement or usage. *Ib.*

3. When a usage, which may affect the rights of the parties, is presented by the testimony, it becomes the duty of the Court to determiue whether, if proved to the satisfaction of the jury, it be reasonable and operative. *Ib.*

4. Where the defendant pleads the general issue with a brief statement, and both are signed by his counsel, and the plaintiff's counsel makes and signs a counter brief statement, but accidentally omits to sign his name to the joinder of the general issue, this furnishes no sufficient cause for setting aside a verdict for the defendant. *Stevens* v. *Bachelder*, 218.

5. Where a large body of evidence, on both sides, contradictory in its character, has been laid before a jury, and they have found a verdict upon it, the Court ought not to revise their proceedings, on the ground, simply, that the evidence preponderated against the verdict. Verdicts should not be disturbed, where there is evidence upon which they may rest, unless the jury have been influenced by partiality, passion, prejudice, or some undue bias. *Glidden* v. *Dunlap*, 379.

See Bailment. Exceptions. New Trial. Poor Debtors, 9.

RAIL ROAD.

See Corporation. County Commissioners, 1.

RECEIPTER.

See Officer. Shipping, 7.

RECORD.

See Evidence, 2.

RELEASE.

Where a mortgage was made by a husband and wife, of four separate parcels of land, of which three were the property of the wife, and the other of the husband, to secure a debt before due from him; and where an entry for condition broken was made by an attorney of the mortgagee, by entering upon one of the parcels belonging to the wife, having in his possession the mortgage deed, and stating in the presence and hearing of the husband and of two witnessess that "he entered for condition broken;" and where afterwards certain acts were done amounting to a waiver by the mortgagee of the entry thus made; and where, after the expiration of three years from the time of such entry, the mortgagee, with the assent and at the request of the husband, but without the knowledge of the wife, made a quitclaim deed of the premises to the demandant, he, however, not being present at the time, wherein it was said — "do hereby remise, release, bargain, sell and convey and forever quitclaim unto said, (the demandant,) the land described in said deed of mortgage, entry having been made to foreclose, and the right of redemption having expired, and the said, (the demandant) having at said (the husband's) request paid the amount which would be due on said mortgage. This release is made to said (demandant) at the request of said (mortgagers) and is intended to discharge all title acquired by said (mortgagee)"; — In a real action brought by the grantee of the mortgagee against the male mortgager, *it was holden*, that as between them, the demandant was entitled to recover. *Rangely* v. *Spring*, 127.

REPLEVIN.

1. Under Rev. St. c. 130, in order that the replevin bond should be considered, a statute bond, it is not necessary that the plaintiff in replevin should sign the bond, or that it should appear on the bond, that it was given in his behalf. *Howe* v. *Handley*, 241.

2. The damages recovered by the attaching officer in the action of replevin being recovered in trust, are not conclusive upon the parties in a suit upon the replevin bond. *Ib.*

3. Where the value of the property replevied might be expected to be diminished by the use of it, and by lapse of time, it has been considered, that the obligors in the replevin bond should be bound by the value of the property named in the bond. *Ib.*

4. When the original debtor has received a discharge in bankruptcy, and his assignee has discharged all claim against the officer for the property attached, the damages to be recovered in an action upon the replevin bond, are, to be retained for the plaintiff's own use, the amount of the judgment for costs recovered in the action of replevin, with interest from the time of judgment, his reasonable expenses incurred in that action, and interest for the same time, and his reasonable expenses incurred in the suit upon the bond; and also, to recover for the use of the creditor, interest at the rate of twelve per cent. per annum on the value of the goods, as alleged in the bonds from the time of the recovery of his judgment to the time when the attachment was dissolved. *Ib.*

5. In an action of replevin for cattle impounded, when the defendant justifies the taking, he must show a full and entire compliance with the requisitions of the statute, or he becomes a trespasser *ab initio*.
Morse v. *Reed*, 481.

RIPARIAN RIGHTS.

1. If one person had acquired a lawful right to float his logs over the land of another, without his consent, through an artrficial channel made by the latter, and is ressited and obstructed in the use of it by the owner of the land, and makes a contract with him to pay a sum of money for the removal of such obstruction, and for the permission to float his logs, such contract is unlawful and void. *Dwinel* v. *Barnard*, 554.

2. Should a person obstruct the flow of the waters of a river or stream over their accustomed bed, so that they could not be used as formerly, for the purposes of boating, or floating rafts or logs, and should turn them into a new channel, he would thereby authorize the public to make use of them in the new channel, as they had been accustomed to use them in their former channel. *Ib.*

3. But if a person without right should open a sluice or channel on his own land, and thereby divert the waters of a stream, river, or lake, from their natural and accustomed course, without causing any obstruction els ehere, the public would not thereby become entitled to their use over his land. They would not be entitled to enter upon his land, and to use the waters in his canal, channel, or sluics, made perhaps for the purpose of operating valuable machinery, because some othor person had obstructed the flow and egress of the waters, from a distant point of such stream, river, or lake. *Ib.*

4. Although the law may not require the lapse of any particular time, to authorize the inference of a dedication to the public for use, there must be

3. In the proceedings of our numerous and various municipal corporations, a scrupulous observance of the most approved formalities is not to be expected. If, therefore, the intention of the voters of a school district, to raise a sum of money for the purpose of building a district school house, is perfectly apparent upon their records, it is sufficient to authorize the assessment and collection of the amount, although such intention may be very informally expressed. *Ib.*

SET-OFF.

See SHIPPING, 5.

SHIPPING.

1. A contract of insurance is completed, when there is an assent to the terms of it, by the parties, upon a valuable consideration. Neither the giving the premium note, nor the reception of the policy by the insured, are prerequisites to its consummation. *Blanchard* v. *Waite*, 51.

2. One part owner of a vessel, has no authority, as such, to procure insurance thereon, for the other owners. And where several owners claim payment for a loss, where the insurance was procured by one, it is incumbent on them to show his authority at the time, or a subsequent ratification of his acts by them. *Ib.*

3. The property in a vessel may be legally transferred without a bill of sale or other written evidence of it. In such case, there must be proof of an agreement to sell and purchase, and of a valuable consideration also, when the title is asserted against creditors of the vendor.
Richardson v. *Kimball*, 463.

4. A delivery of a vessel, *in port at the time of sale*, is as necessary to perfect the title against creditors, as it is when any other description of personal property is sold. *Ib.*

5. Repairs made upon a vessel by the owner, after he became the purchaser, cannot be set off against her earnings prior to the purchase. *Ib.*

6. A sale of a vessel by an officer on execution, conveys nothing but the vessel as it existed at the time of the sale. *Ib.*

7. If a part of a vessel be attached, and the officer takes a receipt therefor, and she is sent to sea, the receipter is not liable to the officer for any earning of the vessel. *Ib.*

STATUTES CITED.

SURETY.

1. Parol evidence is not admissible, to vary the meaning of a promissory note. If the promise is jointly and severally to pay, it cannot be shown to be otherwise. But when the creditor makes an arrangement with one of several debtors, extending the time of payment of the debt, it is competent for the others to prove by parol evidence, that they are sureties merely, and that the arrangement was injurious to them.

Mariner's Bank v. *Abbott*, 280.

2. It is a well settled rule of law, that where the creditor, by a contract with the principal, extends the time of payment, upon a sufficient consideration without the consent of the surety, the latter is discharged. *Ib.*

3. The mere receipt of interest for a stipulated time, from the principal by the creditor, after the note has become payable, is not sufficient evidence of an agreement to give further credit. *Ib.*

See BANKRUPTCY, 7. TRUST, 2.

SURGEON.

A surgeon is not liable for a want of the highest degree of skill in the performance of an operation in the line of his duty; but only for the want of ordinary skill, and for the want of ordinary care and ordinary judgment.

Howard v. *Grover*, 97.

TAX.

See EVIDENCE, 1. SCHOOL DISTRICT, 3.

TOLL BRIDGE.

See BRIDGE.

TROVER.

In an action of trover for the conversion of sheep, an instruction to the jury by the presiding Judge of the District Court, "that if they were satisfied that the defendant was aware of the wrong of S. and undertook to aid him to secrete the sheep, and keep them from the true owner; or if they were satisfied, that the defendant had been indemnified before the suit was commenced for withholdiug the sheep from the true owner, and preventing her from enjoying her property; or that he confederated with P. and S. for that purpose, and that he did withhold the sheep, they should find a conversion," is not erroneous. *Scott* v. *Perkins*, 22.

TRUST.

1. Where a conveyance of land is made by absolute deed, and the grantee gives back to the grantor a written contract, promising to sell the land at a certain time, and to pay two notes with the proceeds, and to pay the balance to the grantor; such grantee holds the land in trust, and it is his duty to make sale thereof at the time specified, and appropriate the proceeds in the manner stated in the contract. *Pratt* v. *Thornton*, 355.

2. And if a third person be a surety on one of the notes, although he might not have known of the trust, when it was undertaken, yet when he was informed of it, and could enforce its execution, the original parties to it cannot annul it. *Ib.*

3. If there should be a mortgage upon the estate, the trustee may pay it off, and the amount paid will be a charge upon the estate. *Ib.*

4. The trustee cannot in equity, become the purchaser of the trust estate; and the *cestui que trust* may avoid any purchase of the trust estate made by the trustee. *Ib.*

See WILL, 2, 3.

TRUSTEE PROCESS.

See APPEAL, 4. PARTNERSHIP.

USAGE.

See PRACTICE, 2, 3.

USE AND OCCUPATION.

See ACTION, 1.

USURY.

1. In an action of debt, brought to recover back money paid as usurious interest, an amendment, by leave of the District Court, changing the form of the action to case, is unauthorized by law and void, and the writ remains as before the alteration, an action of debt. *Houghton* v. *Stowell*, 215.

WAY.

See COUNTY COMMISSIONERS, 2, 3, 4, 5. RIPARIAN RIGHTS.

WILL.