REPORTS

OF

CASES IN LAW AND EQUITY,

DETERMINED

BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

COMPILED, UNDER A RESOLVE OF THE LEGISLATURE,
FROM THE MINUTES OF
HON. JOHN SHEPLEY,
LATE REPORTER.

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ADVERTISEMENT.

THE valuable services of the HON. JOHN SHEPLEY, in the office of Reporter, were withdrawn in January, 1850. The term for which he had been commissioned expired at that time and he declined a reappointment. The law had authorized the publication of one volume only of Reports in each year, and that was limited as to size. From that cause, there had occurred some accumulation of unreported decisions.

In order to secure their publication, a Resolve of the Legislature was passed on the seventh day of August, 1850, as follows : —

STATE OF MAINE.

Resolve concerning the reports of the law decisions of the Supreme Judicial Court.

Whereas the law cases argued and submitted for decision in the year 1849, and a portion of those argued and submitted in 1848, are yet unreported, —

Resolved, that from the late Reporter's minutes, and the papers in said cases, the present Reporter be and hereby is authorized to procure reports thereof, or of so much of the same as in his discretion he shall deem expedient, not exceeding two volumes of the ordinary size, to be prepared under his supervision and with all judicious economy ; the expenses and the compensation to be adjusted by the Legislature ; the reports prepared, to be placed in the hands of the present publishers for publication, under their contract with the State.

JUDGES

OF THE

SUPREME JUDICIAL COURT

DURING THE PERIOD OF THESE REPORTS.

HON. ETHER SHEPLEY, LL. D., CHIEF JUSTICE.
HON. JOHN S. TENNEY, LL. D., } ASSOCIATE
HON. SAMUEL WELLS, } JUSTICES.
HON. JOSEPH HOWARD, }

HON. SAMUEL H. BLAKE,
ATTORNEY GENERAL, FOR THE YEAR 1848.

HON. HENRY TALLMAN,
ATTORNEY GENERAL, FOR THE YEAR 1849.

HON. JOHN SHEPLEY, REPORTER.

A TABLE OF CASES

REPORTED IN THIS VOLUME.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF PENOBSCOT.

ARGUED AT JUNE TERM, 1848.

MEM.—Five cases in this County, argued in 1848, and decided in 1849, were published in the last volume.

NEHEMIAH BARTLETT *versus* EDMUND PEARSON.

Where mutual dealings in account exist, the balance due may be assigned; and after notice of the assignment, the assignee has an equitable right, which the Court will protect, to the balance due at the time of the notice of the assignment, which cannot be diminished by any claim of the other party, accruing or procured subsequently.

And if the assignee bring an action in the name of the assignor for the whole amount of this account against the other party, and the defendant bring a cross action, also, for the full amount of his account, and both actions proceed to judgment; under the provisions of Rev. St. c. 115, the judgment *debt* in the lesser claim may, by leave of court, be set off in payment of so much of the larger; but the *costs of that suit* cannot be set off in further payment of the balance of the larger judgment, without the consent of the assignee.

The District Court may exercise a discretionary power by ordering or refusing to order judgments of the Court to be set off, when it can be done without a violation of the legal rights of either party. But when a set-off is not authorized by law, and when it would deprive a party of any of his legal rights, he can have a remedy to protect them, by bill of exceptions.

THIS case was argued in writing. The Reporter received no copies of the case. The question decided, however, will be understood from the opinion of the Court.

A. Knowles, for the plaintiff.

Lawrence, having a claim against Pearson, assigned it to a creditor in payment of a debt; the assignee gave notice to Pearson and requested him to pay over the amount due, which he neglected to do, and the assignee brought a suit in the name of Lawrence, the demand not being negotiable; the defendant filed nothing in set-off, but at a subsequent term, brought a suit against Lawrence; both actions were then referred, and the referees set off the mutual demands between Lawrence and Pearson, allowing the defendant his whole debt. He has thus had the benefit of a set-off by the tribunal selected by the parties; the referees had full power, and might have adjudicated as to these costs, if they had judged it reasonable, and from the manner in which they awarded, it is evident, they intended the assignee to have the benefit of his award.

These costs were made unnecessarily by the defendant. He might have paid over the amount due, or filed his claims in set-off, or tendered or offered to be defaulted. He did neither. He knew of the assignment, and knew there was a balance due from him. Had he paid it over as he was bound to do, there would have been no suit. He knew that that balance was due to the assignee, and he was thus put upon his guard, and knew from the first, that he could have a claim only against Lawrence, for any costs he might create. He has not been led into it by Lawrence or his assignee. It has resulted from his own neglect in not paying his debt; from the time of notice of the assignment, the balance due became a debt, between defendant and the assignee; Lawrence was only nominally known. The suit has been conducted at the expense and for the benefit of his creditor.

The motion is addressed to the discretion of the Court, to be exercised equitably. It cannot be just, that the defendant by his own act, which was not necessary for his own security, should deprive the assignee of the benefit of his assignment. He took the assignment, it is true, subject to the right of set-off of all mutual and existing demands at the time, but to nothing further. He could not anticipate a bill of costs. He had

a right to presume and to act upon the presumption, that the defendant would pay over the amount due without suit. Lawrence was his debtor and he wished to secure his debt. He might have trusteed defendant and thus secured. Should he not be equally secure when he takes an assignment of the debt, thus becoming the creditor of Pearson by a purchase of the demand against him? and if then, the defendant instead of paying that claim, brings an unnecessary suit against Lawrence, should he not look to him for his pay? The defendant has his execution against Lawrence, which may be collected, as he did not plead his bankruptcy, and the bill of costs, is, therefore, a valid claim accruing since; but if this set-off is ordered, the assignee has no claim whatever, for his debt against Lawrence. It is barred by the bankruptcy, if in no other way; so that he loses his claim entirely.

Where mutual demands exist, Courts will protect any balance due for the benefit of an assignee. *Leathers* v. *Carr*, 24 Maine R. 351; *King* v. *Fowler*, 16 Mass. R. 397.

An attorney has a lien upon a judgment which courts will protect and for which the statute makes provision and which has never been waived in this case. Courts will not interfere to set off judgments, where third persons are interested as assignees. *Makepeace* v. *Coates*, 8 Mass. R. 451.

Set-off of judgments and executions is regulated by statute, chap. 115, sect. 35, of the Rev. Stat. regulating "proceedings in court," which provides, that no demand "acquired" after assignment and notice, shall be set off.

Chap. 117, sec. 35, of the Rev. Stat. makes a similar provision in regard to set-off of executions, and in stronger terms — that no demand shall be set off when the sum due on the first has been assigned before the creditor in the second execution *became entitled* to the sum due thereon.

The cost had not been "acquired nor had defendant become "entitled to receive it," at the time of notice of assignment. A bill of cost arising cannot be called a debt; it is contingent, and always liable to be defeated; is not "acquired" nor is any one "entitled to receive it" till after judgment of Court; it is

not a thing that an assignee has reason to expect or is called upon to guard against. The equity between the parties is to be regulated by the demands actually existing at the time of the notice. The debt to be set off must be an existing debt at the time of assignment. *Carpenter* v. *Butterfield*, 3 Johns. Cases, 145.

After assignment and notice, defendant could not by any act of his, deprive the assignee of his rights under the assignment. If he could do so by making a bill of costs, he might in any other way. *Jenkins* v. *Brewster*, 14 Mass. R. 294.

The defendant should have paid his debt. He is the delinquent party; had he done his duty there would have been no costs on either side. Having created a needless bill of cost, he ought not to be permitted to appropriate the money due the assignee to the payment of it. It would be to enable him to go to law at the expense of an innocent assignee and creditor of Lawrence. A debtor under such circumstances could have little inducement to pay. He may go to law and pay his debt as certainly as in any other way; and if the amount is but sufficient, he incurs no risk.

John Appleton, for the defendant.

The demands between Lawrence and Pearson, were *mutual* demands, which had accrued long before the alleged assignment. The right of mutual offset for debt and cost is an equitable right and one which the Court will protect. The assignee of a demand takes his assignment *subject* and *subordinate* to the higher rights of the original parties, and can by no possibility be in any better condition than his assignor. He has the rights of his assignor; neither greater or less; and no right of set-off can be defeated, altered or impaired by assignment. *Leathers* v. *Carr*, 24 Maine R. 352; *Hooper* v. *Brundage*, 22 Maine R. 461; *Wood* v. *Carr*, 2 Story's Reports.

Nor is it material that the parties between whom the offset is made, be the same nominally. *Moody* v. *Towle*, 5 Greenl. 415.

Nor can death or bankruptcy defeat this equitable right. *Medomak Bank* v. *Curtis*, 24 Maine R. 36; Bankrupt Law, § 5.

The suit in this case was originally brought in the name of Lawrence, and on legal principles it should have been prosecuted in his name, if it was assigned before his bankruptcy. 1 Chitty Pl. 15; 7 East, 64; *Sawtell* v. *Rollins*, 23 Maine R. 196.

The prosecution of the suit in the name of the assignee, whether properly or not, cannot affect the question of costs. *Legally it is prosecuted by the bankrupt*, and by no one else.

Costs are incidental and accessory to the principal debt, and follow the same rule of offset. The only exception is, when the attorney interferes, and claims that his lien for costs should be protected. In all other cases the execution issues only for the balance due. The rule of Court, when it is by rule of Court, or the statute, which protects this lien, requires the off-set of the judgments between the parties, when the attorney does *not* interfere.

The equity of the parties is considered superior to that of the attorneys, and in the C. C. P. the off-set is made notwithstanding the attorney may object. *Dennie* v. *Elliot*, 2 H. B. 587; *Hall* v. *Ody*, 2 B. & P. 28; *Brown* v. *Buzzell*, 4 Bing. 423; *Embden* v. *Darley*, 4 B. & P. 22.

In the other English Courts the lien of the attorney is regarded, but if that lien is discharged, the whole executions are offset. Even though the plaintiff be dead and the execution be assets in the hands of the administrator. 21 E. C. L. Rep. 209; 1 Cowen, 206.

Neither is it for the plaintiff in this case to be so anxious for the protection of defendant's attorney's lien. If the attorney makes no objection, the offset is of the whole executions.

Here, however, the case finds that the attorney for the defendant waived his lien for costs, in which case, according to all the authorities, the offset follows of course.

Neither can the objection avail that the off-set was not ordered by the referees. The presiding Judge, who ordered the offset, was the chairman of the reference and knew and understood all the *equities* of the matter.

The reason, why a further offset of costs was not ordered

by the referees was because the costs had not all accrued and because the offset could not properly be so ordered, till the rendition of judgments, when the Court, upon a hearing of the parties, might order the offset.

Besides the ordering of a set-off is matter of judicial discretion, upon a full hearing of all the equities of the parties, and is not the subject of exception. *Gould* v. *Palmer*, 7 Greenl. 82. The assignee takes subject to this equitable and prior right of offset.

The counsel for the plaintiff invokes in favor of his exceptions, Rev. Stat. c. 115, § 35, but those cannot avail. Costs are not a "demand" against the original creditor, "acquired" since the assignment. The "demand" is the principal. Costs adhere to the original debt and follow it like interest.

The defendant has the right of filing his account in set-off, or of bringing a cross action. He may do either at his election.

The assignee cannot in any way deprive him of that election. He takes subject to that right. If then, the defendant has a legal right to bring a cross action, it would be hard to subject him to the expenses of both claims. The assignment of the demand impairs no right of bringing a cross suit nor imposes any duty of filing in set-off. It leaves the party as he was before the assignment, without affecting any of his legal rights.

Still less is the plaintiff's claim favored by Rev. Stat. c. 117, § 15, which provides, that "executions shall not be setoff against each other, when the sum due on the first has been lawfully and in good faith assigned to another person, before the creditor in the second execution became entitled to the sum due thereon."

WHITMAN C. J. did not sit in the case. The opinion of the majority, WELLS J. dissenting, was drawn up by

SHEPLEY J. — Bennet Lawrence and the defendant had mutual dealings in account. Lawrence for a valuable consideration, assigned his account against the defendant to one of his creditors. The defendant had notice of that assignment, and was requested to pay the amount due from him. A suit

was commenced by the assignee in the name of Lawrence against the defendant, who commenced a cross action against Lawrence, who became a bankrupt, and the present plaintiff, as his assignee, was permitted to prosecute the suit commenced against the defendant. These suits were referred to referees, who ascertained the amount due to each of the original parties, and after deducting the amount found to be due from Lawrence to the defendant from the amount found to be due from the defendant to Lawrence, awarded, that the plaintiff should recover against the defendant a balance of ninety-eight dollars with costs; and that the defendant should recover against Lawrence one cent damages with costs amounting to more than ninety-eight dollars. These reports having been accepted, the counsel for the defendant, having waived his lien upon the costs, moved, that so much of the defendant's judgment for costs, as would satisfy the sum of ninety-eight dollars, should be set off against the damages recovered by the plaintiff against the defendant. The court ordered such a set-off to be made, and to this order the plaintiff filed his exceptions.

The assignment made by Lawrence to his creditor, conveyed the equitable title to the balance due from the defendant to Lawrence at the time, when the defendant had notice of that assignment. The defendant could not diminish that balance by any claim accruing or procured subsequently. The assignee of a chose in action receives it subject to all the equities then existing between the assignor and his debtor. It is liable to no other burdens or deductions. *Jenkins* v. *Brewster*, 14 Mass. R. 294; *Sargent* v. *Southgate*, 5 Pick. 312; *Sanborn v. Little*, 3 N. H. R. 539; *Weeks* v. *Hunt*, 6 Verm. R. 15; *Jefferson County Bank* v. *Chapman*, 19 Johns. R. 322; *Ritchie v. Moore*, 5 Munf. 388; *Newman* v. *Crocker*, 1 Bay. 246; *Hooper* v. *Brundage*, 22 Maine R. 460.

The statute provisions of this State are based upon the same principles. c. 115, § 35, and c. 117, § 35.

There can be no doubt, that courts of justice, when called upon to order one judgment to be set off against another, are

obliged to act upon such rules of law, as will protect the rights of parties.

The defendant first became entitled to the amount due from Lawrence to him for costs, when he obtained a judgment for them. It is said, that costs are incidental and accessory to the debt. They are in fact not connected with it, but are an allowance made by statute to a party to compensate him for the trouble and expense, which he may incur in the prosecution of his suit for the recovery of his debt or damage. They are not a part of his debt, claim, or damage. If the assignee of a chose in action could only acquire a title to it, subject to all equitable claims then existing between the assignor and his debtor, and also subject to all the costs, which they might occasion by litigation respecting them, the law would be materially altered, and his rights valuable, at the time, might prove to be of no value.

It is difficult to perceive, that the defendant has stronger claims in equity than in law to have the set-off made. He was notified, that the balance due from him had been assigned. If he could not adjust it with the assignee, he might have decided how much was due from him and have tendered that balance; or have offered, as soon as the suit had been entered in Court, to be defaulted for that amount, and thus have protected himself, against all further costs, and have placed himself in a position to recover costs, if the balance should not prove to be greater. He might, as he did, lawfully commence a cross action. If he chose to exercise that legal right, he can have no just cause of complaint, if he be left to pursue that legal course to the end, and to obtain all his legal rights by it, without asking to be relieved from the result, by having another person's rights impaired to do it.

It is further insisted, that the plaintiff was not entitled to file a bill of exceptions in this case. That the question, whether a set-off should be ordered, was one submitted to the judicial discretion of the District Court.

Courts may be at liberty to exercise such a discretion by ordering or refusing to order judgments to be set off, when they

can do so without a violation of the legal rights of either party. But when a set-off is not authorised by statute, and when it would deprive a party of any of his legal rights, there can be no doubt, that he would be entitled to have them protected by a bill of exceptions.

The exceptions are sustained, the set-off prayed for is disallowed, and judgments are to be entered in each case accordingly.

Dissenting opinion by

WELLS J. — Where a demand is assigned, the assignee takes it subject to the equities subsisting between the parties, and also to the legal rights of the parties. The debtor having a counter demand, if it is not allowed to him, may file his account in set-off, or bring a cross action, in the same manner as if no assignment had been made. The assignment cannot abridge this right nor limit the legal claim to costs. Where demands are unliquidated, the assignee takes them subject to all the legal rights of investigation, which the law allows. He cannot restrict the debtor to any one mode of judicial investigation. The mode prescribed by law, for determining the rights of the parties, is incident to the demand assigned.

In the present case, the defendant might have filed his account in set-off, and had the whole dispute settled at his own expense. But he was not bound to do so, by law or equity. He had a legal right to commence his action. The plaintiff might in that suit have offered to be defaulted for any given sum, or might have paid what was claimed in the cross action, or made a tender, retaining his own suit; but on the contrary, he litigates it until there is a large bill of costs, and then says, that his own judgment is not to be affected by those very costs which he has created. The defendant might have offered to be defaulted in the suit against him, but that could only protect him against the claim of the plaintiff. His own account would not have been allowed in that way. It is said he might have paid the balance, but it does not appear that the parties could agree upon the balance, and the litigation was to determine

it. There does not appear to have been any more fault on one side than on the other, so far as I can see, not having a copy of the case.

Shall we establish the doctrine, that when a demand is assigned, the debtor shall be confined to some one legal mode of ascertaining the balance?

It is true the costs, which accrue, did not exist at the time of the assignment, but the assignee has given rise to them by his resort to the law, and his mode of resisting the claims of the debtor, as much so as the debtor has done.

A man who purchases an unliquidated claim, takes it with his eyes open, and knows that it is liable to litigation.

The legal rights of both parties exist with the claim and go with it, and it is not in the power of the assignee to debar the debtor from resorting to any mode allowed by law, to decide the differences between them, and he would do so effectually, if the judgments could not be set off. Does the assignee obtain new legal rights, impairing those which existed between the original parties?

A & B have mutual accounts, the law prescribes the mode of adjustment. A's is the larger one, he assigns it to C. C says to B unless you pay the balance, which I claim, I shall commence an action against you in A's name, and you must file your account in set-off. If you commence a cross action, which you have a right to do, still my judgment shall not be affected by the costs you may recover, and I will compel you to prove every item of your claim — and I will collect my bill of costs and the balance of the judgment out of your property, and you may look to A for your bill of costs.

The costs are the result of a right co-existing with the demands before the assignment.

The assignee takes subject to all *defences* which might be made against assignor *Burnham* v. *Tucker*, 18 Maine R. 179.

Pres't, &c. Middlesex Bank *versus* Frederic A. Butman *& al.*

If it appears by the record of a judgment rendered in another State, that the Court had no jurisdiction of the parties, such judgment will not be received here as having any force or validity whatever.

Thus, where it appeared that an action had been brought upon a note before a Court of another State, and a judgment rendered in the suit, but where the defendant had never been an inhabitant of that State, and no personal service had been made upon him, and none of his property had been attached, it was holden, that the record of such judgment was not sufficient, when offered in evidence by the defendant, to defeat an action of assumpsit brought upon the same note in this State.

Assumpsit upon a promissory note. The plaintiffs produced, proved and read the note.

The defendants produced and read a copy of a judgment rendered thereon in the Court of Common Pleas, in the county of Middlesex and Commonwealth of Massachusetts, and contended that the suit could not be maintained upon the note. The return of the officer who served the writ was as follows:—

"Worcester, ss. May 29, 1841.— By virtue of this writ I attached a chip as the property of the within named defendants, and on the same day I summoned each of them to appear at court by giving summons to Col. Isaac Davis, their attorney, who did not acknowledge that he was their general agent, but said he was acting as special attorney for F. A. Butman. I further certify, that this was the only service that I could make, the defendants having removed from this State when they were minors and not having resided in it since, to my knowledge, and the house they formerly lived in with their father, has been taken down, and there is not at present any buildings on the premises. Ivers Phillips, Dep. Sheriff."

A nonsuit or default was to be entered, as the Court should direct.

Rowe argued for the plaintiffs. The defendants introduced a paper, he said, called by them a judgment, and say, that we cannot maintain the suit; not because the note was without consideration, or had been paid, but because it had been merg-

ed in the judgment. If we had brought debt upon the judgment, it would have been said, truly, that the alleged judgment was a mere nullity, and could not be the foundation of an action.

The defendants at the time of the commencement of the suit were not inhabitants of Massachusetts, and never had been, nor were they or their property found there. The Court there had no jurisdiction, and their proceedings are void. 9 Mass. R. 364; 4 Metc. 337; 5 Wend. 148; 4 Peters, 466.

Kent and *Kelley* argued for the defendants, contending, that this was a valid judgment in Massachusetts, and good every where, until reversed.

The question, they said, was not whether the defendants could avoid the judgment for want of jurisdiction in the Court, but whether the plaintiffs, after having selected their own tribunal and recovered a judgment upon the note, can now treat that judgment as a nullity, and maintain a suit upon the note. They cited 4 Metc. 337; 18 Pick. 393; 3 Cowen, 120.

The opinion of the Court, SHEPLEY, TENNEY and WELLS Justices, was drawn up by

TENNEY J. — This suit, which is on a note of hand, is defended upon the ground, that the cause of action is already merged in a judgment obtained in the county of Middlesex and Commonwealth of Massachusetts, and in support of the position taken by the defendants, they invoke the constitution of the United States, art. 4, sect. 1, and the act of Congress under the authority thus conferred upon them, of May 26, 1790; 1 U. S. Laws, chap. 38. By the section in the constitution relied upon, "full faith and credit shall be given in each State, to the public acts, records and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof." The act of Congress provides that records and judicial proceedings authenticated as is prescribed therein, "shall have such faith and credit given to them, in every court within the United

States, as they have by law or usage, in the courts of the States, from whence the said records are or shall be taken."

The section of the constitution and the act of Congress, referred to, have been the subject of much discussion in the courts of the United States and in several of the individual States, and the opinions touching the true construction thereof have not in all respects been uniform.

A judgment rendered in the same jurisdiction with the court called upon to enforce it, while unsatisfied and in force, is considered and observed as conclusive proof of the debt, liable to no exception or inquiry. But a foreign judgment, though sufficient evidence of a debt or promise, *prima facie*, yet it is not incontrovertible proof. Doug. 6. "If an action of debt be sued on any such judgment, *nil debet* is the general issue, or if it be made the consideration of a promise, the general issue is *non assumpsit*." On these issues the defendant may impeach the justice of the judgment, by evidence relative to that point. On these issues, the defendant may also, by proper evidence, prove that the judgment was rendered by a foreign court, which had no jurisdiction; and if his evidence be sufficient for the purpose, he has no occasion to impeach the justice of the judgment." 9 Mass. R. 462.

In the case of *Noble* v. *Gold*, decided in the county of Berkshire, and referred to in 1 Mass. R. 410, which was an action of debt on a judgment recovered in the State of Vermont, and to which the defendant pleaded *nil debet*, the court held the plea bad on general demurrer, and that by the constitution and laws of United States, the judgments of courts of record of the several States were placed in all respects upon the same footing with our own domestic judgments.

In *Bartlett* v. *Knight*, 1 Mass. R. 401, SEWALL J. remarks, in giving his opinion, "that the effect of a judgment, that is, the rights of the party claiming under it, and the liability of the party charged by it, are not enlarged or affected by the constitution or law of the United States," and he holds that the section cited from the constitution, and the act of Congress pursuant to it, are confined to the sole purpose of directing the

modes of proof and the effect thereof, to be employed in authenticating records, when certified from one State to another, and concludes, that a judgment certified from a court of record in any other State, when demanded as a debt within this State, is not an incontrovertible proof of such debt; and that the grounds of such judgment, when impeached by the defendant, may be on that occasion examined." In the same case, SEDGWICK Justice, in speaking of the constitution and act of Congress and the legitimate effect of judgments of another State, says, "The meaning, I take to be this and no more, that they shall be incontrovertible and conclusive evidence of their own existence, and of all the facts expressed in them. The *act* however stops short of declaring, what shall be their effect, and Congress have wisely left this to the judicial department." "I am decidedly of the opinion, that it would be going too far, to say that a judgment of one of the other States should in all cases, have the same effect as a domestic judgment." "The return of an officer of summons left with the defendant's agent or attorney, or at the last and usual place of the defendant's abode, is sufficient authority to the Court to proceed to judgment. An officer may be mistaken, he may act by collusion, notice may never have reached the defendant; that defendant may have been an inhabitant of a most distant State. Shall he be bound by the judgment conclusively? It would be monstrous." The decision of the court was in accordance with these views.

In the year 1813, the subject was again brought before the court in Massachusetts, and an elaborate opinion, drawn by PARSONS C. J. was pronounced as the decision of a majority of the court, in which it was held, "if a court of any State, should render judgment against a man not within the State nor bound by its laws, nor amenable to the jurisdiction of its courts, and if that judgment should be produced in any other State against the defendant, the jurisdiction of the court might be inquired into, and if a want of jurisdiction appeared, no credit would be given to the judgment. In order to entitle the judgment rendered in any court of the United States, to

the full faith and credit mentioned in the Federal Constitution, the court must have had jurisdiction not only of the cause, but of the parties." And it was decided, that judgments rendered in any other States, when offered as foundations of actions, are not treated as foreign judgments, the merits of which as well as the jurisdiction of the courts which rendered them may be inquired into; but they are not considered as they would be, if rendered in the same State in which they are offered, because the jurisdiction of courts from which they came may be the subject of inquiry, and if the jurisdiction is manifest they are entitled to full faith and credit; they may be declared on as evidence of debt or promises; and on the general issue, the jurisdiction of the courts rendering the judgments, are put in issue, but not the merits of the judgments. SEWALL J. adhered to the opinion expressed in *Bartlett* v. *Knight*, that the merits as well as the jurisdiction of the court, was a subject which might be examined.

The doctrines of the case of *Bissell* v. *Briggs*, were supposed soon after, to be in conflict in some respects with the decision of the Supreme Court of the United States, in *Mills* v. *Durgee*, 7 Cranch, 481, and also with *Hampton* v. *McConnel*, 3 Wheaton, 234. In *Mills* v. *Durgee*, Story, in the opinion of the Court, says, "In the present case, the defendant had full notice of the suit, for he was arrested and gave bail, and it is beyond all doubt, that the judgment of the Supreme Court of New York was conclusive upon the parties in that State. It must, therefore, be conclusive here." This seemed to be understood as giving to judgments of the courts of other States the same effect in all respects, as would be given to them, if they were judgments of the State where they were sought to be enforced; that is, that they were incontrovertible, as appears from the remarks of the court in the case of the *Commonwealth* v. *Green*, 17 Mass. R. 415. But such a conclusion cannot be drawn from the opinion without qualification, as the case was one where the court in New York, which rendered the judgment, had jurisdiction of the parties. Judge Johnson, who dissented from the majority of the Court, did not consider

the decision itself as going to such an extent, but apprehended that the reasoning of the opinion would lead almost necessarily to it; that receiving the plea of *nul tiel record* in an action of debt in another State, upon a judgment of another State of the Union, instead of *nil debet*, might at some future time involve the Court in inextricable difficulty; he alludes to the case of *Holker* v. *Parker*, which had been before the court, where a judgment of $150,000 was given in Pennsylvania, upon an attachment levied on a cask of wine and debt in judgment brought on that judgment in Massachusetts; and says, "Now in this action, if *nul tiel record* must necessarily be pleaded, it would be difficult to find a method, by which the enforcing of such a judgment could be avoided. Instead then, of promoting the object of the constitution, by removing all cause for State jealousies, nothing could tend more to enforce them than by enforcing such a judgment. There are certain eternal principles of justice which never ought to be dispensed with, and which courts of justice never can dispense with, but when compelled by positive statute. One of them is, that jurisdiction cannot be justly exercised over property not within the reach of its process, or over persons not owing them allegiance, or not subjected to their jurisdiction, by being found within their limits."

It is believed, that whenever the question was directly presented for decision in Massachusetts, prior to the separation of this State therefrom, since the case of *Bissell* v. *Briggs*, that decision has been regarded as having settled the law on a basis which was not to be shaken. In our own State, the doctrine has been recognized as firmly established. *Hall & al.* v. *Williams*, 1 Fairf. 278. In the opinion of the court, delivered by Parris Justice, after supposing the case of a judgment of a court of another State being amended by the same court, by inserting therein as a debtor, the name of a person who neither resided or had any property in that State, who had no notice of the suit, and never submitted to the jurisdiction of the court, remarks, "could we be called upon to enforce such a judgment against the new party? Should we listen to the suggestion

that, the judgment was binding in Georgia, because the highest court of judicature there, had so adjudged it, and therefore, under the law of the United States, it was binding here and in every other State of the Union." "In the case supposed, we should not hesitate to pronounce the judgment utterly void, a mere nullity and not deserving the name of judgment, an attempt to subvert the first principles of justice, and the power of this Court would be invoked in vain to carry it into execution."

Since we became an independent State, the courts of Massachusetts have frequently had before them cases involving the same questions, and they have uniformly adhered to the construction, given to the constitution and the act of 1790, in *Bissell* v. *Briggs*, with increased confidence, if possible, in its soundness. In *Hall & al.* v. *Williams & al.* 6 Pick. 232, it was held, if notice to or appearance of the plaintiff is not alleged in the record, he may avoid the effect of the judgment, in another State, than that where it was rendered, by showing that he was not within the jurisdiction of the court, and where it appears by the record itself, that there was no appearance and no notice, which he was bound to attend to, the judgment against him is a dead letter beyond the territory in which it was pronounced.

The same subject was before the court in *Gleason* v. *Dodd, adm'r*, 4 Metc. 333, and the same doctrine reaffirmed.

In *Hitchcock* v. *Fitch*, 1 Caines, 460, a majority of the court held, that a judgment rendered in another State, upon a regular service of process and by a verdict of a jury, was only *prima facie* evidence of a debt. Livingston Justice, with one other of the five members of the court, dissented, giving the construction to the constitution and the act of Congress, that such judgments had greater authority in other States than it was believed by the majority, they possessed. He remarks, "Now no violence is done to my understanding of this article, in saying that it does not embrace a judgment which has been rendered against a party to whom no opportunity was afforded of controverting his adversary's demand, and who instead of be-

ing defended by himself or by counsel of his own choice, had no other representative, than an old blanket or a log of wood. A sentence thus obtained, in defiance of the maxim, *audi alteram partem*, deserves not the name of judgment." That the debtor in a judgment of another State, has a right to examine into the question of jurisdiction of the court, who rendered it, is fully established in New York, 4 Cowen, 292, and in several of the other States of the Union. 4 Conn. R. 380; 1 N. H. Rep. 246; Penn. Rep. 405; Hardin's Rep. 413.

By the records of the court of common pleas of the Commonwealth of Massachusetts, holden in the county of Middlesex, it appears, that on the 27th day of May, A. D. 1841, a writ issued from the clerk's office, in that county, in the name of the present plaintiffs against the present defendants, in which the latter are represented to be of Dixmont in the State of Maine, and both late of Worcester in the county of Worcester, the declaration of which writ was upon the note declared upon in the present suit. On the 29th day of the same May, a deputy sheriff of the county of Worcester returned thereon, that he had attached a chip and summoned each of the defendants to appear at court, by giving a summons to Col. Isaac Davis, their attorney, who did not acknowledge that he was their general agent, but said he was acting as special attorney for F. A. Butman; that this was the only service he could make, the defendants having removed from the State when they were minors and not having resided in it since, to the knowledge of the officer, and the house, in which they formerly lived with their father having been taken down, and there being no buildings on the premises. The action was entered at the court to which the writ was made returnable. At the term of the same court, holden in December, A. D. 1841, it appearing to the court by the suggestion of the plaintiffs, that the defendants were out of the Commonwealth at the time of the service of the writ, it was ordered that further notice be given to the defendants of the pendency of the action, by the publication of the order in a newspaper in Boston, in the manner set out in the order; and by an affidavit, making also a part of the record,

that the order had been executed; and at the term held in March, A. D. 1842, the court rendered judgment in the same action, and execution was afterwards issued, and returned without satisfaction. There is no evidence, that the defendants had personal notice of the suit, resided in that Commonwealth after the issuing of the writ, or made any appearance or submitted to the jurisdiction of the court, in any other manner than as appears from the records as before stated. If Isaac Davis had been the general agent of the defendants, they having no residence in the Commonwealth of Massachusetts, and there being no attachment of property upon the writ, they were in no way amenable to the jurisdiction of the court there. But the return itself is sufficient to show that Davis held no relation to the defendants of general agent.

By the authorities to which reference has been made, the court which rendered the judgment now offered by the defendants, had no jurisdiction over them, and the proceedings are utterly void. If it were otherwise, a person living in one State might be made conclusively liable for claims preferred against him in a court of a State the most distant from his residence, in which he had never been or had property, without notice or any opportunity to be heard in defence. For such an absurdity, it is believed, that few advocates can be found.

But it is insisted, that the party who instituted those proceedings, who sought and obtained that judgment, should not be permitted to impeach it; that they must be bound by it, notwithstanding it may be a nullity against the defendants. In support of this view, the reasoning of the Court in the case of *Gleason* v. *Dodd, adm'r*, before referred to, is relied upon, but we think erroneously. That was an action commenced by one Holbrook, who resided in Massachusetts, against Gleason, and after the action was entered in court in this State, the plaintiff died, his death was suggested upon the record, which avers that Dodd, the administrator, *came in*. After several continuances, a nonsuit was entered, and judgment for costs allowed for the defendant. A suit brought in Massachusetts upon that judgment was defended on the ground, that although Dodd was

administrator of the goods and estate of Holbrook, in Massachusetts, yet he never took administration in this State, and never appeared himself to prosecute the suit against Gleason, or authorized any person to appear for him in any manner, and never submitted to the jurisdiction of the court. It was held, that in a common law action, whoever comes in and makes himself a party to a suit and to a record, and claims the benefit of the proceedings, and seeks the further action of the court, undoubtedly submits to the jurisdiction, and the court would have jurisdiction of the person of the administrator as such plaintiff, with power to render judgment against him, on failing to prosecute according to his undertaking. But he denied that he did ever submit to the jurisdiction of the court by coming in to prosecute. If he had made himself a party to the record, and a trial had been had, the defendant in the action could have availed himself of the want of qualification in the plaintiff, to appear and prosecute, but the plaintiff could not resist the effect of the judgment rendered against him, if he had in fact submitted to the jurisdiction; if such had been the facts, the court would have had jurisdiction of the parties upon the record, and a judgment would be good for both parties, in any State of the Union.

A valid judgment is a record of a court, having jurisdiction, which binds both parties. It is a sentence of the law, pronounced by the court upon the matter contained in the record. It is rendered, where the facts are confessed by the parties, and the law determined by the court; where the law is admitted, and the facts are disputed; where both the law and the fact are admitted by the defendant; and where the plaintiff abandons or withdraws his prosecution. 3 Black. Com. 395.

It cannot be a nullity as to one and valid as to the other party. Without jurisdiction, what purports to be a judgment, is not entitled to the name. There is no such thing as a judgment against a party over whom the court had no jurisdiction; consent of parties alone, can give no jurisdiction; and one taking a judgment of a court, against another not amenable thereto, has obtained nothing which affects him, more than

would that, rendered by a tribunal having no jurisdiction, excepting what the parties themselves conferred. We have seen that the judgment could not be enforced against the defendants in this State, and to allow this defence to prevail, would be a perfect denial of justice to the plaintiffs, and render that which is entirely void and powerless against the defendants, to be a perfect immunity to them. The plaintiffs by instituting and prosecuting their suit in Massachusetts, after the defendants had removed from that Commonwealth, mistook their remedy so far as they could apply it in this State. The defendants have suffered nothing in consequence of the proceedings there, and not only the law, but justice requires that they should be holden in the present suit. By the agreement of the parties, a

Default must be entered.

INHABITANTS OF ARGYLE *versus* RUFUS DWINEL.

By the provisions of Rev. Stat. c. 121, § 33, 37, the proceedings and judgment on a petition for partition are not conclusive, unless against one who appeared and answered to the petition, upon an elder and better title than that of the person holding by virtue of the partition.

When a person is the owner of an undivided portion of lands holden in common, which portion is severed and set out, to be holden in severalty by legal process and proceedings for partition, his title adheres to and follows the estate, and becomes limited by it.

The fact, that the lands in a town reserved for public uses had been sold and conveyed, could not prevent their legal location.

When a creditor attaches the estate of his debtor held in common with others, that cannot prevent the other part owners from procuring a legal partition of the estate. Nor will such partition vacate or destroy the attachment which will remain a lien on that part of it set off to the debtor.

And if the attachment be followed by a judgment, execution and levy, that levy cannot, if made after the partition, be legally made upon the debtor's interest, as a common and undivided estate. To be effectual to convey the title, it must be made upon the estate assigned to the debtor to be held in severalty.

If the treasurer of a town be authorized to convey the lands reserved for public uses on certain conditions, under the provisions of the statute, a conveyance thereof, made by him without the performance of the conditions, is unauthorized and void. As the power of the board of trustees to

authorize the conveyance, was conferred by statute, it could be legally exercised only in accordance with such statute provisions; and their acts, performed afterwards, which might otherwise amount to a ratification of the doings of the treasurer, would be inoperative.

The effect of the act incorporating a part of the plantation of Argyle into a town by the same name, was to sanction the location of the public or reserved lands within the plantation, and to assign to the town of Argyle the benefit of those lots which had been located within its corporate bounds.

WRIT OF ENTRY demanding one of the lots of land in Argyle located for public uses.

At the trial, before SHEPLEY J., after the parties respectively had read deeds, acts of the Legislature and other written or printed evidence, and introduced and examined their witnesses, they agreed that the case should be taken from the jury, and submitted to the decision of the Court, upon a report of the trial, with authority to draw inferences, and enter such judgment, by nonsuit or default, as the legal rights of the parties might require. No copy of any of the papers read at the trial, came into the hands of the Reporter.

The facts necessary to the understanding of the points decided will be found in the opinion of the Court.

Cutting, for the demandants.

Demandant's title: — Deed from Massachusetts to trustees, dated June 12, 1815, reserving four lots of 320 acres each, one for use of ministry; one for first settled minister; one for schools and one for the future disposition of the Legislature.

"An Act to provide for the location of certain lands," approved March 17, 1835, authorized organized plantations by their assessors to locate reserved lots.

Location by the assessors of the plantation, as per Common Pleas records, January Term, 1838; one of which lots plaintiffs demand in this suit, located in that part of the plantation of Argyle since incorporated into a town by the act of 19th March, 1839, in which is this provision: — "And the said town of Argyle shall retain one half of all the public or reserved lands called the ministerial and school lands, leaving the west part of said plantation an equal half of said lands, being so located and divided at the time aforesaid."

The location shows two lots in Argyle and two lots in the residue of the plantation. And the clause in the act, "being so located and divided at the time aforesaid," (date of the act,) gives to each territory the lots within its boundary to be held in severalty, otherwise that clause is without sense or meaning.

By statute of 1824, chap. 254, § 1, the fee in reserved lots became vested in the inhabitants of towns when incorporated.

Thus is traced from the Commonwealth of Massachusetts, a perfect title to the premises demanded.

Tenant's title: — Petition for partition of 960 acres in common and undivided in township No. 3, same as in Commonwealth's deed to trustees. Report accepted by this Court, June Term, 1847, setting off to petitioner the same lots which had previously been located by the assessors of the plantation, and embracing the demanded premises.

Tenant then relies on section 31, ch. 121, Rev. Stat. as a defence to demandant's suit. Is it so? Certainly not. See sections 33 and 34, same chapter.

The demandants claim to hold in severalty a part of the premises described in the partition, and have deduced their title from the Commonwealth, while the tenant has exhibited no title, but an *ex parte* proceeding of a very recent date.

Township No. 3, now comprises the towns of Argyle and Alton, and between 30 and 40 M. acres, 1000 inhabitants, and, at the time of partition, from 50 to 100 owners of separate and distinct lots, claiming a perfect title under the Commonwealth through the trustees. Now can it be contended that all of these proprietors must take notice at their peril and attend Court and see that their rights are not interfered with, or otherwise hazard their estates, without right of invoking the 33d section?

Any person so disposed may bring his petition for partition for 100 acres in common and undivided, in the city of Bangor. Must every inhabitant appear in Court at his peril? So that on comparison of titles, the Court are to judge which is the better.

Tenant's title prior to partition: — Writ, *Samuel G. Oaks* v.

Cyrus Moore & al. May 1, 1837. Attachment of all Moore's real estate, May 3, 1837. Judgment, April 30, 1845. Levy on 960 acres, in common and undivided in township No. 3, May 23, 1845. Deed from said Oaks to tenant, June 4, 1845.

Now the question arises, what was Moore's title at the time of the attachment, May 3, 1837.

It was a deed from Nathaniel Danforth, Jr. treasurer of the trustees of the ministerial and school funds in the plantation of Argyle of August 29, 1835 : — recorded, May 21, 1836 : — conveying three lots of 320 acres each in common and undivided with the other lands in said plantation, and being lots reserved for public uses.

1. Under this state of facts, the question arises, could said treasurer convey by deed the reserved lots, before they were located? I contend that he could not.

The law pointed out only two ways by which the reserved lots could be located and separated from the rest of the lands in the township. The stat. of 1821, ch. 41, authorized the Court of Common Pleas, on application of the assessors to appoint three disinterested freeholders to locate and designate said lots. Also authorized the proprietors of the grant in which public lots were reserved to locate the same and make return thereof to said Court for their acceptance, &c. These being the only modes authorized by law for location, how could Moore ever legally perfect a location? After his purchase he could have no legal process to compel either the assessors or the proprietors to locate. And the law does not authorize a location on petition for partition.

So far from it, the stat. of 1839, ch. 357, sec. 1, re-enacted in Rev. Stat. ch. 121, sec. 40, expressly provides, that in any process for partition the public lots shall first be set off, before the commissioners shall proceed to make partition.

It was the duty then of the commissioners first to have set off the public lots before proceeding to the partition, or in the language of the statute, "then proceed to execute the other duties assigned them by the Court," thereby clearly excluding the idea or conclusion that reserved lots are the subject matter of partition.

The statutes regulating partition of land and location of public lots are dissimilar and variant; a location cannot be made by process of partition. *State* v. *Inhabitants of Baring*, 8 Maine R. 135.

Therefore there can be no valid grant, when the grantee can have no power to avail himself of his grant: — if the law ever contemplated such a state of things, provision would have been made.

2. Moore's deed was void, because the treasurer, Danforth, did not comply, in making sale of the public lots, with the requirements of law.

As the conveyance was only authorized by statute of 1824, ch. 254, sec. 3, the grantee must show a strict compliance with all the requisitions of that statute. *Alvord* v. *Collins*, 20 Pick. 421, 424; *Stetson* v. *Kempton*, 13 Mass. R. 278; *Davis* v. *Maynard*, 9 *ib.* 247; *Wolcott* v. *Strout*, 19 Maine R. 132; *Means* v. *Osgood*, 7 *ib.* 147; *Howard* v. *Turner*, 6 *ib.* 108.

"An authority to an agent to sell and receive the money does not authorize him to sell without receiving the money." *Falls* v. *Gaither*, 9 Porter, (Ala.) 605.

That all acts of agents, public or private, exceeding authority, are void, is a well established proposition.

Now sect. 3 of the stat. of 1824, after conferring power to the trustees to convey the public lots, contains this language. "And the proceeds of such sale shall be, as soon as may be, put at interest by said trustees, and secured by mortgage of real estate to double the value of the amount at interest; or by bond or note with sufficient sureties, or invested in bank stock or public securities." Such language plainly contemplates a cash sale; otherwise, how could the proceeds be put at interest and secured to double the value of the amount?

Money, usually, is the only subject matter for investment in bank stock or public securities and not Moore's note payable in five years.

How could either Moore or the trustees suppose, that such a note could be invested according to the true intent and mean-

ing of that statute, which was cautiously drawn and designed to secure the funds derived from the sale.

Or if the trustees chose to accept and the purchaser to give his note as the consideration, he must at the time secure it by a mortgage of real estate to double the amount, or sufficient sureties. Such at least was the imperative duty of the trustees to require and the purchaser to perform, before he could invoke the aid of the statute, which gives an authority, but couples it with a duty.

The tax act says, " the collector shall proceed to sell so much of the said lands as shall be sufficient to discharge said taxes, &c. and shall give and execute a deed," &c. And this Court has decided that such language implies a cash sale, and that the purchaser's note, given instead of cash, invalidates his deed.

So in this case, the act says, " said trustees shall have power to sell and convey," &c. — in one case the proceeds are appropriated to the discharge of the tax, in the other in investment as prescribed.

Now let us examine the acts and negotiations of the parties, and see if there be a compliance with the requirements of law. And first, a vote to bond to Cony and Winslow, at a meeting on April 16, 1835.

A bond from certain persons purporting to be trustees to Cony and Winslow, dated April 14, 1835, to convey to them the public lots containing 960 acres in common with the other lands, at the rate of one dollar per acre, provided said obligees, within 60 days should give good and sufficient security for said payment in equal annual instalments of 1, 2, 3 and 4 years with interest.

An indorsement on the bond signed by three of said trustees, and a majority, as they say, dated June 13, 1835, acknowledged the receipt of said Cony and Winslow, and Isaac J. Stevens' note in performance of the bond; and authorized their treasurer to deed to Cony and Winslow, on request; and if said Cony and Winslow shall prefer and shall deliver to said treasurer, Cyrus Moore's note, with security for the above sum payable in same manner, said treasurer is authorized to give the deed to

said Moore; and said Cony, Winslow and Stevens' note, to be canceled, having passed a vote, they say, to that effect. And, at a meeting of said trustees, held on said June 13, 1835, it was voted substantially as above, only instead of Moore's note with security, it is with surety.

Next appears the treasurer's deed to said Moore, dated August 29, 1835. Then said Moore's mortgage to the trustees, of the same land to him conveyed, dated July 1, 1836, to secure his note of that date for $960 payable in 5 years with interest annually; and the note is in the case wholly unpaid and Moore insolvent. Mortgage recorded, Aug. 10, 1839. Now can any court say, that these proceedings, even under the most favorable aspect they can be presented by the tenant, can sustain Moore's title?

Assume for argument's sake that the deed had been made to Cony and Winslow and that the bond or note mentioned in the statute, was equivalent to a cash payment, still Cony and Winslow, even then, would not have complied with the requirements of the law.

The statute demands "a bond or note with sufficient sureties." But the note furnished by Cony and Winslow had only one surety.

One surety is not a compliance when a statute requires sureties. *Simons* v. *Parker*, 1 Metc. 508.

But it is immaterial as to what might have been Cony and Winslow's title, had the deed been given to them and their note retained; that transaction was vacated and their note canceled, and becomes no otherwise important than as a curious matter of history, exhibiting a little of the machinery.

Moore's title we are considering. Moore does not claim under Cony and Winslow, but under the trustees. On the 29th August, 1835, we find a deed executed to Moore, and recorded May 21, 1836, and Moore's note and mortgage, dated July 1, 1836, nearly one year subsequent to the date of the deed, and more than one month after it was recorded.

But from the proceedings of the new board, held on the 13th July, 1839, it would seem that Cony's note was surrendered,

and Moore's note and mortgage, substituted. And perhaps it may be said that the deed was given to Moore at the request of Cony and Winslow, the treasurer still holding Cony and Winslow's note as the consideration for the deed to Moore. Supposing such to be the state of facts, then Moore's deed would be void for two reasons.

First. Because Cony and Winslow's note was not such security as the statute requires, as I have before shown; and besides, the proceedings of the 13th July, 1839, do not speak of Cony and Winslow's note, but Cony's note.

Second. The treasurer, Danforth, did not comply with the vote of the 13th June, 1835, which was the only authority he had, for making his deed to Moore.

There is no pretence that Cyrus Moore's note, was procured at the date of the deed, nor until nearly a year afterwards; and then without surety and instead of being payable in four annual payments, in the manner of Cony and Winslow's, it was payable at the end of five years.

But, perhaps, it may be argued, that assuming that the treasurer had no authority to deed to Moore, and that said deed was void, still the proceedings of the 13th July, 1839, was a sanctioning of the treasurer's act, and that it became a valid deed from and after that time. Suppose it to be so; that the deed received vitality on the 13th July, 1839, and not before; then Oaks took nothing by his attachment, May 3, 1837, neither by his levy, May 23, 1845, for previous to that time, Moore's mortgage was recorded.

But, I contend, that the action of the boards on the 13th July, 1839, did not operate to sanction the prior proceedings; that their action was illegal and void. Because the case finds that the two boards of the town of Argyle and the plantation of Argyle, met together and acted in conjunction.

Now I contend that the two boards could not act and vote in conjunction; previous to that time, the lots had been located, the plantation divided, and the lots divided between the two corporations as "so located."

3. Thus far I have proceeded on the assumption, that the officers, composing the board of trustees, have been legally chosen and qualified to act.

But I now contend that such was not the fact, that they were not such *de jure*, that the statute never authorized officers *de facto* and not *de jure* to make sale of reserved public lots.

The same rule applies in this case as has been applied to the sale of land for the payment of taxes, the authority in both cases being derived solely from the statutes, and the law applicable to the one is equally applicable to the other. And in the trial of every tax title in this State and in Massachusetts, in no instance, I apprehend, has the legal proof of the election and qualification of town officers been dispensed with. Our Reports abound in cases as to this point. So in sales by executors, administrators and guardians under statute provisions, it is necessary to prove them such, *de jure.*

The meeting held March 16, 1835, for the choice of plantation officers, next previous to the sale, was invalid, because there was no legal notice to the inhabitants. Return on the warrant for calling the meeting was dated same 16th of March by Geo. H. McKecknie, stating "that he had posted up notices in four public places," but not stating for how long a time. This is no compliance with the usage which requires seven days' notice and a service by posting up copies, &c. *Perry* v. *Dover*, 12 Pick. 206; *Tuttle* v. *Cary*, 7 Maine R. 430.

At the first meeting of the board, April 11, 1845, Warren Burr was chosen President and Gideon J. Newton, Clerk, who was sworn by the President. President had no authority to administer oaths, no more than the president of a bank, college or any other corporation. The statute of 1824 requires that "the clerk of the board shall be sworn to the faithful performance of his duty."

It follows then that the board had no clerk, or recording officer, such as the law recognizes, and consequently the board have no records.

The oath of Gideon J. Newton, at the trial, that he made a true record of the proceedings, was unauthorized. It was an

attempt to substitute parol for record testimony. It was not a record made under the sanction of an oath, it was nothing more than minutes by which it may be said Newton might refresh his memory.

The act incorporating town of Argyle was approved March 19, 1839. Legislature adjourned March 25, 1839. Meeting to organize the town was held April 22, 1839, 28 days only after the final adjournment of Legislature. And the warrant introduced by defendant also shows that at this meeting the usual town officers were to be chosen and the records of the town show that they were chosen. The act of incorporation was a public act, and did not take effect until thirty days after the final adjournment, consequently the meeting for the organization and choice of officers was held two days before the existence of the law, therefore the meeting was a nullity. *Gorham* v. *Springfield*, 21 Maine R. 58.

We thus show that the trustees of the town of Argyle, who met on 13th July, 1839, and acted in conjunction with the trustees of the plantation, were not legally trustees, and that their act for this cause also is void, and consequently no recognition of the acts or doings of a former board can avail the tenant, even if a law violated, could be made valid by recognition.

And this leads me to the 4th point in the case, or Satan on the mountain, for this board of trustees undertake to give away what they did not possess.

The act of 1824, ch. 254, § 1, vested the fee of the reserved public lots in towns, when incorporated. Where was the fee vested before that act? I answer, in the Commonwealth. Lots reserved were not granted: — if granted what becomes of the lot for the future disposition of the Legislature for one was as much a grant as the others: — if granted, to whom granted? No person was *in esse* capable of receiving a grant, and our laws do not recognize a fee in abeyance. The fee then inevitably remained in the Commonwealth until the township became incorporated, when it vested in the inhabitants. The fee then being in the Commonwealth, and not transferred

and vested in the the town, until its incorporation, how could the board of trustees of the plantation of Argyle dispose of the reserved lots? The statute of 1824 only gave the board of trustees in towns authority to sell. The board in the plantation of Argyle, it is contended, derived their right to sell by virtue of a private act entitled "an act to provide for the sale and distribution of the ministerial and school lands in the plantation of Argyle," passed March 20, 1835, which constitutes the assessors, clerk and treasurer of Argyle plantation a body corporate — "with all the powers granted to, and subject to perform all the duties required by law of trustees of incorporated towns for similar purposes."

This last mentioned act presents this anomaly, it seems to authorize the board to sell lands as one of the powers belonging to the trustees of a town, while the fee of the lands has never vested in the inhabitants of the plantation.

The language of the statute of 1824, authorizing a sale by trustees of a town, is this, "that said trustees shall have power to sell and convey all the ministerial and school lands belonging to their respective towns."

A true translation of the private act of 1835 would then be this — "that said trustees of said plantation shall have power to sell and convey all the ministerial and school lands belonging to their plantation." A very harmless act, for the plantation had no ministerial and school lands — as I have already shown that the fee had never vested in the plantation.

If it be contended that said act was designed to be otherwise than harmless, then I contend —

5th. That said act was unconstitutional and void for two reasons.

First. In the 7th condition in the act relating to the separation of Maine from Massachusetts and incorporated into our constitution, are these words, "all grants of lands, franchises, immunities, corporate or other rights, and all contracts for, or grants of land not yet located, which have been or may be made by the said Commonwealth, before the separation of said District shall take place, and having or to have effect within

the said District, shall continue in full force after the said District shall become a separate State."

Long before the passage of this statute this township had been granted to the institution, reserving the public lots which at its passage had not been located, or at the separation.

Now what right had the Legislature of Maine to authorize the assessors, &c. of the plantation to sell these unlocated public lots? In any point of view it was unauthorized and unconstitutional. See *Trustees of New Gloucester School Fund* v. *Wm. Bradbury*, 11 Maine R. 126.

Neither was this private act of 1835 authorized by any of the acts modifying the terms and conditions of the act of separation, and approved by the Legislature of Massachusetts.

The first of which is the act of 1831, Feb. 19, entitled "An act to modify the terms and conditions of the act of separation."

This act created no alteration in the law as it before was established, but was designed to give more power to the Legislature of this State, and to obtain the consent of Massachusetts.

Now has the aforesaid statute the least relation or reference to lands in plantations, when it speaks of towns only, and "the consent of such trustees and of the towns? It has relation wholly to lands in towns, where the inhabitants may give their consent or refusal. So the Legislature of Maine, in 1832, understood it, for having obtained the aforesaid consent they reenacted in substance the act of the prior year, by act of March 9th, 1832. It speaks of towns, selectmen, town clerk, and no where of plantations or assessors.

A. W. Paine, for the tenant, went into a full argument of the case. Some of the grounds on which he claimed a decision in his favor will be stated. He first gave his view of the manner in which the parties respectively derived the titles under which they claim; and then a list of the acts in relation to the location and sale of the lands reserved for public uses.

The tenant shows a perfect title by the proceedings in partition, by which this lot was assigned to be holden in severalty. Rev. Stat. c. 121, § 31.

But not only has the tenant a perfect title, but the demandants have none. They must show title in themselves, or must fail in their action.

The proceedings of the town meeting, relied upon to authorize the sale, are valid and binding, although the return of the warrant does not show that the provisions of the law had been complied with. A general return is sufficient. 8 Greenl. 343; 3 Fairf. 487; 8 Pick. 112.

Danforth, the treasurer, had authority to make the conveyance to Moore. *Williston* v. *Morse*, 10 Metc. 17.

The vote did not require a sale for money, and there was a discretionary power given as to the security. The purchaser is not responsible for the proper use of the money. Even, had there been a restriction to a particular kind of security, if there was any loss by departing from the requirement, the agent might be compelled to make it good, but it could not render the sale invalid.

Besides, if there was any defect of authority originally, the acts of the agent were afterwards ratified by the plaintiffs. The vote of the town to foreclose the mortgage was a sufficient ratification. As the parties interested remained unchanged, the ratification related back to the time of the first act. 2 Metc. 163.

The opinion of the Court, SHEPLEY, TENNEY and WELLS Justices, sitting in the case, was drawn up by

SHEPLEY J. — The demandants claim to recover one of the lots located for public use in that township. The Commonwealth of Massachusetts, on June 12, 1815, conveyed township numbered three, including the present townships of Argyle and Alton, to the trustees of the literary and theological institution, reserving four lots of three hundred and twenty acres each, for public uses.

By the act approved on March 15, 1821, c. 41, the circuit Court of Common Pleas was authorized on application of the assessors of a town, in which such reservations had been made, and not located, to cause them to be located. By the act ap-

proved on March 17, 1835, c. 170, the assessors of organized plantations were authorized to obtain in like manner a location of the lots reserved within them for public uses.

The Court of Common Pleas on petition of the assessors of the plantation of Argyle, at its session in this county in the month of January, 1838, caused the lots reserved for public uses in that plantation to be located. Two of those lots were thus located within and two without the territory incorporated as the town of Argyle, by the act approved on March 19, 1839, the second section of which provided, that the town should "retain one half of all the public or reserved lands, called the ministerial and school lands, leaving to the west part of said plantation an equal half of said reserved lands, being so located and divided at the time aforesaid." The time alluded to was the time of the approval of that act. The effect of the act was to sanction the location, which had been made, and to assign to the town of Argyle the benefit of those lots, which had been thus located within its corporate bounds. The title of the demandants is thus presented.

The tenant claims the lot, first by a petition, proceedings and judgment in partition. He filed a petition, alleging that he was seized of nine hundred and sixty acres, in common and undivided with persons unknown, in township numbered three, describing it. Partition was ordered after due notice, commissioners were appointed, and the lot demanded was assigned to the tenant; and the final judgment establishing the partition was rendered at the session of this Court in this county in the month of June, 1847.

The effect of these proceedings upon the title to the lot must depend upon the provisions of the Revised Statute, c. 121. The provisions of the thirty-third section are, "if any person who has not appeared and answered to the petition for partition, shall claim to hold in severalty the premises described therein or any part thereof, he shall not be concluded by the judgment for partition, but may bring his action for the land claimed, against any or all of the petitioners or respondents, or of the persons holding under them, as the case may require,

within the same time, in which he might have brought it, if no such judgment for partition had been rendered." The provisions of the thirty-seventh section are, "if any person, to whom a share shall have been assigned or left, shall be evicted thereof by any person, who at the time of the partition had an elder and better title, than those, who were parties to the judgment, he shall be entitled to a new partition of the residue in like manner, as if no partition had been made." The language of these sections is too plain to leave the intention and construction doubtful, that the judgment should not be conclusive upon an elder and better title, than that of the person holding by virtue of the partition. The demandants have exhibited a title apparently elder and better, than the tenant can have, unless he can make a breach upon it. And this, it is contended in the second place, that he has done.

This branch of his title commences on April 16, 1835, by a vote passed by the trustees of the lands reserved for public uses in the plantation of Argyle, to convey them to Nathan Winslow and Samuel Cony upon certain terms. Those trustees executed a bond, bearing date on April 14, 1835, obliging themselves to convey them on the terms named, within sixty days, to Winslow and Cony.

On June 13, 1835, the trustees received a note signed by Winslow and Cony and Isaac G. Stevens for $960, bearing date on May 11, 1835, and payable with interest from the fourteenth day of April, preceding. And at their meeting on the same thirteenth day of June, they passed a vote authorizing their treasurer to convey the lands to Winslow and Cony as bonded; and also a vote authorizing him "if Cony and Winslow should bring and deliver to him Cyrus Moore's note, with surety for said sum, payable in said manner, to deed to Moore instead of to Winslow and Cony and to give up then their note and receive Moore's instead."

It appears, that Nathaniel Danforth, Jr. then treasurer, made a conveyance of the lands to Cyrus Moore on August 29, 1835, which was recorded May 21, 1836, without receiving any note signed by Moore with surety, and without surrendering the

note signed by Winslow and Cony with Stevens. That Cyrus Moore made a note payable to the treasurer without surety for the same amount, and on July 1, 1836, made a mortgage of the same lands to the treasurer, to secure the payment of it; and that these were left in the possession of Samuel Cony.

There is no proof of any further proceedings, until after the town of Argyle was incorporated by an act approved on March 19, 1839.

On July 13, 1839, the town officers of Argyle, designated by law as trustees of the public lands, and the like officers of the plantation of Argyle composed of the remainder of the township, met together and voted, that their committee be instructed to surrender Samuel Cony's note, and receive Cyrus Moore's note and a mortgage, which are lodged in the hands of Samuel Cony, provided they are satisfied, that there is no attachment which will interfere with the security of that mortgage, and if they receive the mortgage to have it put on record immediately. At a meeting of the trustees after the mortgage had been received, they voted to foreclose the same. And at another meeting, held about one year afterward, they passed a similar vote. These proceedings exhibit the title of Moore.

The tenant derives his title from Moore, by an attachment of all Moore's estate in this county, made on May 3, 1837, by virtue of a writ against him and in favor of Samuel G. Oakes. Judgment was recovered in that suit on April 30, 1845, and an execution, issued thereon, was levied on 960 acres of land in common and undivided, in township numbered three, within thirty days, and the levy was recorded within three months. Samuel G. Oakes by his deed of release conveyed all his interest in the lands levied upon to the tenant on June 4, 1845.

Assuming that the title to the lands reserved for public uses was legally conveyed to Cyrus Moore, if those lands were afterwards legally located, he could no longer have any title to an undivided portion or interest in that township. His title would follow and remain attached to the lands as severed and located in lots. When a person is the owner of an undivided

portion of lands, holden in common, which portion is severed and set out to be holden in severalty by a legal process and proceedings, his title adheres to and follows the estate and becomes limited by it. *Cook* v. *Davenport*, 17 Mass. R. 343; *Arms* v. *Lyman*, 5 Pick. 210.

The lands appear to have been located on the application of the assessors of the plantation in the manner prescribed by law. The fact, that they had been sold and conveyed could not prevent their legal location. No title could be conveyed, which would deprive the State of its right to cause the lands reserved to be located. This right it had not surrendered. The grantee could only acquire the title subject to it. He could not insist upon their remaining in common and unlocated. The State by the act incorporating the town of Argyle had sanctioned the location of the lots.

The attachment made of Moore's estate created a lien upon it, which, like a lien by judgment, followed the title and became a lien on the lots located. *Bavington* v. *Clarke*, 2 Penn. 115.

The levy was not made upon the lots located, but upon an undivided portion of township numbered three. Moore before that time had ceased to be the owner of any undivided interest in that township, and the levy could convey no such title to Oakes. The levy to convey Moore's title should have been made upon the lots located for public uses.

When a creditor attaches the estate of his debtor held in common with others, that cannot prevent the other part owners from procuring a legal partition of the estate. Nor will such partition vacate or destroy the attachment, which will remain as a lien on that part of it set off to the debtor. And if the attachment be followed by a judgment, execution and levy; that levy cannot be legally made upon the debtor's estate, as a common and undivided estate, in disregard of the rights of others legally acquired. To be effectual to convey the title, it must be made upon the estate assigned to the debtor to be held in severalty.

So in this case by the location of the lands reserved for public

uses, all the owners of other lots and lands in the township became entitled to hold them not in common, subject to have them taken or diminished by a future division and assignment of the public lots. This right to hold their lots could not be affected by any attachment or levy made upon the reserved lands. The levy made by virtue of the execution, Oakes against Moore, being void, the tenant fails to have obtained any title under Moore.

The demandants however can only recover upon the strength of their own title. Danforth, the treasurer of the trustees, was not authorized by their vote to convey the lands to Moore without receiving his note with surety instead of the note of Winslow and Cony with Stevens. He made the conveyance to Moore without authority. It is contended, as he was authorized to convey to Winslow and Cony, that a conveyance to Moore would be good under that authority; and the case of *Williston* v. *Morse*, 10 Metc. 17, is cited to sustain the position. The cases are not similar. In that case the conveyance was made to another than the best bidder by his consent. The owners of the estate could not be injured by it. In this case the consideration of the note of Winslow and Cony with Stevens was the conveyance of the lands to them. A conveyance of the lands to Moore, without their consent, would deprive them of that consideration and the note would be of no value. No inference is authorized by the facts proved, that they assented without a surrender of their note. Such a conveyance by the treasurer, made without having any security, which could be legally enforced, would not be authorized.

The subsequent proceedings of the two boards of trustees might be sufficient to ratify that sale, if they could legally act in that manner. As their power was conferred by statute, it could be legally executed only in accordance with its provisions. Their acts, performed in a manner not authorized, would be inoperative. *Tenant defaulted.*

JOHN HODGDON *& al. versus* JOSEPH CHASE.

An agreement by the defendant, made since Rev. Stat. c. 146, was in force, "to waive any defence he might have had by virtue of the statute of limitations, and take no advantage of the same," will not take the contract, to which it had reference, out of the operation of that statute, unless the same be in writing and signed "by the party chargeable thereby."

EXCEPTIONS from the Eastern District Court, ALLEN J. presiding.

Assumpsit on account annexed; writ dated March 6, 1846. The general issue and statute of limitations were pleaded.

Plaintiffs introduced their book of original entries with the supplementary oath; the docket of the Court in which the actions were entered, judgments rendered, and executions issued. And also the deposition of Oliver Frost, Esq. Writ, pleadings, and deposition may be referred to.

The Judge instructed the jury, that from the evidence it was apparent that the plaintiff's claim was barred by the statute, and that they could not recover unless they were entitled so to do from the testimony of said Frost, which the jury would carefully consider; that in order to take the case out of the operation of the provisions of the statute, chap. 146, sec. 19, no acknowledgment of indebtedness or promise to pay the debt would be available to the plaintiffs unless such acknowledgment or promise be an express one and made or contained in some writing, signed by the defendant. But if the defendant had agreed with the plaintiffs, for a valuable consideration, to waive any defence he might have had by virtue of the statute of limitations, or to take no advantage of the same, such an agreement, although not in writing, would preclude the defendant from setting up such defence.

The jury returned their verdict for the plaintiffs. And the defendant filed exceptions.

J. Godfrey, for the defendant, gave a history of the decisions of the Courts, and said, that the statute of limitations at one time had been substantially repealed by judicial construction.

In England, the remedy was found in a statute providing that no promise should take the contract out of the operation of the statute unless it was in writing and signed by the party. That statute was enacted here in nearly the same words, and applies to this case. Rev. Stat. c. 146, § 19.

The object of the Legislature was to prevent a contract from being taken out of the operation of the statute by any verbal proof whatever, in whatever language it may be expressed. The ruling of the Court is, in substance, that a party may do indirectly what he cannot do expressly, and in direct terms.

But that is not the only difficulty. If a parol promise would accomplish the object of the plaintiffs, it should be made on a new and sufficient consideration. And here there was none whatever. He cited 5 Metc. 442; 23 Pick. 302; 23 Maine R. 453.

Cutting, for plaintiffs.

Warren v. *Walker*, 23 Maine R. 458, decides this case. Citing 5 Metc. 443; 23 Pick. 302.

"An agreement to waive the statute of limitations, it must be understood, is an agreement never to set up any such defence."

In *Foster* v. *Purdy*, 5 Metc. 443, the Court say: — "It is a well established rule of law, that a covenant not to sue an obligor, without any limitation of time, may be pleaded as a release, to avoid circuity of action.

"And the same rule applies for the same reason, to a promise or agreement, not under seal, not to sue a note of hand or other contract."

To avoid circuity of action, if this defence succeeds, plaintiffs have an action for damages.

The only distinction, between the case of *Warren* v. *Walker* 23 Maine R. 458, and the case at bar, is that in the former the promise to waive the statute was in writing and in the lat- by parol.

Now at common law there is no distinction as to the validity of a simple contract, whether it be in writing or by parol.

Comyn on Contracts, vol. 1, p. 1, says: — "All contracts are by the laws of England distinguished into agreements by specialty and agreements by parol. If they be merely written and not under seal, they are denominated contracts by parol."

"Now a contract by parol is defined to be a bargain or agreement voluntarily made, either verbally or in writing not under seal upon a good consideration between two or more persons, capable of contracting to do or forbear to do some lawful act."

The stat. ch. 146, sect. 19, does not say that the contract to waive any defence of the statute of limitations, shall be in writing; but only an acknowledgment of indebtedness, or promise to pay.

The consideration, in cases cited, was forbear to sue. That constituted the consideration, and without such forbearance there would have been no consideration.

Here was a consideration; case does not find what it was; and it is not necessary that it should.

The question, whether agreement to waive was made before or after the statute attached, does not affect the question, otherwise than as to the consideration.

The opinion of the Court was delivered, at the same term, orally as follows, by

WELLS J. — This is an action of assumpsit on an account. It comes to this Court upon exceptions to the instructions given to the jury by the Judge of the District Court. The jury were instructed that "if the defendant had agreed with the plaintiffs, for a valuable consideration, to waive any defence he might have had, by virtue of the statute of limitations, or to take no advantage of the same, such an agreement, although *not in writing*, would preclude the defendants from setting up such defence."

Chap. 146, § 19, Rev. Stat. provides, that "no acknowledgment or promise shall be allowed, as evidence of a new or continuing contract, &c., unless such acknowledgment or promise

be an express one, *and made or contained in some writing, signed by the party chargeable thereby.*"

It is contended by the plaintiffs, that it having been decided in the case of *Warren et al.* v. *Walker*, 23 Maine R. 453, that an agreement in writing, to waive the statute of limitations, made for a sufficient consideration, before the statute could operate as a bar, would preclude the party making such agreement, from setting up such defence, that the same result would follow from making a parol agreement, under the same circumstances.

But in that case the agreement was in *writing;* in this it is *by parol.*

The Legislature must have intended to change the existing law, and not to trust to the memory of witnesses, in testifying to a new promise or acknowledgment of indebtedness.

Whether an action could be maintained upon the promise, which, it is contended, has been proved in the present case, it is unnecessary to determine.

The agreement, set up, is not "contained in some writing." The form and mode of making it is immaterial, while it consists in words, not reduced to writing, signed by the party chargeable. The requirements of the statute are plain, and the language used clearly indicates the intention of the Legislature.

The exceptions are sustained.

Joshua W. Carr *versus* Levi Lord *& al.*

By the latter clause of the eighth section of the U. S. Bankrupt Law of 1841, declaring that certain actions should not be maintained, "unless the same shall be brought within two years after the declaration and decree in bankruptcy, or after the cause of action shall first have accrued," is intended, merely, that no suit by or against the assignee, claiming an adverse interest in any property or right of property, transferable to or vested in such assignee, and no suit by or against any other person claiming an adverse interest in the same, should be maintained, unless brought within the two years. An action upon a note, therefore, given by a person the bankrupt, before the decree of bankruptcy, is not barred by such limitation of two years.

If an action be brought, in the name of the assignee, on a note given by the defendant to the bankrupt, without the consent or knowledge of the assignee, and before he had the actual possession of such note, he may afterwards ratify the act, and proceed to judgment in the same manner as if the suit had been originally commenced by his direction.

A note made payable to a bankrupt, after petition filed, and before the decree, passed to the assignee by operation of law, as a part of the bankrupt's effects.

Statement of facts: —

"Assumpsit upon a promissory note given by the defendants to one Hiram Corliss, and is brought in the name of the plaintiff as assignee of the said Corliss in bankruptcy. The writ is dated May 1st, 1845.

"The parties agree to submit the cause to the Court upon the following facts. A nonsuit or default to be entered as the judgment of the Court may be.

"Said Corliss, on 31st December, 1842, filed in the proper court his petition to be allowed the benefit of the U. S. Bankrupt Act of August 19, 1841. On the third of January, 1843, the defendant gave him the note declared on. On the 21st of February, 1843, said Corliss was duly declared a bankrupt, and on the twenty-eighth of same February the plaintiff was duly appointed his assignee. The note has never been in the personal possession of the plaintiff and the suit was commenced without his knowledge. On being inquired of by the defendant's counsel since the entry of the action, the plaintiff stated, that he knew nothing of any such demand, and had

not authorized the suit. Subsequently on the facts being explained to him by the attorney who had commenced the suit, the plaintiff has sanctioned it, and authorized it to proceed in his name.

"The writ and note declared on are made a part of the case and may be referred to without being copied.

"S. W. Robinson, plaintiff's attorney.

"A. H. Briggs, defendant's attorney.

Cutting, for the defendants, contended that the action could not be maintained: —

1. Because the suit was not brought within two years next after the cause of action accrued, nor within two years after the decree of bankruptcy. The suit is barred by the express terms of the eighth section of the bankrupt act.

2. The action was commenced in the name of the assignee without his consent or knowledge, and the note, on which the action was brought, was never in the possession of the assignee, nor upon the schedule of the bankrupt's effects.

The suit is brought in the name of Mr. Carr, as a public officer, appointed by law. A public officer cannot, as such, ratify and adopt what another has done in his name and stead. This is an attempt by the bankrupt to collect this note for his own benefit in the name of the assignee.

S. W. Robinson, for the plaintiff, was not present at this term, but afterwards furnished the Court with a written argument. The only question is, can action be maintained in name of assignee?

It was rightfully commenced in his name because he was legally the owner of the note.

1. The act of Congress, (Aug. 19th, 1841, § 3,) is sufficiently plain. The time when all property passes from the bankrupt, and vests in the assignee, is when he is declared bankrupt, and makes no distinction as to property owned before petition filed, and that which he acquires afterwards, and before the decree of bankruptcy. The decree clearly passes all the property which the bankrupt owns at the time.

2. This section of the act has received an authoritative judicial construction in the C. C. U. S. — *Ex parte* Newhall, assignee of Brown. Law Rep. Vol. 5, (1842,) p. 306; S. C. 2 Story's Reports, 360.

3. "Note never in hands of assignee, and suit commenced without his knowledge." Can this make the least difference?

In the first place, the note was legally the property of the assignee, and he had a right to the possession, no matter in whose hands it might be.

In the second place: — It was competent for the assignee to make Corliss, or any body else, his agent to commence and prosecute the suit; and though he did not do this at the outset, he afterwards assented to the act of Corliss, and authorized suit to proceed in his name.

Subsequent ratification is equivalent to previous authority. This is too well settled a principle to need argument or citation. As to the point that the suit is barred by the eighth section of the bankrupt act: —

It is clear that the limitation clause only applies to the same class of cases, of which concurrent jurisdiction is by the first part of the section vested in the Circuit and District Court of the United States.

And it is expressly applicable to such cases only, where another party claims an interest adverse to the assignee, "touching the property and rights of property of said bankrupt transferable to, or vested in such assignee."

This is not a suit of such character. It is merely a suit to collect a note of the maker, who does not pretend any defence on the merits, and if he did, he certainly does not "claim any adverse *interest*" in it.

If this were a suit by the assignee against a third party, who had got the note in his hands and claimed an interest in it adverse to the assignee, the limitation would apply. In this case it does not.

The opinion of the Court, SHEPLEY, TENNEY & WELLS Justices, was drawn up by

SHEPLEY J. — The suit was commenced on May 1, 1845,

on a promissory note made by the defendants on January 3, 1843, payable to Hiram Corliss, in twenty days from date. The plaintiff is the assignee in bankruptcy of Corliss, who was decreed to be a bankrupt on February 21, 1843, on his own petition, filed on December 1, 1842.

The first objection is, that the action cannot be maintained, because it was commenced more than two years after the cause of action first accrued and after the decree in bankruptcy had been made. The latter clause of the eighth section of the act to establish an uniform system of bankruptcy declares, "no suit at law or in equity shall, in any case, be maintainable by or against such assignee, or by or against any person claiming an adverse interest touching the property and rights of property aforesaid, in any court whatsoever, unless the same shall be brought within two years after the declaration and decree in bankruptcy, or after the cause of suit shall first have accrued."

If the words, "in any case," were omitted there could be little doubt respecting the true sense and construction. It would be, that no suit by or against such assignee, claiming an adverse interest in any property or rights of property, transferable to or vested in such assignee, and no suit by or against any other person claiming an adverse interest in the same, shall be maintainable, unless, &c. Was it the intention by the use of the words "in any case" that the limitation should be applicable to suits of all descriptions, by or against an assignee, and to those suits only by or against any other person claiming an adverse interest in such property or rights of property? Those words have no more particular connexion or relation to the maintenance of an action, by or against an assignee, than they have to the maintenance of an action by or against any person claiming an adverse interest. And it is certain, that the limitation with respect to such persons, applies only when they claim an adverse interest in such property. The former clause of the section provides, that the Circuit Court shall have concurrent jurisdiction with the District Court of all suits brought by any assignee against any person claiming an adverse interest, or by

any such person against such assignee. The same subject appears to have been under consideration in the framing of the latter clause; and more general words may properly be explained and restricted by the subject of legislation. Some assistance in the exposition may be obtained by a recurrence to the tenth section. By this it is made the duty of the District Court to direct a collection of the assets at as early periods as practicable, consistently with a due regard to the interests of the creditors; and to have the proceedings brought to a close within two years, if practicable. These provisions by implication would authorize that court to allow a longer time for the assignee to collect the assets, which would be inconsistent with a prohibition, that no suit should be maintained by an assignee after that time. Taking into consideration the subject of legislation, the arrangement of the language used in the eighth section, and the provisions of the tenth section, the conclusion is, that the limitation was not intended to include suits of this description.

Another objection is, that the suit was commenced by order of the bankrupt, without the knowledge or consent of the plaintiff, and that the note has not been in his "personal possession."

The assignee has since authorized the suit to be prosecuted in his name by the attorney, who commenced it. It is said, that one acting in an official capacity cannot ratify the acts of one assuming to act for him. However this may be, should the person assume to perform duties requiring an official sanction, there can be no doubt, that one acting in an official capacity, may employ agents to perform certain acts for him, and in such cases he may ratify their acts when performed without a precedent authority.

The note, having been made payable to the bankrupt after petition filed and before the decree, passed to the assignee by operation of law as a part of the bankrupt's assets. *Ex parte, Newhall*, 2 Story, 360. The attorney, after his proceedings had been ratified, would hold the note as the attorney of the plaintiff. *Defendants defaulted.*

EDWARD R. SOUTHARD *versus* NATHANIEL WILSON.

In a suit upon a promissory note, if the plaintiff be the holder of it, the law presumes the title to be in him, or in some person for whom he acts.

A written surrender of possession of mortgaged land by the mortgagor to the mortgagee for the purpose of foreclosure, is ineffectual unless recorded within thirty days from its date.

ASSUMPSIT upon a promissory note. Trial before SHEPLEY C. J. It was one of several notes given for land and secured by a mortgage. On the 4th of May, 1840, several months after all the notes had become payable, the mortgagor surrendered to the mortgagee the possession of the land, by indorsing upon the mortgage, under his hand, a memorandum of that date, admitting that he thereby surrendered "peaceable possession of the premises," reserving only a right to redeem within three years. That memorandum was not recorded until 1844. The defendant contended that the mortgage was foreclosed, and offered proof that the mortgagee, upon said 4th of May, 1840, and under and by virtue of said memorandum, entered upon and took peaceable possession of the land, and thenceforward continued to occupy it till the present time; and also offered to prove that the land was of value equal to the amount due upon the notes.

The evidence was objected to and excluded. The defendant submitted to a default, which was to be taken off, if the plaintiff is not entitled to recover.

Washburn, for plaintiff.

Wilson, for defendant.

The opinion of the Court was drawn up by

WELLS J. — The disclosure of the plaintiff, made on the occasion of taking the poor debtor's oath, February 25, 1845, was introduced in evidence, to disprove the plaintiff's title to the note in suit. By the certificate of the clerk, it appears, that the suit was not commenced until the 24th of September, 1845.

The plaintiff might have acquired title to the note, after the disclosure was made, and if so, the disclosure could not affect it. But it is in proof, that he acted under an authority to institute the suit, which was commenced after the disclosure.

It appears by the testimony of Mr. Washburn, that the plaintiff brought him the note, for the purpose of having a suit commenced upon it, in the name of the plaintiff, at the request of Averill, the payee, and the plaintiff said he did not know but he should buy it, and that both the plaintiff and Averill had told the witness, that the plaintiff was not the owner of the note.

If the legal interest is in the payee of a negotiable note, he can authorize an action to be brought by an indorsee, in the name of the latter, for his benefit. *Bragg* v. *Greenleaf*, 14 Maine R. 395 ; *Lewis* v. *Hodgdon*, 17 Maine R. 267.

It is contended, that this testimony, in relation to the authority of the plaintiff, could not be legally derived from the declarations made by him and by Averill.

If this objection should prevail and the testimony be rejected, there would be no evidence in the case, to impair the right of the plaintiff to maintain the action. For the legal inference is, that the title to the note is in him, he being the holder of it, or in some person, under whose authority, and for whose benefit he acts. *Marr* v. *Plummer*, 3 Greenl. 73 ; *Beekman* v. *Wilson*, 9 Met. 434.

Averill entered upon the premises, mortgaged to secure the payment of the note in suit and other notes, by the consent in writing, of the defendant, more than three years before the commencement of the action. If the foreclosure had been perfected, it would be admissible in defence, to show, that the value of the land was equal to the amount due on the notes, or that it was a payment *pro tanto*. *West* v. *Chamberlin*, 8 Pick. 336.

The act of Feb. 20, 1839, chap. 372, requires the writing, given by the mortgager, acknowledging the entry, to be recorded within thirty days from its date, in the office of the register of deeds, "and unless so recorded, *within said time*, such

entry shall not be effectual in law, for the purpose of foreclosing such mortgage."

The writing, signed by the defendant, in the present case, was not recorded until May 4, 1844, and according to the express terms of the statute, the entry to foreclose was ineffectual, and the mortgage, at the time of the trial, was open to redemption. The defence, therefore, was inadmissible and there must be judgment on the default.

ADAMS H. MERRILL *versus* JOHN H. WILSON.

Where the general partner, (in a special partnership subsisting and conducted in his name,) makes a general assignment of *his* property for the benefit of creditors, without using any words to show that the partnership property was intended to be assigned, the partnership property is not thereby transferred.

In such case, one, who takes the partnership property by purchase from the assignee, cannot hold it as against the creditors of the copartners.

SHEPLEY J. — The plaintiff claims the goods replevied, by purchase of Joseph S. Wheelwright, whose title to them was derived from Charles Godfrey, by an assignment made to him for the benefit of creditors, on May 30, 1846. It is admitted, that the goods were the property of a special partnership, formed between the plaintiff, as the special partner, and Charles Godfrey, as the general partner, on Sept. 18, 1844; and that they were attached and detained by the defendant, a deputy of the sheriff, as the property of that partnership, by virtue of a writ in favor of Goss & Upham against Charles Godfrey. The statute provides, that suits against such a special partnership shall be brought against the general partner alone. The parties have agreed, that so much of the report of the case, as states how the capital of the partnership was made up, shall be disregarded, thereby in effect changing the report into a statement of facts.

The only question now presented is, whether the goods attached had been before legally conveyed to Wheelwright by the assignment.

The name of the special partnership was, as the statute required, Charles Godfrey. The assignment was made by him. There is no language found in it to determine, that it was made by the firm or partnership of Charles Godfrey. There can be no doubt, that one partner may sell and convey the goods owned by the partnership, and that he may make an assignment of the partnership effects. It is equally clear, that the general partner of a special partnership, whose business is transacted in the name of the general partner, may have private property of his own and do business also on his own private account, and may be indebted to others in his private and individual capacity. When he makes a conveyance of property in his name and under his signature, how can it be known, that the partnership property is intended to be conveyed, unless there be something found in the instrument to determine that it was? To allow extraneous evidence to be introduced to decide, would be to allow a written instrument to be so varied by parol testimony as to convey either partnership or private property, including real estate, according to the weight of such testimony. When all the language used in the instrument of conveyance is appropriate for the conveyance of one's private property, and there is nothing in it by which it can be determined, that he acted in any other than an individual capacity, that must be a conveyance of his own private property. There must be something to show, that the partnership name and not the individual name was used; or the partnership goods must be clearly described in it to make it operative to convey them.

The assignment in this case was made "between Charles Godfrey, trader," and not between the firm of Charles Godfrey of the first part, and Joseph S. Wheelwright of the second part, and other persons, "as creditors of said Charles Godfrey, of the third part." Must not the private creditors of Godfrey have been entitled to become parties? If so, and the effects of the partnership were conveyed, they would be entitled to an equal dividend from them with the partnership creditors.

The clause of conveyance says, "the said Godfrey hath sold, assigned, transferred, and set over" "all and singular *his* stock in trade, *his* promissory notes, books of account, and other things due and owing *him*, and *all his property* of every description, both real and personal, excepting such as is exempted by law from attachment." Can there be any doubt, that this is appropriate language to convey, and that it would convey by an instrument under seal the real and personal property of the person, Charles Godfrey? The exception of property exempted by law from attachment will be without application and wholly inoperative, if his private property be not conveyed, for no part of the attachable property of such a partnership is by law exempted from attachment. If the effects of the partnership and his private property both be conveyed, and the private and partnership creditors be entitled to become parties and to have equal benefits under it, the assignment would be made in violation of their respective rights, as well as in violation of the provisions of the twelfth and thirteenth sections of the statute, c. 45, which secures to the creditors of such a partnership the whole effects, including, in case of insolvency, the whole capital contributed by the special partner.

The distribution of the property conveyed is to be made "among such of *my* creditors" as shall become parties, not among the creditors of the firm of Charles Godfrey, and in proportion to the amount of their "claims against *him.*" The assignee is to pay to the creditors "the proportion of *said Godfrey's property* according to their respective claims." In short, by reading the assignment, no one would be informed of the existence of a partnership under the name of Charles Godfrey, or that he was interested in or connected with such a partnership. After being informed of its existence by extraneous evidence, one would find nothing in the assignment indicating, that it might have been intended to be applicable to it, unless it be the phrase "*his* stock in trade", and that would more appropriately refer to a stock in trade owned exclusively by him, than to the stock in trade of a firm designated by his name.

If the partnership property be not conveyed by the language of the assignment, it is contended, that it would pass to the assignee by the provisions of the statute, approved on March 21, 1844, c. 112. The provision made in the second section is, that assignments made by debtors for the benefit of creditors shall be construed to pass all the property, real and personal, of the debtors, not exempted by law from attachment, whether specified in such assignments or not. If this assignment convey the property of Godfrey only, and not the property of the partnership, his right only to the partnership property, after payment of all the debts due from the partnership, could be considered as conveyed without a violation of the provisions of the statute, c. 45, for the reasons already stated.

Any attempt to establish a legal conveyance of the partnership property must encounter these difficulties.

The language used in the assignment will be found to be all appropriate for the conveyance of the property of the person Charles Godfrey, and it may all be operative and have its proper effect.

It will be found unsuitable and some of it inoperative in a conveyance of the partnership property of the firm Charles Godfrey; and there is nothing found in the instrument indicating, that it was a conveyance of the property of such a firm. It is impossible, consistently with its plainest provisions, to limit it to the conveyance of the property of such a firm only.

If it be regarded as a conveyance of the private property of the individual, and of the property of the firm, it cannot be admitted to be a legal instrument, and to be executed as such, without a violation of the provisions of the statutes already noticed.

The conclusion is, that the goods replevied were not legally conveyed to Wheelwright, and of course the plaintiff could not obtain a legal title by purchase from him.

Plaintiff nonsuit.

J. Godfrey and *Peters*, for plaintiff.

Rowe, for defendant.

HENRY WARREN *versus* DAVID G. IRELAND.

If, pending a suit in which land had been attached, the plaintiff assign the demand for value, the equitable estate, after the levy, is in the assignee, as a resulting trust.

In the making of such a levy, if the assignment be stated in the appraisers' certificate, such statement is notice of the trust to any attaching creditor of the assignor.

Whether such creditor, without notice, actual or implied, could, by levying the land as the property of the assignor, hold it discharged of the trust; *quære.*

But with such notice, he could hold only subject to the trust, and could not maintain a writ of entry against the grantees of the *cestui que trust.*

SHEPLEY J. — The demandant claims to recover river lot numbered twenty-five in the township of Chester, excepting a small tract in the south-west corner. Both parties derive their title from R. H. Bartlett.

An execution, issued on a judgment recovered in the name of Ezekiel Hacket against Bartlett, was levied on a lot of land alleged to include this lot, on December 21, 1838, and a record thereof was made in the registry of deeds, on February 22, 1839. James B. Fiske claimed to be the assignee of the demand, upon which that judgment was recovered, by a written assignment of it, which had been lost. The testimony to prove the existence of such an assignment was submitted to the jury, and they found, that the demand had been thus assigned before the judgment was recovered. Hackett conveyed the title acquired by the levy to Fiske, by deed executed on February 19, 1839, and recorded on August 17, 1839, but not acknowledged till September 16, 1839, when it was entered both upon the deed and the margin of the record. Fiske conveyed the same to the tenant by deed of release on April 15, 1840, recorded on November 3, 1842.

The demandant, by virtue of a writ in his favor against Ezekiel Hacket, caused the premises to be attached on March 7, 1839, and an execution issued on a judgment recovered in that suit, to be levied thereon within thirty days after the re-

covery of judgment on November 16, 1844. This levy was recorded in the registry of deeds on December 25, 1844.

The demandant contends, that the land described in the conveyance to the tenant is not the same described in his levy. It appears to be the same described in the levy made in the name of Hacket against Bartlett. It is not perceived, that the demandant's right to recover the premises would become more certain, if the fact alleged were proved. His title is derived from Hacket, and there is no evidence, that he ever claimed to own or to possess any part of lot numbered twenty-five, unless it was embraced by that levy. The demandant can recover only upon the strength of his own title, and if the title of Hacket fail his own falls with it.

The land upon which the levy was made in the name of Hacket, is decribed in the levy as "lot number twenty-five, being river lot in township numbered one in the eighth range, west of Penobscot river, now the town of Chester, bounded and described as follows." The monuments, courses, and distances, are then named. What is bounded as follows? Clearly lot numbered twenty-five, and not another tract of land. The monuments, courses and distances were named as descriptive of that lot. The description commences "at the southeast corner of lot No. 26, on the bank of Penobscot river, at a stake and stones." That is, not the corner of lot No. 26 adjoining to lot No. 25, but the corner opposite; and by following the courses named and allowing them to be varied to conform to the lines of the lots as recently surveyed, and disregarding the monuments named, lot No. 26 would be described as the lot levied upon. By doing so, however, the monuments named would not be found, with the exception of a poplar tree, and such a tree is the monument at the northeast corners of both the lots, Nos. 25 and 26. By supposing "southeast" to have been written by mistake for southwest the monument first named would be at the river between lots 25 and 26, and by following the courses named in the levy and allowing them to be varied as before, the monuments named at both the corners of lot No. 25, back from the river, will be found. Taking into

consideration the general description of the lot as No 25 with these facts, there can be no doubt, that such an error was made; and by rejecting the term "southeast" as inconsistent with the other descriptions, lot No. 25 will be described and conveyed by the levy from Bartlett to Hacket.

The question then arises, whether by the levy made in his name, Hacket acquired such a title, that the lot might be levied upon as his estate, by a judgment creditor.

Having assigned the demand, upon which that judgment was recovered, he had no beneficial interest in the judgment, when it was satisfied by the levy. That levy was made to satisfy a judgment debt due to Fiske, who thereby paid the consideration for the purchase of the estate conveyed by the levy to Hacket at the time, when that conveyance was made. And by a resulting trust, he became the *cestui que trust* and beneficial owner of the lot. Hacket held only the legal title to it in trust for him. *Buck* v. *Pike*, 2 Fairf. 1; *Russell* v. *Lewis*, 2 Pick. 508. The statute in force, when that levy was made, c. 60, § 27, provided, that a creditor might "levy his execution upon the debtor's real estate." If the words "debtor's real estate" are to receive such a construction as to include an estate, in which he had no beneficial interest, and the title to which he held in trust, for another, the effect may be to enable a creditor to obtain payment not from the estate of his debtor, but from the property of another person. It might compel the debtor against his will to violate a most sacred trust, for the purpose of paying his own debt out of another's property. Could it have been the intention of the Legislature by the use of such language to authorize the property of one person to be taken to pay a debt due from another, and to compel him to violate a trust, to accomplish such a purpose? The statute also provides, that the levy "shall make as good a title" to the creditor "as the debtor had therein." If the debtor's title was subject to the beneficial interest of another person in the estate, will any more perfect title be conveyed by the levy and statute provisions to the creditor? If so, the rights of the *cestui que trust* may be destroyed without any act of his own

or of his trustee. To determine that they can be, is to decide that the Legislature without a violation of the fundamental law, may appropriate the equitable property and rights of one person to pay the debts of another. And if the rights of the beneficiary are not destroyed, but still adhere to and follow the title, so that they can be enforced against the statute purchaser, the effect will be, that he will be made by the satisfaction of his judgment to pay for the estate without obtaining any value, for he will become the holder of a title, from which he can derive no benefit. The language used in the statute may have its full effect and these mischiefs be avoided, if it be construed to include those estates, only in which the legal and beneficial interests are united in the debtor. It may be, if such be the construction of the statute, that a creditor may have no means of information, whether an estate apparently owned by his debtor be a trust estate; and he may fail to obtain any value by a levy, when he has been vigilant to ascertain his rights. This may also happen in other cases, when his debtor has a title to an estate apparently good, which proves to be wholly defective. In such cases the debt remaining unsatisfied, he may by a proper course, have his judgment revived. The case of *Brown* v. *Maine Bank*, 11 Mass R. 153, may be regarded as opposed to this construction of the statute. The question, whether a levy could be legally made upon an estate held in trust, was not raised or decided in that case. It appears to have been assumed, that it might be. When that case was decided, the law respecting trust estates and the remedies for their preservation and protection were less known and less perfect, than they have since become in that State. The title of the *cestui que trust* is in some States regarded as so perfect that it may be taken on execution and appropriated to the payment of his debts, while it cannot be for those of the trustee. *Foote* v. *Colvin*, 3 Johns. R. 216; *Jackson* v. *Walker*, 4 Wend. 462; *McKay* v. *Williams*, 1 Dev. & Bat. Eq. 405; *Elliott* v. *Armstrong*, 2 Blackf. 198. In the case of *Russell* v. *Lewis*, 2 Pick. 508, it was decided, that the tenth section of the English statute of frauds, which authorized such estates to

be taken by execution for the debts of the *cestui que trust*, had not been adopted in Massachusetts, and that such estates could not be levied upon to pay the debts of the *cestui que trust*. While in the case of *Pritchard* v. *Brown*, 4 N. H. Rep. 397, subsequently decided, it was held, that such estates were liable to be levied on for that purpose. In Virginia the *cestui que trust* is permitted to maintain an action of ejectment in his own name to recover such an estate. *Hopkins* v. *Ward*, 6 Munf. 41. But an estate cannot be appropriated by execution to pay the debts of the *cestui que trust* unless it be held as a simple trust for his benefit *sui juris*. *Ontario Bank* v. *Root*, 3 Paige, 478.

The rule is well established, that the judgment creditors of a trustee are not allowed to hold a trust estate against the *cestui que trust*. 2 Fonb. Eq. b. 2, c. 7, § 1, note a.; 2 Story's Eq. § 977.

Omitting to insist upon this construction of the statute, the question will be again presented, whether the demandant can recover possession of the premises and withhold them from the tenant.

The appraisers in their return say, we entered upon the estate "shewn to us by James B. Fiske, agent and assignee of the within named creditor." This was made a part of the record of the levy. The statement that Fiske was the assignee of the creditor was sufficient to communicate to any person obliged to notice the contents of the record the fact, that he had become by the act of the law, or of the party in some mode, legally or beneficially interested in that judgment. It is said, that the demandant could not be required to notice such a fact stated in the record, because the assignment of a debt is not an instrument which the law requires to be recorded. Admitting the rule and the force of this position, it is still true, that a notice, which might be insufficient to prevent a subsequent purchaser from acquiring title in preference to a prior purchaser claiming it by a conveyance not recorded, might be sufficient to prevent the purchaser of a trust estate from holding it discharged of the trust. So vigilant have courts of equity been

to protect the rights of *cestuis que trust*, that the rule has become established, that whatever is sufficient to put the purchaser of a trust estate on inquiry will be sufficient to prevent him from holding it discharged of the trust. *Smith* v. *Low*, 1 Atk. 489; *Green* v. *Slayter*, 4 Johns. Chan. 38; *Moragne* v. *Le Roy Du Cereveil*, 4 Desau, 256; *Ward* v. *Fox*, Hughes, 231; *Peters* v. *Goodrich*, 3 Conn. R. 146; *Glidden* v. *Hunt*, 24 Pick. 226. How far he must be considered as having notice of what is contained in the recorded title of the person from whom he derives his title, has been considered and decided by different courts.

A devisee in trust with authority to sell, conveyed the estate and received from the purchaser a deed of trust to secure payment of the purchase money by instalments. He then, by a contract made for his own benefit, assigned those instalments to another person by an assignment containing a reference to the deed of trust, which referred to the deed of sale, and that referred to the will, by which the trust was created. It was decided, that the assignee of the instalments must be considered as having notice, that they were derived from the estate devised in trust. *Graff* v. *Castleman*, 5 Rand. 195.

When a purchaser in the deduction of his title, must use a deed or the record of it, which exhibits a fact shewing an equitable interest in another, he will stand affected with notice of it, and cannot avoid it by shewing, that he was in fact ignorant of it. *Thompson* v. *Blair*, 3 Mur. 273; *Graves* v. *Graves*, 1 A. K. Marsh. 165.

Where a deed of purchase referred to a deed by its date, exhibiting an equitable interest in another, the purchaser was considered as having notice of its contents, although it was not recorded. *Johnston* v. *Gwathmey*, 4 Litt. 318.

In the case of *Murray* v. *Ballou*, 1 Johns. Chan. 566, the defendant purchased a lot of land of Winter, who held the title in trust for Mrs. Green. There was a deed recorded from Heatley to Mrs. Green, which recited the declaration of trust executed by Winter. It was contended, that this was notice to Ballou of the trust. The chancellor decided otherwise, but in-

timated, that it would have been notice, if there had been a deed on the record, to which Winter was a party, containing such a recital. By the rule established in these cases, the demandant must be considered as having implied notice of the fact stated in the record of the appraiser's certificate, that Fiske was the assignee of the creditor, and by that put upon inquiry into the extent of his rights as such. And this would be sufficient to prevent his holding the legal title discharged of the trust.

In cases of simple trust, the title being held for the sole benefit of the *cestuis que trust*, entitled *sui juris*, they may retain possession, may convey the estate, and may compel the trustees to convey it for their benefit. Fonb. Eq. b. 2, c. 7, § 2, and c. 8, § 1; 1 Mad. Ch. Pr. 361; *Watts* v. *Turner*, 1 Russ. & My. 634; *Goodson* v. *Ellison*, 3 Russ. 583; *Angier* v. *Stannard*, 3 My. & Keene, 566; *Jervoise* v. *Duke of Northumberland*, 1 Jac. & Walk. 550; *Jasper* v. *Maxwell*, Dev. Eq. 357; *Newell* v. *Morgan*, 2 Harrington, 225.

As the demandant holds this lot, if the levy be regarded as valid, subject to a simple trust, he cannot recover it from the grantee of the *cestui que trust*. And whether the instructions may or not have presented the case to the jury upon precisely correct views, of the rights of the parties, the demandant upon the application of legal principles, not being entitled to recover cannot have been aggreived by them.

Exceptions overruled.

Warren, plaintiff, *pro se.*

Kent, for defendant.

MARTHA PIERCE, *Adm'x, versus* DAVID PIERCE.

A deposition was taken by defendant, after the service but before the entry of the writ. The justice, in the caption, certified notice upon "G. B. M. the plaintiff's attorney." The only indorsement upon the writ was, "from G. B. M's office," in the handwriting of G. B. M., who afterward entered the action and appeared as the plaintiff's attorney in Court.

Held, the deposition was properly rejected.

WELLS J. — The deposition, which was rejected, was taken, after the service of the writ, and before the entry of the action in Court.

By the caption it appears "the adverse party was notified, according to law, by notice to George B. Moody as attorney of the adverse party, to attend the taking of said deposition, and was not present." The certificate of the justice is not conclusive as to the notice. *Minot* v. *Bridgewater*, 15 Mass. R. 492; *Homer & al.* v. *Brainerd*, 15 Maine R. 54.

By c. 133, § 6, Rev. St., notification to the adverse party, to attend the taking of a deposition, "shall be served on him or his attorney, &c." Sect. 7 provides, that "no person shall for the purposes of this chapter, be considered the attorney of another, unless he has indorsed the writ," &c.

There were written on the writ in Mr. Moody's handwriting, the words "from George B. Moody's office." Mr. Moody subsequently caused the action to be entered in Court, and appeared as the plaintiff's attorney.

But we are to look at the evidence, as existing when the notice was served. The manner, in which he could then be regarded as the attorney of the plaintiff, was by having indorsed the writ. The indorsement, required by the statute, must indicate the purpose, for which it is made. It must be the putting of one's name on the writ, so as to manifest, that he is the attorney of the plaintiff. His name alone might be sufficient. *McGee* v. *Barber*, 14 Pick. 212. This indorsement does not declare, that Mr. Moody is the attorney of the plaintiff, but that the writ came from his office. It might have been made by the plaintiff himself. The object of the in-

dorsement was probably to inform the officer, who might serve the writ, of the place to which it could be returned.

We do not think it was such an indorsement of the writ, as the statute requires, to authorize the service of the notification upon Mr. Moody, as the attorney of the plaintiff.

Exceptions overruled.

Kent & Cutting, for the defendant.

Moody, for the plaintiff.

JOHN SARGENT, JR. *versus* INHABITANTS OF HAMPDEN.

Consent of parties cannot confer upon this Court the power to receive and accept an award of referees, made under a submission entered into before a justice of the peace.

AWARD OF REFEREES. The parties entered into a submission to referees before a justice of the peace, according to Rev. Stat. ch. 138, and agreed in writing, "that the report of the referees shall be made to the Supreme Judicial Court, instead of the District Court, as named in the rule" of submission.

The award, (which was in favor of the plaintiff,) was presented to, and accepted by the Supreme Judicial Court, WHITMAN C. J. presiding. The defendants excepted.

Robinson & Knowles, for plaintiff.

Hamlin & J. & M. L. Appleton, for defendants.

WELLS J. — This was a report of referees, under a submission before a justice of the peace. By an agreement of the parties, it was made returnable to this Court, instead of the District Court.

The jurisdiction of our courts is limited and prescribed by the Legislature, whose enactments are the only guide, in the exercise of judicial power.

By the law of 1821, c. 78, reports of referees were required to be returned to the then existing Court of Common Pleas.

The present District Court took the same jurisdiction, with some modifications. The question presented in this case is, whether the Rev. Stat., c. 138, authorizes the return of a report of referees to this Court. No court is mentioned by name, in c. 138, except in the § 2 and § 13. In the § 2, it is provided, that the report "being made within one year from this day to the *District Court*," &c.

The sixth section authorizes the parties to agree upon the *time*, when the report may be made, without being confined to one year.

By § 7 the report is required to be delivered by one of the referees "to the court, to which it is to be returned, according to the agreement," or to "be sealed up and transmitted to such court." The District Court, having been previously mentioned, as the one, to which the report should be returned, must be understood to be the court, to which reference is made, in § 7. The parties were at liberty to enter into an agreement as to the *time*, within which the report should be made, without being confined to a year; it might be more or less than a year, and the form of the agreement could be varied to meet this change.

By § 8 "the same authority" is conferred upon the referees, "as those appointed *by a rule of said court*." The District Court, being the only one previously mentioned by name, "said court," in the ordinary use of language, must refer to it.

By § 12, "the report may be made *to any court*, held within the time limited in the submission, provided that the parties or their attorneys shall sign an agreement to that effect, naming *the court*, which agreement shall be annexed by the referees to their report."

Whatever is done under § 6 is to be incorporated, into the submission, varying from the form, as to the length of time, in which the report should be made.

But by virtue of § 12, the specific court, or in more precise language, *the term* of the court, at which the report is to be made, can be fixed by the parties. By these two sections, power is given to limit the time, within which the report shall be

made, and to designate the term, to which it shall be returned, after it has been made. The report might in fact be made, before the limited time had expired, but not be returned to court until near the end of it. The parties may prevent such delay, by the agreement authorized in § 12, and the referees are bound to annex it to their report.

The parties can point out the *term* of the Court, to which it shall be returned, whatever portion of the time, specified in the submission, may have elapsed. Had the Legislature intended to allow reports of referees, made under this statute, to be returned to the District Court, or to this Court, at the option of parties, it would appear necessary, that a fuller and more perfect manifestation of its intention, should have been expressed. There would have been the same propriety of providing, in the form of the submission, for a return to this Court, as to the District Court, and that the authority of the referees should be the same, as those appointed by a rule of either Court, and that a mode of saving questions of law, in this Court, should have been specified in the same statute.

It would be enlarging the jurisdiction of this Court, by implication, upon vague and unsatisfactory reasons, to give a construction to the expression "the report may be made to any court," so as to embrace this Court, which has never heretofore entertained any such jurisdiction.

This class of cases more properly appertains to the District Court, and has a closer analogy to its other business, than it does to that of the Supreme Court, which, in relation to causes of a small amount, is appellate, in its character. There are constantly arising a great many matters of controversy, which are submitted to referees, and although the amount, in dispute, may be small, yet it is necessary they should be decided, and most of the questions growing out of awards, can be very easily settled in the District Court. Those of a graver and more intricate nature, requiring time for examination, can be brought to this Court, upon exceptions, for which the most ample provision is made.

We must look to the whole statute to ascertain its meaning,

and particular expressions must yield to its general bearing and purpose.

Ordinarily, new modes of practice are not introduced, without some positive, clear and affirmative declarations. If a new provision is to be made as to the Court, to which reports of referees are to be returned, changing a long established and ancient practice, one would suppose, that the new tribunal, to which parties were to repair, would be, at least, mentioned and its name given.

But it is contended, that the decision of the presiding Justice, who ordered the award to be accepted, is final and conclusive, because, as is alleged, there is no provision, for excepting to such decision, by a Justice of this Court. If such is the law, it affords another reason for the construction, which we believe should be given to this statute. The act of 1845, c. 168, is in addition to c. 138, relative to exceptions, and the former with § 13 of the latter, makes provision for a revision of any opinion of the District Court, "in accepting, rejecting or recommitting" a report of referees, but is silent concerning the decision of one Justice, in this Court. Whether a right to except, in this Court, is given by c. 96, § 17, it is not now necessary to determine.

The exceptions were allowed, and the whole case is before us, and if we are satisfied, that this Court, has no jurisdiction over the subject, but that the Legislature has confided it to another tribunal, we surely ought not to put the defendants to the trouble of suing out a writ of error.

The law must have its course, however much we may regret its effect, in particular cases.

The exceptions must be sustained, and the report of the referees dismissed.

DANIEL WILKINS *versus* SIMON B. DINGLEY *& al.*

An officer is liable for taking an insufficient replevin bond, if the only surety never resided in this State.

SHEPLEY J. — The plaintiff was formerly sheriff of this

county, and Dingley was his deputy. This suit is upon a bond made by the latter with sureties to the former for the faithful discharge of his duties. The deputy made service of a writ of replevin in favor of Hawes & Lyon against Frederick Wilson and took a bond signed by them with a surety, who was then an inhabitant of the city of Boston, and who does not appear to have ever resided or to have had any property in this State. Wilson appears to have prevailed in the replevin suit, and to have recovered judgment against the sheriff by default for the neglect of Dingley to take a sufficient bond to Wilson. The defendants are not concluded by the judgment recovered by Wilson against the plaintiff, but may make any defence, which the plaintiff could have made to that suit.

The statute required that the deputy should take a bond with sufficient surety or sureties. It did not require in terms, that the surety should be an inhabitant of this State, or have any property within the State. But the general language used is necessarily limited by the jurisdiction of the legislative power, which did not contemplate its operation beyond its limits. *Miller* v. *Ewer*, 27 Maine R. 509; *Bramhall* v. *Seavey*, 28 Maine R. 45. If the plaintiff in replevin should fail to establish his title to the goods, the Legislature designed to afford to the defendant in replevin an effectual remedy to obtain an immediate restoration of his goods, or their value with the damages prescribed by the statute. If an irresponsible plaintiff were permitted to obtain possession of valuable goods by a writ of replevin, and to give a bond with a good surety residing in a distant State of the Union, or in a foreign country, it is quite obvious, that the owner of the goods might not only fail to have the remedy designed by the statute, but to recover an indemnity for the loss of his goods. Admitting that the bond could be enforced in the State or country of the surety's domicile, the obligee might be enabled to do it only by being subjected to great delay and expense, when it was the design of the statute to afford him a remedy by and according to the laws, by which he was deprived of the possession of his property.

The act approved on January 27, 1821, c. 80, by virtue of which this bond was taken, prescribed the remedy for the restoration of the goods, and for the recovery of damages, and fixed the amount of such damages. It has been decided, that a bond taken in one State cannot be enforced in another State in a manner unknown to the common law and prescribed by a statute of the State in which it was taken. *McRae* v. *Mattoon*, 10 Pick. 49: *Pickering* v. *Fish*, 6 Verm. R. 102; *State of Indiana* v. *John*, 5 Ham. 218. In the case of *Gleyen* v. *Rood*, 2 Metc. 490, it was decided, that a person residing without the State, and having sufficient personal property within the county, might be legally taken as surety upon a bail bond. This decision appears to have been made on account of the peculiar phraseology of the statute, and because the bond might be enforced against the property within that jurisdiction. No opinion was expressed, whether the sheriff could be considered as having performed his duty faithfully by taking sureties residing without the State, and having no property within it.

The replevin bond taken by the defendant Dingley cannot be regarded as a sufficient bond, and he must be considered as responsible in damages for a neglect of duty.

Another point of the defence is, that the defendants have been discharged from their liability on the bond. It requires some attention to obtain from the agreed statement, an accurate knowledge of the facts so far, as they are disclosed.

No deed of release or written contract made between the plaintiff and Jefferson Parsons, one of the defendants, is proved or exhibited. Nor is the existence of any agreement between them admitted or shown in any other manner, than by a recital contained in an instrument under seal, signed by the plaintiff and those, who were sureties for him on his official bond to the State. The agreement made between the plaintiff and Parsons, one of the defendants, as shown by that recital, is in substance, that Parsons shall not be called upon to make any further payments upon this bond; that upon any execution issued upon a judgment recovered upon it, an indorsement shall be made of the payment by Parsons of his full share; and that no further payments on account of this bond shall be by judg-

ment or execution enforced against the property or body of Parsons.

There being no proof that the agreement was made by an instrument under seal, there is no technical release of either of the defendants. It cannot have the effect of a covenant not to sue for that reason, and also because it appears to have contemplated, that a suit might be brought upon the bond, and that judgment might be recovered against all the defendants. Such an agreement, not under seal, will not prevent the plaintiff from recovering judgment against them all. *Walker* v. *McCulloch*, 4 Greenl. 421.

Neither of the defendants is a party to the sealed instrument signed by the plaintiff and containing the recital; and neither of them can plead it as an estoppel; for estoppels are mutual, and a deed cannot operate as an estoppel against one, who is not a party or privy.

The plaintiff will be entitled to recover the amount of the judgment, which Wilson has recovered against him, as well as the amount of that recovered by Robie against him.

J. & M. L. Appleton, for plaintiff.

Moody, for defndant.

JONATHAN R. HOLT *versus* EBENEZER H. BARRETT.

An action, commenced before a justice of the peace, cannot be brought into this Court by an appeal from the District Court.

WELLS J. — This case was originally commenced before a justice of the peace, and brought by appeal from the District Court to this Court.

In *New Gloucester* v. *Danville*, 25 Maine R. 492, it was decided, that § 13, c. 97, Rev. Stat. has reference merely to actions originated in the District Court.

In the case of *Putnam* v. *Oliver*, 28 Maine R. 442, it was also decided, that an action originally commenced before a justice of the peace could not be brought by appeal, from the District Court to this Court.

The eighteenth section of the same chapter gives a remedy to the aggrieved party, in such cases, by exceptions to the opinion of the Judge of the District Court.

The appeal must therefore be dismissed.

A. Waterhouse, for plaintiff.

S. W. Robinson, for defendant.

JAMES PHILLIPS *versus* OLIVER FROST.

The drawee of an order of $55 paid 34,75, and indorsed upon it that the payee had received that sum, "it being all that the drawee agrees to pay, unless the drawer intended the order to be exclusive of $20,25 which the drawee had previously paid without order." It was afterwards ascertained that the drawer intended the whole $55 should be paid by the drawee, of which the drawee was notified by a new request from the drawer.

Held, the drawee was liable for the balance.

WELLS J. — It appears by the testimony of Hathaway, that the defendant promised him to accept Foss' order for his services, and that relying upon this promise, the credit was given.

But it is unnecessary to decide whether a verbal promise, to accept an order, not *in esse*, is binding. The order was drawn and presented for acceptance. The defendant wrote upon it the following indorsement, "Received of Oliver Frost thirty-four dollars $\frac{75}{100}$ towards this order, it being all said Frost agrees to pay unless said John Foss intends this order to be exclusive of $20,25 paid by Frost without order."

It is not necessary to the validity of an acceptance, that the name of the acceptor should appear. Any language indicating the acceptance written by him is sufficient. Bailey on Bills, 163.

The acceptor is holden by a verbal acceptance of a bill. *Ward* v. *Allen*, 2 Metc. 53; *Grant* v. *Shaw*, 16 Mass. R. 341; *Sproat* v. *Matthews*, 1 D. & E. 182; *Pierson* v. *Dunlop*, Cowp. 571; *Storer* v. *Logan*, 9 Mass. R. 60. But the holder of a bill may take a special acceptance, *Campbell* v.

Pettengill, 7 Greenl. 126, or he may refuse it, as was done in the case of *Peck* v. *Cochran*, 7 Pick. 34.

The writing on the order, having been made by the defendant, although in the form of a receipt, is to be considered, not an absolute, but a qualified acceptance, expressed in his own language.

The substance of what he says is, that if Foss intended he should pay the balance, he will do it. He probably supposed there was some mistake, and that Foss had drawn the order for too much.

Hathaway deposes, that he and Foss went to the defendant and ascertained how much had been paid without orders, and settled the amount due, for which the order in suit was drawn.

There was, therefore, no mistake, and Foss did intend the order should be paid.

But the defendant, according to the construction of his acceptance, claimed to have further satisfaction, other than that which the order on its face presented, of the intention of Foss. And he had a right to require it, because he could qualify his acceptance, in such manner, as he thought proper. The acceptance is a contract, and the defendant is to be holden according to its interpretation.

The defendant does not require an exhibition to him of Foss' intention, but simply the existence of the fact, and it may be that nothing more would be required to maintain the action, than proof of the fact. As if he had said, I will pay it, if the signature of Foss to the order is genuine.

However this may be, it appears, that May 8, 1846, Foss did clearly manifest his intention by a written request to the defendant, to pay the order, which is therein alleged to be due, exclusive of what had been paid, without any order, and that this request was presented to the defendant, before the commencement of the action. Foss also deposes, that such was his intention, when the order was drawn.

It is objected, that the manifestation of intention came too late, and that there was then a balance due the defendant from the drawer. Such balance might have existed when the order was drawn. There is nothing in the facts showing oth-

erwise. The fact of such balance in 1846 does not negative the idea, that it was existing in 1841. There is not satisfactory evidence of any change in the relations of the defendant and the drawer, from the time of drawing the order to the bringing of the action.

But if there had been, we do not say it would have altered the liability of the defendant, who having made an acceptance of this import, must respond to it, if called upon within the usual time of limitation. He could have required, in the acceptance, the mode and time, when a knowledge of Foss' intention should have been brought home to him, but he did not do so. If he had assets in his hands, he should have retained them, until his obligation was satisfied. But his acceptance without them, would bind him; it is a contract between him and the holder, which he must perform, and failing to do so he is responsible in damages, if the action is brought in season, and such is the case here.

The declaration, in the amended counts, expresses the contract, according to its legal tenor and effect.

Judgment for the plaintiff.

Hathaway & Peters, for plaintiff.

J. & M. L. Appleton, for defendant.

MICHAEL GILLIGHAN *& al. versus* CHARLES BOARDMAN.

Where one transfers a note and, at the same time, guarantees its payment, the consideration for the transfer is a sufficient consideration for the guaranty.

It is not necessary that a contract should contain a statement of its consideration.

A guaranty to pay a note after the guarantee has obtained execution, if it cannot be collected of the maker, is valid, although the execution be obtained in the name of an indorsee of the guarantee. In such a case the guarantor before suit against him, is not entitled to notice that the note could not be collected of the maker. A guarantor is not discharged by the laches of the guarantee, unless he has thereby suffered some loss or injury.

SHEPLEY J. — This suit is upon a guaranty made by the defendant on November 19, 1836, of a promissory note, made

by C. C. Cushman on May 31, 1836, payable to the defendant or order on demand, and by him indorsed to the plaintiffs without recourse, at the time when the guaranty was made. The case is presented upon an agreed statement of the facts. Several grounds of defence are relied upon.

1. It is said, there is no proof of consideration. When a guaranty is made at the same time with the principal contract, both constituting the ground of credit to the principal debtor, the consideration of the principal contract is a sufficient consideration for the guaranty. *Huntress* v. *Patten*, 20 Maine R. 28. When the guaranty is made subsequently, there must be proof of a different consideration to support it. *Ware* v. *Adams*, 24 Maine R. 177.

The defendant, it may be clearly inferred from the language of the guaranty, received a valuable consideration for the transfer of the note to the plaintiffs; for he therein makes himself accountable for it to them, if it could not be collected in the manner prescribed. The restricted indorsement and guaranty made at the same time, the former being expressly referred to in the latter, constitute one agreement, by which the property in the note was transferred to the plaintiffs with the guaranty of the defendant and without any right to call upon him as an indorser. It was not therefore the note alone, but the note with the guaranty, that constituted the consideration of purchase by the plaintiffs. This case is distinguished from that of *Ware* v. *Adams*, by the facts proved in that case, that the defendant was not the owner of the note indorsed by him with a guaranty; that it was made payable to him by mistake; and that he transferred it, only to pass the legal property in it to the plaintiff, who was before the equitable owner of it. In that case the defendant received no consideration for such a transfer of the note. In this case the defendant appears to have been the owner of the note, and to have transferred it to the plaintiffs for a valuable consideration received for the transfer made by the indorsement with the guaranty.

2. It is objected that the consideration upon which it was made, is not expressly stated in the guaranty. There is a well

known difference in the decisions of the different State tribunals, respecting this matter. The doctrine maintained in England is received in the State of New York and in some of the other States, that the consideration for a promise to pay the debt of another must appear on the face of the instrument containing the promise. That doctrine has not been received and is not the law in this State, and the cases cited to sustain it are without authority here.

3. It is insisted that the condition upon the performance of which the defendant agreed to be accountable for the note has not been performed.

He stipulated in the guaranty to be accountable for it, if it could not be collected of the maker, "after they have obtained execution against him."

It is contended, that a strict compliance is necessary, and that the defendant is not liable without proof, that the plaintiffs have obtained an execution against the maker issued in their own names.

Guarantors may prescribe the terms upon which alone they will become liable, and they are entitled to insist upon a strict compliance with those terms. This, however, does not prevent the legal rules of construction from being applicable to such contracts, for the purpose of ascertaining what the intentions of the parties were, and what the legal effect of their contract is. Hence it will be found stated in the case of *Holl* v. *Hadley*, 2 Ad. & El. 758, cited by the counsel for another purpose, that parties are not bound according to the letter of a contract of guaranty, but by what the "agreement virtually is." This, like other contracts, must receive such a construction as will carry into effect the intentions of the parties. When these are apparent, the effect of the instrument must not be destroyed by requiring a strict compliance according to the letter, and not according to the spirit, especially when it appears to have been drawn by an unskillful hand. If the true construction of the guaranty be such as to require, that an execution should be issued in the plaintiffs' own names, the defendant could not have been made responsible upon it, if one or both of the

plaintiffs had deceased before a judgment could be recovered. And it is obvious that it could not have been the intention of the parties that the defendant should be discharged by such occurrences. The note was indorsed by the defendant without any restriction of its negotiability. The indorsement and guaranty, as before stated, constituting one agreement, exhibiting the intention of the parties, it would seem to be most in accordance with the spirit of their arrangement to consider the purpose to have been to make the defendant accountable, if the debt could not be collected of the maker of the note, by virtue of an execution issued upon a judgment recovered in a suit upon it. Upon this construction of the guaranty there is proof of a strict compliance with its terms, so far as it respects the issuing of the execution.

4. It is further insisted, that there is no sufficient proof, that the note could not have been collected of the maker.

There is proof, that the execution had been placed in the hands of a deputy of the sheriff, who had returned upon it *nulla bona*. That the maker of the note had been insolvent at all times since the guaranty was made. That he made a disclosure by virtue of the act for the relief of poor debtors in the month of May, 1837, in which he stated, that he had no property ; and that he was thereupon discharged. That he obtained his discharge as a bankrupt on February 20, 1844, and that his " assets were of no value." Counsel still insists, that the judgment rendered after the proceedings in bankruptcy were commenced is valid, and that his body should have been arrested on the execution. The proof of his insolvency subsequent to his discharge as a bankrupt and until the time of trial is sufficient to authorize the conclusion, that an arrest of the body would have been only productive of an useless expense.

5. It is contended, that the defendant is discharged by the want of due diligence in obtaining the execution. That the suit upon the note was not commenced so early, as it should have been, must be admitted. But a guarantor is not discharged by proof of negligence and laches, when it appears, that he has not thereby suffered any loss or injury. Story on Promis-

sory Notes, c. 10, § 460, note 3. *Skofield* v. *Haley*, 22 Maine R. 164; *Howe* v. *Nickels*, *idem.* 175.

6. It is also insisted, that he is discharged by the neglect or omission to give him notice, that the note could not be collected of the maker. Admitting that such a notice should have been given, and that there is no proof, that it has been, the rule last stated would become applicable. Neither of these last two objections can avail the defendant, for it appears that he has not suffered any loss or injury by the neglect to obtain the execution and to give the notice.

The plaintiff's right to maintain the action rested upon a performance of the conditions stated in the guaranty, and not upon a notice, that they had performed it. The defendant did not become liable only upon performance of the condition and upon notice of such performance, as one does, who signs a guaranty, which does not take effect and become binding without notice that it has been accepted, and that the principal has obtained credit upon it. There is a plain distinction between an absolute and yet conditional guaranty, and a guaranty, which can take effect and become binding only upon the performance of a condition precedent. *Wildes* v. *Savage*, 1 Story, 22.

7. It is scarcely necessary to notice the objection, that the statute of limitations is, or ought to be a defence. The right of action upon the guaranty did not accrue until after performance of the condition; and the suit was commenced within three years after that time.

Defendant defaulted.

THE STATE *versus* BENJAMIN D. RICKER.

The Revised Statutes, c. 167, § 4, in providing that an accessory before the fact "may be indicted and convicted of a *substantive felony*, whether the principal felon shall or shall not have been convicted, or shall or shall not be amenable to justice," are not to be understood as abrogating the distinction between principal and accessory, but clearly preserve the difference between the two.

A "substantive felony" is that which depends on itself, and is not dependent on another felony which can only be established by the conviction of the one who committed it.

Under this provision of the statute, the accessory may be indicted and convicted without reference to the conviction of the principal, either in the indictment or on the trial, although the guilt of the principal must be shown in evidence. But in the indictment, the crime of the accessory is to be alleged in the same manner as if he alone had been concerned, followed by the averment of the acts done by him which make him an accessory before the fact.

THIS was an indictment against Benjamin D. Ricker in two counts. The first count charged, that said Ricker did counsel, hire and procure one John Staples, a minor, to set fire to and burn the barn of one Isaac Barker in Hermon, in said county, and that afterwards, on the same day, the said John Staples set fire to said barn, and it was burned; and that said Ricker, before the burning of said barn by said Staples, was accessory thereto, by hireing, counseling and procuring the felony aforesaid to be done, &c. The second count alleged, that said Ricker, at the same time and place, did set fire to and burn the same barn, &c.

At the trial of the respondent, John Staples was a witness for the prosecution, and had not been convicted or indicted. WELLS J. instructed the jury, that if they were satisfied by the evidence, that the barn was burned by the act of John Staples, and that he did it by the procurement of the respondent; or if they were satisfied that the respondent wilfully and maliciously set fire to it himself, and it was thereby burned, they might find the respondent guilty under the second count, the jury all agreeing upon one or the other mode of burning alleged in the indictment.

The jury found the respondent guilty on the second count, finding the facts alleged in the first count to be proved.

The respondent excepted to the instructions above stated.

Rowe, for the respondent, argued that the indictment destroys the difference between accessory and principal, and allows the jury to find the accessory guilty on evidence only showing the principal guilty. The instructions of the Judge are liable to the same objections. The finding of the fact of the burning is not enough. He who is present at the burning, aiding and assisting, is a principal, and can be convicted only on proof of knowledge prior to the fact. Rev. St. c. 167, § 3 and 4; 4 Black. 36; 1 Chitty Cr. Law, 261.

The respondent, if connected with the burning at all, must be an accessory either before or after the fact. The principal not having been convicted, the indictment is wrong because it does not charge the respondent with a substantive felony, under the statute, but at common law as principal or accessory. He cannot be convicted as principal, for he was not there; nor as accessory, for the principal has not been convicted. By the statute, a new offence is created, of counseling and procuring the crime to be committed. He has not been indicted for this new offence, which is different from both the others. The meaning of the statute is not that one in such circumstances may be convicted as a principal. The special verdict, that the respondent is guilty under the second count, by finding the facts alleged in the first, is an absurdity. Each count is a substantive charge, and under it, the jury must find all the facts stated in that count. The verdict is the same as finding that he had hired Staples, and after he had hired him had burned the building himself. 1 Chitty's Crim. Law, 644.

Blake, Attorney General, for the prosecution. The indictment depends on the construction of the statute. The new provision affects only the accessory; it is a mere definition of an accessory. The accused may be convicted in either mode. If indicted as principal, he may be convicted on proof of his being an accessory.

TENNEY J. — The first count in the indictment, charges the defendant with the offence of procuring one John Staples to burn a barn described, which was burnt by the said Staples accordingly. The second count is against the defendant for burning the barn as principal. Staples had not been convicted or indicted, and was a witness for the prosecution. The jury were instructed, that if they were satisfied, that the barn was burnt by the act of John Staples, and Staples fired it by the procurement of the defendant, they might find the defendant guilty under the second count.

An accessory before the fact, is he, that being absent at the time of the actual perpetration of the felony, procures, counsels and commands, incites or abets another to commit it. If the person be present, aiding and abetting, he cannot be indicted as an accessory. 1 Chit. Crim. Law, 262.

By the common law an accessory could not be tried before the principal, without his own consent; and as the crime of the former depended upon the guilt of the latter, and an accessory must have been convicted of a felony of the same species as the principal, it was both usual and proper to include them in the same indictment. And if they pleaded the general issue or the same plea, both could have been tried together; but the principal must have been first convicted, and the jury would have been charged, if they found the former not guilty, the latter must be acquitted. But when the indictment of the principal and the accessory before the fact was joint, they might have been tried separately. *Commonwealth* v. *Knapp*, 10 Pick. 477. They might be indicted separately, but in such case the trial of the accessory could not take place till the conviction of the principal. 1 Chit. Crim. Law, 272. In *Commonwealth* v. *Phillips*, 16 Mass. R. 123, the Court say, "By the common law an accessory cannot be put upon trial, but by his own consent, until the conviction of the principal. The reason of this is very plain. If there is no principal, there is no accessory, and the law presumes no one guilty, until conviction. Statutes have made a difference, in some lesser species of offences." In an indictment against the accessory

alone, after the conviction of the principal, it was not necessary to aver, that the principal committed the felony, or on trial, to enter into detail of the evidence against him. But it was sufficient to recite with certainty, the record of the conviction. The verdict is to be taken as *prima facie* evidence of the guilt of the principal. It may be rebutted by showing a want of guilt in him, he having the burden of proof. 1 Chit. Crim. Law, 273. *Commonwealth* v. *Knapp*, 10 Pick. 484. 7 Term Rep. 465.

The Revised Statutes, chap. 167, sect. 4, provide, that every person, who shall counsel, hire or otherwise procure a felony to be committed, which shall be committed in consequence thereof, may be indicted and convicted as an accessory before the fact, either with the principal felon or after his conviction; or he may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been convicted, or shall or shall not be amenable to justice; and shall in the last mentioned case be punished in the same manner, as if convicted of being an accessory before the fact. By the preceding section of the same chapter, the accessory before the fact, shall be punished in the same manner, which is or shall be prescribed for the punishment of the principal felon.

By the modification of the common law, in these provisions, more effectual modes for the prosecution and punishment of accessories to felonies before the fact, was intended. The change has the tendency to prevent the delays attending the trial and the escape of accessories, arising from the failure to bring the principals to trial. The history of legislation upon this subject, conclusively shows that such was the purpose. These provisions in the Revised Statutes are the same as those of the statute of 1831, chap. 504, sect. 1. The statute of Massachusetts of 1830, chap. 49, sect. 1, and the Revised Statutes of that Commonwealth of 1836, chap. 133, sect. 2, are identical with those of this State; and all are in the same terms as those of the statute of England, 7 Geo. 4, chap. 64, sect. 9, which section commences with the words, "and for the more effectual prosecution of accessories before the fact to felony, be it enacted," &c.

The statute provides three modes in which accessories before the fact to felonies may be brought to trial. It is insisted in behalf of the prosecution, that by the last mode it was intended that such accessory could be indicted as a principal in all respects, in the manner and form, that he would be indicted, if he did the act, which at common law would constitute him a principal. It is obvious, that upon such a construction, the distinction between the principal and accessory before the fact may be entirely disregarded. Was this the design of the Legislature? We cannot believe that it was.

In the former part of the section, the crimes of the principal and the accessory are presented as being distinct. Nothing indicates an intention, that they should not remain so. If "substantive felony" afterwards mentioned, was designed as synonymous with principal felony, there would have been a definite reference to it, as its antecedent in the same section. But the offence, for which an accessory before the fact may be indicted and convicted, is a substantive felony, a form of expression, which is general, and not meant to refer to either of the offences before named. If the term "principal felony" had been used, as it well might be, on the construction contended for by the attorney for the government, the indefinite form could not be proper.

If it was designed, that "substantive felony" was that of the principal, the terms might be changed without any alteration of the meaning, and the procurer would be a principal, and would be regarded by the statute as such. By the substitution supposed, the provision would be, that the procurer might be indicted and convicted, a principal, whether the principal had or had not been convicted. This would be a confusion of language, and of ideas, not contemplated.

If it was intended, that accessories before the fact could be treated as principals, no additional mode for the indictment, conviction and punishment of such offenders was required. The simple provision, that they might be so indicted and convicted was all that was necessary to secure such a purpose.

Accessories before the fact are to be punished in the same

manner as are the principals. If such accessories may be indicted principals, the punishment was fully provided, to meet all the forms of indictment, and nothing farther was required, under a conviction upon an indictment, in the third mode. But if "a substantive felony" is designed as a mode of indictment, distinct from that, which is of the principal, and of the accessory after the conviction of the former, no punishment is provided by the third section for such offence. With a view to prescribe a punishment for the one convicted of the new offence, by the fourth section, a punishment is provided for the "substantive felony." A provision for the punishment of the last offence would not have been easy, if it was intended to be different from that to be inflicted upon the principal, who was such at common law. But as the punishment is, and is to continue to be the same, it was an useless repetition, on the construction contended for in behalf of the government.

The language of the statute, in the third mode prescribed for the indictment and conviction of the accessory before the fact, shows that it was the meaning of the Legislature, that the two offences should still continue distinct. The accessory can be indicted and convicted of "a substantive felony," whether the principal has or has not been convicted; clearly preserving the difference between the two, when the punishment of the latter shall be sought by this form of indictment.

An accurate definition of the word "substantive" is "depending upon itself."—Webster's Dictionary. A substantive felony, is that which depends upon itself, and is not dependent upon another felony, which is established by the conviction of the one, who committed it, alone. By the common law principle every one is presumed innocent, till proved guilty under proper process. On the trial of an accessory, before the statute, the one named as principal was presumed innocent, till he was convicted; consequently the accessory was in no peril, till this presumption applicable to the one named as principal in the indictment should be removed by proper process.

It is in no case necessary that the word *accessory* should be used in the indictment. 1 Chit. Crim. Law, 273. Hence it

may be said, that the indictment for "a substantive felony," is identical with that for the offence of an accessory, before the fact, at common law. By the statute provision it was manifestly designed to be otherwise. By the first mode, the indictment and all subsequent proceedings are to be precisely the same, as when the principal and accessory are charged in the same indictment at common law. The second mode is more restricted than when the indictment was against the accessory alone, before the statute. Although at common law, the accessory before the fact, when indicted without the principal, could not be *tried* till after the conviction of the principal, yet he could be *indicted* before, even if the principal was unknown, as well as after his conviction. 1 Russ. on Crimes, 38. Under the statute, if indicted in the second mode, it is after the conviction of the principal only. We have seen, if the indictment is against the accessory after the conviction of the principal, at common law, it is proper, if not necessary to allege the conviction of the latter; and the record of conviction is *prima facie* evidence of his guilt. Under the statute, the same allegation would be proper, and would be uniformly made, inasmuch as it would be attended with material advantages for the prosecution, as the burden would be thrown upon the accused to show that the conviction of the principal was unauthorized in fact.

By the last form of indictment, the accessory may be indicted and convicted, without reference to the conviction of the principal, either in the indictment or on the trial. The guilt of the latter will be alleged in the same manner, as if he alone had been concerned, followed by the averment of the acts done by the procurer, which constitute him an accessory, before the fact. The guilt of the principal is a necessary fact to be shown on the trial, in order to obtain a conviction of the accessory, but the record of a conviction is not required; other competent proof is sufficient.

Exceptions sustained.

DEXTER HUTCHINSON *versus* JONATHAN EDDY *& al.*

It is no defence to an action on a joint note, that one of the promisors has been summoned and defaulted as trustee of the payee, and has paid to the creditor in the trustee process the amount of the judgment thus recovered, there being no evidence to show that he was adjudged trustee on account of the note. In the absence of evidence, the presumption is, that he was held trustee on account of other indebtedness.

It seems that where a debtor holds a joint contract against two or more, and his creditor would avail himself of the benefit of it by trustee process, he must summon all the parties liable by law to discharge it, who reside within the State.

AGREED statement of facts in the District Court, ALLEN J. Judgment was there rendered for plaintiff. Defendant appealed.

Rowe, for plaintiff.

Kelley, for defendants. —

The principal defendant was summoned as trustee of Hutchinson, and defaulted, and the judgment paid and satisfied. The defendants offered to be defaulted for all but the amount paid as trustee. Where there is a joint debt, either debtor may pay, and here is payment by one; and it is immaterial how received, as the plaintiff has received so much. If Eddy's indebtedness as trustee was on account of any other debt due Hutchinson, the plaintiff could show it; but the defendants cannot show that there is no other debt. The writ says Hutchinson had deposited a sum in the hands of Eddy as trustee. Every indebtedness is a several one, although more than one is liable. A payment by one, is a payment by all. The cases cited from New Hampshire decisions are not law here. The testimony of Turner that he received the debt, and the indorsement of the attorney on the execution as to costs, is evidence of payment. This evidence would bar an action on the judgment. Payment of a judgment may be proved in any way.

SHEPLEY J. — The suit is upon a promissory note not negotiable, made by the defendants on July 13, 1835, for the sum of $100, payable to the plaintiff in July then next with inter-

est. On February 13, 1836, the plaintiff made a written assignment of it on the back of the note to Isaac Shurtleff; but there does not appear to have been any notice thereof given to the defendants; and they may avail themselves of any defence which would be good, if no such assignment had been made.

The defendants offered to be defaulted for the sum of $65, and contended that they had paid the residue. To prove payment, they introduced the record of a suit in favor of John Turner against the present plaintiff, in which Jonathan Eddy, one of the defendants, was summoned as his trustee. Principal and trustee were both defaulted, and judgment was rendered against them at the October Term of the District Court in this county, in the year 1840, for the sum of $65,32 debt, and $17,89 costs. The trustee paid to Turner the amount of the debt thus recovered. He does not appear to have made any disclosure as trustee; and there is no other testimony to show, on what ground he was adjudged to be the trustee of the plaintiff.

Does a legal presumption arise, that he was adjudged trustee and made that payment, because he was jointly with the other defendant indebted to the plaintiff? He may have been adjudged to be otherwise trustee, because he alone was indebted to the plaintiff otherwise than by the note now in suit. Or because the plaintiff had deposited money or goods in his hands. The record, not affording the least evidence, that he was adjudged trustee on account of his being indebted jointly with the other defendant by virtue of this note, is more appropriate to charge him as being solely indebted in some other manner. If it were only equally as appropriate to charge him on account of a separate as a joint indebtedness, and therefore left it wholly uncertain on what account he was charged, the defence must fail; for the burden of proof is upon the defendants to show, that the payment was made on account of this note. The presumption arising from the record is, that he was not charged as trustee of the plaintiff on account of this note. In the case of *Jewett* v. *Bacon*, 6 Mass. R. 60, it was said, when a debtor holds a

joint contract against two or more, and his creditor would avail himself of the benefit of it by this special attachment, he must summon all the parties liable by law to discharge it. The same rule is applied in New Hampshire. *Hudson* v. *Hunt*, 5 N. H. R. 538. This rule was so far varied by the case of *Parker* v. *Danforth*, 16 Mass. R. 299, as to permit one of several partners residing within the State to be summoned and charged, when the other partners had no residence within the State. Such is the rule also in New Hampshire. *Atkins* v. *Prescott*, 10 N. H. R. 120.

It does not appear that both the makers of this note were not within the jurisdiction, when one of them only was summoned as the trustee of the plaintiff. The just inference would seem to be, that they were. It cannot therefore be presumed, that a judgment was rendered against Eddy as trustee in a case, in which he would not seem to have been legally chargeable, when he might have been legally charged on account of being solely indebted to the plaintiff. The plaintiff will be entitled to judgment for the amount due upon the note.

CALVIN COPELAND *versus* DANIEL HALL.

Whether certain words, spoken by the mortgagee to the mortgagor of personal property, conveyed authority to sell the property, is a question for the jury and not for the Court; and where the jury were instructed that if the words used were "sell the horse and pay me," the power to sell was given, it was held to be erroneous, it being the province of the jury to find not only the words used, but the meaning of them.

The words used were but evidence. Whether that evidence proved the authorization, was a question, not of law for the Court, but of fact for the jury.

REPLEVIN for a horse. Verdict for defendant. Exceptions filed by plaintiff.

TENNEY J. — In support of the action, a writing was introduced signed by S. L. Megquier, dated Nov. 18, 1841, by which it appears that he received of the plaintiff, two horses,

that were to be returned the following June, and payment made for their services. It was in proof that at the same time there was a parol agreement that upon the payment of the price stipulated, Megquier was to become the owner of the horses. Subsequently the plaintiff received one of the horses at a certain price, fifteen dollars in money and a set of double harnesses, so that the sum to be paid for the other horse was reduced to $22,50. Megquier wished the plaintiff to take back the other horse, at such a price as he chose to allow, saying he had nothing for him to do, and wished to get rid of him in some way; thereupon the plaintiff replied, "well, sell him and pay me." According to the testimony of another witness who was present at the same conversation, upon the plaintiff's declining to take the horse, Megquier said he wanted him to take another set of harnesses, in payment of what was due for the horse, take him back or relinquish his claim and give him liberty to sell the horse, to which the plaintiff answered, "pay me, and you can sell the horse." Upon the continued urgency of Megquier, that the plaintiff would permit him to sell the horse, the plaintiff said, "you can sell the horse, pay me, and I guess there will be no trouble." The deposition of Megquier, substantially confirms the testimony last referred to. The defendant purchased the horse, which is the one replevied, of Megquier, for the sum of $50.

Exceptions were taken to the instructions given by the Judge to the jury, that it was for them to determine what language and words were used by the plaintiff; that the words "pay me and sell the horse," would not imply an authority to sell the horse, but if the words were, "sell the horse and pay me," that they would authorize Megquier to sell the horse; if the words were "sell the horse and pay me and there will be no trouble," they amounted to an authority to sell the horse; and that the last clause, "and there will be no trouble," did not alter the sense, and made no difference in the effect of the words.

In order to substantiate every charge or claim, it is essential that the jury should find some predicament or state of facts, and the Court should adjudge such special modes or facts so

found to be sufficient in law to sustain the charge or claim. And the Court in their instructions, must inform the jury hypothetically, that if they find the facts in one mode, the claim is supported; or the jury must find those predicaments or modes specially, and then the Court can afterwards apply the law, and pronounce whether the facts proved, be or be not such as satisfy the general and defined essentials to the charge or claim." "But if the jury were to find *mere evidence*, however cogent, in its nature, of any of the essential facts, the Court could not draw the conclusion." "In the case of a charge of larceny, if the jury were to find, that immediately after the goods were missed, the prisoner was seized in the act of absconding with the goods, and that he confessed that he was guilty, this might be abundant evidence to prove his guilt, but would be mere evidence, and the Court could pronounce no judgment." Stark. Ev. 407, 408, 409, and note, (n.) In *Harwood* v. *Goodright*, Cowper, 89, the jury found, that after the will had been executed by a testator, in favor of the plaintiff, he executed another will, the contents of which were not known, and it was contended by the heir at law, that this amounted to a revocation. Lord Mansfield remarked, "In considering the special verdict, the duty of the Court is, to draw a conclusion of law from the facts found by the jury, for the Court cannot presume any fact from the evidence stated. Presumption indeed is one ground of evidence, but the Court cannot presume any fact.

It often happens, in conversation and in parol contracts, that the meaning of the parties may be understood, and is in fact intended to be very different from the literal import of the words employed. What may have been said before or after, the use of figurative expressions, emphasis upon particular words or sentences, reference to other matters, not fully expressed, but well understood by all in hearing, and many other circumstances, are material elements, and often have a controlling influence, in acertaining the intention of those whose language is reported. Important contracts are made verbally, in terms not well suited to express the design of the parties, if

they were used in a written instrument, but are understood by them and others with the utmost precision. Actions of slander are maintained upon words, which taken literally indicate no unworthy motive, or conduct. In cases, where such evidence is adduced in support of the affirmative or negative, of any proposition presented to a jury, it is their province to determine its meaning. To find what the language was, is nothing more, than to find the evidence, which they adjudge to be true; the result of that as a fact, it is their duty to find, and the Court cannot direct what it shall be; and if the jury omit to find the fact, which is involved in the issue, the Court have no power to infer it.

In the case at bar, the propositions of the defendant were, that he purchased the horse of Megquier, and that he was authorized by the plaintiff to sell him; the latter proposition the plaintiff denied; and upon this issue of fact, the verdict was to be rendered. It was the business of the jury to find not merely what the evidence was, or what portion they believed, upon that point, but from all the evidence in the case, whether such authority was in fact given. The witnesses did not agree in their testimony touching the language used by the plaintiff, when Megquier requested his permission to sell the horse. In the instructions, the jury were left free to find, what the language was, but they were restrained from an exercise of their own judgment, by a construction of the language by the Court, which precluded them from finding the meaning of that language, under all the evidence in the case. They were permitted only to determine what were the terms used; and if they found them as the witnesses for the defendant had testified, they were required by a rule of law to find that the authority was given. In this we think the instructions were erroneous. *Exceptions sustained.*

Appleton & Knowles, for the plaintiff.

A. W. Paine, for defendant.

JAMES C. MOORE *& als. versus* PROTECTION INS. CO.

Where it was made a condition of a policy of insurance, that in case of loss, "the assured shall, if required, submit to an examination under oath by the agent or attorney of the company, and answer all questions touching their knowledge of any thing relating to such loss or damage, or to their claim therefor, and subscribe such examination, the same being reduced to writing;" if such examination be once made and completed, the assured cannot be required by the company to submit to a further *examination under oath* afterwards, although at the time of making the oath he may have assented to a further and future examination.

Where in a policy insuring a stock of dry goods, it is provided that the policy shall be void, if "the risk shall be increased by any means whatsoever within the control of the assured, or if such building or premises shall, with the assent of the assured, be occupied in any way so as to render the risk more hazardous than at the time of insuring;" and among the articles denominated hazardous is cotton in bales; — yet if cotton in bales is merely kept for sale as a part of the stock of dry goods, it does not vitiate the policy, unless the jury should find that the keeping of such cotton increases the risk.

Where in a policy upon a store and stock of dry goods, one of the conditions protected the insurers against the appropriating, applying or using the store for keeping or storing goods of a hazardous character,— *held*, that the keeping of a hazardous article for sale among the other goods was not an infraction of that condition. Such a condition is merely a protection against appropriating the store for a depository of such goods, as a sole or principal business.

The affidavit of the assured, made in pursuance of the requirement of the policy, and his examination before the company's agent, after being introduced into Court without objection, are proper evidence for the consideration of the jury as to the amount of the loss.

The fact that the assured in his affidavit estimated the value of the goods consumed, at $2800, and the jury returned a verdict for $1853 only, is not such evidence of fraud and false swearing, as would justify the Court in granting a new trial.

TENNEY J. — The plaintiffs procured "three thousand dollars on their stock in trade, consisting of dry goods, kept in a frame store, occupied by themselves in Belfast," to be insured by the defendants, for the term of one year, by a policy dated Dec. 15, 1845. Conditions are annexed to the policy, which by its terms constitute a part of it. By the tenth condition, it is necessary after a loss by fire, that the assured should forth-

with give notice thereof to the company, and as soon as possible deliver in a particular account of such loss or damage, signed with their own hands, and verified by their oath or affirmation; and shall also procure a certificate under the hands of a magistrate or notary public (most contiguous to the place of the fire, and not concerned in the loss as a creditor or otherwise, or related to the insured or sufferers) that he has made due inquiry into the cause and origin of the fire, &c.; and the assured shall also if required, submit to an examination under oath by the agent or attorney of the company, and answer all questions touching their knowledge of any thing relating to such loss or damage, or to their claim therefor, and subscribe such examination, the same being reduced to writing; and until such proofs, declarations and certificates are produced, and examination if required, the loss will not be deemed payable. And if there appear any fraud or false swearing, the insured shall forfeit all claim under the policy. By the policy it is agreed and declared, to be the true intent and meaning of the parties thereto, "that in case the above mentioned premises shall at any time after the making and during the continuance of this insurance, be appropriated, applied or used to or for the purpose of carrying on or exercising therein, any trade, business or vocation, denominated hazardous or extra hazardous, or specified in the memorandum of special rates, in the terms and conditions annexed to this policy, or for the purpose of keeping or storing therein any of the articles, goods or merchandize, in the same terms and conditions denominated hazardous or extra hazardous, or included in the memorandum of special rates," &c. "then and from thenceforth so long as the same shall be appropriated, applied, used or occupied, these presents shall cease and be of no effect."

The second condition, annexed to the policy is, "if any insurance is effected upon any building, or goods, in this office, either by the original policy or the renewal thereof, the risk shall be increased by any means whatsoever within the control of the assured, or if such building or premises, shall with the assent of the assured be occupied in any way, so as to ren-

der the risk more hazardous, than at the time of insuring, such insurance shall be void and of no effect."

Among the articles denominated hazardous, is cotton in bales.

This action is upon that policy, which the plaintiffs introduced, and evidence, that the store and the goods therein were consumed by fire, on the twentieth day of March, 1846; together with the affidavit of James C. Moore, one of the plaintiffs, and the certificate of Andrew T. Palmer, a justice of the peace, who it was admitted resided most contiguous to the fire; the affidavit and certificate were dated March 22, 1846. It is not denied on the part of the defendants, that those papers contained all that was contemplated by the policy, that they should contain, or that they were not made and produced in proper season after the fire. They were a substantial performance of those acts, as preliminary steps necessary, before the commencement of the action, unless the defendants required an examination of the plaintiffs under oath. This requirement was made, and the plaintiffs produced a document without objection, exhibiting such examination, in writing, signed by said Moore, and verified by oath, taken April 4, 1846. It appeared from the testimony of the defendants' agent, who took the examination, that Moore answered all the questions put to him, and upon being informed, that a further examination from some one from the office would be wanted, he made no objection, but, as the agent understood, gave his assent; and when called upon on April 14, 1846, submitted to a further examination before the defendants' attorney, but declined to make oath to the answers there given to the questions propounded. It is insisted, that for this omission, the action cannot be maintained.

By the tenth condition annexed to the policy under which such examination may be required by the insurers, this examination before their agent or attorney, is not a necessary prerequisite to the commencement of the suit, unless the assured are called upon to submit to it. If the demand is made, it becomes essential to the right of recovery, and it must be done before the commencement of the suit. When once fully made,

reduced to writing, signed by the party examined, and verified by oath, this condition in the policy becomes fulfilled. A further examination afterwards, is not required by the spirit or the terms of the policy, and the conditions annexed, and therefore is not a preliminary step, material to the maintenance of the action. It does not appear from the case that the examination before the defendants' agent, was not as full as the latter desired to make it. Every question proposed was answered, the whole was reduced to writing, signed and sworn to, by the person, who was examined. It does not appear to have been in contemplation either by Moore or the agent, that if a further examination should be required, that it was to annul the effect of that already completed, so far as it was material to perfect the plaintiffs' right, to call for indemnity, for the alleged loss. If Moore had consented after the first examination, to submit to another, and to make oath thereto, when requested, it could not be a waiver of the plaintiffs' right under the policy, to commence a suit upon it, if such right existed without such consent. It moreover appears from the case, that Moore did submit to a full examination afterwards, when required by the defendants' attorney, which was all, which he assented to do, according to the evidence of the defendants, and the facts so obtained, were competent evidence to be used in the trial by them, notwithstanding they were not verified by oath.

It is contended, that as cotton in bales had been kept in the store at some time within the period covered by the policy, the Court should have given the instruction requested to the jury, "that if they find the plaintiffs kept or had in their stock cotton in bales at the time of the fire, this action is not maintainable." The refusal to give this instruction cannot be legal ground of complaint, unless there was evidence, that cotton in bales was in the stock of goods at the time of the fire, and that keeping or having such in their stock was prohibited by the policy. If the keeping of such article was unauthorized, without an increase of the risk, by any means whatsoever within the control of the assured, it was not designed by the parties, upon a proper construction of the contract, that it should be an absolute

forfeiture of all right of the assured under the policy, but that such right should be suspended and of no effect, so long as such article should be kept in the store. The case does not find, that there was any evidence, that such hazardous article was there at the time of the fire, and the question of fact to be submitted to the jury, as the basis of the *legal* principle contended for, was hypothetical. If there was plenary evidence that such an article was in the store, and was consumed therewith, the policy would not necessarily be forfeited, or its operations suspended thereby. The policy contains no stipulation, that the goods in the store embraced no article, which was hazardous. A certain amount "on the stock in trade of the plaintiffs, consisting of dry goods, kept in a store, was covered by the policy, which prohibited the appropriation, application or use of the premises for carrying on, or exercising any business, which was hazardous or extra hazardous, and for the purpose of keeping or storing goods of that character. The term *premises*, when considered in connection with the whole policy, must have been intended the store, in which the goods were kept, and not the goods themselves, which were the subject of the insurance. By any other construction certain language used in reference to the *premises*, must be regarded as unmeaning or absurd. The restriction does not extend to the keeping of a single article denominated hazardous or extra hazardous as a part of the dry goods stock in trade, provided the store was not appropriated, applied or used for purposes not intended by the language of the policy. These purposes were of a general nature, and distinguished from that of keeping a stock of dry goods for sale. It is not pretended, that the store was used for carrying on a business unauthorized by the policy ; and if the plaintiffs kept or had in their stock a hazardous article, it is by no means the same thing as appropriating, applying or using the store for keeping or storing therein, goods and merchandize, which was hazardous. In the language of this Court in the case of *N. Y. Equitable Insurance Co.* v. *Langdon*, 6 Wend. 628, which was an action upon a policy containing substantially the same conditions as the one now under consideration. "It

appears to me, that the word storing was used by the parties in this case in the sense contended for by the plaintiff, *viz.* a keeping for safe custody, to be delivered out in the same condition substantially, as when received; and applies only, when the storing or safe keeping is the sole or principal object of the deposit, and not when it is merely incidental, and the keeping is only for the purpose of consumption." *Langdon* v. *N. Y. Equitable Ins. Co.*, 2 Hall, 226.

If the jury had found that the keeping of cotton in bales in the store, increased the risk, and that such an article was kept in the store by the plaintiffs at any time during the period covered by the policy, the contract of insurance was thereby rendered void under the second condition. But the case does not show that any question of this kind was presented to the jury, or that the Judge was requested to instruct them upon such point.

Was the affidavit of Moore, and his examination before the defendant's agent competent evidence for the consideration of the jury, on the question of the amount of the loss? The facts contained in documents of this kind, were intended as evidence; and they were required to be in that form, that they might be preserved, and so verified, that they could not be regarded as statements casually or inconsiderately made, and subject to be modified or explained by recollections which might be subsequently called up. They are material for the protection of the rights of insurers. One of them was required to be made immediately after the fire, and the other as soon as the underwriters should demand it, and before they should be exposed to be affected, to so great extent, as they might be by delay, by facts, having little or no foundation in truth, stated by the party interested to increase the amount of his claim. This evidence may be very important, to confine the demand of the assured to the proper limits; and it may also be that which the party attempted to be charged, would prefer should be adduced by his adversary. When introduced it would be evidence for the jury to consider, like other facts in proof. Facts, which are inadmissible for the party offering them, if objected to, may be

competent, when put in by consent or without objection. The documents, which the defendants insisted could not be considered, and their contents weighed by the jury, touching the amount of the loss, were introduced by the plaintiffs, without objection. They were necessary to show that the claim set up was payable before the institution of the suit. The right of the defendants to require this preliminary proof, was not waived by them. They may have supposed that it was for their benefit to require their introduction for some purpose; and when legitimately before the jury, no rule of law would prohibit them from giving these papers due consideration in connection with all the other evidence in the case.

It was contended at the trial, that the plaintiffs were guilty of fraudulent conduct and false swearing in the preliminary affidavit, and therefore they were not entitled to recover. Much evidence was introduced upon this point, which is reported; and a motion was filed that the verdict for the plaintiffs be set aside because it was against evidence. By the preliminary affidavit, the affiant estimated the value of the goods in the store at the time of the fire, at the sum of twenty-eight hundred dollars. The jury returned a verdict for the plaintiffs for the sum of eighteen hundred and fifty-three dollars in damages. The defendants rely particularly upon this verdict as proof of false swearing on the part of the affiant, showing as it is contended, that the jury disregarded the facts asserted and sworn to in the affidavit. The jury were properly instructed, that if they found that there was false swearing on the part of the plaintiffs, they would not recover. It cannot be assumed, that the instruction was disregarded, without convincing evidence. The value of the goods in the store at the time of their destruction was only a matter of judgment by Moore who made the estimation, and the affidavit founded thereon. No account of the stock had been taken previous to the fire, and the books were consumed with the goods and the store. No basis existed, by which the amount of the loss could be ascertained with any degree of accuracy. The judgment of Moore in his estimation of the value of the

property lost, was properly considered with all other evidence upon the same point. They might believe that his interest in the question, would affect his judgment to some extent, though honestly exercised. The general knowledge of the jury in relation to the kind of property consumed, and its value, might also have had upon their minds a legitimate influence. Other facts and circumstances on the same question, coming from other sources, would have their proper effect; and when the whole was weighed, it might have produced the conviction that Moore had erred in opinion, without being guilty of any dishonest intention.

The case of *Levy* v. *Baillie & als.* 7 Bing. 349, has an analogy in some respects to the case before us. The verdict being for a less sum, than the estimation of the loss by the plaintiff, it was contended by the defendant therein, that it established the fact that there was fraud and false swearing. The verdict was set aside on the payment of costs. But inasmuch as the case shows, that it was also insisted that the verdict was against evidence, and the Court do not even intimate the grounds of their decision, it cannot be inferred, that they were governed by the principle here contended for, as one of legal obligation.

The evidence bearing upon the questions raised by the defence, was peculiarly for the consideration of the jury. It was necessary that fraud and false swearing, of which the defendants contended the plaintiffs were guilty, should be affirmatively and satisfactorily established, before that defence could prevail. The proof of this was not of such a character, as to authorize the Court to say, that the jury was under such improper influence, that their verdict should be disturbed.

Exceptions and motion overruled.

Kent, for plaintiffs.

Hobbs, for defendants.

WILLIAM CUMMINGS *versus* ELIAS BLAKE *& als.*

Under Revised Statutes, c. 69, § 7, where the damages in an action on a note alleged to be usurious, are not reduced by the oath of the defendant, but by the voluntary act of the plaintiff, in indorsing the amount received as usurious interest on his note, after the commencement of the suit, the defendant is not entitled to costs.

THIS suit was on a promissory note made March 5, 1841, by defendants to plaintiff for $400, payable in one year with interest. The defence was usury, to be proved by the oaths of the makers. The trial was before SHEPLEY C. J.

The defendants testified that they received but $352 of the plaintiff when the note was made, the balance, $48, being allowed for 12 per cent. interest in advance; that about the expiration of the year, they obtained delay, and paid $38, of which only $14 were indorsed; and that on March 7, 1843, they paid $58,60, of which $34,60 were indorsed, which paid the interest for one year in advance, $10 for deficiency of interest paid the year before, and 60 cents interest on that sum.

The plaintiff testified that all which he ever received on account of the note in any manner had been indorsed, three sums of $24 each, having been indorsed on the note since the commencement of this suit by his direction; that the defendants said the $24 was a present, but the indorsements include all sums received as present or interest. Thereupon the defendants submitted to a default.

The case was brought into this Court by demurrer, and the indorsements of the illegal interest were made since the case came into this Court.

The Court is to cause the proper judgment to be entered, or grant a new trial if necessary.

Godfrey, for defendants.

Both parties say on oath, that 12 per cent. interest was agreed for. The excess is void by c. 69, § 3. By indorsing a part of this excess, the plaintiff affirms the 12 per cent. The plaintiff should not be allowed to alter the state of things as it

was in the District Court. If the law will allow the alteration of claim, the statute against usury becomes a dead letter. In assumpsit, the plaintiff cannot alter his bill of particulars. *Babcock* v. *Thompson*, 3 Pick. 446; *Varnum* v. *Bissell*, 14 Pick. 191. The statute against usury is penal, and is not to be evaded. *Warren* v. *Coombs*, 20 Maine R. 139. The Court would not allow the indorsement to be made after the evidence is all out, and the case is ready for the jury. Neither should it be made in the office of the plaintiff's counsel, as in this case. Indorsements made after suit brought are nullities.

Hathaway & Peters, for the plaintiff.

WELLS J. — The question raised in this action, relative to costs, was decided in *Wing* v. *Dunn & al.* 24 Maine R. 128. By § 7, c. 69, Rev. Stat., the plaintiff was bound to pay costs to the defendant, provided the damages were reduced by the *oath* of the latter. The act of July 22, 1846, c. 192, provides for the recovery of costs by the defendant, upon a reduction of damages by *proof* of the usurious interest. By a subsequent act passed August 7, of the same year, it was provided, that the former act should not embrace pending suits.

This suit was commenced Sept. 9, 1844, and is therefore to be determined by the provision of § 7, c. 69, although that section is repealed by the act of July 22. The damages in this action are not reduced by the *oath* of the defendants, but by the voluntary act of the plaintiff, in making an indorsement on his note. The plaintiff was probably induced to make the indorsement from the apprehension of a reduction by the defendant's oath. But the statute does not extend to such a case, so as to give costs, although it appears that usurious interest was paid. Costs cannot be allowed unless they are given by statute.

MICHAEL GILLIGAN *versus* JOSEPH SPILLER *et al.*

If a person who is a constable, appoint one of the justices of the quorum to hear a poor debtor's disclosure of his property affairs, the proceedings of the justice will be invalid, unless it be shown, that, in making the appointment, such person acted in his capacity of constable.

SHEPLEY J. — The suit is upon a poor debtor's bond, made in the usual form. The case is presented on an agreed statement of the facts. After notice to the creditor of his intention, and of the time appointed to take the oath, the debtor selected James Sanders, and the creditor, Church Murch, as the two justices to take the disclosure and administer the oath. Murch refused to act. Sanders then, at the request of the debtor, selected Isaac P. Haynes for the other justice. The disclosure was taken and the oath was administered by Sanders and Haynes, who were of the quorum, and resided in the town where the oath was administered. It is agreed, that Sanders was at that time a constable of the same town. A constable is authorized by the act approved on February 23, 1844, to make such a selection, if he could, as in this case, have legally made a service of the precept.

If he would prevent a forfeiture, the debtor must show affirmatively a performance of one of the conditions of his bond. The record of the proceedings of the justices, signed by Sanders, states, that he selected the other justice, and it does not state, that he did so as a constable. The only capacity in which he is stated in the record to have acted, is that of a justice of the peace, and the only legitimate inference in the absence of other proof is, that he performed all the acts described in the record in that character. Parol evidence might have been received to prove in what manner the other justice was selected. There is no proof that he was selected by Sanders acting as a constable. The mere fact that he was a constable, affords no proof that he acted in that capacity. The facts agreed do not prove that the debtor has performed either of the conditions of his bond.

While the case has been continued to await this decision, the

Legislature passed the act approved on August 11, 1848, which provides, that in all actions of this description, commenced or to be commenced, if it shall appear that the debtor had taken the oath prescribed by the statute, before the 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 case comes within the provisions of that act. The parties have agreed to submit it to the decision of the Court. But as they could not have anticipated the passage of such an act to vary their rights, and as the Court by the facts agreed is not informed of such facts as may enable it to form a correct judgment respecting the damages which it is required to assess, the parties must be allowed, after a default has been entered, to introduce further testimony, respecting the damages.

Defendants to be defaulted and to be heard in damages.

Kelley, for plaintiff.

Prentiss, for defendants.

JOHN HEATH & *al. versus* RENDOL WHIDDEN.

In local actions, if the venue be in the wrong county, and the objection appear on the record, it should be taken advantage of on demurrer. After pleading to the merits, and after verdict, it is too late to raise the objection.

By a default, the declaration is to be taken as true, and regarded the same as it would have been if a verdict had been taken.

A receipt not under seal, cannot be regarded as a release of the covenants in a deed which is not apparently referred to in the receipt; for "covenant by deed must be discharged by deed."

When an amendment has been properly made, and is for the same cause of action originally embraced in the writ, the amended writ is treated as it would have been if so made when the suit was commenced, notwithstanding the amendment was not filed till the action would have been barred by the statute of limitations.

THIS was an action of covenant broken. It was tried before SHEPLEY J. The defendant was defaulted. If the plaintiffs

are entitled to recover, judgment is to be entered in their favor; if not, the default is to be taken off, and a new trial granted.

Blake, for defendants.

The action is local, and not brought in the right county. *Lienow* v. *Ellis*, 6 Mass. R. 331. In this case, the plaintiff claims by virtue of a covenant running with the land. There is privity of estate and not of contract. The authority is directly in point. Chapter 59, § 9, statutes of 1821, is identical with the Massachusetts statute referred to in the case cited. *Sumner* v. *Finegan*, 15 Mass. R. 285.

The receipt, Dec. 10, 1819, was after the breach of the alleged contract, after covenant broken, but before eviction. When the covenant was broken, a right of action accrued, a demand of some name or nature arose, and this receipt cuts off the claim. A release of all demands operates a release of particular demands. It is incumbent on the other side to show that the receipt does not include the breach of covenant. *Hyde* v. *Baldwin*, 17 Pick. 307. The entry to foreclose, Sept. 7, 1823, is capable of explanation. This authority also shows that a common receipt not under seal, discharges an equity of redemption. 3 Coke 461, Thomas' Ed.

It is said there was no damage, because no eviction had taken place. But both parties knew of the covenant broken and the cause of action. The covenant was therefore canceled, and could never be revived. It is immaterial what the sum named in the receipt is, because it is in full of all demands. *Whitwell* v. *Brigham*, 19 Pick. 123. Tender before the day, may be pleaded as of the day.

The action is barred by the statute of limitations. The writ was amended October term, 1846, as appears by the docket. The eviction was in Sept. 1826; the entry in Sept. 1823. The writ was dated Feb. 1841. The original declaration was not such as to enable the plaintiff to recover, and he could recover only on the amended declaration. As the writ could not be sustained, because barred by the statute, and there is cause of action only by the amendment, the amendment must be regarded as the commencement of this claim. The deed is not admissible; but this point is not pressed.

TENNEY J. — The action is upon the covenants in a deed executed and delivered by the defendant to one Nathaniel Herrick, deceased, brought by his heirs at law in the county of Penobscot, the land described in the deed, being situate in the county of Piscataquis. To prove the breach of the covenants, the plaintiffs introduced a mortgage deed from said Whidden to Calvin Sanger of the same land, executed, acknowledged and recorded, prior to the date of the deed to Herrick, and proved that there had been an entry for condition broken in the mortgage, and a foreclosure of the same. After the action was entered in Court, the plaintiffs were permitted to amend their writ, but the amendment was not actually filed till more than twenty years had elapsed from the time when the cause of action accrued. It appeared in defence, that after the delivery of the deed to the plaintiffs' ancestor, but before the entry of Sanger, the grantee of the deed from Whidden gave him a receipt, acknowledging that he had received five dollars, in full of all demands of every kind, name and nature. The defendant consented to be defaulted; and if the plaintiffs are not entitled to recover upon the evidence introduced, which is competent, the default is to be taken off and the action to stand for trial.

The counsel for the defendant insist, that the plaintiffs must fail to recover on these grounds: — 1. That the action is local, and is brought in the wrong county. — 2. That the right, which might have once existed, is taken away by the receipt. 3. That the statute of limitations is a bar.

1. "In local actions, if the venue be in the wrong county, and the objection appear upon the record, it is clear, that the defendant may demur, and if it do not appear on the record, may, under the general issue, avail himself of the objection at the trial, as the ground of nonsuit." 1 Chitty's Pl. 284. By the statute of 17 Car. 2, c. 8, it is provided "after verdict judgment shall not be stayed or reversed, for that there is no right venue, so as the cause were tried by a jury of the proper county or place, where the action is laid." *Mayor of London* v. *Cole & als.* 7 T. R. 559; 1 Ld. Raym. 330; *Hath-*

orn v. *Haines*, 1 Greenl. 238; *Morton* v. *Chase*, 15 Maine R. 188.

The objection in the case before us appears upon the record, and the defendant should have availed himself of it on demurrer. Having pleaded to the merits, the judgment could not be stayed, if there had been a verdict. By the default the declaration is to be taken as true, and regarded the same as it would have been, if a verdict had been taken.

2. At the time, when the receipt was given, there had been no ouster of the plaintiff's ancestor by the mortgagee. There was a breach of the covenant against incumbrances at the time of the delivery of the deed, but the damages were nominal only, and it cannot be considered, that such an acknowledgment as that evidenced by the paper can be a release of the covenants in a deed, which is not apparently referred to. "It is a settled rule, that with as high degree of force or validity as a contract receives in its formation, it must be dissolved, and according to the Roman rule *unum quodque dissolvi eo ligamine, quo ligatur.* On this principle a deed must be discharged by deed. Hence a discharge in the nature of a release, *without deed*, in satisfaction of all demands, cannot be pleaded in an action of covenant; *for covenant by deed must be discharged by deed.*" 1 Dane's Ab. page 97, chap. 1, art. 7, § 1; 4 ib. page 407, chap. 119, art. 2, § 2, 4; ib. 122, page 467, chap. 122, art. 2, § 8; 2 Stark. Ev. 437; *Kelleran* v. *Brown*, 4 Mass. R. 443.

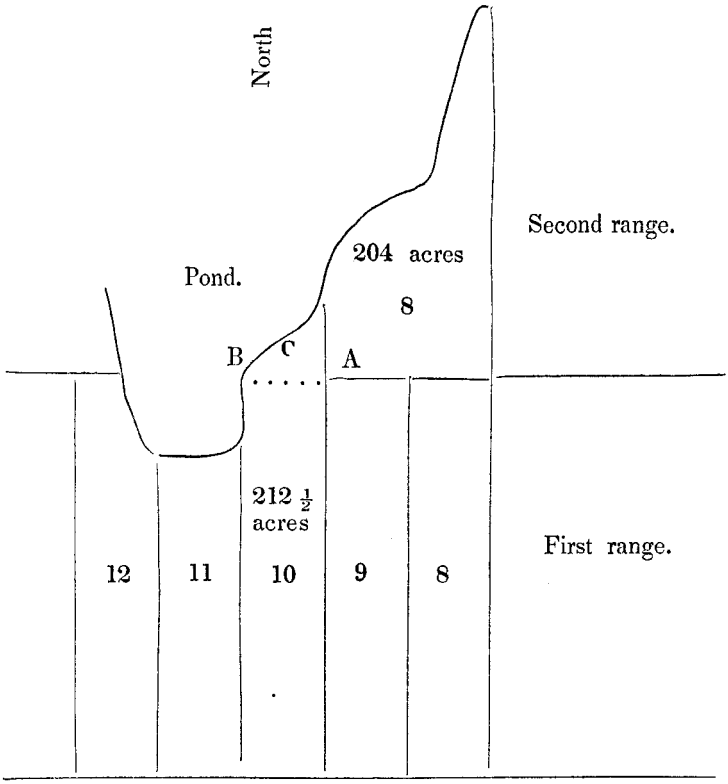
3. It is not insisted that the amendment was improperly allowed; it must be for the same cause of action originally embraced in the writ; the amended writ is treated as it would have been, if so made, when the suit was commenced, as between the parties thereto; if the action was not barred, when it was commenced, it cannot, when properly amended, be followed by such an effect.

By the agreement of parties, there must be judgment upon the default.

Reuel Williams *versus* Stephen Spaulding.

Where a plan of a tract of land is made, with intent to represent a survey actually made and marked upon the face of the earth, if there be a variance between the survey and the plan, the plan is controlled by the survey.

In such a case, conveyances made of lots according to the plan must yield to conveyances of lots according to the survey.



Writ of entry. Trial before Shepley C. J.

The full ink lines upon the accompanying diagram, are a transcript of Weston's plan made of the township in 1797. The dotted line and the letters A and B are put in by the reporter merely for illustration.

The demandant established title to lot No. 10, in first range according to Weston's plan. The tenant established title to lot

No. 8, in 2d range, according to Weston's *survey*. The land in controversy, is the triangular piece marked C, lying between the dotted line and the pond. There was evidence from which the jury inferred that Weston, when making the actual survey upon the earth, run a line from A to B, for the North line of No. 10, where the dotted line is, and marked it upon trees and by corners.

The Court instructed the jury, that although they might be satisfied that according to the actual survey, made by Samuel Weston in running the lines of said township upon the face of the earth, the demanded premises were a part of said lot No. 8, in the second range, yet as by the plan of said Weston, made subsequent to the survey, said premises were included in said lot No. 10, in the first range, that said plan would govern and control said survey, and if they were satisfied that said plan was the original one, made by Samuel Weston, they were bound upon the evidence, although they found the facts as testified to by tenant's witnesses, to return their verdict for demandant.

The jury accordingly returned their verdict for the demandant, and the defendant excepted.

WELLS J. — It is a well settled rule of our jurisprudence, that where a plan is made, intending to delineate a previous survey, and there proves to be a variance, between the survey and the plan, and a conveyance is made, containing a reference to the plan, the grantee will hold according to the survey. *Thomas* v. *Patten et al.* 13 Maine R. 329; *Esmond* v. *Tarbox*, 7 Greenl. 61; *Pike* v. *Dyke*, 2 Greenl. 213.

The survey is the original work, and when actually made, in the forests, marked trees designate the lines, corners and numbers of the lots. Each lot is clearly indicated, upon the face of the earth.

When the plan is intended to represent this work, but differs from it, the error is to be corrected by reference to the original to which the plan as a copy must yield.

A proprietor of a township may alter the form or size of his lots, after the survey is made; he can divide or unite lots, at

his pleasure, and cause the plan to be made intentionally different from the survey.

But when he makes a grant of a lot, the survey and plan of which are known to be variant, and he uses the word survey or plan, in the grant, he must be considered, in legal contemplation, as using those words, in their ordinary acceptation.

The demandant claims under a deed from David Green to the Union Bank, through intermediate conveyances, lot number ten, which is described, "as being numbered *on said plan* of said township, number four, taken in the month of April, 1797, by Samuel Weston, surveyor."

According to the *plan*, lot number ten would embrace the demanded premises.

The tenant claims, through intermediate conveyances, from the same grantor, but by a prior grant, to Benjamin Shepherd, lot number eight, among other lots, and the deed to Shepherd contains this language, "agreeable to Samuel Weston's *survey* of said township into lots, the same being more or less." According to the *survey*, as marked upon the face of the earth, lot number eight would embrace the demanded premises as appears by the diagram, annexed to the report of the case.

It is contended by the tenant, that the reference to the survey, in the deed from Green to Shepherd, is limited to the quantity of land, rather than to the lots themselves. But the ranges and lots are mentioned in the deed. The conclusion reciting the number of acres, would not extend or limit it; the lots would pass, including all the land, within their limits. The deed says, "the same being more or less." The language is express, in its reference "to the survey of said township into lots." It must therefore refer to the lots granted, as delineated by the survey, and not to the mere quantity of land. Whether there would be land enough to complete the number of acres, mentioned in the deed, without the demanded premises, does not appear, nor is such inquiry material, in giving a construction to the deed.

It may be that Green, who resided at a distance from the township, had no other knowledge of the lots, than what was

exhibited by the plan, and that the surveyor made the plan, changing the arrangement of some of the lots, according to his own judgment, without consulting the proprietor, who, ignorant of any difference between the survey and the plan, really intended to convey according to the plan. But the difference between the survey and plan is too broad, to be disregarded, and parties to conveyances must be held to intend what their language implies.

David Green, having conveyed the demanded premises to Shepherd, by the survey, before his deed to the Union Bank, which is the foundation of the demandant's title, the demandant cannot recover.

It results, therefore, that the construction, given to the deeds from David Green, by the presiding Judge, was erroneous, and the verdict must be set aside, and a new trial granted.

W. L. Walker, for demandant.

A. & J. Waterhouse, for tenant.

HIRAM CORLISS *versus* JOHN MCLAGIN *& al.*

If a mortgagor of a mill, after making the mortgage, put into it a shingle machine and apparatus attached to it, it becomes a part of the freehold and passes to the mortgagee after foreclosure.

TROVER to recover for a shingle machine, tub-wheel, shafts and gearing appertaining thereto. Trial before SHEPLEY J. The plaintiff, Corliss, Aug. 25, 1835, mortgaged a mill and privilege in Carmel, to William Moulton, which mortgage was foreclosed March 17, 1840. Pending the mortgage, the plaintiff enlarged the mill, and put in the shingle machine and apparatus sued for. McLagin, one of the defendants, for several years rented the shingle machine and gearing of the plantiff. But on Nov. 15, 1843, Moulton conveyed by deed to John Dore, one of the defendants, the mill and appurtenances, including the machinery sued for. Dore and McLagin subsequently occupied the mill and machinery. The Court ruled that the tes-

timony was not sufficient to sustain the action, and the plaintiff consented to a nonsuit, to be taken off if the ruling was incorrect.

Dinsmore and *Knowles*, for the plaintiff.

Kelley and *McCrillis*, for the defendants.

WELLS J. — After the plaintiff had mortgaged the mill, he made an addition to it, and placed the shingle machine, tub-wheel, shafts and gearing in it, and the machine was used by himself and others.

Between landlord and tenant, many things are regarded as personal, which would be considered a part of the realty in an absolute conveyance or a mortgage.

The mortgagor generally looks to the redemption of the property, and what he adds to it, of a permanent character, is for his own benefit; for it is but collateral to the debt. The case is different with a tenant who cannot be considered as intending to incorporate the fixtures, which he erects, with the freehold.

Whether a thing is a fixture does not always depend upon the manner in which it is attached to the freehold. Its character is often indicated by the uses and purposes, to which it is devoted. Doors and blinds which may be easily removed from the buildings, with which they are connected, are nevertheless a part of them. They are component and necessary parts of them, and are intended to be used as such.

On this principle it was held, that by the conveyance of a saw mill, with the appurtenances, the mill chain, dogs and bars would pass. *Farrar* v. *Stackpole*, 6 Greenl. 154.

A moveable water wheel and its gearing were considered fixtures, having been erected by the owner for the permanent enjoyment of the inheritance. *Powell* v. *M. & B. Manufacturing Co.* 3 Mason, 467 — 8.

In the case of *Winslow & al.* v. *The Merchant's Insurance Co.*, 4 Metc. 306, the rights of a mortgagor, who has erected fixtures, after the mortgage was made, are very fully considered. In the latter case, it is said, in relation to the opinion

given in the case of *Union Bank* v. *Emerson*, 15 Mass. R. 159, as to the right of the mortgagor, to remove the kettle, if it had been put in by him, after the mortgage was made, "that no such point was decided by the Court, nor was it necessary, upon the facts of that case."

In *Gale* v. *Ward*, 14 Mass. R. 352, the Court considered the carding machines, as personal property and as not passing to the mortgagee.

In the case of *Taylor* v. *Townsend*, 8 Mass. R. 411, the erections were made by the mortgagee, while in possession. He did not make them with the expectation, that they would be held by the mortgagor. His estate being defeasible, he had the same control over fixtures made by himself, as a tenant would have.

We consider the shingle machine, and apparatus attached to it, as a part of the freehold, and having been incorporated with it by the mortgagor, it goes to the mortgagee. *Smith* v. *Goodwin*, 2 Greenl. 173; *Butler* v. *Page*, 7 Metc. 40.

The mortgagor may always save himself from loss, however expensive his erections may be, by paying his debt and redeeming the premises. The mortgagee entered to foreclose on the 17th of March, 1840, and conveyed to the defendant, Dore, Nov. 15, 1843. Dore having the title of the mortgagee, was under no obligations to restore the property, upon the demand, which was made, and McLagin, acting with Dore, is protected by his title, and neither of them can be considered as wrongdoers.

The nonsuit which was entered must stand.

LORENZO DOW *versus* MATTHIAS P. SAWYER *& als.*

It seems, that contemporaneous entries made by third persons in their own books, in the ordinary course of business, the matter being within the knowledge of the party making the entry, and there being no apparent motive to pervert the fact, are received as original evidence.

The books of a deceased agent, proved to be in his own handwriting, are

admissible as evidence for his principals, if, on inspection, they appear to have been kept fairly, and the entries to have been made, as he had occasion to make them in the way of his agency, and to relate to the matter in controversy between the parties.

EXCEPTIONS from the District Court, GOODENOW J. The action was assumpsit on account annexed, in which the defendants were charged for 96 days work at $1,25 a day, amounting to $120, and on which was credited the sum of $26, leaving a balance of $94. The defendants offered in evidence certain memorandum books kept by their agent, since deceased, in his handwriting, and relating to the matter in controversy, showing payments to the plaintiff more than he had credited; but they were excluded by the Court. The exceptions presented several points, but the view taken by the Court renders all but one of them immaterial.

Hobbs, for the defendants.

Ingersoll, for the plaintiff.

SHEPLEY J. — The action is assumpsit to recover for labor alleged to have been performed for the defendants, by direction of their agent, Hazen Mitchell, deceased, in repairing the Penobscot Steam Mill. The plaintiff had credited in his account, payments made by Mitchell to him. Among other grounds of defence, it was contended that Mitchell had paid to him more than he had credited. To prove this, the entries in certain small memorandum books of Mitchell, made in his handwriting, were offered to be read in evidence, but were excluded. They were held to be inadmissible "without proof that they were the daily minute books of said Mitchell, in which he was in the habit of making his entries." That they were the books of Mitchell and that the entries were made in his handwriting, appears from the statement made in the bill of exceptions. After the decease of a person, who has made entries in his books of his business transactions, it might be very difficult, if not impossible in many cases, to prove "that they were [his] daily minute books" or in other words, that he made entries in them daily. How frequently he made entries in them might perhaps

be readily ascertained by inspection. And whether he was in the habit of making entries in them might be ascertained in the same manner. The purpose for which the books were kept and how far the entries appeared to have reference to the business of repairing the mill, and to the plaintiff's account, would become known by inspection. And the Court, upon inspection of the books, would be authorized to decide, whether they were of a character to permit the entries made in them to be used as testimony.

In several of the decided cases it does appear, that testimony was offered to prove that the deceased person was accustomed to make entries and to keep books of the kind offered in testimony, while in other cases, no such proof appears to have been introduced, when the book itself sufficiently disclosed the purpose, for which it was kept, and for which the entries had been made. There does not appear to be any rule requiring proof to be made by any extraneous testimony, when it may be satisfactorily obtained by an inspection of the book.

The entries offered do not appear to have been excluded, because they were found upon inspection of the books, not to have been made by Mitchell regularly as he had occasion to make them in the course of his business in repairing the mill, or because they were found to be of such a character as to be inadmissible.

The entries having been made in the handwriting of Mitchell, and in his books, if it appeared on inspection, that they were made respecting his business, while he was employed to make repairs on the mill, and that they had reference to the account of the plaintiff, while he was employed to make repairs on it, they would be legally admissible as original evidence in the case.

The rule, as stated by Mr. Greenleaf, 1 Greenl. Ev. § 116, appears to be sustained by the cases referred to by him; that contemporaneous entries made by third persons in their own books in the ordinary course of business, the matter being within the knowledge of the party making the entry and there being no apparent motive to pervert the fact, are received as original evidence.

According to this rule the entries offered should have been received without extraneous proof, if upon inspection of the books, they appeared to have been fairly kept, and to contain entries respecting the business of Mitchell in repairing the mill, which might shew the amount paid to the plaintiff, on account of his labor, performed at the request of Mitchell.

Exceptions sustained and new trial granted.

LUCY S. EATON & *als. versus* SEWALL KNAPP.

Where a deed of a tract of land bounds it "partly on a stream, as the said lot was surveyed by L. L. Esq. reference being had to the plan," and the plan shows a straight line drawn along the stream pursuing its general course, but crossing the stream at a curvature, and taking in a piece of land on the other side within the curvature; and the lines named in the deed do not entirely surround the tract; but by substituting the straight line instead of the stream the tract is surrounded, the straight line must be regarded as the true boundary, and the land on the other side of the stream between the curvature and the straight line is embraced in the deed.

THIS was a writ of entry. Plea, general issue and betterments.

The demandants, to prove their title, introduced a deed dated Feb. 26, 1812, from the Commonwealth of Massachusetts to James Brackett, from whom the title passed to the demandants; also a plan made by Lothrop Lewis dated January, 1804, referred to in said deed. The deed describes the premises conveyed as bounded "partly on Eddington line, partly on Nichols stream, and partly on the 32 settlers' lots, including the gore between lots No. 2 and 3, and containing 1832 acres and a half, as the same was surveyed by Lothrop Lewis, Esq. in the year 1803, reference being had to the plan now on file in the land office of said Commonwealth." The description annexed to the plan corresponds to that in the deed, but the plan shows a straight line drawn along the stream according to its general course, but crossing the stream where there are curvatures and taking some portions of land on the other side between the curvatures and the said line.

The tenant claimed title under the State of Maine, by deed dated in 1832, which is not found amongst the papers in the case, but appears to have embraced a piece of land on the north side of the stream, between the straight line and one of the curvatures of the stream.

A default was entered by consent, to be taken off, and the case to stand for trial, if in the opinion of the Court the premises demanded are not embraced in the deed, Commonwealth to Brackett. If the default is to stand, then some one is to be appointed by the Court to determine the question of betterments.

J. Appleton, for tenant.

Hobbs, for demandant.

TENNEY, J. — The parcel of land to which the demandants claim title in this action, is understood to be on the northerly side of Nichols stream, bounded on the southerly part by a small curvature in that stream and on the northerly side by a straight line following the general direction of the stream, above and below the curve, and cutting it at the eastern extremity of the parcel in dispute, and passing to the north-eastern corner of settlers' lot No. 2, and thence south-westerly a short distance to the stream. The demandants hold under a deed from the Commonwealth of Massachusetts to James Brackett, Jr., dated February 6, 1812, and the tenant under a deed from the State of Maine, dated in 1832. The deed to Brackett refers to the survey and the plan of Lothrop Lewis, made in 1804, and returned to the land office of Massachusetts, and the description accompanying the plan is identical with that in the deed to Brackett, and is as follows, " Bounded partly on Eddington line, partly on Nichols stream and partly on the thirty-two settlers' lots, including the gore between the lots numbered two and three, and containing one thousand, eight hundred and thirty-two acres and one-half, as delineated on this plan." The straight line, which the demandants contend is the northern boundary of the tract surveyed, and the Nichols

stream, which the tenant regards as the northern line of the same tract, are both protracted upon the plan.

In the description, without the plan, three general boundaries only are expressed, and from these alone, it would be difficult if not impossible, to locate the land upon the earth, so that it would correspond with the plan, upon the construction contended for, by either party. The plan is referred to in the description and makes a necessary part of the description, and cannot be disregarded. It is insisted in behalf of the tenant that by the use of the word "partly" as applied to each of the three boundaries mentioned, it was designed, that each entire side of the tract, which is in its general form triangular, should be distinguished from the other two entire sides severally, and that one of these entire sides is Nichols stream. If the boundary so expressed, constitutes the entire line on every one of the three sides, intersecting at both ends, the other lines, the construction contended for is correct; for this qualifying term would not otherwise be appropriate. But if all or either of the three lines are imperfect, as described, having portions thereof only on the Eddington line, the settlers' lots, and Nichols stream, the construction of the tenant's counsel is not necessarily correct; for when the three lines are together taken as one whole line, it would be proper to say that part of the whole line was that of Eddington, part, that of the settlers' lots, and a part that of Nichols stream, leaving the plan to make up the description when these several lines failed to do it.

By the plan, the south-western side of the tract is bounded entirely on the line of the town of Eddington. The north-western boundary is not made up entirely by the lines of the settlers' lots, inasmuch as a gore separates the last mentioned line, which gore is included in the tract surveyed, but its extreme boundary is Penobscot River. The northern boundary is the one in dispute. Nichols stream does not meet the Eddington line at the south-eastern corner of the tract, as delineated on the plan, and the tract would not be perfectly surrounded on this construction, there being the intervention of Nichols *pond*, not mentioned in the description, or represented

by the plan as making any part of the boundary. The surveyor had a design in running the straight line ; by treating that as the northern boundary, every call in the description and the plan referred to is answered ; by substituting therefor the stream, the description is imperfect, the tract is not surrounded, and a line upon the plan, which with others free from dispute, fully encloses the tract must have been drawn for no purpose. This cannot be admitted. By adopting the straight line as the true boundary, the land in controversy will be embraced in the deed under which the demandants hold, and

Judgment must be entered on the default.

BANGOR BOOM CORPORATION *versus* JAMES WHITING *& al.*

When the authority given to a corporation is to *boom* lumber and receive toll therefor, it is not entitled to demand toll for *driving* lumber, that sort of business not being within its corporate powers.

In a suit by such corporation, upon an account annexed for *driving* and *booming* lumber, it is rightful to allow the plaintiffs to amend by withdrawing the charge for the *driving*.

Payments to a person, acting as agent for such a corporation, made partly to pay for *driving* and partly for *booming*, are to be applied to each, according to the intent of the parties when the payments were made.

If the doings of such an agent are some of them *within* and some of them *beyond* the corporate powers, the corporation may ratify his doings so far as they were within its powers, but no further.

ASSUMPSIT on account annexed. General issue pleaded.

The plaintiffs were chartered with authority to *boom* lumber and receive toll therefor, at the rate of 38 cents per thousand feet. This action was for *driving* and *booming* logs. The defendants objected that the *driving* of lumber was not authorized by the plaintiffs' charter. This objection was sustained by the Court, WELLS, J.

The plaintiffs then moved to withdraw the charge for *driving*. This was allowed and was done, although objected to by the defendants.

The following facts were proved. The plaintiffs, by their agent, Moody, drove and boomed logs, beginning in the spring

of 1846. Washburn was the owner of the logs until he mortgaged them, in June of that year, to the defendants, who took them into actual possession, 27th July. Being called upon by Moody, they promised to pay the plaintiffs' past and subsequent charges upon the logs, if the plaintiffs would continue to drive and boom them, which the plaintiffs accordingly did.

For the plaintiffs' services upon the logs, Moody received several hundred dollars, partly from Washburn and partly from the defendants.

The defendants then offered to prove that Moody, acting for the plaintiffs, before commencing work upon the logs, agreed with Washburn to drive and boom them for him at sixty cents per thousand feet. This evidence was excluded.

The defendants' counsel then requested instruction to the jury, that the defendants were not liable to pay for boomage, prior to their taking actual possession of the logs under the mortgage; and that they were entitled to have all the money which had been paid to Moody, applied toward the charges for the *booming*, inasmuch as the plaintiffs had no right to recover pay for *driving*.

The jury were instructed that the corporation were entitled to a lien on the logs for the booming; that they might yield up the lien, and have a right of action against the defendants, being mortgagees, if the lien was surrendered at their instance, and if the credit was given to them, whether they had or had not taken possession.

That, of the payments to Moody, so much shall be applied to pay for *driving* and so much for *booming* as was the intent of the parties, when the payments were made. That, if the lien was surrendered to the defendants, and a credit given to them, the plaintiffs would be entitled to recover of them for the boomage, so much as had not been paid to Moody for that service.

The verdict was for the plaintiffs.

Hobbs, for defendants.

1. The amendment was wrongfully allowed. It changed the cause of action. An amendment ought never to be allowed, if

it would injure the other party. *Dodge* v. *Tileston*, 12 Pick. 328. It was a surprise. Defendants were supposing the plaintiffs were attempting to charge them on the special contract.

2. The proof of the special contract was wrongfully excluded. 7 East, 479; 14 Johns. R. 377; 11 Johns. R. 346; 1 Stark. R. 113. It deprived the defendants of a valid defence.

3. The instruction to apportion the payments made to Moody was wrong. All ought to have been applied to "*boomage.*" As the contract for the *driving* was void, none of the payments could be applied to it. There was no liability, no indebtment but for *boomage.* It is to claims which are legal, that the law applies payments.

4. As to ratification of the unauthorized acts of agents, we cite 8 Wheat. 363; 8 Mass. R. 299; 17 Mass. R. 28, 29; 1 Pick. 220.

The defendants, though mortgagees, were not liable for the boomage, until they had taken possession. 1 H. B. 114, and cases cited. 6 Shepl. 132; 20 Maine R. 213; 15 Johns. R. 298.

Ingersoll and *A. Sanborn*, for plaintiffs.

Shepley, J. — The action was assumpsit on an account annexed to the writ for driving, booming, rafting and delivering "certain mill logs and lumber." A verdict was found in favor of the corporation, and the case is presented on a report for the consideration of several objections, taken by the counsel for the defendants to the rulings and instructions of the Court.

1. The first is, that an amendment was allowed to be made by erasing the word "driving." It is said this changed the form of action. The declaration contains no count on a special agreement; the effect was only to diminish the claim by excluding from the contest a matter, for which the corporation could not recover. It was not liable to the objection, that it divided the plaintiffs' claim and deprived the defendants of credits as in the case of *Dodge* v. *Tileston*, 12 Pick. 328.

2. The second is, that testimony to prove, that Thomas M. Moody, professing to act for the corporation, made a special contract with George W. Washburn, who had made a conveyance of the lumber to the defendants in mortgage, respecting the rafting, booming and driving of the logs, was excluded.

The counsel for the corporation, in opening the case to the jury, had stated that Moody was the sole corporator, and that he had made such a special agreement. The counsel for the defendants had objected, that the corporation could not recover upon it, for it "was beyond the scope of the charter." There does not appear to have been any evidence that Moody was authorized by the corporation to make such a contract. The remarks of counsel, that he was the sole corporator are relied upon; but if such remarks were to be regarded as testimony in the cause, the administration of justice would be greatly changed, and it is to be feared not for the better.

If the corporation had by a vote attempted to confer such an authority upon Moody, it would have failed to do so; for it was not authorized by its charter to make such a contract. If Moody made the contract he alone would be bound to execute it. The corporation having no legal connexion with it could not be affected by it. Its right to claim compensation for boomage of logs, which it was by its charter authorized to collect and receive, could not be affected by an attempt to connect it with the performance of other unauthorized acts.

The testimony was properly excluded.

3. It is alleged, that the instructions respecting the application of the payments made to Moody for "boomage" and for services performed by him were erroneous. The argument is, that if the special agreement be invalid, the law will infer, that all payments were made on account of the claim, for which the defendants were legally liable. This would be correct, if the payments had been made to the corporation on account of what was supposed to be due it. But they were made to Moody; and some of them expressly on account of matters, with which he could not connect the corporation. Such payments could not be considered as made to the cor-

poration. Receipts are liable to explanation by parol testimony. Testimony for this purpose was introduced, and the jury were instructed in substance to allow the defendants to have the benefit of whatever sums had been paid at any time on account of boomage, and that payments made to Moody for other purposes should not be considered as payments made to the corporation. These instructions appear to have been correct.

4. It is alleged, that the instructions respecting the description of logs, on which the toll, or boomage as it is called, could be legally collected, were erroneous. They were in substance, that the corporation could recover the toll only upon such logs, as had been rafted from the boom and delivered to the defendants or to their agents. It is insisted, as the men, who received the logs, were employed by Moody, they were acting as the servants of the corporation, and not as the servants of the defendants. This would depend upon the capacity in which they acted. If they were employed by Moody, acting under an agreement made by him with the defendants to float the logs to their mills, an agreement with which the corporation could have no legal connexion, such men would become for that purpose the agents of the defendants. It could make no difference, if the same persons were also at the same time the agents of the corporation, while employed about its business to raft and deliver the logs. A person may be the servant and agent of one person or corporation for one purpose, and of another for another purpose respecting the same property at the same time. There does not appear to have been any error in these instructions.

5. It is said, that the defendants were mortgagees not in possession, and that the instructions respecting their liability were erroneous. The instructions were, "that the plaintiff was entitled to receive of the defendants the boomage on the logs mortgaged, upon which the lien had been given up by the plaintiffs to the defendants, and for which boomage credit had been given by the plaintiffs to the defendants." The argument is, that the lien upon the logs for toll was relinquished by

Moody, that the credit was given by him, and that the promise to pay was made to him. That if he had no authority to act for the corporation, it could claim no benefit from an agreement made with him. But the corporation might authorize or ratify his acts to the extent of its corporate power and no further. This power was sufficient to embrace contracts respecting the toll upon logs.

Judgment on the verdict.

JOSEPH E. FOXCROFT *versus* DAVID BARNES.

A judgment upon a verdict, rendered in favor of petitioners for partition against persons unknown, is conclusive, so far as concerns the rights of those who did not appear and become parties to the proceedings, although the finding of the jury did not conform to the issue and by inadvertence was not written out in form, before it was affirmed.

A judgment establishing the partition of lands bars the legal possessory title of all who did become or might have become respondents.

Disseizin, in order to defeat the operation of the proprietor's deed, must be by occupancy of a part under a deed of conveyance recorded, or such an open and visible occupancy, that the proprietor may at once be presumed to know the extent of the disseizor's claim and occupation.

An occupation according to the provisions of stat. 1821, c. 62, § 6, or R. S. c. 147, § 11, does not constitute such a disseizin as would prevent the owner from conveying his land, although, if continued 20 years, it might bar a writ of entry, brought by the owner for possession.

WRIT OF ENTRY. Trial before SHEPLEY, J. The general issue was pleaded with claim for betterments.

The verdict was for the demandant. The jury having allowed the betterments, and fixed the amount thereof, the questions considered by the Court related only to the title.

A. W. Paine, for tenant.

All the deeds under which the demandant claims were made while the grantors were disseized. Such deeds could convey nothing.

The R. S. c. 91, § 1, cannot aid him. It was wholly prospective. Its language is, "*shall*" make a deed. If otherwise, it would have been unconstitutional. 2 Gall. 141. The

grantor of demandant's grantor, when making the deed, was disseized. Therefore no right of entry passed.

The demandant's reliance must be upon the partition alone. But that was invalid because of the defect in the proceedings. That defect was a fatal one. The verdict did not approach the issue. The issue was sole seizin ; the verdict was that one of the former conveyances was fraudulent, whereupon partition was ordered. 1 Story's R. 174, S. C. in C. C. U. S. and afterwards in Sup. Court U. States. The judgment, on its face, is invalid, as to all persons, without a reversal. Before the R. S. the right of entry only was tried, now the right to the land must be settled in process for partition. Rev. Stat. chap. 145, creates a new rule. The process combines the character of a writ of entry with that of a writ of right. But when the judgment in question was rendered, it operated on the possession, and it is no bar as to the right. In the same case, 4 Howard, 352, these partition proceedings were not even insisted upon. The demandant's deed was void ; could it control a title by 15 years possession ?

Kelley, for demandant.

Our title is good with or without the partition. Long before the tenant's possessory title began, we had title by recorded deeds. It is said some one had disseized. But the law on that point only related to the remedy ; it only raised a question whether the suit should be in name of the grantor or grantee. We had good title under the partition. The case cited from 1 Story's R. was on the former statute. Then the judgment in partition could be overhauled by writ of right. The tenant's possessory title had commenced but two years before the proceedings in partition. No right could then have accrued. At all events the judgment is effectual until reversed.

Shepley, J. — The demandant claims by a writ of entry to recover the westerly half of lot numbered twelve in the fifth range in the township of Lee. Samuel T. Mallett conveyed in mortgage on June 5, 1827, to the trustees of Williams College, six thousand acres, in common and undivided in that

township. The trustees of the college, conveyed the same on May 11, 1835, to John Webber. Nathaniel Ingersoll conveyed all his interest in that township to John Webber on July 19, 1833. John Webber on June 19, 1835, conveyed one-half of the lands which he had purchased of Nathaniel Ingersoll, and of the trustees of that college, to the demandant. John Webber and the demandant presented their petition for partition against persons unknown to have the lands owned by them in that township, set out to them to be held in severalty. Several persons appeared and a trial was had in this Court upon an issue joined, and a verdict was found in favor of the petitioners, but the finding of the jury did not conform to the issue, and through some inadvertence, it was not written out in form, before it was affirmed. The judgment founded upon it may be erroneous or inoperative upon the rights of those, who were parties in that issue ; but the judgment that partition be made, and the final judgment establishing the partition as made cannot thereby be affected, so far as it concerns the rights of other persons, who did not appear and become parties to those proceedings.

Neither the tenant nor any person, from whom he claims to have derived title, became a party to those proceedings. The final judgment was entered at the June Term of this Court in this county, in the year 1839, and lot numbered twelve in the fifth range, was set out to the petitioners, as a part of their share.

This Court has decided, that "the judgment establishing the partition completely bars the legal possessory title of the respondent and of all others, who might have become respondents." *Baylies* v. *Bussey*, 5 Greenl. 159. Any person claiming to be the owner of lot numbered twelve in the fifth range might have become a respondent, and thus have protected his rights, if any he had. The statute approved on February 8, 1821, c. 37, § 2, under which this partition was made, declares, that the partition or division, so made, accepted and recorded, " shall be valid and effectual to all intents and purposes."

Pending the proceedings in partition, John Webber, on Nov.

4, 1836, conveyed to the demandant by deed of release, all the lands owned by him in the township of Lee, excepting one-eighth part of the lands set off on execution against Nathaniel Ingersoll. It does not appear, that the premises demanded, constituted any portion of the land set off on execution against Ingersoll. If the demandant be required to proceed further and to prove, that he has extinguished all the rights of John Webber, remaining unconveyed or acquired by the proceedings and judgment in partition, he shews, that he had done so by two deeds of release made by Webber to himself, the first on June 16, 1840, and the second on August 13, 1843. The counsel for the tenant insists, that these conveyances were inoperative, because John Webber was disseized, when they were made. The effect of the argument is, that the operation of a deed to convey title may be defeated, when the land of the grantor is occupied by another person according to the provisions of the statute of 1821, c. 62, § 6, or the provisions of the Revised Statute, c. 147, § 11. And this is the basis of the requested instruction which was refused.

The rule of the common law, that the owner of lands, who has been disseized cannot convey them, becomes applicable only, when a disseizin is proved, according to the rules of the common law, which can know no other disseizin, than one established according to its own rules. What constitutes a disseizin according to the common law, as received in this State, was decided in the case of the *Proprietors of the Kennebec Purchase* v. *Laboree*, 2 Greenl. 275. It must be an occupancy of a part under a deed of conveyance recorded, or "such an open and visible occupancy, that the proprietor may at once be presumed to know the extent of the claim and occupation of him, who has intruded himself unlawfully into his lands, with an intent to obtain a title to them by wrong." In this case all pretence to such a disseizin is disproved, except to a small portion of the premises demanded. And neither the defence, the requested instruction, nor the argument, makes any distinction between such small portion and the remaining portion of the demanded premises. It cannot be admitted, that an occupation

according to the provisions of those statutes, would constitute such a disseizin as would prevent the owner from conveying his lands. It was no part of the object of their enactment to defeat the operation of such a deed of conveyance. There is no allusion to it found in them. Their object was to limit or restrict the right of the owner of lands to recover them of one, who had occupied them in the manner therein described, for twenty years. Courts would be wholly unauthorized to extend their provisions by construction, so as to embrace another and distinct subject, not noticed or alluded to in them.

The conveyances to the demandant being operative, his title to the demanded premises becomes established, and the instructions to the jury to that effect were correct.

The title exhibited by the tenant, commenced in the year 1833 or 1834, by the entry of Moses Thurlo upon a portion of the demanded premises. He cut down the trees then standing upon some acres of the land, and put up a frame for a house. William True, who succeeded him, made a conveyance of the premises on October 11, 1834, to James L. Thomas, but this deed was not recorded until November 11, 1846. Thomas conveyed the same to the tenant on May 15, 1841, by a deed not recorded till October 30, 1847. The case states, that the house on the premises had been finished, and that other improvements had been made, but that no more than a few acres of the land had at any time been enclosed. The tenant therefore could obtain no title to the premises under the statute of 1821, c. 62, or under the R. S. c. 147, during the time of such occupation; and it becomes unnecessary to consider the construction and effect of the R. S. c. 145, abolishing writs of right and authorizing the recovery of lands by a writ of entry only. Nor is it necessary to consider or determine, what effect the R. S. c. 121, § 31 and 33, might have had, if the demandant had relied upon the proceedings and judgment in partition without exhibiting any other title. The instructions given being correct, and those requested properly refused, the entry must be *Judgment on the verdict.*

JOSEPH C. STEVENS *& als. versus* THOMAS A. HILL.

The directors of a bank, having the control of its financial affairs, may direct the assignment or transfer of a note belonging to the bank.

Where the directors of a bank, just before the expiration of its charter, transfer property to trustees for the benefit of the stockholders, all interest which the corporation had in the property terminates, the legal interest vests in the trustees, and the beneficial interest in the stockholders.

The maker of a note which is sued by those who have a legal interest in it, has no right to inquire into the disposition to be made of the proceeds when collected; but if the plaintiffs can lawfully receive payment for the note, the defendant is protected in making it, whatever may become of the proceeds.

ASSUMPSIT on a note payable to the Lafayette Bank.

By a vote of the stockholders, the plaintiffs were appointed trustees of all the property belonging to the bank, in trust for the benefit of the stockholders individually, in proportion to their respective numbers of shares in the stock; and the president was authorized to assign to said trustees all the notes belonging to the bank. Joseph C. Stevens, acting as president, indorsed the note in suit. This action is in the name of the trustees, and was commenced after expiration of the time allowed by law for closing up the affairs of the bank. Records of the stockholders' and of the directors' proceedings were introduced.

The trial was before SHEPLEY, J. The defendant submitted to a default, which is to be taken off if the plaintiffs, upon the evidence or so much thereof as was legally admissible, are not entitled to recover.

J. & M. L. Appleton, for defendant.

Prentiss & Rawson, for plaintiffs.

WELLS, J. — By a vote of the stockholders of the Lafayette Bank, of October 4, 1843, the plaintiffs were appointed trustees, in behalf of the stockholders, and the property of the bank was transferred to them, for the use and benefit of the *stockholders*, after discharging the corporate liabilities. At a meeting of the directors, holden on the 26th of March,

1844, before the time limited for closing the affairs of the bank had expired, the president of the bank was authorized to assign all the notes, &c. belonging to the bank to the trustees appointed by the vote of the stockholders.

The note in suit was indorsed by J. C. Stevens, as president of the bank. There is no vote exhibited, showing that Stevens was chosen president of the bank, but as no question is made, that he was such, we assume that to be so.

The directors having the control of the financial affairs of the bank, may undoubtedly direct the assignment or transfer of a note, belonging to the bank. *Northampton Bank* v. *Pepoon*, 11 Mass. R. 288; *Spear et al.* v. *Ladd*, *ibid.* 94; *Folger* v. *Chase*, 18 Pick. 63.

The assignment being effectual, the legal interest in the note passed to the plaintiffs.

But it is contended, that the action having been commenced after the time was passed, for closing the affairs of the bank, cannot be maintained.

But the note was transferred before that time, when the charter was in force. And although the plaintiffs are acting as trustees, they are not trustees holding for the benefit of the corporation, but for the stockholders. Their action does not continue the powers of the bank, for they do not hold the property for the bank.

It is true, that the bank could not confer a power, upon the trustees, which it did not itself possess. But by the assignment, all interest, which the corporation had in the note, terminated; the legal interest was vested in the trustees, and the beneficial interest, in the stockholders.

By the common law, upon the civil death of a corporation, its real estate reverts to the grantor and his heirs, and the debts due to and from the corporation are extinguished. But by the R. S. c. 76, § 28, the property, belonging to a corporation, on its final dissolution, vests in its stockholders or members, as tenants in common.

If therefore, the note in suit, had remained, until the dissolution of the corporation, without being negotiated, it would

have become the property of the stockholders, and they could have transferred it to the plaintiffs, as their trustees. By the course, which was pursued, the stockholders acquired no more power over the note, than the law gave them.

By the act of March 24, 1843, the Governor and council, upon the application of a stockholder or creditor, may appoint a receiver, who is authorized to use the corporate name of the bank, for collecting its debts and closing its business. But if no such application is made, the property passes by operation of the statute to the stockholders, who can dispose of it, as they may think proper, without the aid of the corporate name or powers. The 25th section of chapter 76, before cited, authorized a creditor or stockholder to apply to the Supreme Judicial Court, upon the dissolution of a corporation, for the appointment of trustees, to receive its effects, and close its affairs. The Court may appoint them, and they can use the name of the corporation, in prosecuting and defending suits.

But if neither creditors or stockholders apply to the Governor and council, or to the Court, the affairs of the corporation are to be under the control of those, who have the legal interest in them.

But we do not perceive, that the defendant has any legal right, to inquire into the disposition of the proceeds of the note, when collected; if the plaintiffs have a legal interest in the note, and can lawfully receive payment for it, the defendant is protected, in making payment to them, whatever disposition they may make of the proceeds. *Folger* v. *Chase*, before cited. The default, to which the defendant submitted, is to remain.

Samuel J. Foster and Benjamin P. Gilman *versus* John Fifield.

Where one of two partners has assigned his interest in the partnership effects to his co-partner to secure the latter for debts due him from the former, but remains liable for the debts of the firm, and entitled to his share of any surplus, his declarations are evidence against the firm, in an action in the name of the partnership, brought for the benefit of the assignee alone.

In such a suit, the partnership book, containing charges made against one of the partners, for moneys paid by him upon his private debts, is receivable in evidence for the defendant, to prove that the other partner must have known of such payments, although some other payments may have been made, which were not entered on the book.

In such a case, as against the assignee-partner, the defendant cannot retain money paid to him out of the co-partnership funds upon a debt due to him from the other partner, if at the time of receiving it, he knew the money belonged to the company, unless the assignee-partner, at or before the payment had assented thereto.

Assumpsit to recover $75 and $25, received by the defendant. Trial before Shepley, J.

Foster & Gilman was the name of a firm, in which the plaintiffs were the sole partners. Foster, being indebted to Gilman, assigned to him as collateral security, all his interest in the partnership property, with a provision that the partnership should still be continued.

The plaintiff introduced the defendant's receipt for said sum of "$75, received of Foster and Gilman, to be accounted for," and also proved that the $25 were indorsed, as received of Foster & Gilman, upon a note which defendant held against another firm, of which Foster was also a co-partner. This action is brought to recover back said sums for the sole benefit of Gilman.

Gilman also showed another assignment to him from Foster, as collateral security, of all his interest in said company affairs, with authority to use his name in the collection of company claims, but still reserving his right to his share of the surplus, which might remain to the partnership, after his debt to Gilman had been paid.

The defendant, (under objection by the plaintiff,) read a paper signed by Foster, and made since the commencement of this suit, stating that after said first assignment, he let the defendant have said sums in part payment of the abovementioned note.

To prove that Gilman assented to such payments by Foster, the defendant offered the company book of Foster & Gilman, containing charges against Foster for payment so made on his private debts, and on the debts of said last mentioned firm. The book was objected to. In order to have the book excluded, the plaintiff offered to prove Foster's declarations that he had paid two forged notes out of the funds of Foster & Gilman, which he had never charged. The evidence of such declarations was excluded. The book was received.

"The case was submitted to the jury with instructions that if satisfied that defendant received the money in payment of a debt due to him from the firm of Lincoln, Foster & Co., from Samuel J. Foster, and knew that it was by Foster taken from the funds of Foster & Gilman, he could not be entitled to retain it, but the plaintiffs would be entitled to recover, unless they should be also satisfied that Benjamin P. Gilman assented to such payment; that his consent might be expressed or implied; that they might be authorized to infer it from the state of the accounts on the books, from the documents introduced and the other testimony in the case, if it satisfied them that he did assent to it; that in such case the plaintiffs would not be entitled to recover; that they would consider whether the $75, as well as the other sum, was paid to him toward the debt due from Lincoln, Foster & Co. to him; that they might take into consideration the declarations of Samuel J. Foster contained in the annexed paper, and the other testimony and relations between those parties; that if not satisfied it was paid towards that debt, plaintiff would be entitled to recover; that while considering whether Benjamin P. Gilman assented to the payment of the money to the defendant, they would not consider the declarations of Foster that he knew of such charges as affecting him or tending to prove it."

The jury found a verdict for the defendant. If these rulings or instructions were erroneous, the verdict is to be set aside, and a new trial granted.

SHEPLEY, J. — The action was commenced to recover two sums of money, $75 and $25, alleged to be due to the firm of Foster & Gilman. In defence it was contended, that those sums were paid by Foster with the knowledge and consent of his co-partner Gilman, to the defendant in part payment of a promissory note, made by the firm of Lincoln, Foster & Co., to the defendant. Samuel J. Foster was one of the members of the latter as well as of the former firm. A verdict was found for the defendant.

It is insisted, that the written and verbal declarations of Samuel J. Foster, one of the plaintiffs, were not legal testimony.

Whether they were or not legal testimony must depend upon the relation, which he sustained to the cause. If, as contended, he was but a nominal party having no interest in the event of the suit, they were not legal testimony. If on the contrary he was a party, whose interests were liable to be affected by them, they were properly admitted. The paper signed by Foster and bearing date on February 4, 1846, shows, that the firm of Foster & Gilman had been dissolved, and that Gilman was authorized to settle the affairs of the partnership, and to commence suits in the names of the partners. It does not transfer the interest which Foster had in the assets of the firm, to Gilman, except for the benefit of Foster, in payment of his liabilities to Gilman. Foster continued to be liable for the debts of the firm; and to be entitled to have half of any surplus, that might remain after payment of the debts of the firm, and the debts due from Foster to Gilman, paid to him. His declarations would affect his own interest in that surplus. The admissibility of his declarations cannot be determined by the contingent character or by the magnitude of that interest.

It is further insisted, that the testimony offered to prove, that two notes were forged and were paid by Foster out of the funds

of the partnership, without any charge therefor made upon the books of the partnership, was improperly excluded.

It is apparent, that such testimony could have no direct bearing upon the issue. It is alleged to have been admissible for the purpose of showing, that the books of the firm did not contain a correct account of all their transactions. If the fact alleged were admitted, that would not vary the rights of the parties. The purpose for which the books were introduced, was to show what charges were made upon them, and that Gilman might be presumed to have known, that such charges were made upon them. For this purpose, it was immaterial to inquire, whether the books were correctly kept or not.

The next alleged error is found in the instructions, that if satisfied, that the money was paid by Foster, from the funds of the partnership to the defendant, with the knowledge on his part, that it was taken from those funds, the defendant could not retain the money, unless they should be also satisfied, that Gilman assented to such payment. These instructions are said to be deficient, in not requiring that there should be a consideration for that payment, received by Gilman or by the firm. If a consideration on the part of the defendant were not sufficient, a person holding a note against one of the members of a firm, could not lawfully receive payment of it from the funds of the firm by the express consent of all the members of the firm. The law only requires it should be made by their consent and for a valuable consideration, which may consist in a benefit to one party, or in an injury to the other.

The instructions are alleged to have been erroneous in stating that Gilman's assent to the payment might be inferred from the accounts upon the books, from the documents, and other testimony. The argument is, that they did not require such an assent to exist at the time, when the payment was made. But they do not admit of such a construction. They required, that the jury should be satisfied, "that Benjamin P. Gilman assented to such payment." This necessarily required that the jury should find, that he assented before or at the time of payment.

The counsel proceeded in argument to examine the testimony to prove the assent and to attempt to show, that it was insufficient to authorize such an inference; as if the Court had decided upon its sufficiency, and had committed an error in doing so. But counsel are in error in supposing, that the Court by the instructions withdrew the free consideration of that question from the jury by expressing any opinion upon it.

The counsel also entered upon a consideration of what might amount to a ratification of that payment by Gilman. It is unnecessary to consider that question, for it does not appear to have been presented at the time of trial; nor do the instructions appear to have had any reference to it.

Judgment on the verdict.

W. G. Crosby, for plaintiffs.

Kent and *Cutting*, for defendant.

FREDERIC SPOFFORD *versus* GEORGE M. WESTON.

The Revised Statutes, c. 91, § 26, have abrogated the law by which *implied* or *constructive notice* of a prior *unregistered* deed, would avoid a subsequent one from the same grantor. Unless the grantor in the subsequent deed had "*actual* notice," of the prior one, his title is valid.

It seems, the conduct of a subsequent purchaser or attaching creditor, who has knowledge or notice of a prior conveyance, and afterwards attempts to acquire a title to himself, is *fraudulent*.

The registry of a deed of a piece of land from one stranger to another, does not indicate that the grantor in said deed had a conveyance from the former actual owner, no such conveyance appearing on the record; nor can any information derived by the grantee from those who obtained their knowledge from such registry, have any such effect.

Nor is a party, proposing to purchase the same premises, bound to inquire of the grantor in such a deed, with regard to the title.

It is for the party relying on an unregistered deed, against a subsequent purchaser or attaching creditor, to prove that the latter had *actual* notice or knowledge of such deed.

Where the declarations of the subsequent purchaser, indicate his disbelief that any prior deed had been given by his grantor, although admitting his knowledge of a claim that such deed existed, by those who professed to

hold under it, there can arise no presumption that he had *actual* notice of the existence of such a deed; nor can his conduct be considered fraudulent in taking a conveyance to himself.

THIS was a petition for partition. The petitioner claimed an undivided half of a tract of the land. The respondent pleaded sole seizin in himself. Francis Butler, deceased, was formerly the owner. Both parties claimed title under him. The petitioner claimed under a levy made in 1839, on an undivided half of the premises on a judgment against Philip H. Coombs and another, and duly recorded. He produced also a deed from Henry Johnson to P. H. Coombs and J. W. Dickenson, dated Sept. 19, and recorded Sept. 21, 1835; and proved the existence of a deed from Francis Butler to Henry Johnson found amongst the papers of Butler in the summer of 1847, after his decease, and which Johnson testified had once been delivered to him. This deed was dated September 14, 1835.

The respondent claimed under deeds from the heirs of Francis Butler to himself, subsequent to 1845.

A deed of mortgage from Coombs and Dickenson to John Dole, dated June 28, 1837, and a subsequent entry to foreclose, made and recorded, were read; and there was evidence as to the mortgage being settled by Johnson and Francis Butler.

Testimony was also introduced as to notice to the respondent, of the claim of the petitioner, before the former purchased of the heirs of F. Butler. This testimony is sufficiently stated in the opinion of the Court.

The question whether the deed from Francis Butler to Henry Johnson was delivered so as to make it a valid conveyance, was submitted to the jury; and for the purpose of enabling them to find that fact, they were instructed to find the issue for the petitioner if it was so delivered, and for the respondent if it was not; and they found a verdict for the petitioner.

By agreement, the case as it respects the rights of the parties, that fact being found, was to be submitted on the testimony, or so much as may be legal, to the decision of the Court, with power to enter judgment on the verdict, or to set it aside and enter a nonsuit, as the legal rights of the parties might require.

J. & M. L. Appleton, for the defendant. The statute requires *actual* notice. It implies that there must have been a deed, and if no deed, there can be no notice. Notice that some one claims a piece of land, is no notice of any deed. There must be a deed recorded, or actual notice of its existence, to the party purchasing. The defendant could have had a warranty deed for $1800, and gave $1750, for a quit-claim. The difference was only to pay for the trouble of maintaining the title against a fictitious claim. Express notice is not pretended. Implied notice must be such as to leave no reasonable doubt. *Lawrence* v. *Tucker*, 7 Greenl. 200; *Keese* v. *Wiswell*, 8 Greenl. 98; 2 Mass. R. 508; 8 Johns. 106; 3 Pick. 155; 6 N. H. R. 47; 8 N. H. R. 264. It is not sufficient to put the purchaser on inquiry. Knowledge of a deed, said to be invalid, is not enough. Notice of the existence, execution and delivery is necessary. *Brackett* v. *Winter*, 5th Verm. R. 424. The record gave no notice. 14 Pick. 231; 23 Maine R. 169, 170, 240; 24 Maine R. 35; 12 Johns. 453. The deed of Johnson to Coombs contains no reference to a deed from Butler to Johnson.

Kent, for the plaintiff. Whatever puts a party on inquiry that would result in his obtaining full information, is a notice. 2 Penns. R. 439; 3 Penns. R. 67. The 10th Johns. 457, is a case in point Notice to a second purchaser, may be express or implied. 4 Mass. R. 639. The words "actual notice," in R. S. (same as ours,) do not mean positive and certain knowledge, but such knowledge as men act upon in the ordinary affairs of life. *Curtis* v. *Mundy*, 3 Metc. 405. The term is "notice," not knowledge. Possession by a grantee supersedes the necessity of recording, as against subsequent purchasers; but not on the ground of knowledge. It is an existing fact that ought to put the purchaser on inquiry. 22 Maine R. 315.

Before Weston purchased, he examined the records and had an abstract made. They showed the deed of Bussey to Butler, and the deed of Johnson to Coombs, referring to Bussey's deed to Butler, thus clearly intimating that he claimed under

that title, and not adverse to it. This was notice to Weston that there must have been an intermediate deed, and should have led him to make further inquiry. The record also showed, that Spofford claimed there was such a deed, by his levy on Coombs's part duly recorded. Also that Dickenson and Coombs had acted as owners, by mortgaging in 1837, to Dole, and that Dole had claimed under it, and entered to foreclose. There was no evidence on record or elsewhere, that Butler claimed any right after his deed to Johnson.

Weston knew that Butler and Johnson adjusted Coombs's mortgage to Dole. Why did they adjust it? Dole had no claim on *them*, only on the land. The inference must be, that a deed from Butler to Johnson existed. Weston also knew that Spofford insisted there was such a deed. Wingate told Weston he would not buy, because he had no doubt there was such a deed. A man of ordinary prudence would be put on his guard, as Wingate was, when he refused to buy. Weston told Wingate *he knew what Spofford's claim was*, thus admitting his knowledge before his purchase. Why did not Weston inquire of Johnson? This might have been easily done.

It is not necessary that Weston should have seen the deed; nor that he should be told by any one who had seen it. That is one class of notice, but is not essential, and it is *only* notice, not knowledge. A man may tell another he has seen a deed, and it may be false. But if, after such a statement, the existence of the deed is proved, is not that notice enough?

Weston, pro se, in reply. There must be record notice, or *actual* notice. If there is sufficient notice, the second purchaser is guilty of a fraud. A deed on record, where there is no title in the grantor, is no notice. The credit of Johnson was sometimes good, and sometimes bad; and there was no probability of a deed to him, without a mortgage back. Such a man should not be allowed to prove a title in himself by his own oath. If Johnson had a deed, there was nothing for him or Butler to settle with Dole. The settlement must have been Johnson settling for a fraud.

WELLS, J. — The jury having found, that the deed, from Francis Butler to Henry Johnson, was delivered, the question, for our decision, according to the agreement of the parties is, whether upon the facts proved, the respondent had notice of that deed, when he took the conveyances from the heirs of Francis Butler.

The Revised Statutes have made an essential alteration in the law in this respect. The 26th sect. of chap. 91, provides that, " no conveyance of any estate, in fee simple, fee tail, or for life, and no lease for more than seven years from the making thereof, shall be good and effectual against any person, other than the grantor, his heirs and devisees, *and persons having actual notice thereof*, unless it is made by a deed recorded, as provided in this chapter."

The *implied* or *constructive* notice, of a prior unregistered deed, which would avoid a subsequent one from the same grantor, is abrogated by the statute. The grantee, in the subsequent deed, must have " actual notice" of the prior one, otherwise his title is valid. The language of the statute is clear and explicit and leaves no room to doubt, as to the intention of the Legislature.

In the case of *Pomroy* v. *Stevens*, 11 Metc. 244, a construction has been given to the Massachusetts statute (the phraseology of which is the same as ours,) similar to that adopted by us, in the present case. The authorities cited show, that the conduct of a subsequent purchaser or attaching creditor, who has knowledge or notice of a prior conveyance, and afterwards attempts to acquire a title to himself, is *fraudulent.*

But did the respondent have actual knowledge or notice of the deed, from Francis Butler to Johnson, when he took his title from the heirs of Francis Butler, in 1846 and 1847.

Francis Butler died in June, 1845. His deed to Johnson, which was found in the summer of 1847, by Francis G. Butler, among his father's papers, bears date September 14, 1835. Francis G. Butler was the administrator of his father's estate.

The respondent, Weston, could not apply to Francis Butler

for information, for he was dead. Francis G. Butler told Weston, that in his opinion, his father had never given a deed to Johnson. The deed had not then been found.

Johnson conveyed to Coombs and Dickenson, September 19, 1835. This conveyance was recorded September 21, 1835. Coombs did not see any deed from Francis Butler, when he and Dickenson took their deed, nor does it appear, that either of them, at any time, saw the deed from Francis Butler, before it was exhibited at the trial. Weston was told before he purchased, that Spofford claimed the land. This information was communicated to him by Francis G. Butler. Weston told Wm. P. Wingate, that he knew, when he purchased the land, that Spofford claimed there was a deed from Francis Butler to Johnson; but he had examined the records, and Spofford's claim was not worth a straw. Weston had seen the title of Coombs and Dickenson, as exhibited by the registry, and also that of Daniel Spofford, under whom the petitioner claims, arising from an attachment of an undivided half of the premises, as the property of Coombs, made in 1835, and a levy on the same, made in 1839. But these records show no title derived from Butler. And the registry of a deed is constructive notice only to after purchasers, under the same grantor. *Bates* v. *Norcross*, 14 Pick. 224; *Roberts* v. *Bourne*, 23 Maine R. 165; *Veazie* v. *Parker*, *ibid.* 170; *Pierce* v. *Taylor*, *ibid.* 246.

The declarations made to Weston, appear to have been made by those, who derived their information from the registry, which exhibited a title from Johnson and those claiming under him. But as the registry, of a deed from Johnson, does not indicate, that Francis Butler conveyed to him, so the notice given to Weston, by those who obtained their knowledge from the registry alone, could have no greater effect. It does not appear, that any person, whose knowledge was derived from any other source, communicated with Weston in reference to the title before he purchased.

What connection Francis Butler had with the mortgage to John Dole, is obscure and uncertain. Francis G. Butler says,

that Weston told him, that his father and Johnson adjusted the mortgage with John Dole. It is left altogether in doubt, whether Francis Butler did any thing, by which it would appear, that he recognized the title of Johnson to the premises in controversey, and it is very far from showing any actual notice to Weston, that Francis Butler had conveyed to Johnson. Implied notice is no longer available.

But it is contended, that Weston should have applied to Johnson who could have given him correct information of the whole transaction between him and Francis Butler. Johnson was residing in Boston, when Weston purchased, and it would have been very easy for Weston to have applied to him, personally or by letter.

The statute says he must have actual notice. Because Johnson had conveyed the premises, it could not be implied, that Francis Butler had conveyed to him. The former was not a fact of such a character, as that the latter could necessarily be inferred from it. Johnson might convey without any claim to title, or he might claim it from another source. But the statute has removed from Weston the pressure of implied knowledge or probabilities.

In the case of *Pomroy* v. *Stevens*, before cited, the tenant was in possession and occupation of the demanded premises, when the demandant attached them, as the property of the tenant's grantor. Now it would have been easy for the demandant, to have inquired of the tenant respecting his title. But it is said by WILDE, J. in that case, "that it is not sufficient to prove facts that would reasonably put him on inquiry. He is not bound to inquire; but a party relying on an unregistered deed, against a subsequent purchaser or attaching creditor, must prove that the latter had actual notice or knowledge of such deed." And we believe this is the true construction of the statute. For if a person having implied or constructive notice were bound to make inquiries, he would be affected by the information, which he might have acquired, and therefore by implied knowledge. Such a construction would annul the statute, and leave the law, as it was, before its enactment.

The whole testimony tends to show, that Weston had no confidence in Johnson's title. He did not believe, that Johnson ever had a deed. Eleven years had elapsed since Johnson had conveyed, and no record of Francis Butler's deed to him could be found. Neither Francis G. Butler, nor Weston, considered Spofford's claim of any value. Only fifty dollars were deducted from the consideration of seventeen hundred dollars, on that account. It does not appear, in the case, that Johnson before the respondent's title accrued, ever stated to any person claiming under him, that he had a deed from Francis Butler. He says, that sometime after he had conveyed to Coombs and Dickenson, a person called on him, and made inquiries about the deed to him, that he then had the deed, and told the person, he might take it, and get it recorded. Spofford told him, he thought the man who called on him, was the one he had asked to make the inquiries. It does not appear, that this person ever communicated to Spofford the answers of Johnson, nor why the deed was not taken and recorded. Johnson says, he had the deed with him, in Bangor, when he conveyed to Coombs and Dickenson. But Coombs has no recollection of seeing it, and it is said, that no reference is made to the deed to Johnson, in his deed to Coombs and Dickenson. But, as no copies of the deeds have been furnished to us, we are unable to say, whether there is any such want of reference.

The facts of the case were calculated to create great distrust in the mind of any one, whether Francis Butler had ever conveyed to Johnson; and Weston appeared to disbelieve entirely the fact of any such conveyance. If Francis Butler had been living, we do not think an attaching creditor would have been bound to apply to him or Johnson, before making an attachment as the property of Butler, although he might possess as much information, concerning the state of the title, as Weston did.

In the case of *Curtis* v. *Mundy*, 3 Metc. 405, the demandant told three witnesses before he made the attachment, that the debtor had given a deed of the land to the tenant. His declaration warranted the conclusion, that he had actual notice of

the fact. But Weston's declarations are all, entirely repugnant to the idea, that he had any such notice.

We cannot consider the conduct of the respondent, as fraudulent, in making the purchase from the heirs of Francis Butler ; there is nothing in the case, shewing him a *mala fide* purchaser, or creating a doubt in the honesty of his convictions as expressed by his declarations, that Johnson never had a deed from Francis Butler.

In conformity with the agreement of the parties, the verdict is to be set aside, and a nonsuit entered.

FRANKLIN SPOFFORD *versus* FREDERIC HOBBS, *Adm'r.*

Where a power of attorney has been given, authorizing the conveyance of land, verbal directions from the constituent to the attorney can confer no new authority, nor enlarge that contained in the power of attorney.

A ratification, by the proprietor of land, of an unauthorized conveyance by his attorney, in order to be effectual, must be by an instrument under seal.

In such case, the taking back of a mortgage and notes by the proprietor, without the mortgage referring specifically to the deed of the same premises or containing any thing inconsistent with the attorney's want of authority, cannot be construed as a ratification of the conveyance ; nor does it estop the mortgagee from denying that the title passed to the mortgager, by the attorney's deed.

Where a power of attorney authorized the attorney, to sell certain lands "for the purpose of making actual settlement thereon," and to sign, seal and deliver "legal and sufficient deeds, with the several covenants and a general warranty," to convey such land "in fee simple," *it was held*, that the attorney was clothed with discretion to judge, whether the purchaser intended to purchase for purposes of settlement, and there being no evidence of fraud on the part of the purchaser, or of the attorney, a conveyance made under the power was valid, although it appeared afterwards that the land was not purchased for actual settlement, but on speculation.

Whether such evidence, introduced by the purchaser himself in an action on the covenant, would invalidate the conveyance, *quære.*

COVENANT broken, to recover for breach of the covenants of a deed executed to the plaintiff, by Samuel Lowder as attorney for Benjamin Bussey, the defendant's intestate. The opinion

of the Court states the facts in evidence and the rulings of WHITMAN, C. J., before whom the action was tried, to which rulings the plaintiff excepted.

J. and *M. L. Appleton*, for the plaintiff.

Hobbs, for the defendant.

TENNEY, J. — The deed containing the covenants alleged to have been broken, purports to have been executed by Samuel Lowder as the attorney of Benjamin Bussey. The authority of the attorney to execute the deed, was denied on the ground, that the deed was for a purpose not contemplated by the parties to the letter of attorney. The power gives authority to the attorney "in my name and behalf, to bargain and sell to any person or persons, for the purpose of making actual settlements thereon, any lots or tracts of land, not exceeding five hundred acres;" "and in my name and behalf, to sign, seal and deliver as my deed, legal and sufficient deed and deeds, containing the several covenants, and a general warranty, to convey to such purchaser or purchasers or their heirs or assigns, such lot or tract of land in fee simple;" "hereby ratifying and confirming all and whatsoever my said attorney shall lawfully do in and about the premises." There was evidence by parol, from witnesses introduced by the plaintiff, that the contract for the purchase of a tract of land embracing that described in the deed introduced, was made by the purchasers with Bussey himself, who gave verbal directions to the attorney to make the conveyance, and that upon its being made accordingly, notes were taken for the consideration, secured by a mortgage of the same land, which mortgage was subsequently discharged, Bussey himself having received the money which was paid upon the notes, and given his receipt therefor on the books of the agency; that the purchase was made for speculation and not for settlement. The Court who tried the case "ruled, that the action was not maintainable, that Lowder had no authority by the power produced to execute the deed, and that there was no evidence from which a ratification could be legally inferred, so as to make the deed obligatory on Bussey;" to which rulings exceptions were taken.

The verbal directions from Bussey to Lowder, could confer no power upon the latter to make the conveyance in the name of the former; and they were equally impotent to increase the authority contained in the power of attorney.

It is insisted, that there was a subsequent ratification of the act of Lowder in giving the deed, by Bussey, which has given to it full and complete effect. A ratification cannot stand on higher ground than an original authority, and must be by an instrument under seal. Story's Agency, sections 49 and 242.

The mortgage is relied upon as a ratification on the ground of estoppel. And if there is any thing therein, which can estop the mortgagee on legal principles from denying the conveyance of the land, the ruling of the Court was erroneous.

"Every estoppel because it concludeth a man to allege the truth, must be certain to every intent, and not be taken by argument or inference. Every estoppel ought to be a precise affirmation of that which maketh the estoppel, and not be spoken impersonally." Co. Litt. 352, b. In *Bowman* v. *Taylor*, 2 Ad. & Ellis, 278, Lord Denman says, "The doctrine of estoppel has been guarded with great strictness, not because the party enforcing it necessarily wishes to exclude the truth, for it is rather to be supposed, that that is true, which the opposite party has already recited under his hand and seal; but because the estoppel *may* exclude the truth. However, it is right that the construction of that, which is to create the estoppel should be very strict."

The mortgage deed, and the notes referred to therein are all to be regarded as parts of the same mortgage. But neither the deed nor the notes contain any recital of that which was the consideration of the notes, or that the land described in the mortgage was conveyed by the mortgagee to the plaintiffs. There is no certain, direct and precise affirmation of facts, which are absolutely inconsistent with the fact, that Lowder had not legal power to execute the deed in the name of Bussey. For ought which appears in the mortgage deed or the notes, the latter may have been given for a consideration, wholly distinct from the conveyance of the land, and the former may

have been of premises, to the title of which previously, the mortgager was always a stranger.

The design of Bussey to convey his land only to actual settlers is clearly exhibited by the power of attorney. But where proper proof satisfactory to the one, who was to judge of the intention of the purchasers in that particular was afforded, it is equally clear, that the conveyance was to be conclusive. This is manifest from the language of the instrument, as the deeds were to pass a fee simple estate with all the covenants usually contained in warranty deeds, without a provision, that they should contain any thing making them void in any contingency. If he had chosen to have made all conveyances himself without the intervention of an agent, adhering to his intention of giving deeds of land for actual settlement only, his unconditional deeds to such as satisfied him, that they took them for that purpose, would pass the title, though it should afterwards turn out that he was grossly deceived, the purchases having been actually made with a different design. His intention, well understood by his grantees, and their deception in that particular, would not affect the deeds. He having undertaken to judge of the evidence of their purpose, and having acted upon the judgment formed, in making the conveyances, he would be concluded. When he delegated the power to make conveyances to an attorney, with the restriction contained in the instrument, in which he engages to ratify and confirm his legal acts, is it to be supposed, that he did not mean to intrust to his judgment and discretion, the evidence of the intention of those who proposed to be purchasers, and that he should exercise them in the same manner, that the constituent would have exercised his own judgment and discretion, if he had acted in the premises? The intention of purchasers in order to have effect, must have been judged of and determined by some one. No provision having been made for another mode, in which the purpose of the purchasers could be ascertained, previous to the conveyances, the power to perform that duty must have been intended to be conferred upon the attorney. It is manifestly designed, that upon his being satisfied of this intention in the

purchasers, payment being provided for, deeds absolute in their terms and passing a fee simple estate, should be executed and delivered by him in the name of Bussey. This would preclude the owner from opportunity to revise the judgment of the agent, before the title would vest in the grantees.

If the deeds themselves contained recital of the fact, that the purchases were made with the design in the grantees, that actual settlement on the land conveyed, should be made, this fact could not be contradicted by parol, inasmuch as the owner had not retained to himself, after the delivery of the deeds, the power to re-consider this question of intention, in the purchasers. No more could he claim the right that the jury should judge of acts of the agent, which he had made conclusive upon himself.

The letter of attorney is to be considered in connection with the deeds given by the agent, and as making a part of them; it follows, that when such deeds have been delivered, the attorney had determined, that the purchases were made for the object contemplated, as much as if the deeds had contained the express statement thereof. The proof of this is under seal making part of the deeds themselves. It cannot be admitted, Buzzey having acted through the judgment of another with full powers for the purpose, by deeds in all respects like those he would have given, that the title should remain in uncertainty; that the tenure, by which the immediate and subsequent grantees should hold after a quiet possession for a longer or a shorter period, should depend, not upon the intention of the purchasers, found by the one empowered to judge thereof, whose judgment is evidenced by the deeds themselves; but upon the finding of a jury on an issue to be settled by parol evidence of the most uncertain, equivocal and varying character, liable peculiarly to be changed almost daily by the frailty of human memory, death of witnesses and the sinister designs of parties and their agents. The title cannot be thus impeached by the former owner or his representatives, by proof that the object was different. It is not pretended in this case, that fraud was practised by the agent and the grantees to the

injury of Bussey, and it could not be so pretended, for the evidence was plenary, that the contract of sale was made by Bussey himself, and that he gave verbal orders to the attorney to execute and deliver the deed in the name of the owner; and such evidence is admissible on the question of fraud.

The evidence, that the plaintiffs did not intend the land for settlement, but for speculation, and that it was so understood by the attorney, at the time of the execution and delivery of the deed, came from the plaintiff's witnesses; whether in the direct or the cross examination, does not appear from the case. It is difficult to perceive, that the plaintiffs could expect any benefit from this proof; and it was not admissible for the defendants; and it was probably voluntarily stated by the witnesses, or called out on cross examination, when no objection was interposed. We are by no means prepared to say, that if adduced by the plaintiffs by direct inquiry of the witnesses, it could affect the deed of conveyance, but of this we give no opinion. It does not appear, that the ruling of the Judge, "that the power gave no authority to execute the deed," was upon the ground, that proof of the design of the plaintiffs, when they made the purchase, came from them. The ruling was founded upon no such distinction, and we think it was erroneous. *Exceptions sustained.*

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE COUNTIES OF

WASHINGTON & AROOSTOOK.

ARGUED AT JULY TERM, 1848.

MEM. — WHITMAN, C. J. was not present at the hearing of the cases this term.

SHEPARD CAREY *versus* HIRAM ESTY.

Though a petitioner in bankruptcy may have had an *equitable* interest in land, which had been sold by the *legal* owner, who had taken a note payable to himself for the purchase money, it would not certainly follow that the petitioner in bankruptcy had any interest in the note; nor would an omission to specify the note in the schedule, be conclusive evidence of fraud on his part, such as to invalidate his certificate of discharge.

ACTION of debt on a judgment. The case was tried in the District Court, ALLEN, J. presiding. The defendant offered a certificate of discharge in bankruptcy, and the plaintiff charged a fraudulent concealment by the defendant, and offered testimony from which it appeared, that in 1830, defendant entered upon unimproved land, belonging to one Houlton, and erected buildings and made improvements to the value of $1000 or $1300; that he resided on the same until 1841, calling it his own and paying the taxes; that in 1841, Houlton conveyed it to Putnam & Co. for $1300, for which they gave their note to said Houlton; that Putnam & Co. conveyed the same to one Doyle for $1000, of which $300 was paid in a claim Doyle

held against defendant due prior to his proceedings in bankruptcy, without objection of the defendant, and the balance was accounted for by Putnam to defendant; that in 1844, Putnam & Co. received from Houlton their note of $1300, without any consideration being given therefor.

The defendant did not place the land or the notes, or any interest in the same, among the assets in his schedule in bankruptcy.

From the testimony of *Samuel Houlton*, it appeared that he owned the land when defendant moved on to it, and owned it with the improvements when he sold it to the Putnams; that defendant never had any interest therein; that he never agreed with the defendant to hold the same for his benefit, and convey it to him on his request; that defendant had no interest in the notes for $1300, and received no benefit from them. He stated that defendant was his agent and erected the buildings and made the improvements out of materials furnished by him, the witness, and that he had accounted to the defendant for the same. Defendant never bought and never agreed to buy the premises of him.

The plaintiff offered evidence to show that defendant participated in negotiating the sale to the Putnams, and that it was understood between the defendant and Houlton, that said Houlton held the premises and the notes received therefor, for the use of the defendant. He offered no evidence of a deed, agreement or writing of any kind from said Houlton in relation thereto, or to said notes. There was evidence showing that a note, due from defendant, had been paid from the proceeds of the property since he had obtained his certificate. There was also testimony on the part of defendant going to show that Putnam & Co. had accounted to Houlton for the $1300 note.

The defendant requested the Court to instruct the jury, that, if the defendant had no title or claim to the land or notes beforementioned, and no interest therein which he or his assignee in bankruptcy could recover in any action or process at law, or in equity, and the jury were satisfied from the evidence, that

such was the fact; then he was not bound to state any thing in relation thereto, in his schedule in bankruptcy; and the omission would not be sufficient to impeach his certificate of discharge, unless he had voluntarily deprived himself of such title, claim or interest for the purpose of defrauding his creditors, or in fraud of the bankrupt act.

This instruction the Court declined to give, but among other things did instruct the jury, that one question for them to determine was, whether the defendant at the time had any claim or equitable interest in the notes given by Putnam to Houlton, for the land, and in the determination of that question, they would consider what interest, if any, defendant had in the land conveyed to Putnam; that although the title, till conveyed to said Putnam, remained in Houlton, yet if the defendant had paid him money or its equivalent for the land, a trust would result to defendant; that if he had such interest in the land, he would also have an interest in the notes given for the same; and if, on the whole testimony, the jury believed that defendant was equitably entitled to the whole or a part of the money due on said notes, although there was no written contract or declaration of trust between Houlton and defendant, it was the duty of defendant to include it in his schedule of assets in bankruptcy; that if its omission was designed, it would be such a concealment as would render the certificate of discharge void and of no effect.

The jury found a verdict for plaintiff. Defendant filed exceptions.

Washburn, for defendant, contended that there was no fraud which could avoid the certificate.

Defendant had no legal title to the land. The title had passed to *bona fide* purchasers a year before he made his application.

Defendant had no interest in the proceeds of that land, or in the note. And if he ever had any interest in it, he certainly had none at the time of making his schedule; for then, by the plaintiff's own showing, the note had been already paid. The note was paid in 1841, though it was not given up till 1844.

The instructions requested by defendant, should have been given. The facts warranted and required it. There was no agreement or understanding of any kind, between Houlton and defendant, that defendant should have any interest in the land; but Houlton made the deed to Putnam, and took to himself the note for the consideration. This state of facts required substantially the instructions asked for.

The instructions given were erroneous, calculated to mislead the jury, and uncalled for by the evidence.

The Judge instructed the jury "that one question for them to determine was, whether defendant, at the time, had any equitable interest in the note from Putnam to Houlton." Now whether defendant had or not an interest in the note, it had been paid and was due four months before defendant's application in bankruptcy.

The Court further instructed the jury, "that although the title, till conveyed to said Putnam, remained in said Houlton, yet, if defendant had paid him money or its equivalent for the land, a trust would result to the defendant." It could not be an express trust, for there is no written declaration or evidence of such trust. It is not an implied or resulting trust. "To raise a resulting trust, by implication of law, in favor of one who pays the purchase money, the payment must be a part of the original transaction; the trust cannot arise from subsequent payments." *Buck* v. *Pike*, 2 Fairf. 1.

It is not even pretended that there was a payment by defendant to Houlton, at the time of the original transaction. There was no deed till ten years after defendant entered on the land, and no deed at all from Houlton to any one, for the use of defendant. So also there could be no trust growing out of any claim for betterments, defendant holding in submission to Houlton.

Carr, for plaintiff. Defendant had an interest in the land or the note given for it. It is not contended that Houlton could have been compelled by defendant to give him a deed; but on refusal, he would have been liable to defendant for money expended. 5 Mass. R. 137; 14 Mass. R. 68; 16 Mass. R. 162; 6 Mass. R. 394; 7 Metc. 62 and 447.

A trust would result to defendant for the notes or the land. 10 N. H. R. 117; 4 Kent, 306; 3 Johns. R. 216; 3 Mason, 364.

Houlton received pay for the land in 1830, or never received any; as he gave up in 1844 the note received in 1841, on Putnam's accounting to defendant for consideration for the purchase.

Defendant says the note was paid in 1841. No such point was made at the trial, nor does it appear as a fact in the case. Houlton was present and testified, and must have known, but he did not state any such fact.

TENNEY, J. — The defendant relies upon his discharge in bankruptcy to defeat this action. If this is successfully impeached, the plaintiffs are entitled to recover. They attempt to do this by proof of a wilful omission of the defendant to enter upon his schedule of assets a certain note against Jay S. Putnam & Co., alleged in the plaintiff's specification to belong to the defendant. To support this ground they introduced evidence, that in 1830, the defendant entered upon a parcel of unimproved land, belonging to one Houlton, erected buildings and made other improvements thereon to the value of from $1000 to $1300; he resided on the land and paid the taxes; that in 1840, Houlton conveyed the land with the improvements to Putnam & Co., and took therefor, their note for $1300; and in the same year Putnam & Co. conveyed the land and improvements to one Doyle for the consideration of $1000, $300 of which was discharged by a debt owed by the defendant to Doyle before his bankruptcy, without any objection of the defendant, and the balance was accounted for to the defendant by Putnam & Co.; and in the spring of 1844, Putnam & Co. received their note from Houlton without consideration or promise for value. The plaintiffs also adduced evidence tending to show, that the defendant participated in negotiating the sale to Putnam & Co., and that it was understood between Houlton and the defendant, that the former held the land and improvements, and the note received therefor, for

the use of the latter. But no evidence was offered by the plaintiff, that the defendant ever had a deed of the land, or written agreement, declaration of trust, or other writing from Houlton in relation thereto, or to the note.

The defendant's petition in bankruptcy was filed on May 25, 1842, and the discharge obtained Dec. 13, 1843.

The instructions of the Court to the jury required them to find the discharge void, if the omission to include in the schedule, the note against Putnam & Co. was designed, and if the defendant was equitably entitled to the whole or a part of that note; that he had an equitable interest in the note, if he had such in the land, for which the note was given; and that he had an equitable interest in the land, if he had paid money therefor. The jury must have understood, that the discharge was valid as a defence, or otherwise, according as they should find, whether the defendant had or had not made payments for the land, the title of which had never been in him, if the omission was wilful.

It does not appear, under what agreement the defendant occupied the land, and made the improvements, or whether there was any contract between him and Houlton, upon the subject of his occupation; and without such evidence it could not be known fully what were their respective rights. If the defendant was at first a disseisor, he may have acquired a legal interest in the improvements, and payments may have been made subsequently, in order to obtain a title to the land by virtue of some contract. Or he may have occupied the land from the first in submission to the rights of Houlton, and paid money or its equivalent under an agreement between them. Whether he would have a legal or equitable interest in the land, or in the note, would be determined by the evidence and the finding of the jury, under proper instructions from the Court.

If the note against Putnam & Co., was outstanding and unpaid, at the time the defendant filed his petition in bankruptcy, and was wholly or partially the property of the defendant, there certainly would have been a propriety in entering

it upon the schedule of assets, and stating the interest of the defendant therein. But if the note had been paid in full prior to the filing of the petition, though not actually in the possession of the makers; or if paid to the defendant so far as he had an interest therein, it would be otherwise. And the evidence of the plaintiff would seem to authorize the conclusion, that the note was in one or the other of these conditions. But if it were unpaid when the petition was filed, an equitable interest of the defendant would not necessarily follow from the fact that he had paid money or its equivalent for the land. The jury were required by a rule of law, to pronounce the discharge void, and therefore not a good defence, if they found certain facts, which alone would not be sufficient for such a purpose. *Exceptions sustained.*

JOTHAM L. SPRAGUE *versus* JAMES GRAHAM.

Though a conveyance of land by A be fraudulent and therefore void as to his creditors, and notes be taken therefor, secured by a mortgage of the same land, the assignee of the mortgagor is entitled to redeem, as against any holder of the mortgage not claiming as a creditor of A, or standing in a relation which would entitle him to such an objection as a creditor might make.

In such a case, (except as to creditors or parties having the rights of creditors of A,) the notes and mortgage are valid in the hands of one to whom they have been indorsed and assigned without knowledge of the fraud.

But if he took the notes when overdue, they are subject to equities to the same extent as if not secured by mortgage.

SHEPLEY, C. J. — The plaintiff by his bill seeks to obtain a decree for the redemption of a farm from the incumbrance of certain mortgages. He is the grantee of Levi A. James, by a deed executed on April 16, 1846. There is testimony tending to prove, that this conveyance was fraudulent as against the creditors of the vendor. It is not necessary to enter upon that inquiry, for such a purchaser would be entitled to redeem of one, who does not appear to be a creditor or to be in a condition to make such an objection to the plaintiff's right to redeem.

Thomas James appears to have been the owner of the farm, and to have conveyed it on December 7, 1839 to Charles Brockway, who at the same time re-conveyed it in mortgage to secure the payment of part of the purchase money.

Brockway on July 11, 1842, conveyed his equity to Joseph McConaghy, who at the same time re-conveyed it in mortgage to secure the purchase money.

McConaghy on May 15, 1843, conveyed to Levi A. James, who at the same time re-conveyed in mortgage to secure part of the purchase money.

Brockway, having retained the mortgage and notes made by McConaghy to himself, on August 21, 1845, assigned them to the defendant in part payment for a dwellinghouse owned by the defendant, and conveyed by him, at the request of Brockway, to James Murphy.

The defendant by virtue of that mortgage, and to foreclose the same, entered into possession of the farm in the month of July, 1846, and claims to hold it for that purpose, and also to obtain payment of one of the notes made by Levi A. James to McConaghy, which was indorsed to him in part payment for the dwellinghouse.

The bill in substance alleges, that McConaghy held the title to the farm only for the benefit of Brockway; that the mortgage and notes, which he made to Brockway, were merely colourable, that Brockway made the bargain with Levi A. James to sell the farm to him, and assured him that he would obtain a good title from McConaghy, and that McConaghy made his conveyance in performance of that bargain; that the defendant knew all these facts, when he took an assignment of the mortgage. The bill, as presented by the abstract furnished, does not contain any offer to pay such sum as may be found to be equitably due, as is required by the statute, c. 125, § 16, to enable the plaintiff to maintain his bill without a tender. This objection is not taken by the counsel for the defendant, and if there be no such offer made in the bill, it may be amendable.

The answer distinctly denies all knowledge of any improper

proceedings between any of the parties. The testimony does not disprove the truth of the allegations contained in the answer; or show that the defendant does not stand in the position of an innocent purchaser for a valuable consideration without notice of any fraud.

Levi A. James appears to have been induced to believe, either that there was no mortgage existing, made by McConaghy to Brockway, or none that could injure his title derived from McConaghy. But if he reposed confidence in the declarations of others, and omitted to have the records examined, where that mortgage had been recorded, and no relief should be obtained by the application of legal principles to the facts proved, there will be no cause for just complaint.

If the transactions between Brockway and McConaghy were fraudulent with respect to creditors, they appear to have been valid between themselves. The plaintiff does not present himself in any such relation to them as to be enabled to impeach those conveyances. McConaghy conveyed to Levi A. James with covenants of warranty, and the benefit of those covenants running with the land passed by a release deed to the plaintiff. But he has paid nothing to relieve the estate from any existing incumbrance and cannot now present himself as a creditor of McConaghy, much less as a creditor of Brockway. It is not therefore necessary to inquire or to decide, whether those transactions were or were not fraudulent as against creditors.

The plaintiff appears to have acquired the rights, which McConaghy would have had at that time to be relieved or rather to have the estate relieved from the mortgage made by him to Brockway. And the defendant appears to have acquired the right which Brockway would have had to insist upon an enforcement of that mortgage against the estate.

It is contended, that the defendant as an innocent purchaser without any knowledge of fraud would have rights superior to those of his assignor. But he took an assignment of the mortgage and notes long after the notes were all overdue. And in such case he can have no right to insist upon their

payment, if Brockway could not have enforced the payment of them at the time when he transferred them to the defendant. The defendant must take them subject to all the rights and equities then existing between the parties to them. The fact that they were secured by a mortgage can make no difference. *Wallwyn* v. *Mathews*, 4 Ves. 118; *Glidden* v. *Hunt*, 24 Pick. 226.

The plaintiff can obtain relief from the incumbrance of that mortgage only by proving, that the notes secured by it were in fact paid by McConaghy to Brockway before they were indorsed to the defendant, or that Brockway held them at that time in such manner that he could not legally enforce the collection of them against McConaghy.

The testimony does not appear to have been taken so exclusively with reference to this matter as it might have been, had it been already settled that the rights of the parties must be thus determined. If the plaintiff be entitled to redeem by the payment of those notes or without the payment of them, the amount expended in repairs and improvements and the amount of the rents and profits must be ascertained.

It is therefore ordered, that ——— ——— be appointed master to take, if needed, additional testimony and to ascertain the amount due to the defendant and secured by mortgages upon the farm, considering the plaintiff to have acquired the rights of McConaghy, and the defendant to have acquired the rights of Brockway, so far as it respects the mortgage and notes made by the former to the latter existing at the time of their assignment to the defendant. And also to ascertain the amount of the rents and profits and money expended in repairs and improvements.

Joseph Granger, for plaintiff.

T. J. D. Fuller, for defendant.

LOTHROP WIGHT *& als. versus* ALEXANDER STILES.

An amendment of a writ, by striking out of the account annexed, a part of the charges and credits, is within the discretion of the Court, and is not a subject for revision on exceptions.

Depositions taken out of the State, by persons duly authorized, may be admitted or rejected at the discretion of the Court, although the oath was not administered to deponent before giving his testimony.

In an action for goods sold and delivered, if the plaintiffs furnish credible testimony, that the goods were purchased by defendant of the plaintiffs, as a partnership known by their style and name; that a bill of goods was made out and delivered to the defendant, who fully examined the same, and made no objection thereto; and that the goods were delivered on board a vessel by him designated; it is sufficient to authorize a verdict for the plaintiffs.

THIS was an action of assumpsit to recover the balance of an account, and was tried at the last term before WHITMAN, C. J. The plaintiffs moved for leave to amend, by striking out of the account annexed all the items of debt and credit, except the last four items, which were for a bill of merchandise and the expenses attending it. The motion was resisted, but allowed by the Judge. The plaintiffs offered in evidence the deposition of James M. Gooken, which purported to be taken by a Commissioner of Maine, for Massachusetts, and the caption was in these words, "on the first day of July, 1847, the aforesaid deponent was examined and cautioned and sworn agreeably to law, to the deposition aforesaid by him subscribed," which was objected to, as not being in conformity with the R. S., but was admitted.

The counsel for the defendant, among other things, requested the Judge to instruct the jury, that, in order to maintain this action, the plaintiff must prove that the goods enumerated in the writ were either sold and delivered to the defendant, or, if shipped to him, that he actually received them; and that they were sold to defendant to be paid for on demand; also that the contract was made with the plaintiffs, as a partnership firm, composed of the individuals named in the writ; and that said persons, at the time of the alleged contract, were co-partners under the firm of Wight, Reed & Co. as alleged.

But the Court refused so in terms to instruct them; and directed the jury, that if they believed the deposition which had been read to them, the plaintiffs' case was perfectly made out. The jury thereupon returned a verdict for plaintiffs; and the defendant filed exceptions.

[NOTE. — The deposition did not come into the hands of the Reporter.]

S. H. Lowell, for defendant.

The amendment allowed, at the moment of trial, was improper and unwarranted by any provision of law, and if improper may be subject to exceptions. *Newall* v. *Hussey,* 18 Maine R. 249.

The Court may permit plaintiffs to strike out items of charge when they fail to prove them, but have no authority of law to permit them to strike out credits. Such amendments deprive the defendant of set-off, and occasion surprise, as well as encourage a multiplicity of suits. *Dodge* v. *Tileston,* 12 Pick. 328.

Gooken's deposition was improperly admitted. It was not taken in conformity with the law. R. S. chap. 133, § 15. When the requisitions of law are not complied with, the deposition cannot be used. *Atkinson* v. *St. Croix Manufacturing Co.,* 24 Maine R. 171; *Braintree* v. *Hingham,* 1 Pick. 245.

The provision in chap. 133, § 22, must be restricted, so as to embrace only such depositions taken out of the State, as could be legal evidence. It was held by the Court in *Amory* v. *Fellows,* 5 Mass. R. 219, that the testimony of witnesses, whether *viva voce* or in writing, cannot be admitted, unless there is evidence that it was given under oath. Our law requires the oath to be first administered, in all cases. Commissioners are required to be governed by our laws in their proceedings. R. S. ch. 134.

The instructions requested, were improperly withheld. The plaintiffs should have proved, that the goods were sold and actually delivered to the defendant, or that the contract was in writing, or that he came under one of the provisos in R. S.

chap. 136, § 4. Here there was no delivery. Where goods are ordered verbally, the delivery by the vender to a carrier, will not take the case out of the statute, unless the purchaser has been accustomed to receive goods from the vendor in that way. Long on Sales, 71 and 72.

And it is the duty of the vendor, where goods are sent to a distance by sea, to give such due and timely notice of the shipment as circumstances will permit, in order that the vendee may know when they are likely to arrive. Long on Sales, 447. No such notice was given.

The Court should have instructed the jury that the plaintiffs must prove that the contract was made with them, as a partnership firm, composed of the individuals named in the writ and that said persons, at the time of the alleged contract, were co-partners under the firm of Wight, Reed & Co., as alleged in the writ. 2 Greenl. Ev. § 478 and cases cited in note 2; 1 Saunders' Plead. page 144, and cases cited; *Norcross & al.* v. *Clark*, 15 Maine R. 80; *Dob* v. *Halsey*, 16 Johns. R. 34.

The instructions given were wrong. The Court told the jury, if they believed the deposition, the plaintiffs' case was perfectly made out. They thus usurped the province of the jury in deciding matter of fact, and what amount of evidence would warrant them in finding a verdict for the plaintiffs. It is well settled, that if the Judge instruct the jury, that if they believe a certain one of the witnesses, they ought to find for the defendant, a new trial will be granted. *Tufts* v. *Seabury*, 11 Pick. 140; *Baldwin* v. *Hayden*, 6 Conn. R. 453; *Wilkinson* v. *Scott*, 17 Mass. R. 249.

It is the duty of the Court on request to instruct the jury what the law is, applicable to the testimony in the case, but not to instruct them, that certain evidence proved certain facts. *George* v. *Stubbs*, 26 Maine R. 243.

Moulton, for plaintiffs, proposed to remit the amount of one small item in the account, which had not run for the term of credit given, and contended that the deposition proved the partnership. That the statute of frauds could not apply, for here was a sale and delivery. The goods were delivered ac-

cording to the directions of defendant, and put on board the vessel.

The amendment allowed was correct. There was a change of partners after the first and before the second bill was purchased. The credits applied to the first bill only. It was a matter wholly within the discretion of the Court.

As to the objections to the instructions, there was nothing unusual in them. The credit of the testimony was submitted to the jury. The Court did not distinguish any particular portion of the evidence; there was only one piece before them, and if the deposition proved the case the instructions were right. The Court can now see that the case was proved.

TENNEY, J. — The Judge before whom the action was tried allowed the plaintiffs to amend their writ, by striking out of the account annexed a part of the charges thereon, and also the credits, which by the bill were applied to reduce the charges, so stricken out, against the objection of the defendant. This was an amendment, which it was competent for the Court to authorize in the exercise of his discretion, and is not a subject of revision on exceptions.

By the statute of 1821, chap. 85, sect. 3, it was required that deponents, should be cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, before they should give their testimony. Rev. Stat. chap. 133, sect. 15, contains a similar provision. The chapter of the statutes of 1821 referred to, sect. 6, provides that "all depositions taken out of the State, before any justice of the peace, public notary, or other person legally empowered to take depositions in the State or county, where such depositions shall be taken and certified, may be admitted as evidence in any civil action, or rejected at the discretion of the court." It was decided by this Court in 1839, that a deposition taken out of the State, could be used under this provision, notwithstanding the oath was not administered to the deponent before giving his testimony. *Blake* v. *Blossom*, 15 Maine R. 394. In Rev. Stat. chap. 133, sect. 22, there is a provision similar to that in the

statute of 1821, chap. 85, sect. 6, in very nearly the same language. The construction of the Court of the statute of 1821, by a well settled rule, is regarded as adopted by the Legislature, when they re-enacted the same provision in the Revised Statutes.

The defendant's counsel requested the Court to instruct the jury, that to maintain the action, the plaintiffs must prove that the goods were either sold and delivered to the defendant, or if shipped to him, that he actually received them, and that they were sold to be paid for on demand; that the contract was made with the plaintiffs as a partnership, and that they were such at the time of the sale of the goods. The Court thereupon instructed the jury, that if they believed the testimony in the deposition introduced, the case was perfectly made out. By this evidence the goods were purchased by the defendant of the plaintiffs as a partnership, known by the name of Wight, Reed & Company; that a bill of the goods was made out and delivered to the defendant, who fully examined the same, and made no objection thereto; and that the goods were delivered on board a vessel which he had designated, as the place where he requested them to be delivered. If this evidence was true it was sufficient to authorize a verdict for the plaintiffs.

It is objected, that the Court erred in restricting the jury to the consideration of testimony contained in the deposition. If there was conflicting evidence for the jury to weigh, there would have been some foundation for the objection. But the case does not show that any other evidence was adduced; consequently from that alone the jury were required to judge concerning the facts.

Two items of the account were for goods delivered less than six months before the date of the writ, and interest thereon, and from the bill it might have been inferred, that a credit of that time was given. The case discloses no ruling or instruction in reference to this part of the claim, and there was no ground for exceptions on that account.

Exceptions overruled.

THEODORE LINCOLN *versus* MARINER A. WILDER.

Where land is conveyed according to a plan, to which reference is made in the conveyance, it becomes a part of it; and if the plan bounds the lot by a fresh water stream, the lot extends to the centre of the stream.

The intention of the grantor, if it can be ascertained, is to be carried into effect, but if the expressions of the deed are contradictory, and it cannot be known what is the true meaning, the deed is to be construed most favorably for the grantee.

Where two monuments are referred to in a deed, incompatible with each other, that which is the more certain and the more prominent must prevail over the other.

Thus, where the shore and also a plan are referred to and are incompatible, the plan will be considered the more certain, and will control.

WRIT OF ENTRY to recover possession of that portion of lot numbered 52, in Dennysville, between the shore and the centre of Dennys river.

The plaintiff claimed title by conveyance from one Russel, which embraced lot numbered 52, according to the plan of Dennysville by Benj. R. Jones.

The defendant put in a deed from the plaintiff to one Wilder, which contained this description: "a certain lot or parcel of land in Dennysville aforesaid, containing two hundred and eighteen acres, more or less, bounded partly by lot numbered 53, partly by Abner Gardiner lot, and partly by the shore of Dennys river, said premises being the lot numbered 52, on the plan of said town of Dennysville, by Benj. R. Jones, which plan is now recorded in the registry of deeds for Washington county, reference being had to said plan," and a deed, with the same description from said Wilder to him. The plan referred to was introduced, and it appeared that it was made before the conveyance from said Russel to plaintiff; that in running out all the lots lying on Dennys river, said Jones measured the lines to the water in said stream; that the western boundary of lot numbered 52, by said plan, is Dennys river; that said river is a fresh water stream, and the boundary between that and the adjacent town.

It appeared that the defendant was owner of the land lying

in Edmunds, opposite to said lot numbered 52 in Dennysville, to the centre of said Dennys river and in occupation of the same; and that in 1846, he erected valuable dams and mills on said river, from his land in Edmunds, across to and upon that part of Dennysville described as lot numbered 52.

The plaintiff notified defendant, when about to commence building said dams and mills, of his claim to the premises.

It was agreed, that the *Court* might reject any of said evidence not legally admissible, might make such inferences as a jury might do, and order a nonsuit or default, as the application of the principles of law to the facts stated should require.

The case was argued in writing. The arguments were much extended. An epitome is all for which space can be allowed in this volume.

S. Greenleaf, of Massachusetts, for plaintiff.

The *subject* of controversy in this case is a strip of land, lying between the shore and the central line of Dennys river.

It was once the plaintiff's. The defendant claims title under the plaintiff's grant. This grant was of "a parcel of land," "bounded "*by the shore of Dennys river,*" being lot numbered fifty-two on the plan." The plaintiff claims that by this deed, the grant is limited to *the shore.* The defendant claims that it extends to the *filum aquæ.*

We do not controvert that where a grant is *expressly* bounded by or upon a fresh "river" or "stream," or along the same, the *presumed intent* of the grantor was, to convey the land to the thread of the river or stream; in which cases it is therefore said that the grantee is entitled to hold to that extent, of common right.

Such intent is presumed, wherever the "*river*" or "*stream*" is *expressly mentioned* as a boundary, even though other monuments are mentioned, standing on or near the bank, *if there are no words showing a different intention.* The decisions to this effect are founded wholly on the *express mention* of the river or stream as the boundary.

But this presumption of intent is controlled and the grant

limited, so as to exclude the river or stream, whenever an intent to exclude it is apparent from the deed.

In this case, we contend, the grantor, by *expressly* bounding the grant by the "*shore*," intended to *exclude the river.*

The word shore has already received a judicial interpretation. 5 Wheat. 385. "The *shores* of a river *border* on the water's *edge.*" And elsewhere the *shore* of a fresh river has been defined to be the part between high and low water mark, *exclusive* of the *alveus fluvii*, or bed of the river.

The words "*to*," "*from*" and "*by*," in the description of the premises in a deed, are held to be words of exclusion, unless, by manifest implication, they are used in a different sense. If the boundary is a "*river*," "*stream*" or "*creek*," and is *so expressed*, the *expression* is taken to imply an intent to *include* the river to the thread thereof. But if the boundary mentioned is the *bank* of the river, the words *to*, *from* and *by*, are held to *exclude* the water, or rather the land below high water mark.

The case of *Moore* v. *Griffin*, 9 Shep. 350, 353, as to this point, was decided expressly on this distinction.

The plaintiff limited his grant to the shore, and therefore has not parted with the land in dispute, unless by referring to the plan.

The question is upon the language of the deed, and not upon the actual location. What does *the plan itself* say? This is purely a question of interpretation.

It will doubtless be contended for the defendant, that the deed and plan together present a case of ambiguous language, to be taken most strongly against the grantor; and that by the plan, lot 52 appears *bounded by the river.*

To this we have several considerations to suggest, by way of answer: —

1st. It does not so appear by the plan. One of the lines does appear nearly or quite to touch the line denoting the course of the river or the bank, it being obscure. The other appears to stop short of it. But if both lines touched the waving line on the plan, it would still remain uncertain

whether the lines on the plan, denoting Dennys river, in a *general* manner, were designed to represent the lines of the *bank or shore*, at high water mark, that is, the *edges* of the trough or canal in which the water flowed, or were intended to denote more strictly the *breadth of water* within those limits. If the defendant claims the latter, the burden of proof is on him to show it. But it *does not* appear *by the plan;* and therefore is not in the case. There is no evidence, that lot 52 was ever bounded in fact by Dennys *river*. If the deed had referred to the *plan alone*, it being ambiguous, and doubtful whether the crooked lines were intended for the "*banks*" or for the actual margin of the *water*, it might well be taken most strongly for the grantee, to carry him to the "*river*." But here the descriptive words in the deed must go along with the plan, and both be made if possible to stand together. The plan merely suffices for general description and relative locality, and the words in the deed serve for more particular and exclusive limit.

2d. It is a sound rule of interpretation of private writings, that where the instrument consists partly of a printed *formula* and partly of *written* words, greater effect is to be given to the latter, as being selected by the parties for the *more precise expression of their meaning*, the printed part being more general in its nature and application. 1 Greenl. on Evidence, § 278, and cases there cited. See also *Alsager* v. *St. Katherine's Dock Co.*, 14 M. & W. 799, *per Parke B.*

Now *here* the parties themselves have industriously employed *their own* language for the *particular* description of the premises, referring to the plan, as in the nature of a printed *formula*, on which less attention is bestowed. Where the plan is of a public and general character, like the plan of a town or other large tract, it is to be admitted into the deed only on the footing of a printed formula.

3d. In construction of conveyances, the *highest* regard is to be had to *natural boundaries;* for respecting these men are least liable to mistake. See 1 Greenl. on Evidence, § 301, note 2, 3d ed.

In this deed *two* boundaries are called for; namely, the "*shore,*" which is a *natural* boundary; and the *line marked on Jones's plan,* which is an *artificial* boundary.

The interpretation, thus given to the deed, gives *full effect* to the *plan* and to *every word* of the deed; rejecting nothing.

The defendant's construction *totally rejects* the important boundary of the "*shore,*" and runs counter to all the principles above stated.

If the plan was referred to for any other than general purposes, it would seem that boundaries would have been particularly expressed in the deed.

Bion Bradbury and *T. J. D. Fuller,* for defendants.

If, by the plan, lot 52 extends to the centre of Dennys river, the plaintiff has shown that he once had a title to the land, which he claims; but, if not, he exhibits no title to this land, and cannot maintain this suit. But if, by the plan, that lot extends to the centre of the river, then, as the plaintiff conveyed by that plan, he has no case.

The defendant contends that this grant conveys the whole of lot 52, according to the plan; extending to the centre of Dennys river.

1. The plan referred to in plaintiff's deed, is to be taken as part of the deed. *Pike* v. *Dyke,* 2 Greenl. 213; *Brown* v. *Gay,* 3 Greenl. 126; 5 Greenl. 24. Where lines are laid down on a map or plan, and are referred to in a deed, the courses, distances and other particulars appearing on such plan are as much to be regarded as the true description of the land conveyed, as they would be if expressly recited in the deed. *Thomas* v. *Patten,* 13 Maine, 333; 17 Mass. 207; 20 Pick. 62; 21 Pick. 135.

But the plaintiff's counsel contends that where the plan is of a public and general character, like the plan of a township or other large tract, it is admitted with the deed only on the footing of a printed formula, not attracting the attention of the parties so closely as their own words have done; and, therefore, not entitled to control them.

But, in this case, the plan was evidently the matter most considered; the prominent idea of the description.

It appears that this plan was the result of an actual survey. The general concluding words, "reference being had to the plan," relate back to the whole of the descriptive language of the deed.

2. By the plan, the lot numbered 52 extends to Dennys river, and is bounded on its westerly side by that stream.

The river is represented on the map by a crooked, waving line. The side lines of the lot extend to it and touch it. A line has length, but no breadth or thickness. The side lines, touching the line representing the river, must of course touch the water of the river. As these lines extend to the water's edge, the lot must of necessity extend to the centre of the river. Neither of the side lines appear by the plan to stop short of the line representing the river, as stated by plaintiff's counsel.

The language of the statement of facts is, "it appeared that the plan was made before the conveyance from said Russell to plaintiff; that in running out all the lots lying on Dennys river said surveyor measured the lines to the water in said stream; that the western boundary of said lot, numbered 52 by said plan, is Dennys river; that said Dennys river, was the boundary between Dennysville and Edmunds, or townships numbered two and ten."

3. In the case of a fresh river, every possible intendment is in favor of the grant going to the centre, whereas, in the case of the sea, the intendment is directly otherwise. Angell on Water Courses, (2d Ed.) page 8, note 1.

4. The only mode, by which any portion of the bed of a river can be retained in the grantor of a tract of land adjacent to the river, is by a reservation clearly made in the deed. Angell on Water Courses, (2d Ed.) pages 2—6.

5. The owner of land adjacent to a fresh river, owns to the centre of the stream, of common right. The right is incident and annexed to the grant by the common law.

6. With these considerations before us, we may now inquire

what was the intention of the parties to this grant? Did not the plaintiff intend to convey the whole of lot 52?

From the language of the deed, this is apparent. It conveys "a certain lot containing two hundred and eighteen, acres more or less," (not a portion of a certain lot) "said premises being the lot numbered fifty-two on the plan of said town of Dennysville (late township No. 2.)"

Upon inspecting this plan, we find a lot numbered 52, that it contains 218 acres, that its western boundary is Dennys river.

Here, then, is a clear, distinct and perfect description of a tract of land, with the centre of Dennys river as its western boundary.

But the deed also contains other language. Before the reference to the particular lot and plan, the land conveyed is described as bounded "partly by the shore of Dennys river." Is there any necessary conflict between this and the other language of the deed? May not the whole be construed in perfect consistency?

It may be here remarked, that the description by boundary is not intended to be accurate and certain. If it were so, why need there be any reference to the lot and plan? It is designed only to convey a general idea of the location of the lot, with reference to other lots on the river. Its indefiniteness indicates this. The term "partly" is entirely uncertain; it may mean any portion less than the whole. The lot 52, as indicated by the plan referred to, is evidently the leading idea in the minds of both parties.

Now upon the hypothesis that the words "shore of Dennys river," were used in this grant to mean the same thing as Dennys river, the deed receives a construction giving full effect to its entire language — rejecting nothing.

The subsequent use of the terms "Dennys river," where the "shore of Dennys river" had been previously adopted, clearly indicates that the parties applied an equivalent meaning to these expressions. It was the same idea expressed in different language.

If the word shore, as applied to fresh rivers, has a technical meaning, it is not necessary to adopt it where it was evidently not so used by the parties.

Where the intention is clear, too minute a stress ought not to be laid on the strict and precise signification of words. Cruise's Digest, chap 19, § 1, clause 4; 2 Saund. 167; 3 Johns. 395.

Further there is no language used in this deed, which indicates an intention to reserve any portion of lot 52. Had there been a design to reserve the bed of Dennys river, it would have been clearly indicated.

The plaintiff purchased this tract on the 15th of April, and sold on the 30th of April, 1824, being the owner for fifteen days, buying and selling by Jones's plan.

But it is alleged by the plaintiff, that the word shore has a technical meaning which must be adopted in this case, and that its use indicates an intention to restrict the grant to the upland of lot 52.

The sea shore has been judicially defined in *Storer* v. *Freeman*, as being that portion of land, lying between ordinary high and low water mark. In the 3d Shepl. 237, it was held synonymous with beach. But it is believed no judicial construction has been given to the term, as applied to a fresh river. This seems to be taken for granted by Angell, in his work on Tide Waters, 2d edition, page 67.

We must, therefore, resort to other sources for a definition of this term.

No analogy exists between the sea shore and the shore of a fresh river. Entirely different principles apply to them.

Regarding Webster as authority, we find the meaning of the term shore, evidently restricted to tide waters.

It seems agreed on all sides, that the shore touches the water. It is conceded by plaintiff's counsel, that a grant of land bounded "by," "upon," or running "to" a river, carries the grantee to the centre of the stream, and that these expressions are taken to imply an intent to include the river.

But why is this intent implied? Because the common law,

assigning ownership to every thing capable of it, and from motives of policy makes the owner of land, adjacent to a fresh river, the owner to the centre. If your boundary is by, to, or upon the river, the title to the centre passes. The shore, margin or bank touches *the river*, why should not the same title pass? Especially when every possible intendment is in favor of extending a grant upon a fresh river to the centre, as has been shown.

But if the term shore has a technical meaning, to be applied in this case, it presents a case of ambiguity or double description.

In discussing this part of the case, we are aided by certain well established rules, some of which are laid down with great clearness, in the case of *Melvin* v. *Proprietors of Locks and Canals on Merrimack river*, 5 Metc. 15.

Now, in this case, the inconsistency results from the word shore, upon the supposition that the term excludes the bed of the river. Aside from the use of this term, the description of the estate conveyed is clear and "unmistakeable." Upon the principle just stated, it may be rejected.

Again, if some of the particulars of the description of the estate conveyed do not agree, those which are uncertain or liable to mistake must be governed by those which are more certain.

The description in this case derived from the plan, is fixed and certain. But the meaning of the term shore is uncertain.

Again, if there be a double description in a grant, or an ambiguity, the grant is to be construed most strongly against the grantor.

Upon this principle, the title of the defendant, would extend *ad filum aquæ*.

The attention of the Court is particularly called to the cases of *Vose* v. *Handy*, 2 Greenl. 322; *Keith* v. *Reynolds*, 3 Greenl. 393; *Willard* v. *Moulton*, 4 Greenl. 14; *Drinkwater* v. *Sawyer*, 7 Greenl. 366, in this connection.

In *Moore* v. *Griffin*, the general description precedes the

particular one ; in *Herrick* v. *Hopkins*, the particular description precedes the general one.

From these cases, the principle is derived, that, where, in a grant of land, general terms are used, in themselves clear and explicit, clearly describing an estate to be conveyed, those terms will control any description inconsistent therewith, being construed most favorably to the grantee.

It is suggested by plaintiff's counsel, that the boundary of the shore, being a natural boundary, is entitled to more consideration than the boundary established by Jones's plan, which is artificial. But is this so? The boundary by Jones's plan is Dennys river. If it is not, the plaintiff has no case. Dennys river is a natural boundary. The plan but represents a natural boundary.

WELLS, J. — The demandant claims to recover a portion of lot 52, in Dennysville, lying between the shore and the centre of Dennys river. It appears by the statement of facts, that his title is derived from James G. Russell, and that lot 52, according to the plan of Dennysville, by Benjamin R. Jones, is one of the lots described in the deed. Whether he has a title from any other source does not appear. It is contended by him that the side lines on Jones's plan do not extend to the water, and that the plan does not embrace the territory between the shore and the centre of the river. If so, unless he has some other title than that disclosed, then he is not the owner of the demanded premises. If he claims by the plan, and that does not embrace the premises, he cannot recover.

But according to the copy of the plan furnished by the tenant's counsel, the side lines appear to be extended in the usual manner to the water. It does not exhibit any different appearance from other plans where lots are bounded by rivers. If it had been intended by Jones, not to embrace the space between the shore and the centre of the river, in lot 52, he would probably have made his plan, so as clearly to indicate that intention.

Whatever title the tenant has, is derived from the demandant, through E. C. Wilder, who conveyed to him the same, which was derived from the demandant.

No copies of the deeds have been furnished. The description of the premises, granted by the demandant to Wilder, is obtained from the arguments of the counsel. It is as follows: "a certain lot or parcel of land, in Dennysville aforesaid, containing two hundred and eighteen acres, more or less, bounded partly by lot numbered fifty-three, partly by Abner Gardner's lot, and partly by the shore of Dennys river, *said premises being the lot numbered fifty-two on the plan of said town of Dennysville*, (late township No. 2,) by Benjamin R. Jones, which plan is recorded in the registry of deeds for Washington county, reference being had to said plan."

Land, bounded by the shore, limits the grantee to it, and does not extend over it. *Storer* v. *Freeman*, 6 Mass. R. 435; *Lapish* v. *Bangor Bank*, 8 Greenl. 85; *Handly's lessee* v. *Anthony*, 5 Wheat. 385; *Nickerson* v. *Crawford*, 16 Maine R. 245. The use of such a term manifestly excludes the bed of the river. *Child* v. *Starr*, 4 Hill, 369. And if it were the intention of the demandant, by the deed, to limit the western boundary by the shore, then he would be entitled to the land, between the exterior line of the shore, and the *filum medium aquæ.*

Where land is conveyed according to a plan, to which reference is made in the conveyance, it becomes a part of it, as much so, as if it were incorporated in the conveyance. This is a well established rule of construction. The demandant says in his deed, "said premises being the lot numbered fifty-two on the plan," &c. He makes the plan a part of his deed. *Davis* v. *Rainsford*, 17 Mass. R. 211.

The plan bounds the lot, on the west, by the river, and is to be viewed in the same manner as a deed, bounding a grant by a river. In such case it is stated, in *Storer* v. *Freeman*, which is supported by a long and unbroken series of decisions, "that the owner of land bounded on a fresh water river, owned the land to the centre of the channel of the river, as of common

right." If then the demandant intended by the deed, to convey the land according to the plan, the premises demanded belong to the tenant.

The intention of the grantor is to be carried into effect, if it can be ascertained. Did he intend to limit the grant to the shore, or in accordance with the plan, to extend it to the thread of the river?

General and comprehensive words may be restrained by particular words following them. *Roe* v. *Vernon*, 6 East, 51; *Moore* v. *Griffin*, 22 Maine R. 350. But in the present case, the particular words, creating the restriction, if there be any, precede the general ones.

In the case of *Thorndike* v. *Richards*, 13 Maine R. 430, the general description was limited by the particular one, following it; and the same mode of construction was adopted in *Allen* v. *Allen*, 14 Maine R. 387, and *Barnard* v. *Martin*, 5 N. H. R. 536.

In *Keith* v. *Reynolds*, 3 Greenl. 391, there was a general description, but the courses and distances, which followed, did not embrace all which was contained in the general description. But the general description was adopted. So also in the case of *Moore* v. *Griffin*, before cited, the particular words were not considered, as limiting the grant to the shore of the river.

In the case of *Cate* v. *Thayer*, 3 Greenl. 71, by the act incorporating the town of Dresden, the courses and distances would exclude the farm of Dr. Gardiner, but the act declares it is to be included. And it was decided to be included. In the case of *Melvin* v. *Proprietors of L. & C. on Merrimack river*, 5 Metc. 15, the conveyance was of the "estate on which the said Moses Cheever now lives, and which was conveyed by Benjamin Melvin and Joanna Melvin to Dr. Jacob Kittridge, by deed dated the 25th day of April, 1782." The description in the deed did not contain so much land, as was embraced in the farm occupied by Cheever. The reference to the deed from the Melvins was not considered as limiting the land previously described. The mode of construction, adopted in the cases of *Barnard* v. *Mar-*

tin, before cited, and *Woodman* v. *Lane*, 7 N. H. R. 241, is not in harmony with that laid down in the 5th Metc.

The rule is quite plain, that a general description may be affirmed or restricted by a special one, but the difficulty consists in the application of it, and in determining whether the language employed is intended to be used, in a restrictive sense; and it is difficult to find any precise rule, furnishing a sure and unerring guide in such inquiry.

It is also apparent, that the mere arrangement of the words, the same sense being preserved, can make no difference in the result.

The leading idea, to be obtained from the cases is, that what is more certain shall prevail over that, which is less so, and the part of a description, which the parties must be supposed fully to understand, will triumph over that, which is more obscure, and whose delineation would require a more accurate and careful examination. As monuments are generally decisive, that which approximates more nearly to them, has a controlling influence.

In the description under consideration it is stated, "said premises *being the lot* numbered fifty-two on the plan," &c. According to the demandant's construction, it was *a part* only of the lot conveyed. If the whole lot had not been intended to be conveyed, one would suppose, that a part of it would have been expressed, or some exception made. The deed and the plan correspond in the number of acres; but the deed says more or less. All the boundaries could not be found without reference to the plan. There is no other way of finding the eastern side, but by reference to it. It is a map of the premises, and would clearly indicate what was granted.

In *Cate* v. *Thayer*, before cited, in the description of the boundaries of Dresden, C. J. MELLEN says, the Gardiner farm is a monument. In the same sense, lot fifty-two is a monument, it being truly described by the plan. The courses laid down did not include the Gardiner farm, and the course, "partly by the shore of Dennys river," would not include lot fifty-two. But the Gardiner farm was considered within the

town. So also, for the same reason, the lot would pass by the conveyance.

Yet it may be correctly said, that the shore is a monument also, and not a course indicated by the compass. Then there would be two monuments, incompatible with each other. By the same rule, we are to ascertain, which of them is the more certain and the more prominent.

Where a person purchases a lot, according to a plan, he must understand, that he would obtain the whole lot, in the same manner as other lots were granted, in the township. But if the deed described a portion of it, as bounded by the shore of a river, it might not attract his attention so forcibly as the plan, or he might misapprehend the meaning of it.

Although it may be difficult, to arrive at a satisfactory conclusion, we are inclined to the determination, that the plan is the more certain and prominent part of the description.

But if the expressions of a deed are contradictory, creating so much doubt, that it cannot be known, which of two descriptions is the true one, the deed is to be construed most favorably to the grantee.

In the case cited from the 5th of Metc. it is said, "that where there is a doubt as to the construction of a deed poll, it shall be taken most favorably for the grantee. If, therefore, there be two descriptions of the land conveyed, which do not coincide, the grantee is entitled to hold by that, which will be most beneficial to him. It must, however, be a case of real doubt; for if one of the descriptions be more certain than the other, the more certain description must govern, although the construction may be less favorable to the grantee."

In a deed poll, where there is a doubt, the construction must be against the grantor. *Worthington* v. *Hyler*, 4 Mass. R. 205. Where a deed may enure in different ways, the person to whom it is made, shall have his election which way to take it. *Jackson* v. *Blodget*, 16 Johns. 178. The descriptions of the western boundary, in this deed, are clearly repugnant. The plan bounds the premises by the thread of the river, the other description by the shore, and there is no language in the latter, limiting the former.

If one description is not more certain than the other, then it is a case of doubt, as to which shall be adopted, and falls within the rule of construction most favorable to the grantee, and the whole of the lot is conveyed. It results from either view, that the tenant is entitled to judgment.

WILLIAM PIKE *versus* THOMAS C. GALVIN.

Where one has made a conveyance of land, by a deed containing a covenant of warranty, a title subsequently acquired will be transferred to the grantee, or the grantor, and those claiming under him will be estopped to deny it.

Where one has made a conveyance of land by deed containing no covenant of warranty, an after acquired title will not enure or be transferred to the grantee; nor will the grantor be estopped to set up his title subsequently acquired, unless by doing so he be obliged to deny or contradict some fact alleged in his former conveyance.

The doctrine as to covenants in a deed, asserted in the case of *Fairbanks* v. *Williamson*, 7 Greenl. 96, is overruled.

A WRIT OF ENTRY. The facts in this case sufficiently appear in the opinion of the Court. WELLS, J. gave a dissenting opinion which has not come into the hands of the Reporter.

SHEPLEY, J. — The title of both parties to the demanded premises is derived from Artemas Ward, who by his agent Robbins, made a contract in writing, on October 26, 1820, to convey a tract of land including the premises to Theodore Jellison upon the performance of certain conditions therein stated. Jellison appears to have entered into possession, but does not appear to have performed the conditions. On July 7, 1823, Jellison assigned that contract to the demandant, and on the same day made a deed of release purporting to convey the same tract of land to the demandant. Artemas Ward on October 27, 1825, by a deed containing covenants of warranty, conveyed a larger tract of land including the tract before named, to Jones Dyer, jr. who on July 11, 1829, conveyed to Theodore Jellison the tract of land described in his deed to

the demandant. Jellison on May 9, 1833, conveyed the premises demanded to Stephen Emerson. These conveyances were all duly recorded. The defendant is the tenant of Joseph Wyeth and Stephen G. Bass, who have exhibited a title derived from Stephen Emerson. The demandant has never been in possession of the land described in his deed from Jellison, but Jellison and those claiming title from Ward through Jellison have always been in possession.

As Jellison had no title when he made his deed on July 7, 1823, the demandant can have none, unless that acquired by Jellison on July 11, 1829, enured to him.

The deed from Jellison to the demandant contains no covenants but the following, "so that neither I, the said Jellison, nor my heirs or any other person or persons claiming from or under me or them, or in the name, right or stead of me or them, shall or will by any way or means have, claim or demand any right or title to the aforesaid premises or to any part or parcel thereof forever."

Without entering upon a discussion of the doctrine or the different aspects of it presented in the very numerous cases, which have been decided respecting the effect of covenants contained in a conveyance of land, to transfer to the vendee by enurement, estoppel, or otherwise, a title subsequently acquired, it will be sufficient for the present purpose, to state a couple of positions, which appear to have been asserted or admitted in many of them.

1. When one has made a conveyance of land by a deed containing a covenant of warranty, a title subsequently acquired will be transferred to the vendee, or the vendor and those claiming under him will be estopped to deny it.

Such is the doctrine in this State. *White* v. *Erskine*, 1 Fairf. 306; *Lawry* v. *Williams*, 13 Maine R. 281; *Baxter* v. *Bradbury*, 20 Maine R. 260.

In New Hampshire. *Kimball* v. *Blaisdell*, 5 N. H. R. 533.

In Vermont. *Middlebury College* v. *Cheney*, 1 Vermont R. 336.

In Massachusetts. *Somes* v. *Skinner*, 3 Pick. 52; *White* v. *Patten*, 24 Pick. 324.

In New York. *Jackson* v. *Matsdorf*, 11 Johns. R. 91; *Jackson* v. *Bradford*, 4 Wend. 619; *Pelletreau* v. *Jackson*, 11 Wend. 110.

In Ohio. *Hill* v. *West*, 8 Ham. 222.

In the Courts of the United States. *Terrett* v. *Taylor*, 9 Cranch, 53; *Mason* v. *Muncaster*, 9 Wheat. 455; *Stoddard* v. *Gibbs*, 1 Sum. 263.

Against these and other decisions to the same effect it has been contended, that "the old common law warranty has no practical operation under the system of conveyancing employed in this country, except in the single case of release with warranty, to a party in adverse seizin of an estate, and of a subsequent descent of the right of entry or action to the warrantor." And that "the doctrine of estoppel in deeds cannot be based upon that of warranty." *Doe* v. *Oliver*, Smith's L. C. 460, in note. If the question could be considered as open to discussion, it might be worthy of deliberate consideration. But it would seem to be too late to entertain it.

2. Where one has made a conveyance of land by deed containing no covenant of warranty, an after acquired title will not enure or be transferred to the vendee; nor will the vendor be estopped to set up his title subsequently acquired, unless by doing so he be obliged to deny or contradict some fact alleged in his former conveyance.

There is an irreconcileable difference in the decided cases respecting this proposition. It is believed however to be fully established by the better considered opinions; and to be in accordance with well established principles.

It is sustained in this State by the cases of *Allen* v. *Sayward*, 5 Greenl. 227; and *Ham* v. *Ham*, 14 Maine R. 351, and opposed by the case of *Fairbanks* v. *Williamson*, 7 Greenl. 96.

In New Hampshire it is sustained by the case of *Kimball* v. *Blaisdell*, 5 N. H. R. 533.

In Massachusetts it is sustained by the cases of *Somes* v. *Skinner*, 3 Pick. 61; *Blanchard* v. *Brooks*, 12 Pick. 47; *Comstock* v. *Smith*, 13 Pick. 116, and opposed by the case of *Trull* v. *Eastman*, 3 Metc. 121.

In Connecticut it is sustained by the case of *Dart* v. *Dart*, 7 Conn. R. 250.

In New York it is sustained by the cases of *Jackson* v. *Wright*, 14 Johns. R. 193; *Jackson* v. *Bradford*, 4 Wend. 619; *Pelletreau* v. *Jackson*, 11 Wend. 110; *Jackson* v. *Waldron*, 13 Wend. 178. And it may be considered as opposed by the cases of *Jackson* v. *Bull*, 1 John. Cas. 81, and *Jackson* v. *Murray*, 12 Johns. R. 201. If they be so considered, they were overruled by the case of *Pelletreau* v. *Jackson*.

In Ohio it is sustained by the case of *Kinsman* v. *Loomis*, 11 Ohio, 475.

The only suitable inquiry to be entertained in this State is, whether our own case of *Fairbanks* v. *Williamson*, although the doctrine asserted in it may have been approved elsewhere, as well as in the case of *White* v. *Erskine*, can upon sound principles be sustained. The deed in that case, contained no covenant but that of *non claim*. The ground, upon which it was decided, that a title subsequently acquired enured to the vendee, appears to have been, that the covenant of non claim was "a covenant real, which runs with the land and estops the grantor and his heirs to make claim, or set up any title thereto."

Covenants, which relate to the land, are said to run with the land. *Sale* v. *Kitchingham*, 10 Mod. 158; *Norman* v. *Wells*, 17 Wend. 136. But acovenant, which may run with the land, can do so only when the land is conveyed. It can only run, when attached to the land, as its vehicle of conveyance. *Spencer's case*, 5 Coke, 17 b; *Lucy* v. *Levingston*, 2 Lev. 26; *Lewes* v. *Ridge*, Cro. Eliz. 863; *Bickford* v. *Page*, 2 Mass. 460; *Slater* v. *Rawson*, 1 Metc. 456; *White* v. *Whitney*, 3 Metc. 81; *Clark* v. *Swift*, 3 Metc. 390; *Chase* v. *Weston*, 12 N. H. 413; *Garfield* v. *Williams*, 2 Verm. 327; *Beardsley* v. *Knight*, 4 Verm. 471; *Mitchell* v. *Warner*, 5 Conn. 497; *Kane* v. *Sanger*, 14 Johns. 89;, *Beddoe* v. *Wadsworth*, 21 Wend. 120; *Garrison* v. *Sandford*, 7 Halst. 261; *Randolph* v. *Kinney*, 3 Rand. 394; *Backus* v. *McCoy*, 3 Ham.

211 ; *Allen* v. *Wooley*, 1 Blackf. 149. The cases of *Kingdon* v. *Nottle*, 1 M. & S. 353 and 4 M. & S. 53, are denied to have been correctly decided in *Mitchell* v. *Warner*, 5 Conn. 497; and in *Clark* v. *Swift*, 3 Metc. 390. Kent, also, in speaking of covenants, which run with the land says, " they cannot be separated from the land and transferred without it, but they go with the land, as being annexed to the estate." 4 Kent's Com. 472, note b.

Admitting the covenant in the deed, alluded to in *Fairbanks* v. *Willsamson*, to be a covenant that might run with the land, it could not run or be transferred by law, to the assignee of the grantee, so as to enable him to derive any benefit from it. Nor could it operate in his favor by way of estoppel to prevent circuity of action, for he could maintain no action on that covenant. Nor could it so operate in any other mode, unless there had been found some allegation in the deed, by which the releasor had asserted some matter to be true, which he must necessarily contradict, and deny to have been true, if he would claim to be the owner of the land. In such case he would have been estopped, because the law will not permit one, who has in such a solemn manner admitted a matter to be true, to allege it to be false. " This," says Kent, " is the reason and foundation of the doctrine of estoppels." 4 Kent's Com. 261, note d; where he also says, " a release or other deed, when the releasor or grantor has no right at the time, passes nothing, and will not carry a title subsequently acquired, unless it contains a clause of warranty; and then it operates by way of estoppel, and not otherwise." The covenant of non claim asserts nothing respecting the past or the present. It is only an engagement respecting future conduct.

One, who acquires no title by a release without covenants respecting the title, cannot recover back the purchase money, which he paid for it. *Emerson* v. *the County of Washington*, 9 Greenl. 88. To permit him to acquire a title subsequently purchased by his releasor, would often enable him to obtain in another and less direct mode, property of more value than the purchase money.

The conclusion is, that the doctrine asserted in the case of *Fairbanks* v. *Williamson*, cannot, upon sound principles be admitted, and that the decided cases in this and other States, are opposed to it.

When Jellison made his deed of release to the demandant, he was in possession in submission to the title of Ward, and was but a tenant at will to him. Not being seised of a fee simple he could not convey it. The demandant must have known, when he received that deed, that Jellison had no title and could convey none, for he at the same time, took an assignment of Jellison's contract, to purchase that land of Ward. He subsequently acted as an appraiser to make a levy and to pass the title to a part of that land, from a grantee of Jellison to a creditor of that grantee. There is no allegation in the deed of Jellison to the demandant respecting the title, which it would be necessary for Jellison or his grantee to deny or contradict by setting up a title subsequently acquired.

Demandant nonsuit.

F. A. Pike, for demandant.

J. Granger, for tenant.

SILAS PIERCE *versus* JOSEPH WHITNEY.

Counsel will not be permitted to argue to the jury, that the note before them was payable, according to the agreement of the maker, at a different place, than is indicated by the note itself.

In an action against the indorser, evidence that the maker of a note addressed a letter to the holder, informing him that he should not be able to pay it at maturity, and requesting an extension, is not admissible to excuse a presentment of the note at the maker's place of residence and business, at its maturity.

The parties to a note, deposited in a bank in Boston for collection, cannot be affected by an usage in the other banks, which has no existence in the bank where it is lodged.

THIS was an action brought upon a note of hand, of this tenor. "Boston, May 18, 1837. Six months from date, value

received, I promise to pay to the order of Joseph Whitney, three thousand three hundred and seventy-eight dollars and sixty cents. *Luther C. White*", and indorsed by the defendant.

At the trial before TENNEY, J. the plaintiff showed by *Charles Hayward*, a notary public, that at the maturity of said note he demanded payment of the same of the maker, at the Commonwealth Bank in Boston, where the same was lodged for collection, and notice of the dishonor of the same on that day was given to the indorser, through the postoffice, directed to him at Calais, Me. It was admitted that the notice to indorser was conformable to law.

The plaintiff also proved by the messenger of the Commonwealth Bank in the fall of 1837, that he had charge of the collection paper left at said bank for collection, and that said note was left in said bank for collection, and that, from a week to ten days before the note fell due, notice was given to White, the maker, through the postoffice, directed to Calais, Me., where White at that time lived, informing him where the note was, and that it was left in said bank for collection. Also that when the note fell due, demand was made upon White, through the postoffice, directed to Calais, Me.

The plaintiff showed by one *Bela Keating* a general usage of the banks in Boston as to demand and notice, and among other things, that it was the custom of the Boston banks, when a note is dated at Boston, and the maker and indorser live out of the State, and it is payable at no definite place, to notify the maker that the note is at the bank, where it may be, for collection, a reasonable time before it becomes due; that if it is unpaid at maturity or the last day of grace, it is delivered to a notary, to be protested, who notifies all the parties of the non-payment of the note on the same day; that he never knew of any other usage of the banks in Boston, in relation to such paper; that the notices are sent by mail, and the notary, on the day the note becomes due, presents it at the bank, to some officer of the bank, and demands payment; and this is done at the bank at which the maker has been notified that the note is left. It also appeared by this witness, that he had been

a collecting clerk in a Boston bank for twelve years heretofore, and a merchant since, and had had the notes of Whitney, which had been lodged at the banks for collection.

It also appeared by the deposition of *Mark Healy*, that he had long been a director of a Boston bank, and president of the Merchants' bank, and was acquainted with the usages of the Boston banks, and he with another witness generally confirmed the other testimony as to the usage.

The plaintiff also proved by the deposition of *H. N. Crane*, that he deposited the note in suit, in the said bank for collection, and particularly requested the messenger to notify the maker where the note was, and that the maker wrote back that he should not be able to pay the note at maturity, and wished an extension.

To show the knowlege of defendant of said usage, the plaintiff introduced three notes of hand, for large amounts, and one draft and acceptance, which were lodged in the North bank, Boston, for collection, and which afterward became the property of said bank, and which were put in suit in this county, and the defendant defaulted. On one of said notes, said *Whitney* was indorser, and also upon the draft. The plaintiff also showed that the defendant had long been engaged in business as a merchant in Calais, and had drawn many drafts on persons in Boston, and had had notes frequently at the different banks in Boston, and was frequently there.

It also appeared that the maker of the note had been a director in the Calais bank five years, and had indorsed notes and drafts, payable at Boston, for defendant and others. Upon this evidence, the plaintiff's counsel contended: —

1. That as the note was dated at Boston, and White, the maker, was informed where the note was left and to be found, before its maturity, and had notified the holder, that he could not pay it at maturity, and wished an extension of the same, the same having been given for goods purchased by the maker in Boston; that there was evidence from which the jury might presume, that by the understanding and agreement of the parties, at least on the part of White, that the note was to be

paid in Boston. But the presiding Judge, would not allow the counsel for plaintiff to urge such evidence upon the jury.

2. The plaintiff's counsel contended, that, as the evidence proved that the maker of said note could not pay it at maturity, and had so informed the holder, it became unnecessary to make a demand upon the maker at Calais, in order to charge the indorser; that the note was dishonored if not paid at maturity, and the maker had no right to refuse payment at the bank when he had been informed where the note was, and when he had made no objections to such place of payment, and that it was sufficient under such circumstances, if the note was left in a bank in Boston, and notice given on the last day of grace to the indorser, of the demand at the bank, and that the note was not paid, and that the holder looked to him for payment, and this irrespective of any usage of the banks of Boston, variant from the law merchant to bind the indorser, but the Judge ruled otherwise.

3. The plaintiff's counsel contended, that if from the facts and circumstances of the case, it appeared that the maker of the note had such demand made upon him as to cause a dishonor of said note, according to the usage of the Boston banks, and notice was given to the indorser in due season, that although *White & Whitney* were unacquainted with the usage, yet the indorser would be liable, but the Judge ruled otherwise.

The plaintiff's counsel further contended and requested the Judge to instruct the jury, that if they found such a general usage of the banks in Boston, as had been testified to, and *White & Whitney* were acquainted with that usage, or either of them, and that demand and notice has been made and given in conformity therewith, the indorser would be liable in this action, but the Judge refused to give such instruction.

In summing up, the presiding Judge charged the jury, that if it was proved to them that there was a custom of the Commonwealth Bank existing before and on Nov. 21, 1837, (the time this note was at maturity) when a note was left there for collection, the parties to which lived out of the city, to notify and

make demand as had been done here, and *White & Whitney* were acquainted with such custom, or either of them, the indorser would be liable; but that a general custom of the banks of Boston, if found to exist at or before said time, and that *White & Whitney*, or either of them, were acquainted with such usage, would not be sufficient to hold the indorser.

The jury returned a verdict for the defendant, and also to a question submitted to them by the Court, whether there was any such usage as testified to in the Commonwealth Bank, answered that it did not exist.

And exceptions were taken to the rulings in the trial.

Bridges, for plaintiff.

There are cases, where no demand need be made upon the maker of a note to bind the indorser; as where he has fully secured himself from loss, or where the note is payable at a bank; and the maker of a note may agree to waive a demand upon him, or that the demand may be made at a particular place other than his place of business or residence; or from usage at the bank, where the note is discounted or left for collection, he being shown to be acquainted with that usage, he will be considered as waiving a condition implied by law in his favor, if a demand is made upon him in accordance with such usage, and in these cases an indorser will be held liable to pay, if he has notice in due time. And if the maker of a note make a payment on the day the note falls due, this would be evidence of presentment on the day it was due. 20 Maine, 98.

From this it appears that it is immaterial to the indorser in what form the demand was made upon the maker, if seasonable notice of the non-payment of the note was given to him. 17 Mass. 449.

Do not the facts in this case show a waiver on the part of White as to a demand on him at Calais? And why might not a jury infer from them, the understanding of White, that the note was to be paid in Boston? Why was the counsel refused this? Suppose White, at the time the note was given, had agreed with the holders that they need not send the note to Calais to make demand upon him when due, but that he would

pay it at the Commonwealth Bank, if left there. It is not easy to see why this would not have been binding in law, and also a waiver of a demand at Calais, and such a demand as the maker would be bound by. Then why might not the plaintiff have urged such evidences of waiver upon the jury? Surely if White had no right to refuse payment in Boston and at the bank, then the demand and notice were sufficient, else the law as laid down in the case last cited is not sound. But the principles of that case are cited and commended in 18 Maine, 99.

But I pass to the second and most material point of this case. There was evidence before the jury of a general usage of the banks in Boston to demand and give notice as was done in this case, and also tending to show that White and Whitney were acquainted with it before and at the time the note fell due. The instructions requested on this branch of the case ought not to have been withheld. Bills of exchange and notes of hand are creatures of usage, and the laws regulating the rights of the parties have grown up and been adopted from usage.

Here were White and Whitney, both merchants, and doing large mercantile business, and much of it in Boston, and having many notes and bills and drafts at the banks there, and left for collection. Why should they not know the general usage of the banks upon such a case, and be bound by it, as well as a person living in Boston? It is well settled, that a demand upon one resident in a city, without the note, and on the first day of grace, will be sufficient to hold the indorser, accustomed to do business at the bank. 18 Maine, 99. It was not shown that White or Whitney were accustomed to do business at the Commonwealth bank; but we showed the invariable usage of all the banks in Boston respecting notes like the one in question, and evidence was adduced tending strongly to show the knowledge of both parties to the note. The mode adopted here to charge the indorser was the mode adopted by all the banks in Boston, and no exceptions were known. One would have supposed, when the usage was shown of the kind named, and that

the parties were acquainted with it, and the objection coming up, that it was not shown that such was the usage of the Commonwealth bank before and at the time, &c. and the parties acquainted with it; that the presiding Judge would have given quite a different direction to the cause, than was given and that he would have charged the jury, that "if they believed such was the general usage of Boston banks, from the evidence, they might judge whether or not such was not the usage at the Commonwealth bank, before and at the time the note became due, as the usage embraced all the banks in Boston."

We showed a general usage of a particular place, regulating the trade and business in this particular, and binding upon all acquainted with it. The finding of the jury as to the Commonwealth bank, was in consequence of the erroneous instruction of the Judge.

Downes and *Cooper*, for defendants.

SHEPLEY, J. — The promissory note, on which this action was commenced, appears to have been made in the ordinary course of business. It does not appear to have been made or indorsed with any knowledge or expectation, that it would be discounted or deposited in a bank for collection. Whatever knowledge persons may have of the usages of banks, they can scarcely be expected to make all their negotiable paper with reference to such usages, especially when their residence is established at a great distance from them. In the case of *Maine Bank* v. *Smith*, 18 Maine, 99, the notes were made to be discounted at the bank as renewals, as they are called, of former notes discounted.

It is unnecessary to consider, what might have been the effect of such an usage of banks, as was attempted to be proved in this case, upon the rights of parties to negotiable paper not made or indorsed with any knowledge or expectation, that it was to be discounted or deposited in a bank, if the proof had shown, that they were acquainted with the usage; for the jury have found, that no such usage, as would vary the legal rights of these parties, was proved to have existed at that time in the bank, in which this note was deposited.

The first cause of complaint presented by the bill of exceptions is, that the counsel for the plaintiff was not permitted to make an argument to the jury, to show "that the note by the understanding and agreement of the parties, or at least on the part of White, was to be paid in Boston." In doing so the presiding Judge acted correctly. It had already been decided, that the note was not made payable in the city of Boston, because it appeared to have been made and dated there. 22 Maine, 113. Parol evidence cannot be received or have the effect to show, that a note not made payable at any particular place was in fact agreed to be payable at a particular place. A written memorandum of such a place, at the foot or on the margin of the note, has been adjudged to be insufficient. The place of payment must be stated in the body of the note to make it payable at that place. Story on Notes, § 49, and notes 1 and 2.

The second cause of complaint is in substance, that the Court refused to admit proof of a letter addressed by the maker to the holder of the note, before it became payable, informing him, that he should not be able to pay it at maturity and desiring an extension of the time of payment, to have the effect to excuse the holder from making a presentment of the note at the maker's place of residence and business. The maker and holder, had they agreed to do so, could not change the contract by a parol agreement, so as to affect the rights and liability of an indorser or to excuse themselves from performing the condition required by the law of the contract, unless the indorser had consented to it. Story on Notes, § 291.

The remaining cause of complaint appears to be, that full effect was not allowed to the proof of usage generally of the banks in Boston upon the rights of these parties, although that usage was not found to have any existence in the bank in which this note was deposited. To have any effect upon the contract, if it be not so made with reference to the usage, that it becomes a part of it, the usage must be applied to it. As well might it be contended, that a presentment made by an

individual not in conformity to law, would be good, because there was in that place a usage of banks, by which it might have been good, if made by them, as that it would be by a corporation having no usage of its own differing from the law, because other corporations had such a usage. *Camden* v. *Doremus*, 3 Howard, 515.

Exceptions overruled.

JACOB LONGFELLOW *versus* LUTHER QUIMBY *& al.*

The power, which the county commissioners exercise over roads, under the statute, is a judicial power, and the records of their proceedings and judgments, so long as they act within the sphere of their duty, cannot be incidentally impeached.

Hence, if there are important irregularities in the location of a road, or in the assessment of taxes to build it, they can be taken advantage of only by *certiorari*.

In a sale of lands by a county treasurer for unpaid taxes, where there is no stipulation before the sale, that a credit is to be given, and after the sale the treasurer receives a note for part of the purchase money, this does not invalidate the sale.

Where a trespass has been committed upon the land, of which the plaintiff is part owner, his right of action cannot be defeated by a subsequent payment to his co-tenants.

In an action of *trespass quare clausum*, evidence is not admissible of acts of trespass upon other lands of plaintiff, than those described in his writ.

Nor is the trespass, as matter of law, a wanton one, though committed without license from any owner of the land.

"The trouble of looking after trespassers," is not to be taken into consideration by the jury in making up the damages in such an action.

The law does not recognize interest as the exact measure of damages for the detention of property taken in trespass, in addition to its value.

THIS was an action for *trespass* upon certain lots in townships numbered six and seven in the county of Washington. The writ was dated in April, 1845.

The cause came on for trial at the last term of this Court, before WHITMAN, C. J.

The plaintiff read a deed from George S. Smith, county treasurer, to him of 10,674 acres of land in east half of town-

ship numbered six, dated Oct. 22, 1840, and another deed of the same date, from said Smith as county treasurer, to the plaintiff of 29,000 acres in township numbered seven.

It was admitted, that said townships were lotted prior to the assessment of the taxes referred to in the deed of said Smith.

It appeared in evidence, that defendants in the winter of 1844 and 1845, cut and hauled a large amount of timber from some portions of the land described in plaintiff's writ.

The defendants proved by George S. Smith, that the sale of said townships by him on the 9th Oct. 1840, were on the usual terms for cash, that plaintiff paid him $1,000 down, and gave his note for the balance of about $2,000. This was done, as he did not have occasion to use the money, and considered the note as good as bank bills.

The defendants also introduced office copies of deeds, executed in 1836, from W. T. Pierce and H. Pierce, to J. B. Hutchinson, M. Talcot and A. Sweetland of an undivided half of all the lots in No. 7, mentioned in plaintiff's writ. Also a deed from plaintiff to J. B. Hutchinson and others in 1843, of an undivided half of the lots named in the plaintiff's deed. Also a deed from Fuller & Warren to W. T. & H. Pierce in 1835, of three-fourths of the lots named in the writ. Also a deed from the State of Maine to Wm. A. Blake in 1835, of township No. 6, and from Blake by his grantees in 1843, to one of the defendants.

It also appeared from the testimony of *Waldo T. Pierce*, that since the year 1835, he had acted as agent for J. B. Hutchinson, Talcot and Sweetland, of the State of Connecticut, in the management and oversight of their interests in township numbered seven, and in two lots in number six; that some years he had given permits, and thought he had given one, to one of defendants in 1842 or 1843; that this permit was for one team; that since that time, defendant had cut a small quantity almost every year on some of the lots; that he had two persons to examine those lots, and ascertain the quantity cut, and he had settled with defendants for all that had been cut, or reported by scalers as cut on said land by defendants. That a few weeks

since he had settled with said Hutchinson and others, who were all present with the defendants at Bangor, for all the timber that had been cut on these several lots.

The plaintiff also put in an abstract of the record of the county commissioners, under which said county treasurer sold said townships to the plaintiff, and a copy of their records relating to the opening of the road through the same. It appeared that public notice was duly given in the papers, of the proposed sale.

With a view to settle the question of damages the Judge ruled that the action was sustained, and instructed the jury, that as to township No. 7, the defendants, having failed to prove a license from any owner of said lots therein, were to be deemed wanton trespassers, and that plaintiff was entitled to recover the full value of the timber taken off, and such further compensation as he ought, in the opinion of the jury, to have for looking after the trespassers, and in addition to the damages occasioned by being deprived of the value of the timber, since it was taken off, that it was not unusual to consider the interest of the value, as such compensation. That as to lots in No. 6, the defendants had made a show of title; and that if they acted in good faith, supposing they had good title to the land, at the time when the acts complained of were done, the measure of the damages under the count for *trespass de bonis asportatis*, would be the value of the trees when severed from the freehold, and compensation for his trouble and damages for detention of the value as in Township No. 7. The jury returned a verdict for the plaintiff.

If in the opinion of the whole Court, the action was not maintainable, the verdict was to be set aside and the plaintiff to become nonsuit; but if, in their opinion, the action is maintainable, and the rulings of the presiding Judge were correct, judgment was to be entered on the verdict; but if said rulings were not correct, the verdict was to be set aside and a new trial granted.

Hobbs, for defendants, argued 1st, that as to the acts on township No. 7, the defendant had a license or its equivalent

from the tenants in common, or some of them, as was shown by the testimony of Peirce, and that a settlement of a trespass by one tenant in common bars the action of the plaintiff, he being co-tenant. 1 Saund. 103, 106; Com. Dig. pl. 3, 35.

2. The assessment of the tax by commissioners was illegal, and therefore void. The townships were lotted before the assessment, and the taxes should have been assessed upon the several lots in the same way that town taxes must be. *Shimmin* v. *Inman*, 26 Maine, 228.

3. That the testimony as to trespasses on lots 79 and 80, not being described in the writ, was wrongfully admitted.

4. That the sale by the county treasurer, was in effect on credit, and therefore plaintiff's title failed. *Cushing* v. *Longfellow*, 26 Maine, 306.

5. That the record of the commissioners, being in the case, the Court will look into it, without a formal *certiorari*, and give only proper effect to their unlawful proceedings.

6. The location of the road through No. 6 and 7, was illegal. It does not appear that the commissioners met at the time and place appointed. The adjudication was illegal for there was no quorum present. Act of 1832, c. 54, § 2. It does not appear that all or a major part met. Three years were not allowed to open the road, but only eighteen months. Act of 1835, c. 90, § 1. Nor did they decide whether the land was enhanced in value. Act of 1833, c. 101, § 1.

7. The damages were erroneously assessed under erroneous instructions. The question whether the defendants were wanton trespassers or not, was for the jury to settle, not the Court. Nor was the instruction correct as to the measure of damages. "Compensation for trouble in looking up trespassers," is too remote to be allowed to enter into the computation by the jury. And the instruction as to interest is not sustained by law. *Cushing* v. *Longfellow*, 26 Maine, 306.

J. Granger, for plaintiff. As to the alleged illegality of the assessments, if that matter can be inquired into in this way, there was no validity in the objection. Different owners may have separate assessments, when they furnish evidence of the

title at the proper time. The advertisements here were in general terms, not stating the lots, and rightfully so, as has been already decided.

In regard to the cutting on No. 7, under an alleged license from Peirce, it turns out from an examination of the testimony, that there was no license, but merely that Peirce has settled with defendants since the commencement of this action. That can have no influence, for he had no authority to interfere in this suit. One tenant in common has no right to grant a license to cut timber on the common land. R. S. c. 129, § 7. The defendant has failed to show any right to go on to this township.

Lots 79 and 80, are not embraced in the description in the writ, and if plaintiff is not entitled to recover for what was proved to have been cut on these, he will remit enough of the verdict to cover that amount. The evidence was explicit as to the quantity.

The sale by the county treasurer was not one on time, according to his own testimony, and if he took a note for a part of the purchase, instead of cash, the defendants have no concern with it. The treasurer could settle for a cash sale as he pleased.

The objections to the location of the road cannot be valid. The record of the commissioners is sufficient until it is vacated, and it cannot be impeached in this method.

As to the instruction in regard to the damages, the verdict ought not to be disturbed, when the Court can see that no injustice has been done. The verdict is actually less than the value of the timber cut, as stated by the only witness who testified respecting it.

TENNEY, J. — The plaintiff claims title to the land, on which he alleges that the trespass has been committed by the defendants, under a sale made by the treasurer of the county of Washington, to him on October 9th, 1840. This sale was for the purpose of obtaining the tax, which had been assessed upon the land by the county commissioners of that county, to make

the road laid by them through the townships, in which the land was situated.

The defendants deny the title claimed by the plaintiff, and therefore his right to maintain this action, upon the ground, that the records of the county commissioners, introduced, show, as it is contended, that they did not follow the steps pointed out by the statute, in their attempt to establish the road; and several defects in their proceedings are pointed out and relied upon. In adjudicating upon the necessity of the road and in their subsequent acts in its location, the commissioners had jurisdiction of the subject matter. It appears that they gave notice to all interested, in a manner contemplated by the statute; and therefore the defendants became so far party to the proceedings, that they are precluded from denying the jurisdiction of the Court. The power, which the commissioners exercised in reference to the road, under the statute, was a judicial power. The records of their proceedings and judgments are, therefore, entitled to the same respect as the records and judgments of other tribunals, so long as they act within the legal sphere of their duty; they have the character of judgments, until impeached in some proper mode.

The road, which the commissioners laid out, was such *de facto*, and the failure of the plaintiff to recover upon this ground, would have no effect to make it otherwise. It cannot be declared a nullity, until the proceedings are quashed on *certiorari*; and this can be done, only in the exercise of a sound discretion of this Court, where the subject is legally before it, notwithstanding it may be seen by the record now in this case, that there were important omissions and irregularities. To allow these omissions and irregularities to have the effect contended for, as matter of right and law, would be giving to them a consequence, when incidentally presented, which they might not have if they were directly brought to its consideration on a petition for *certiorari*. And the road might continue to exist as a legal highway, while the power, which the statute requires should be exerted for its construction and repair, might be practi-

cally denied. Principles which tend to such results cannot be admitted.

The authority of county commissioners, on the subject of highways, has been regarded in this State as differing materially from the powers vested in towns and their officers over town and private ways. It has been held by this Court, that a writ of *certiorari* does not lie to quash the proceedings of selectmen, and the town where they have attempted to lay out and establish ways, which they are authorized to do, and failed to comply with all the legal requirements, as it does where highways have been located by the court of sessions or county commissioners; and hence the proceedings of towns in this matter, have been allowed to be examined and controverted in actions of trespass *quare clausum fregit*. *Harlow* v. *Pike*, 3 Greenl. 438. The Court say, in the case of *Parks* v. *the City of Boston*, 8 Pick. 218, "The uniform distinction is between judicial and ministerial acts; the former being only voidable for error, and the latter being merely void, if not done in pursuance of lawful authority. And as judicial acts are valid, until reversed for error, a writ of error or *certiorari* will lie in such cases. If the proceedings are in a Court of record, according to the course of the common law, a writ of error is the proper remedy, to reverse and vacate an erroneous judgment; otherwise, the remedy is by *certiorari*. *Wales* v. *Willard*, 2 Mass. 120; *Sumner* v. *Parker*, 7 *ibid.* 79; *Cushing* v. *Longfellow*, 26 Maine, 306.

Another objection relied upon by the defendants is, that the county commissioners erred in the manner in which they made the assessments upon the land of the township, for the purpose of making the road; that instead of assessing the land in gross, they were required to impose the tax upon the several lots, into which the town had been divided. And the case of *Shimmin* v. *Inman*, 26 Maine, 228, is adduced as authority in support of the proposition contended for. The same provision of the statute, which authorized the commissioners to establish the road, empowered them to raise a tax with which to support it.

Their power is judicial in one case as in the other, and the

judgment which is the result of their deliberations and acts, as disclosed by their records, must be annulled in another process, before the assessment can be pronounced void. But it may not be improper to remark, that the statutes regulating the assessments of unimproved lands of non-resident proprietors in incorporated towns, and that for the direction of county commissioners in the performance of their duties which we are now considering, are unlike. In the latter, it is provided, that the assessments shall be made on such tracts of land, township or plantation at so much per acre, as the commissioners shall adjudge necessary for making or mending such highway, and defraying the necessary expenses attending the same; if the lands are held in severalty, the proprietors shall be taxed in severalty, provided such proprietors shall previously furnish the Court with proper documents for that purpose. Stat. 1821, chap. 118, sect. 24. The case does not show that such documents were furnished, and it is not perceived that there was any error on this account in the assessment.

The objection to the validity of the sale of the land, by the county treasurer, has no foundation in fact. The sale was on the usual terms for cash, and there was no understanding, that the treasurer should not call on the purchaser for the money till it was wanted. After the sale, the plaintiff paid a part of the consideration and gave his note for the balance, the treasurer having no occasion for the money, and considering the note as good as the common currency of the country. This is unlike a case, where a stipulation is made before the sale, that a credit is to be given to the purchaser. Here the treasurer, as such, was accountable for the whole sum for which the land was sold, and the taking of the note for a portion of the purchase money was a matter between the plaintiff and himself, in his private character.

No evidence was adduced tending to prove that the defendants, or either of them, entered upon the land described in the plaintiff's writ, and cut the timber thereon under a license from any one; and their acts at the time they were committed, were a trespass upon the rightful owner. For this trespass, this ac-

tion was properly brought by the plaintiff. The subsequent payment to the other tenants in common with the plaintiff cannot defeat the action. The injury complained of, was the breaking and entering the plaintiff's close, aggravated by cutting and carrying away the trees thereon standing. The damage sought to be obtained was to the plaintiff alone, and to recover this, he is entitled to his several action. R. S. chap. 129, sect. 17. If the co-tenants had themselves cut and carried away the timber in the same manner, that the defendants are charged with doing it, the cutting and carrying away would have been unlawful, and they would have been liable in an action, for three times the value thereof, to the plaintiff. R. S. chap. 129, sect. 7. Their receipt of the value of the timber belonging to the plaintiff, given to the defendants, cannot take away his right to maintain the action, previously commenced, for the loss which he has suffered by their unauthorized acts.

The plaintiff was allowed to introduce evidence against the objection of the defendants, to show that a quantity of timber was cut by them on parts of township No. 7, which parts were not described in his writ as land on which a trespass was alleged to have been committed. This was incorrect. A reduction of the damages found by the jury, which is offered by the plaintiff, cannot be made with certainty. The quantity and the value of the timber cut upon this portion of the township is shown, and no contradictory proof appears to have been adduced; but no evidence is reported of the whole quantity taken from this township, and nothing exhibiting the sum allowed by the jury in addition to the value of the timber.

The jury were instructed, that the defendants, having failed to prove a license from any owner of township No. 7, were to be deemed wanton trespassers and the plaintiff was entitled to recover the full value of the timber taken off, and such further sum as he ought, in the opinion of the jury to have, for looking after the trespassers; and in ascertaining the damages for trespass upon township No. 6, the jury were allowed to add to the value of the trees, compensation for the trouble of the plaintiff. These instructions were erroneous. The mo-

tive of the defendants, if material, was a fact to be found by the jury. The Court could not make the legal conclusion that the acts were a wanton trespass, from the fact that the defendants had no license from the real owners. One may enter upon the land of another by virtue of an authority, which he believes to be fully sufficient; if it proves otherwise, his acts cannot be termed wanton, so long as they were prompted by honest intentions.

The case discloses no attempt to prove any trouble on the part of the plaintiff in looking after the trespassers; and damages would not be increased by reason of what did not exist. The jury might well have understood, that they were permitted to presume that the plaintiff had been put to trouble in seeking indemnity for his losses, by exertions to ascertain who invaded his rights, and to bring them to justice, and that damages should be allowed therefor; and it may have been done accordingly.

If evidence upon this point had been introduced, it was not competent for the jury to have increased the amount of their verdict on that account. Damages are given as compensation, recompense or satisfaction to the plaintiff for the injury actually received by him from the defendants, and they must be the natural and proximate consequence of the act complained of. 2 Greenleaf's Evidence, sect. 253 and note, 2nd ed.; *ibid.* 255. The trouble of looking after the trespassers is not of this character, and cannot be considered by the jury in the estimation of damages.

The law does not recognize interest as the exact measure of damages for the detention of property taken in trespass in addition to its value. The jury could not have so understood the Judge in his instructions. He laid down no rule of law, which required them to make that addition or to restrict them thereto. *Verdict set aside, and new trial granted.*

HORACE VERY *versus* THOMAS MCHENRY.

Where A, an inhabitant of this State, performed labor in New Brunswick, for B, who was an inhabitant of that Province, and C, who was an inhabitant of that Province, received means from B, for the purpose of paying the claims of A and others; his undertaking is to be performed in that Province.

The bankrupt laws of another country cannot govern our Courts, in regard to contracts made there, excepting from a principle of comity, extending the right to other nations, which it demands and exercises for itself.

But where it is manifest, that the foreign bankrupt law was not intended to have effect beyond the jurisdiction of the government, where it was made, the Courts of another government cannot give it an operation beyond the purposes of its authors.

Nor would the Court regard such a law if it should make an unjust discrimination between the foreign and domestic creditor.

A certificate of discharge in bankruptcy, from the contract, according to the law of the place where it is made, and where it is to be performed, is a legal bar to an action in this State, though the plaintiff is, and ever has been, one of its citizens.

And such certificate, under the bankrupt law of New Brunswick, will be a bar to an action on the contract, though the defendant acted originally in a fiduciary character.

THIS was an action of assumpsit. And it came before the Court, upon a statement of facts, from which it appeared that the plaintiff was a citizen of this State, and performed labor for one *Duncan Barber*, upon his mills situated in the British Province of New Brunswick. Toward the close of the same year in which the services were performed, Barber finding himself in failing circumstances, executed for the benefit of his creditors a judgment bond in favor of the defendant, a citizen of New Brunswick. The creditors were named in the bond, and the plaintiff was one of them. Execution upon the bond was taken out by the defendant, and levied on *Barber's* property. The plaintiff specially demanded the amount of his claim of defendant, prior to the commencement of this action.

It also appeared that defendant, since assuming this trust, had obtained a certificate of discharge under the bankrupt law of New Brunswick, and the law was enacted after the services were performed, and the trust assumed. The Court were

authorized to make such inferences from the facts, as a jury might do, on applying to them the principles of law.

J. & B. Bradbury, for plaintiff.

The facts agreed upon and the deposition introduced show that the plaintiff had a valid claim against the defendant. The duty of relieving himself from this obligation now rests upon him. To do this, he offered the bankrupt laws of the Province of New Brunswick and certificate of a discharge under them.

He also offered a deposition or two, to show that the whole amount received by him, under the judgment bond, was exhausted in expenses incurred in prosecuting that claim, and in payments to other creditors, than plaintiff.

1st. The decisions of the Supreme Court of the United States have uniformly maintained the doctrine, that bankrupt or insolvent laws have no operation beyond the limits of the State adopting them.

A discharge under a foreign bankrupt law is no bar to an action in this country. *McMillan* v. *McKill*, 4 Wheat. 209; 4 Cond. Rep. 424.

A bankrupt or insolvent law cannot have an extra-territorial operation. Both parties must be citizens of the State where the law is made, and the suit must be brought in that State. *Sturgis* v. *Crowninshield*, 4 Wheat. 122; *Ogden* v. *Saunders*, 12 Wheat. 213; 12 Wheat. 272; 6 Peters, 635. The same doctrine has been held in several cases in the Massachusetts courts. *Proctor* v. *Moore*, 1 Mass. 199; *Baker* v. *Wheaton*, 5 Mass. 511; *Watson* v. *Bourne*, 10 Mass. 337, 340; *Maynard* v. *Marshall*, 8 Pick. 194.

It is not to be denied, that there is much conflict among the authorities of different States upon this subject, and even of the same State; but in Massachusetts the weight of authority seems to restrict the operation of bankrupt and insolvent laws to the territorial limits of the nation making them.

2. Suppose we adopt the broadest rule for which the defendant can contend, and, then tracing out its modifications, let us see to what result we shall arrive. This rule, as laid

down by Judge Story in his Conflict of Laws, is, "That a discharge of a contract by the law of the place where it is made is a discharge every where."

It would be absurd to say that the laws of a foreign nation could have any force in our country, excepting from international comity. The judicial power in each State will use its own discretion in determining how far such laws are to be recognized or sanctioned. And in the exercise of this discretion, certain modifications and limitations of the general rule of "private international law" have been established.

Let us notice some of them. The cases, without exception, hold that if a contract is made, or is to be performed in any other county than that in which the discharge is obtained, such discharge is no bar to the action. Now personal property, including debts, has no locality, but follows the domicil of the owner. *Story's Confl. of Laws*, page 346, sec. 410.

The plaintiff's domicil is, and ever has been, in this State. It is the duty of the trustee, (defendant,) to pay the amount due plaintiff at his domicil.

Another exception to the general rule is, that a foreign bankrupt's discharge will not avail as a defence, where the foreign law is manifestly unjust and injurious to the rights of our citizens. *Story's Conflict of Laws*, § 349; 13 Mass. 6.

When the defendant assumed his liability to the plaintiff, the bankrupt law of New Brunswick had not been enacted, nor did it become a law until two years afterwards. This liability was assumed with no reference to such an act by either party. It is a law which no State of this Union could constitutionally pass.

Still another exception is to be found, where the foreign bankruptcy or insolvent law is temporary, local or partial in its operation. Story's Confl. of Laws, § 349, 350, 351. *Prentiss & al.* v. *Savage*, 13 Mass. 20. This latter case is directly in point.

The very title of the New Brunswick law indicates its local character, "an act relating to bankruptcy in this Province." No provision is made with reference to foreign creditors. No

notice to them, or which could possibly reach them, is provided.

Aside from the foregoing considerations, there is still a fatal defect in this defence. The claim, upon which this suit is instituted, is one which cannot be affected by the bankrupt law of New Brunswick. It is not an ordinary debt or contract. It is a case of trust. The money transferred by Barber to the defendant was the plaintiff's. McHenry was but a trustee. His case is like that of an executor or administrator. The money received for plaintiff could not be made by defendant, a portion of his assets in bankruptcy. It could not pass to defendant's assignee. 1 Term Rep. 619; 8 Pick. 113.

From the character of the evidence put in by defendant, the ground will probably be assumed, that he has converted the whole amount placed in his hands by Barber, to the payment of the other creditors intended to be secured by the judgment bond, and that therefore, he is not bound to pay the claim in suit.

To this position are two answers: —

1. The transfer of the property was for the benefit of all the creditors named, among whom the plaintiff was one. If there was not enough to pay in full, there should have been a *pro rata* distribution.

2. But it is not true that the fund has been exhausted by payments to other creditors than the plaintiff, and in expenses, as appears from a careful examination of the evidence. And upon such careful examination, the Court cannot but conclude, that a larger portion of this trust fund than the plaintiff's claim is now in defendant's possession, or has been misappropriated by him, in which case he is justly chargeable.

F. A. Pike, for defendant, contended, that there was no evidence to satisfy the Court of any claim against the defendant; but if there was, he relied upon two grounds of defence. And the first was a discharge under the bankrupt law of New Brunswick.

The contract upon which this suit is founded, was made in

New Brunswick. It was also to be performed there. 3 Johns. Ch. 587; 6 Peters, 644; 3 Wheat. 101; 16 Mass. 477.

The general rule is, that a discharge from the contract according to the law of the place where it is made, or where it is to be performed, is good every where, and extinguishes the contract. Story's Confl. of Laws, § 335; 2 Kent, 332, and others cited.

According to the bankrupt law of New Brunswick this contract is discharged. *Bankrupt law*, 1843, § 24.

Upon general principles then the certificate of discharge in bankruptcy is a bar to this action.

The only question on this point, is, whether there is any thing which takes it out of the general rule. The plaintiff's counsel offers several reasons why this case is an exception: — 1st. The plaintiff is an American citizen, and therefore not bound by the discharge. To this point he cites 4 Wheat. 209. The gentleman has omitted the most important part of the marginal note to the case, which is "a discharge under a foreign bankrupt law is no bar to an action in this country *on a contract made here.*" The other cases, cited from the United States Court, settle the important point, that under the present Constitution of the United States, the different States cannot pass insolvent laws, which shall bind others than their own citizens. They refer purely to State powers under the Constitution.

As to the decisions from Massachusetts, I think hardly any one of them denies that a contract, *made and to be performed in any country,* is discharged by the bankrupt law of that country.

The continental jurists recognize no distinction between citizens and foreigners. The English decisions are understood to maintain the universality of the doctrine, whatever may be the allegiance or country of the creditor. And a like doctrine would seem generally to be maintained in America. Story's Confl. of Laws, § 340.

The second reason of plaintiff for restricting the operation of this discharge is already answered. The debt in this case, if any, was payable in New Brunswick. It was the plaintiff's

duty to demand the payment of defendant, and defendant to pay the amount due plaintiff at the defendant's domicil. 14 Mass. 428; 3 Pick. 213; 4 Mass. 634.

The third objection is to the law itself, and is the same objection, which is made to all bankrupt laws. But the parties, when they made their contract, should have taken into consideration the power of the legislature to make such a law, although it had not then an existence.

The fourth objection might have some show of support if the law was temporary, local or partial, but I am at a loss to see how either of these epithets can be applied to it.

The other objection to the efficiency of the discharge in bankruptcy, I do not see the force of. In the first place, there is no exception in the New Brunswick law of cases of trust. If the defendant had received moneys of Barber, for plaintiff, and had not paid them over, would not that have constituted a "debt," or if not a debt, such a "claim or demand" as is provided for in the law. There is no proof when the demand was made upon the defendant in this case, but this "claim" could have been proved in bankruptcy even without previous demand.

But suppose there was a "fiduciary" claim in the law, it would then be no better for plaintiff. In New York, under the bankrupt law of 1841, it has been held that debts of a commission merchant, for goods sold and delivered, are not "fiduciary." The money received by an auctioneer or commission merchant, for goods sold and delivered, is his own, and not the money of the owner of the goods entrusted to him for sale. *Commonwealth* v. *Stearns*, 2 Metc. 343. If it is his own money, it passes of course to his assignee.

The second branch of the defence is the obvious one, that defendant has paid out the money received under the judgment bond, to individuals to whom he became responsible for Barber, before taking the bond. The counsel examined this point of the defence at great length, but the ground taken in the decision renders it unnecessary to report his views.

TENNEY, J. — In 1839, the plaintiff, a citizen of this State, performed labor in the British Province of New Brunswick, for Duncan Barber, who resided there. No special agreement between them being shown, the promise of Barber to make payment was implied; and he was bound to fulfil that promise on the performance of the service by the plaintiff. The liability of the defendant, if any existed, resulted from the receipt of means, from Barber, for the purpose of paying the plaintiff's and others' claims. The transaction which created this supposed liability, took place in the Province of New Brunswick, and the contract, under which the defendant is attempted to be holden, must consequently have originated there. It was in New Brunswick, that Barber was bound to discharge his obligation in the first instance, and the defendant having assumed the trust to receive money from Barber and to disburse the same to his creditors in that place, he is to be considered as undertaking there to perform these duties. *Lavasse* v. *Barker*, 3 Wheaton, 101; *Coolidge* v. *Poor*, 15 Mass. 427; 3 Johns. Ch. 610; *Boyle* v. *Zacharie & al.* 6 Pet. 644; *Blanchard* v. *Russell*, 13 Mass. 1.

The defendant does not admit, that he was ever under any circumstances liable to the plaintiff. But if it were otherwise he relies upon the certificate of discharge as a bankrupt under the act of New Brunswick, entitled "an act in relation to bankruptcy," and "an act in addition to and in amendment of the law of bankruptcy," as a defence to this suit. The certificate is in the case and is admitted in its terms to be a full discharge under the bankrupt law of New Brunswick; but still the plaintiff insists, that it can have no effect to relieve him from liability in this action.

1. The counsel for the plaintiff contends that the acts referred to, were merely temporary, and not intended in their operation to extend to creditors living beyond the limits of the Province; or if they were intended to be permanent laws, and to apply to foreign creditors as well as to those residing within the Province, that they are unjust to our citizens, as

withholding from them the benefits, to which domestic creditors were entitled.

It is well understood, that bankrupt laws of another country cannot govern our courts here in regard to contracts made there, excepting from a principle of indispensable comity, extending the right to other nations, which it demands and exercises for itself. When it is manifest that the foreign bankrupt law, was not intended to have effect beyond the jurisdiction of the government, where it was made, courts of another government cannot give it an operation beyond the purposes of its authors. If it were designed however to embrace a larger sphere, and to apply to debts due to those out of the jurisdiction, but its provisions insured to domestic creditors in effect all or more than a fair proportion of the assets of the bankrupt, and at the same time provided for the discharge from all claims foreign as well as others, national comity could not be expected to extend so far, as to require courts to lend their aid in doing the injustice that such a law would occasion, to the citizens of the country where they exercise jurisdiction; where the foreign law must obviously deprive citizens or subjects of another government, of rights, which it secured to its own, it certainly ought not to be respected by tribunals of the former, and in the exercise of the discretion with which they are entrusted, such law would be disregarded.

The acts of the Province of New Brunswick, relied upon by the defendant, are not in their terms temporary only, or limited to claims of persons residing there at the time, when the aid of their provisions should be sought. From the language used, it may be inferred that they were intended as permanent laws, and to have all the operation and effect of general bankrupt laws. The notice to be given to creditors is not such as would convey to them the information, that attempts were making to render their debtors subject to the provisions of the law, with so much certainty in all cases as that required by some other bankrupt laws. But the time allowed, is not so short, or the medium so imperfect as to induce the conclusion, that all creditors beyond the boundary of the Province, were not enti-

tled to prove their claims; or that they would be prejudiced, if they exercised the care and diligence which the law presumes. The residence of the plaintiff was so near the Province, that he was secure from loss from this cause, if he observed such care and diligence, and it does not appear that he has suffered by reason of any such supposed defect in the law.

2. It is insisted that if the bankrupt law of New Brunswick is to be treated as a general law applicable to all creditors, as other general bankrupt laws are, effect cannot be given to the certificate of discharge obtained under it, so as to bar a suit in this State in favor of one, who has always been a citizen thereof. Reference has been made to decisions of the Supreme Court of the United States and of courts of States of the Union, touching the effect of discharges under bankrupt and insolvent laws of individual States, upon suits in courts in other States, than those which passed such laws, or in federal courts sitting in the States, where they existed. In many respects the principles applicable to such questions, might be supposed to apply also to general bankrupt laws of another country. But the doctrines of those decisions are by no means uniform; and the same State has not invariably at different times held the same opinions. In some of the cases, questions touching remedies rather than rights were presented. In others, the power of States to pass such laws under the restrictions of the federal constitution was examined. Judge Story, in his Conflict of Laws of Nations, reviews those opinions without the attempt to reconcile them all; and in section 341, remarks, "under the peculiar structure of the constitution of the United States, prohibiting States from passing laws impairing the obligations of contracts, it has been decided that a discharge under the insolvent laws of a State, where the contract was made, will not operate as the discharge of any contract excepting such as are made between the citizens of the same State. It cannot, therefore, discharge a contract made with a citizen of another State. But this doctrine is wholly inapplicable to contracts and discharges in foreign countries, which must, therefore, be decided upon principles of international law."

It is believed, that in England and in this country, the law touching the effect of a certificate of discharge in bankruptcy obtained in another government is well settled, provided the discharge in the country where it is obtained is absolutely from the contract itself. The general rule is, that a discharge from the contract according to the laws of the place where it is made, or where it is to be performed, is good every where and extinguishes the contract. This rule was recognized by Lord Mansfield in *Ballantine* v. *Golding*, 1 Coop. Bankrupt Laws, 347, 5th Ed. In *Potter* v. *Brown*, 5 East, 124, Lord Ellenborough says, "the rule was well laid down by Lord Mansfield in *Ballantine* v. *Golding*, that what is a discharge of a debt in the country where it was contracted, is a discharge of it every where." And this doctrine is firmly established and generally recognized in America. Story's Confl. Laws, § 335. "The converse of this doctrine is equally well established, viz. that the discharge of a contract by the law of the place where the contract was not made, or to be performed, will not be a discharge in any other country." *ibid.* 342. "The doctrine of the Supreme Court of the United States in *Ogden* v. *Sanders*, 12 Wheaton, 213, is, that a discharge under the bankrupt law of one country does not affect contracts made or to be executed in another. The municipal law of the State is the law of the contract made and to be executed within the State and travels with it, wherever the parties to it may be found, unless it refers to the law of some other country, or be immoral or contrary to the policy of the country, where it is sought to be enforced. This was deemed to be a principle of universal law; and therefore the discharge of the contract or of the parties, by the bankrupt law of the country where the contract was made, is a discharge every where." 2 Kent's Com. sect. 37, page 293, 2nd ed.; *Blanchard* v. *Russell*, 13 Mass. 1; *Hunter* v. *Potts*, 4 T. R. 182; *Smith* v. *Buchanan*, 1 East, 6; *Sturgis* v. *Crowinshield*, 4 Wheat. 122; *McMillan* v. *McNiel*, *ibid.* 209; *Le Roy* v. *Crowninshield*, 2 Mason, 152, 161, 162; *Phillips* v. *Allan*, 8 B. & C. 477.

3. Again it is insisted that this suit is not barred by the discharge of the defendant, because the debt did not arise from an ordinary contract between the parties, but the defendant holds the character of trustee. The funds from which the plaintiff contends he was entitled to payment of his claim against Barber, was received by the defendant originally, acting in a fiduciary character. But he failed to apply those funds on demand, as he was bound to do, so far as the plaintiff was concerned, and was therefore liable for the damages arising from his neglect. It is not contended in behalf of the plaintiff, that the acts of the Province of New Brunswick referred to, by any express provision, exclude trust claims from the general operation of the law; but it is insisted that by the settled law, such exception is made. We have been referred to no decision in which such a doctrine has been held applicable to facts similar to those agreed in the case at bar. In *Westcott* v. *Hull*, 2 Brown, 305, it was decided that a legacy payable to the legatee at the age of twenty-one years, or marriage with interest, was a vested legacy, and the executor having become bankrupt, might have been proved under the commission, and his certificate was therefore a bar. In *ex parte Holt*, in cases in bankruptcy, before the Court of Review, 1 Deacon, 248, a trustee, who was directed to convert the whole of the testatrix's property into money and place the same at interest upon mortgage for the benefit of the *cestui que trusts*, employed the money in his business, paying interest to the parties entitled to it and afterwards became bankrupt and obtained his certificate, without any proof having been made under his commission for the amount of the trust money either by himself or the *cestui que trusts*, who were entirely ignorant of his misapplication of the trust money; he became bankrupt a second time, when the *cestui que trusts*, discovered that he had not invested the money pursuant to the trusts of the will; it was held that his certificate under the first commission was a bar to any proof for the amount under the subsequent fiat. Sir G. Rose, in this case, said, "in the whole course of my experience in bankruptcy proceedings, I

never remember a case, in which it was decided, that where a trustee was liable before his bankruptcy to a *cestui que trust*, for the payment of a sum of money, the certificate would not bar the claim." *Judgment for defendant.*

JOHN MCMILLAN *versus* THOMAS WOOD.

To a note of hand, made in the Province of New Brunswick, to the plaintiff, who has ever resided there, the maker, though living in this State for eleven years, cannot set up as a defence, our statute of limitations.

THIS was an action of assumpsit, commenced in February, 1846, by the plaintiff, who lived in the Province of New Brunswick, against the defendant, who had resided for the last ten or eleven years in this State. It was upon the following writing: — "Due John McMillan the sum of twenty-three pounds, ten shillings and five pence, as settled this day.

"Buctouche, Oct. 3, 1836. Thomas Wood."

"£23, 10s. 5d."

All the other facts sufficiently appear in the opinion of the Court.

D. T. Granger, for plaintiff, cited 11 Pick. 36; 1 Gall. 342.

J. C. Talbot, Jr. for defendant, argued that the statute of limitations may rightfully be interposed as a good defence to the action. The plaintiff still resides out of the country, and the cases cited on the other side are where the party had been out of the country and returned. But where he resides out of the country the statute proviso cannot apply. U. S. Dig. 765.

That the statute of limitations of the country, where the action is brought, applies, appears from a fair construction of the language of this statute, which speaks of a *return* of the party.

WELLS, J. — The defendant sets up two grounds of defence. 1st. That the signature to the contract, in suit, is not his. 2d. That the action is barred by the statute of limitations.

The case is submitted to the Court, upon a statement of facts, and the depositions of Peter L. Smith and Hiram S. Favor, are made a part of the case.

Smith deposes, that in 1836, he saw the defendant write his name, and he believes the signature to the note to be that of the defendant.

Favor states, that in Oct. 1845, he received a note from the plaintiff's attorney, with a request to present it to the defendant. The defendant said he supposed it was settled, that he had left some property with his father to settle it, that the note was outlawed, but if it had not been settled, it ought to be, and that he would write his father about the matter. The deponent judges, from the appearance of the note in suit, that it is the same which he exhibited to the defendant, but is not willing to testify to its identity.

There is no testimony introduced by the defendant, tending to show, that he gave any other note to the plaintiff, and there is no reason to doubt, that it is the same one, exhibited to him, by Favor. He recognized the note as the one he had given. In the absence of other testimony, the conclusion is, that the signature to the contract is that of the defendant.

The contract was made in the Province of New Brunswick, and it does not appear that the plaintiff has ever resided in this State, but the defendant has for ten or eleven years. The latter has been amenable to our jurisdiction for a time, long enough to consummate the ordinary statute bar, if the former had also been within it. The R. S. c. 146, § 10, provides, that "if *any person*, entitled to bring any of the before mentioned actions, shall, at the time when the cause of action accrues, be within the age of twenty-one years, a married woman, insane, imprisoned, or without the limits of the United States, such person may bring the actions, within the times, in this chapter respectively limited, *after the disability shall be removed.*

It is contended that this section of the statute, does not apply to foreigners. But the expression is *any person*, not *any citizen.* The plaintiff is within the letter and spirit of the

law. The disability, under which he labored, could not be removed, until he came within our jurisdiction.

The exception, in the English statute of the 21 Jac. 1, cap. 16, embraces any person, entitled to bring the action, who is, when the cause of action accrues, beyond the seas, and the limitation commences after such person has returned from beyond the seas. The use of the word *returned*, in the proviso to this statute, indicates a departure from the country and coming back to it, and it might be contended, could not embrace those persons, who had never been within the country. But the construction has been otherwise. *Hall* v. *Little*, 14 Mass. 203; *Wilson* v. *Appleton*, 17 Mass. 180; *Bulger* v. *Roche*, 11 Pick. 36; *Chomqua* v. *Mason et al.* 1 Gal. 342.

But the phrase, in the 10th § of our statute, "after the disability shall be removed," excludes all ambiguity from its construction. The absence from the United States is the disability, and the return into the United States is the time, from which the limitation commences. In the cases cited, of *Wilson* v. *Appleton* and *Chomqua* v. *Mason et al.*, it does not appear that the plaintiffs had ever been within the United States. Like the plaintiff in this case, they were aliens. The statute bar of the 10th section does not apply to them until they shall have come within "the limits of the United States." *Von Hemert* v. *Porter*, 11 Metc. 210.

The plaintiff is entitled to judgment.

WILLIAM TODD, JR. *versus* WILLIAM H. TOBEY.

The plaintiff, with others, were guarantors for the purchase of goods by A of B. Afterwards C purchased A's stock, and informed one of the guarantors that he had assumed to pay the debt due B under the guaranty. Subsequently the guarantors were called on for payment, and on informing C, he repeatedly promised one of them it should be paid. C also made the same promises to the attorney who had the demand for collection. The guarantors paid B's claim, and the plaintiff paid his portion thereof and charged the same to C who acknowledged its justice. *Held* that C's un-

dertaking was not within the statute of frauds, and that there was such privity between the parties, that *indebitatus assumpsit* might be maintained.

In such action it is not necessary that all the guarantors should be joined.

THIS was an action of *indebitatus assumpsit*, and came before the Court on a statement of facts. The action was to recover a balance of account of $55,07. Of the bill of particulars filed embracing plaintiff's whole account of $112,63, there was one item: "cash paid S. H. Hitchings, Esq. $57,88."

In March, 1845, about two years before the commencement of this action, the defendant employed one *Hamilton* to do some business for him, and requested him to settle his account with the plaintiff. Hamilton then went as the agent of defendant to settle with Todd, taking with him defendant's account to the amount of $34,94 and two other items, viz: — "Amount paid by Luflin, $6,50," and "William Todd, Sen. account, $16,12," making the whole of Tobey's account against Todd $57,56. The settlement was made in this manner; upon Tobey's bill against Todd, the amount of Todd's account against Tobey, including the item aforesaid "cash paid Hitchings $57,88," and being $112,63, was entered to the credit of Todd thus: —

"*Supra Credit.*

By amount your account		$112,63
And said Tobey's bill against Todd was balanced by adding to its amount	$57,56	
The balance of Todd's bill against defendant, thus: — New account	$55,07	$112,63

And Hamilton signed the same thus: —

E. E. settled, St. Stephen, March 21, 1845,

"W. H. Tobey,

"By Asa Hamilton."

Hamilton exhibited a copy of this settlement to defendant, who observed, "it takes them to figure," but made no objections to the settlement. Hamilton called his attention to the item "paid Hitchings," and defendant said, "I expected they would likely charge that to me."

The item "cash paid Hitchings $57,88," originated in this way. Sometime in the spring of 1844, one Haycock of St. Stephen obtained a quantity of medicines of one Hale in Boston upon a letter of credit, signed by the plaintiff, one R. M. Todd and others. Sometime afterward the defendant consulted with R. M. Todd about buying out Haycock's stock of medicines, and after this, defendant informed him that he had purchased it, and had assumed to pay the debt due Hale, on that letter of credit. Soon after this purchase, the guarantors were called on to pay the debt due Hale. R. M. Todd spoke of it to defendant, who replied "give yourself no trouble, I will see the debt is settled." Early in the summer of 1844, Hale sent his demand against Haycock, with said letter of credit, to one Hitchings of St. Stephen, an attorney, for collection. Hitchings called on the guarantors, who referred him to defendant and R. M. Todd. The defendant told Hitchings it belonged to him to pay, and that he had promised Haycock to pay it. That he bought Haycock's stock and had agreed to pay this demand of Hale, and that it should be done as soon as he could make some collections. The defendant failed to pay and the plaintiff paid Hitchings his own proportion of the claim in Oct. 1844, being $57,88, and the same amount for R. M. Todd.

Subsequently, the defendant promised R. M. Todd to pay Hale's demand. There was not in the case any evidence of any direct promise, verbal or written, by the defendant to the plaintiff to pay him this item or any portion of Hale's demand, unless it may be inferred from the facts herein stated.

Thacher, for plaintiff.

The principal objection to this action is, that the promise to pay Haycock was not in writing, and so within the statute of frauds. We say it was a promise to pay his own debt, for he received the medicines for which the debt was contracted. If it is said, that he cannot be made liable to the guarantors it is an answer, that they paid for the benefit of the defendant, and therefore the claim is as strong against him. If it is objected that it was not paid by request of defendant, it is sufficient to

say, that the law will imply a request to pay, when the party is so situated that he must pay.

But should this view not be sustained, then we say, that the defendant, by his own agreement made by his agent, has allowed this claim of the plaintiff, in writing, and made it the basis of a new account. The agent had the previous authority to settle, and his acts were subsequently approved by the defendant. 17 Mass. 404 and 579; 7 Greenl. 361.

G. F. Talbot, for defendant.

The statute of frauds is a good defence. There was no promise in writing to pay the demand of Haycock to Hale. No case carries the exception to the rule so far as to include this case. Furthermore, there is no proof of any consideration, and consideration is necessary where promise is not in writing. Chitty on Cont. 465, 466, 467, 468; 5 Greenl. 81.

When Haycock died, it was a matter between Hale and Haycock's representative, and the plaintiff can be in no better position than Hale, and he could enforce only to the extent of the fund.

Again, there was no privity of contract between these parties.

It is said that the settlement is a promise in writing. But the agent had no authority to make a promise, and if he did, this is one of the errors which is guarded against in the paper purporting to be a settlement. There does not appear to have been a ratification, such as to bind the defendant.

If there was any promise to pay, such as the law will recognize, it was to the guarantors jointly, and all should have been joined in the suit. 8 Cowen, 168; 2 U. S. Dig. § 1, art. 16 and 21.

The opinion of the Court, SHEPLEY and WELLS, *Justices*, concurring in the result, was given by

TENNEY, J. — Goods were purchased by Haycock of Hale, on the strength of a letter of credit signed by the plaintiff, R. M. Todd and others, which we understand, from the statement of facts, made them liable. The defendant afterwards consulted R. M. Todd upon the subject of making the purchase of

Haycock's stock, and soon after informed him, that he had made it, and had assumed to pay the debt due Hale, on that letter of credit. Subsequently these guarantors were called upon by Hale to pay the debt, and on their informing the defendant thereof, he promised R. M. Todd repeatedly, that he would pay it; and afterwards made the like promise to one Hitchings, the attorney, in whose hands the demand had been left by Hale, saying that he had bought of Haycock his stock, and had agreed to pay this claim, and should pay it; and he requested Hitchings not to call on the guarantors; but the defendant failing to pay, they paid it, on being called upon a second time, to Hitchings.

After the payment made by the plaintiff of his proportion of the debt to Hale, one Hamilton was employed by the defendant to take a bill against the plaintiff and make a settlement with him, and on being inquired of by Hamilton whether he wished to see the plaintiff's account, before he should settle it, he answered in the negative. Among the items of account produced by the plaintiff, was a charge for the money paid by him to Hitchings, and the whole account was placed upon the bill presented by Hamilton as a credit, leaving a balance in favor of the plaintiff of a sum a very little less than the money paid to Hitchings, and under the whole was written, "St. Stephen, March 21, 1845, E. E. settled, W. H. Tobey by Asa Hamilton;" and this was left with the plaintiff. A copy of the bill and the credits were shown by Hamilton to the defendant, who remarked, after examining it, "it takes them to figure," and when his attention was directed to the charge for the payment to Hitchings he said, "I expected they would likely charge that to me," and made no objection to the correctness of the plaintiff's account. For the recovery of this balance, the present suit was brought on February 8, 1847.

The questions made by counsel upon these facts, are, — 1st. Was the defendant's promise within the statute of frauds? — 2d. Was there such a want of privity between the parties, as to prevent a recovery? If the negative is the legal answer to these questions, can the plaintiff maintain the action without joining the other guarantors of Haycock's debt to Hale?

If the promise to pay the debt of another, be founded on a new and distinct consideration, independent of the debt, and one moving between the parties to the new promise, it is not a case within the statute. "It is considered in the light of a new promise." *Leonard* v. *Vredenburgh*, 8 Johns. 29. The promise upon a good consideration to pay a debt, which another was alone liable to pay, previously, is not a promise to pay the debt of another, but to pay the debt, which the promise makes his own. *Colt* v. *Root*, 17 Mass. 229; *Dearborn* v. *Parks*, 5 Greenl. 81; *Farley* v. *Cleaveland*, 4 Cowen, 432; 9 *ibid.* 639; *Hilton* v. *Dinsmore*, 21 Maine, 410.

The promise of the defendant to pay the debt due to Hale, was upon the consideration of its amount, in the value of goods received by him, and treated in the transaction with Haycock, as money; a consideration entirely distinct from that which was the foundation of the debt in its origin; and one moving from Haycock to the defendant. This was not within the statute of frauds.

2. It is well settled, that an action may be maintained by one for whose benefit a promise is made to another. *Schemerhorn* v. *Vanderheyden*, 1 Johns. 139; Com. Dig. Assumpsit E; *Dalton* v. *Poole*, 2 Lev. 210. *Martyn* v. *Hind*, was a case where a rector gave a certificate addressed to the bishop, appointing the plaintiff a curate, promising to allow him a certain sum, as a salary. It was contended, that this was a promise to the bishop, and that the curate could not maintain the action. Lord Mansfield said, "It is in no possible respect a promise, but merely a matter of information to the bishop. The contract is with the curate. Therefore, there is no shadow of objection to the plaintiff's maintaining this action."

In *indebitatus assumpsit*, for money received by a defendant, it has not been regarded as essential in all cases, that the person should be named or distinctly referred to, in order to enable him to maintain an action, in his own name. Such right may depend upon his interest in the money received by, or in the hands of the other party. One cannot legally retain money, which clearly belongs to another, and he is liable to this

action therefor, though no contract existed between them. In *Jacob* v. *Allen*, 1 Salk. 27, an attorney who had collected money, and paid it to an administrator, before it was known that there was a will, was holden liable to the executor in this action. In *Hitchen* v. *Campbell*, 2 Wm. Bl. 830, it was said by the court, "and though when this action was in its infancy, the courts endeavored to find technical arguments to support it, as by a notion of privity, &c., yet that principle is too narrow, to support actions in general to the extent to which they are admitted." "There is a supposed privity of contract between the persons, whose money it lawfully is, and the person, who has got or received it."

The holder of negotiable paper, may strike out, and disregard the intermediate indorsements, and declare as the immediate indorsee of the first indorser; but between them there is no privity, each indorsement being evidence of a distinct contract; the contract, to which the holder is a party, is between him and the next preceding indorser. If the suit was against the latter, he, on payment, could recover of the first indorser, and so the judgment would come down upon the indorser first liable; and a payment to the holder by the first indorser, is a bar to an action in favor of one who is subsequent. The law therefore allows the maintenance of an action against the first indorser, instead of requiring the circuity of action, which "the law abhors." 1 Cranch, 439, and seq.

In *Heard, Assignee,* v. *Bradford*, 4 Mass. 326, the Court use the following language, "We think the rights of the parties must depend upon their interests; and whenever an award was made nominally to one, when the interest was in another, that other would be entitled to the benefit intended." *Goodridge & al.* v. *Lord*, 10 Mass. 483. In *Hall* v. *Marston*, 17 Mass. 575, it is said by the Court, "The principle of this doctrine is reasonable and consistent with the character of the action for money had and received. There are many cases in which that action is supported without any privity, other than what is created by law. Whenever one man has in his hands the money of another, which he ought to pay over, he is liable to

this action, although he has never seen or heard of the party, who has the right. When the fact is proved, that he has the money, if he cannot show, that he has a legal or equitable ground for retaining it, the law creates the privity and the promise."

In the case before us, Hale had originally a claim against the plaintiff and others, who signed the letter of credit; after the purchase by the defendant of Haycock's stock, Hale had a claim against the defendant, as we have seen. He availed himself of the liability of the guarantors, and obtained payment. After this payment, Haycock was liable to those who made it; but he having provided the means, with which to discharge this debt, and having put them into the defendant's hands under his promise to apply them accordingly, and the defendant having failed to comply, the defendant was liable to Haycock. If suits should be instituted upon all these several liabilities, judgments and satisfaction thereof be obtained, the result would be, that the guarantors would be reimbursed for the money paid by them, from the funds of the defendant. The law applied to the facts admitted, authorize them to reach this object directly instead of being obliged to resort to the circuity of action supposed.

If the guarantors had chosen to look to Haycock for indemnity, each might have maintained a suit for the amount which he had paid. The contract which was implied between him and them, was several and unlike that which they made with Hale. The latter was discharged on the payment made by the guarantors, and could afterwards be enforced by no one. The defendant cannot invoke that contract, to which he held no relation in its inception, as the foundation of an objection, technical in its character, and which was not open to Haycock.

Under the view, which we have taken, the plaintiff can maintain the action upon the facts as they were, immediately after he paid the money to Hale in discharge of his liability. If it were otherwise, the transaction of the 21st March, 1845, when the settlement was made between Hamilton and the plaintiff, with the other facts in the case, would be fully suffi-

cient. Hamilton was specially intrusted with the power to make the settlement, without any opportunity of the defendant to examine the account of the plaintiff, when he expected, that such a claim would be preferred against him. The account was rendered, allowed by the agent, and the whole signed by him for the defendant. This was a demand, which the defendant had assumed and promised to discharge upon the receipt of full consideration therefor, admitted afterwards his obligation to do so, and when it was known to him, that his agent had treated it as his existing debt, he made no objection to what had been done. *Judgment for the plaintiff.*

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF HANCOCK.

ARGUED AT JULY TERM, 1848.

MEM. — WELLS, J. being engaged in the trial of issues in the counties of Washington and Aroostook, took no part in the decisions in this county.

PHILIP R. SOUTHWICK *versus* AMOS SMITH.

S. delivered to W. a quantity of hides, and received his note at their agreed value, payable in eight months. At the same time W. gave to S. a written agreement, if his note should not be paid at maturity, to return the leather made from the hides to S. to be sold by him, and the proceeds to be applied to the payment of the note, and the surplus, if any, paid to W. *Held* that the property in the hides passed to W. and that S. could not maintain replevin for them.

REPLEVIN for a quantity of hides. The action was referred, and the referee awarded that the plaintiff become nonsuit, unless upon the evidence before him the Court should be of opinion that the action could be maintained.

The plaintiff introduced a paper of which the following is a copy. "Boston, Nov. 27, 1844. Whereas I have this day received of P. R. Southwick, 200 dry Buenos Ayres hides, weight 4422 lbs. and given my note for the same at this date for six hundred and ten $\frac{62}{100}$ dollars, at eight months, now I hereby agree to return the leather, made from the above named hides, to the said Southwick to be sold, the proceeds of

which is to be applied to the payment of the above described note, and the balance to remain in his hands subject to my order; provided, nevertheless, if the above named note shall be paid by me at maturity, this agreement to be void, otherwise to remain in full force and effect. Jos. E. Were."

The hides, described in this paper, were taken to Bucksport to be tanned, and were tanned, and soon after attached by defendant and another as the property of Were; the note described was unpaid, and Were had disposed of a few of these hides. It was proved that the leather replevied, was made from these hides.

Upon this report the court below, ALLEN, J., ruled and adjudged, that the plaintiff could not sustain his action and ordered a nonsuit, to which order and determination plaintiff excepted.

Kent & Cutting, for plaintiff, maintained, that from a common sense view of the receipt, no one could fail to see, that it was designed to secure the payment for the hides; if not so, why was any other paper taken but the note? According to defendant's construction, the receipt was a perfect nullity.

In the exposition of all agreements, the great object of the law is, to effectuate the intention of the parties. *Long on Sales*, chap. 3, 106; *Blood* v. *Palmer*, 11 Maine, 418.

This was not in the alternative, to return the leather *or* pay the note, and so bring it within our decisions in 16 Maine, 17, 17 Maine, 346, and 20 Maine, 318, nor could the parties so understand it, for if so, the paper would be a nullity.

Had the contract been to pay $610,62 in eight months, or return the leather, and that was all, any one could see the intention of the parties, and it would fall within the cases cited. But here was something more than an alternative. Plaintiff could enforce the payment of the note if Were was worth it; he wanted other security, viz. upon the hides which were delivered coupled with a condition, which run with his property. Not so in the cases cited from our Reports. There

the plaintiff had no power to enforce payment, but the option to pay or return the property was with the other party.

The design of Southwick was to get pay for his hides, and if his note was paid at maturity that design was accomplished and his contract void; if he did not get his pay, his contract was to be enforced. The note not being paid, the proviso executed its office, and became *functus*, the moment after the maturity of the note.

The note being unpaid at maturity, *Were* could not afterwards tender the amount, but Southwick could reclaim the leather; he had a right to it, an interest in its sale, for commissions and employment as a commission merchant, and could enforce his contract. *Blood* v. *Palmer*, 11 Maine, 418.

It was therefore a sale upon a contingency. If the note was not paid at maturity, the property was to revert to the original owner. The note was security on *Were;* the agreement was security on the property.

Again, it was a bailment and not a sale. Judge Story, in his work on Bailments, chap. 6, § 439, has put a case like in principle to this, and it is cited by the Court in *Buswell* v. *Bicknell*, 17 Maine, 346. The taking of the note can make no difference, for that was merely to obtain personal security, without reference to the things delivered. The agreement was a distinct affair, and had reference to security in the things, *in rem.* No legal mind can for a moment entertain an idea of the note altering the rights of the parties, as to the security on the property.

W. Abbott, for defendent, contended, that the plaintiff, alleging himself to be the owner, the burden of proof is upon him to establish that fact. He produces a paper, made by *Were*, as evidence of his title, which on the face of it shows the property in *Were.*

The preamble is an admission of the sale, and the plaintiff producing it cannot deny its assumptions.

There was a delivery of the hides to Were and payment for them by his note of hand payable in eight months. The paper says, I have received the hides and given my note for

the same. That is, I have given my note in payment for the hides.

Here was a sale, delivery and payment, and the sale was absolute.

Does the remainder of the paper affect the sale of the hides? We say it does not.

The preamble is merely introductory to the agreement. In the agreement, if it had been the intention of the parties to make the sale conditional, or to retain any security upon the hides, some appropriate terms would have been used for that purpose.

The agreement is entirely independent of the sale. If the parties intended any thing but the personal security of Were, they have used no language to effect their purpose.

If the sale was to be void unless the note was paid, or the leather sent to Boston, it would have been easy to have said so.

The agreement to send the leather to Boston was a mere personal affair, for which Were would have been liable to an action and nothing more. The leather if sent, was to be treated precisely as if the property of Were. The proceeds were to be appropriated to pay his debt, and the balance subject to his order.

But it is said this is a bailment. Surely nothing can be more unfounded in law. Suppose the hides had been lost on the voyage from Boston to Bucksport, or the leather tanned from them destroyed, would the loss have fallen upon Southwick? This point needs no argument.

As to the sale being on a contingency, we say, if not absolute, it was left in the power of Were to pay the note or to return the leather, and in that view the cases of 16 Maine, 17, 17 Maine, 344, 1 Fairfield, 31, and 20 Maine, cited by plaintiff's counsel, are full to our purpose.

The hides could not be considered a pledge, because the property remained in the hands of the pledger. Nor can it be considered a mortgage, as no record of the paper has been made.

SHEPLEY, J. — The hides replevied were formerly the property of the plaintiff. On November 27, 1844, he delivered them to Joseph E. Were, and received his note for their agreed value, payable in eight months. He received from Were at the same time a written contract, to return to him the leather made from them to be sold by him. The proceeds were to be applied to the payment of the note, and he was to account to Were for the balance. If he paid the note at maturity, Were was to be relieved from the performance of his contract, to return the leather.

There was no provision or stipulation, that Were should in any event be relieved from the payment of his note. He could not return the hides, or the leather made from them, and be entitled to receive it. If the hides or the leather had been lost on the passage from Boston to Bucksport, or from Bucksport to Boston, the entire loss would have fallen upon him. If he failed to pay his note, the leather was to be sold as his, and the proceeds were to be accounted for to him as coming from his property. If by reason of the hides being of an inferior quality, by negligence or misfortune in the process of tanning, or by a fall of price, the leather would not sell for an amount sufficient to pay the note, the plaintiff could have collected the balance of Were. By no election could Were have avoided the risks and liabilities of an owner, and he alone would under all circumstances have been entitled to all the benefits that might accrue to the owner. The agreement to return the leather, was to be avoided by a punctual payment of the note, but the completion of the sale, did not depend upon it. Both parties were absolutely, and not upon a contingency, entitled to all the profits and subjected to all the losses of a transfer of the title to the property.

The argument for the plaintiff, that it was "a sale, if the note was paid at maturity, if not paid at maturity the property was to revert to the original owner," is not consistent with the plaintiff's right secured by the contract, to sell the leather in such an event as the property of Were, and to subject him to any loss which might happen. Nor can Were, according to

the cases referred to in the argument, be considered as the bailee of the plaintiff. If the hides had been delivered without any other contract to be tanned, and the leather made from them to be returned, a similar case might have been presented. There can be here no foundation for an argument, that the leather was the joint property of the plaintiff and of Were, for the whole and not a part of the loss or gain was to be borne or received by Were. If, as insisted, it was the intention of the parties, that the title to the property should not pass from the plaintiff, that could only be ascertained by a judicial tribunal for the purpose of regulating its duty from their acts and written contracts; and if they did not so exhibit their intention, that it could be legally ascertained, the result must be the same. *Exceptions overruled.*

NAHUM HAYNES *& ux. versus* NATHAN H. LELAND.

It is a good defence, in an action of slander, to show that the words spoken, were but the repetition of what was uttered by some other person, whose name was given at the time, unless it be proved that the repetition was malicious.

The repetition of slanderous words, spoken by another, at the request of the plaintiff, will not sustain an action.

Where one justifies, that the slanderous words were but the repetition of what was uttered by another, whose name was given at the time, the burden of proof is upon the defendant, whether the defence be presented under the general issue, or by a special plea.

THIS was an action for words spoken slanderously of plaintiff's wife, and was tried at the last term of the Court, before SHEPLEY, J., upon the general issue.

From the testimony of *Geo. Herbert*, it appeared, that he was retained by plaintiffs to bring a suit against one *William Haynes*, for slander of plaintiff's wife, and it was agreed by plaintiff with him, that the defendant should come to the witness' office and state to him what William Haynes had said of plaintiff's wife. Defendant stated to witness the words as set forth in plaintiffs' writ, and said they were spoken by William

Haynes. That defendant had repeatedly since stated on oath that he did not recollect the words spoken by *William*, as alleged in the writ, and stated by him to witness.

It also appeared by one witness, that defendant was a witness, at a church meeting, or meeting of a church committee, and there spoke the words set forth in the writ as spoken of plaintiff's wife by *William Haynes.*

Moses Stevens also testified, that defendant told him what William Haynes said of plaintiff's wife, as set forth in the writ.

The jury were instructed, that if they were satisfied from the testimony, that the defendant made the statements to Mr. Herbert, as he had testified, and to the committee of the church as testified to, *at the request of the plaintiffs;* the plaintiffs could not recover damages of defendant for making such statements, whether they were true or false.

They were also instructed, that if satisfied that he made the statements as testified by Moses Stevens, he would be liable in damages, unless he gave the name of the person from whom he received the story which he related; and if he did give the author of the story and related it, as told to him, without variation or colouring, even if the story were false, he would not be liable, unless he stated it with a design to slander or injure the plaintiffs; and the burden of proof was upon the plaintiffs to show that Haynes did not relate to the defendant, the story told by him.

Under which instructions and ruling the jury returned a verdict for defendant, and the plaintiffs filed exceptions.

Herbert, with whom was *Hathaway*, for plaintiffs. Malice is an inference of law. If defendant would justify the speaking of the words, he cannot do it under the general issue, but must do it under a special plea. Their falsity is admitted, if their truth be not put in issue. 1 Chitty's Pl. 532.

At the trial, no question was raised about the pleadings. If defendant would justify, as the words of another, he ought to show that he believed the words to be true, 10 B. & C. 263, and uttered them on a justifiable occasion. 3 B. & C. 24; 16 Maine, 13; 2 East, 426; 5 East, 463; 2 Bing. N. C. 372.

Some of the English cases assert, that hearing the words from another, and merely repeating them, is a good justification; but that doctrine has been denied in the U. States, and more recently repudiated in England. 2 Greenl. Ev. § 424, page 405, note 2.

The instruction as to the burden of proof was wrong; it was for the defendant to show, that the person named really spoke the words. The plaintiff could not prove Haynes did not speak the words, for that would require him to prove a negative. And whether they were spoken with a design to injure the plaintiff, was not for the jury to settle. 5 Bingh. 329; 2 Greenl. Ev. § 423; 2 Bingh. 372.

The whole doctrine, as to the effect of giving up the author, is settled in 4 Wend. 659 and 8 Wend. 602.

Robinson, for defendant.

There is no occasion to say any thing as to the two first counts in the writ, and the instructions upon them, as they were communications, made at the request of the plaintiff, one of them when defendant was a witness in a lawful proceeding. As to the remaining part of the case, he maintained, that slander imports a voluntary act to injure. On the last occasion alluded to in the evidence, there was manifestly no design to slander or injure the plaintiff. Stevens was a brother of plaintiff's wife, and really sought the information.

In a former period, it was held, that if the author was given of the slanderous words, it would be a justification. Recently the defendant has been held to a little further than that, but not further than the case here presented. The jury were required to find the words were spoken without a slanderous design, or intent to injure, and if that be not a justification, it would be impossible to conceive of a case where a defence could be interposed. 2 Greenl. Ev. § 418; 2 Black. Com. 124, note 4, (N. Y. ed. of 1822,); 2 Stark. Ev. 421.

It is for the jury to decide with what intent the words were spoken. 16 Maine, 14.

The burden of proof is on the plaintiff to prove the story false as related.

The opinion of the Court, (WHITMAN, C. J. dissenting,) was delivered by

SHEPLEY, J. — One question presented by the instructions is, whether the repetition of slanderous words spoken by another person may be justified, if the name of such other person, as the author of them, be stated at the time.

In the latter part of the fourth resolution, in the Earl of Northampton's case, 12 Rep. 132, the law is stated, that "for slander of a common person, if J. S. publish, that he hath heard J. N. say, that J. G. was a traitor or thief, in an action of the case, if the truth be such, he may justify. But if J. S. publish, that he hath heard generally, without a certain author, that J. G. was a traitor or thief, there an action *sur le case* lieth against J. S. for this, that he hath not given to the party grieved any cause of action against any but himself, who published the words, although that in truth he might hear them."

This doctrine is recognized in *Crawford* v. *Middleton*, 1 Lev. 82.

In the case of *Brook* v. *Montague*, 1 Cro. Jac. 91, Coke cited the case of parson Prick, who in a sermon recited a story out of Fox's Martyrologie, that one Greenwood being a perjured person and a great persecutor had great plagues inflicted upon him and was killed by the hand of God, whereas in truth he never was so plagued, and was himself present at the sermon; and he brought an action for calling him a perjured person. WRAY, C. J. delivered the law to the jury, "that it being delivered but as a story, and not with any malice or intention to slander any, he was not guilty of the words maliciously, and so was found not guilty." "And Popham affirmed it to be good law, when he delivers matter after his occasion as matter of story, and not with any intent to slander any."

The rule stated in Earl of Northampton's case appears to have been regarded by the legal profession as so fully established, that it was esteemed to be necessary to allege in the declaration, that the person named as the author of the slanderous words did not in fact use them. *Morrison* v. *Cade*,

Cro. Jac. 162; *Lewis* v. *Walter*, *idem*, 406. In the latter case a verdict having been found for the plaintiff, a motion in arrest was made alleging, that the words were not actionable, first, because they were but the report of the speech of another and not of his own speech. On this point it was adjudged for the plaintiff and affirmed in a writ of error, "where the Court was satisfied in this point, that the report of the speech of another, who never used such words, is chargeable." The law at this time appears to have been regarded as too well established to be questioned, that the action could not in such case be supported without such an allegation sustained by proof.

In the case of *Davis* v. *Lewis*, 7 T. R. 17, the rule as first stated was repeated, and re-affirmed to be the law by Lord Kenyon.

In the case of *Maitland* v. *Goldney*, 2 East, 426, the rule so far as it respects oral slander was again recognized; and again in the case *Woolnorth* v. *Meadows*, 5 East, 463.

In the case of *Lewis* v. *Walter*, 4 B. & A., in an action on the case for a libel printed in a newspaper, *it was held* not to be applicable, and some doubts were for the first time expressed respecting the rule as applicable to oral slander without some qualification. BAYLEY, J. observed, "it must not therefore be taken as a general rule, even in oral slander, that the *malicious* repetition of it may be justified, if the name of the author be given at the time." ABBOTT, C. J. observed, — "Nor am I prepared to say, that this is matter of defence upon a plea in bar, for it cannot be an answer to the charge of *malice*, which may exist in the case of repetition as well as invention; and if we hold it to be a bar, that question would be altogether withdrawn from the consideration of the jury. But, if instead of pleading it, it be given in evidence under the general issue, then the question, whether it were repeated maliciously and from a design to slander or not, would be left to the jury, who might then find their verdict upon the whole case." The rule appears here again to be admitted with the qualification, that the defence should be presented under the general issue,

and that it should appear by the finding of the jury, that the repetition was not maliciously made.

In *McGregor* v. *Thwaites*, 3 B. & C. 24, the action was for a libel printed in a newspaper. BAYLEY, J. remarked, "according to the rule laid down in Lord Northampton's case, the party is excused, because by naming the person, from whom he heard the slander, he gives the party slandered an action against another, but here the defendants gave the plaintiff no action against any other person." HOLROYD, J., speaking of the opinion of Lord Ellenborough in the case of *Maitland* v. *Goldney*, remarked, "the opinion of that learned Judge was, that an action would lie against a person, who *maliciously* repeated slander, even though he name his author at the time."

LITTLEDALE, J. observed, "Now if the law as to the repetition of oral slander, were to he propounded for the first time to-day, the propriety of the rule laid down in Lord Northampton's case might perhaps admit of some doubt."

In *De Crespigney* v. *Wellesley*, 5 Bing. 392, the action was for a libel. The distinction between oral slander and libel in this respect, appears to have been finally and fully established. BEST, C. J. observed, that "the reason, which Lord Coke gives, why in the case of oral slander, you should name the author, proves, that you must not be allowed to publish written calumny." He says, the Court, "if we were to admit, what we beg not to be considered as admitting, that in oral slander, when a man at the time of speaking the words, names the person who told him, what he relates, he may plead to an action brought against him, that the person, whom he names, did tell him what he related; such a justification cannot be pleaded to an action for the republication of a libel." His remarks in the opinion in this case have been referred to as repudiating the whole doctrine as it respects oral slander, but his meaning rather appears to have been, only to deny or to refuse to admit, that such a defence could be good, if presented by a plea in bar, which would withdraw from the jury the consideration, whether the words were repeated maliciously. The note referred to for the same purpose, in 2 Greenl. Ev. § 424, note

2, when carefully noticed will be found to state, that it was formerly held to be a good justification, "and therefore pleadable in bar." "But this doctrine, *(id est*, that it was a good justification and therefore pleadable in bar,) has been solemnly denied in the United States, and has of late been repudiated in England." If this be not the sense intended to be conveyed in the note, it could not well be sustained by the cases cited to support it. Thus explained, the doctrine is left as it was in the case of *Lewis* v. *Walter*, that proof of a repetition, naming the author of the words at the time of repeating them, may be made under the general issue, and if found to have been done without malice, it would operate as a good defence to the action. Such appears to have been the law in England, as exhibited by the decisions of her tribunals, until the year 1829.

That a repetition of slanderous words with the name of their author at the time, might be justified, was stated also to be the law in elementary treatises. Starkie on Slander, c. 13, 2; Chitty's Pl. 506; 3 Sel. N. P. 1060.

The question has been discussed in tribunals in this country. In the case of *Dole* v. *Lyon*, 10 Johns. 447, which was an action for a libel, KENT, C. J. observed, that it might be "well questioned, whether even this rule as to slanderous words ought not to depend upon the *quo animo*, with which the words with the name of the author are repeated;" and he gave his reasons for it, while he stated, that the rule did not apply to actions for libel. This was, but an anticipation of the modification of the rule, which took place several years afterward in England. The rule, as thus qualified, was not denied; and it does not appear to have been substantially varied since, by the decisions of the tribunals in that State. In the case of *Mapes* v. *Weeks*, 4 Wend. 659, it was decided in accordance with the long established doctrine, that a defendant, who had not named the author at the time, could not be permitted to prove that another person told him the story.

In the case of *Inman* v. *Foster*, 8 Wend. 602, the rule by implication was admitted. SAVAGE, C. J. in the commence-

ment of the opinion observed, "I must take it for granted, that the defendant did not name his author, when he uttered the slanderous words."

In other States, the rule as originally stated or in a modified form, appears to have been received as the law, allowing in some of the cases, the question to be settled by the jury, whether the repetition of the slanderous words naming the author of them, had been maliciously made. *Miller* v. *Kerr*, 2 M'Cord, 285; *Trabue* v. *Mayo*, 3 Dana, 138; *Church* v. *Bridgeman*, 6 Mis. 190; *Jones* v. *Chapman*, 5 Blackf. 88.

It was rejected in the case of *Haines* v. *Welling*, 7 Ham. 253.

In the case of *McPherson* v. *Daniels*, 10 B. & C. 263, three justices, BAYLEY, LITTLEDALE and PARKE, composing the court for the decision of the case, expressed opinions unfavorable to the admission of the rule, without further modifications. BAYLEY, J. observed at the conclusion of his discussion, "upon the whole I am of opinion, that a man cannot by law justify the repetition of slander by merely naming the person who uttered it; he must also shew, that he repeated it on a justifiable occasion, and believed it to be true."

LITTLEDALE, J. speaking of the fourth resolution in Lord Northampton's case said, "that resolution has been frequently referred to within the last thirty years, and though not expressly overruled, has been generally disapproved of." "The fourth resolution, however, in terms perhaps does not go the length of saying, that a defendant may justify the repetition of slander, generally, but only, that he may justify under certain circumstances. Assuming that it imports, that a defendant may justify the repetition of slander, generally, by showing that he named the original author, I think that is not law."

PARKE, J. said, "it is not absolutely necessary to determine in this case, whether the latter part of the fourth resolution in Northampton's case be good law, because, assuming the rule there laid down to be correct, this plea is bad for two reasons." He subsequently stated, that he was of opinion it "cannot be law," and he denied that there was any distinction in this respect between oral and written slander.

It is not a little remarkable, that nearly all the remarks, which have been made, complaining that the fourth resolution in Lord Northampton's case was extra-judicial, were themselves of a like character.

What practical rule can be obtained from the opinions expressed in the case of *McPherson* v. *Daniels*? If any could be derived from the observations of Mr. Justice PARKE, it would rather seem to be that all the previous decisions were to be considered as overruled, and that the well established distinction in this respect between oral and written or printed slander, was to be considered as abolished. And yet this would be at variance with the opinion of Mr. Justice BAYLEY as expressed in the same case, and also with that of Mr. Justice LITTLEDALE, who denies that the rule should be received as a general proposition expressive of the law, while he admits "that he may justify under certain circumstances" without stating, what those circumstances are or affording any definite rule for a decision of the question.

Mr. Justice BAYLEY presents a rule for decision, but one which does not appear to have been approved by his associates. One part of his rule requires, that the person repeating the slanderous report should believe it to be true, to enable him to justify it. How could he ever prove the convictions of his own mind; his belief or disbelief, unless it had been expressed at the time? If he expressed his belief of its truth then, it would surely be better suited to injure the person, and be more indicative of an unfriendly spirit or of malice, than an expression of his disbelief of it. If one desirous of ascertaining the character of a professional man, or that of a merchant for credit or integrity, or that of a mechanic for skill or honesty, should inquire respecting it, and be informed in answer of a story told by a person named, of a slanderous character, with an expression of his own opinion that it was unworthy of credit, is his informant to be deemed guilty of slander and unable to justify himself, when he might have been deemed innocent and able to justify himself, if he had expressed an opinion that the story was true?

This would certainly be a new element, and a novel rule to introduce into the administration of justice. The other part of his proposed rule, that "he must also show, that he repeated it on a justifiable occasion," when applied in practice leaves undecided, what is a justifiable occasion. Perhaps a satisfactory answer might be, any occasion, in which from all the circumstances disclosed, the jury may infer, that it was done without malice or an intention to injure. This would be the rule as modified in accordance with the opinions of ABBOTT, BEST and KENT. To receive it thus, will be to afford a rule, which can be applied in the practical administration of justice, without difficulty. One, that will enable a person to obtain redress from those, who have repeated and named at the time, the author of slanderous words, with malice or an intention to injure, while it will protect those, who have done so without any such intention. The rule applied at the trial appears to be the one, which can be ascertained most satisfactorily from the decided cases, and to be best suited for the correct administration of justice.

When an action for slander, can only be maintained by proof of special damage, it has been decided, that such damage must appear to have been occasioned by the words spoken by the defendant, and not by a repetition of them by another person. *Ward* v. *Weeks*, 7 Bing. 211; *Stevens* v. *Hartwell*, 11 Metc. 542. The opinion in each of those cases, expresses an approval of the case of *McPherson* v. *Daniels*. But in neither of them are the practical difficulties here suggested, noticed or obviated.

It is insisted, that this defence could not be properly presented under the general issue. It has already been shown, that serious doubts have been expressed in the more recent decisions whether such a defence could be presented by a special plea. The earlier cases allowed it to be presented by special plea or under the general issue. *Brook* v. *Montague*, Cro. Jac. 91; *Smith* v. *Richardson*, Willes, 20; *Lewis* v. *Walter*, 4 B. & A. 605. There would seem to be no good reason, why it might not still be presented by a special plea containing an allegation, that the repetition of the words was made without any inten-

tion to slander or injure the plaintiff, as well as under the general issue.

The instructions respecting the repetition of slanderous words spoken by another, made at the request of the plaintiff, are not the subject of complaint. There could be no just cause for it.

The jury were instructed, that the burden of proof was upon the plaintiffs, to show that the person named as the author of the slanderous words, did not relate them to the defendant. If the mere fact of naming the author of the slanderous words at the time, were held to be a justification, on the ground that such person was shown to be the one, against whom the action should be brought, the burden of proof would rest upon the plaintiff to prove the falsehood of that statement made by the defendant or he would fail to establish the essential ingredient of malice. The falsehood of the statement being the element, from which alone malice could be inferred. Hence, as before stated, while such was esteemed to be the rule of law, and the declaration contained an allegation, that the person named as the author did not make use of the words imputed to him, the burden of proof would be upon the plaintiff. Nor does the objection seem to have great weight, that the plaintiff would be required to prove a negative. For it would be necessary for him before the commencement of his suit, to ascertain with precision the words spoken, and by doing so, he would become informed of the name of the person, who was stated to be the author of them. But when the ground of defence is carefully examined, it will be perceived to be, that he did but repeat the words of another, that he named the author at the time, and that he did so, without an intention to slander or injure. These positions he must establish by proof. A failure to establish the first position, leaves him without a justification. Falsehood then appears, and malice is inferred from it. Should he establish the truth of the two first positions, malice can only be inferred from the circumstances, under which the repetition was made. The burden of proof would seem therefore to rest properly upon the defendant, whether the defence be presented

under the general issue, or by a special plea. *Miller* v. *Kerr*, 2 M'Cord, 285; *Church* v. *Bridgeman*, 6 Mis. 190. The instructions respecting the burden of proof being erroneous, a new trial must be granted.

Exceptions sustained, and new trial granted.

Dissenting opinion by

WHITMAN, C. J.—This case is before us upon exceptions taken to the instructions of the Court to the jury at the trial. And my brethren have agreed that the exceptions, upon one point, must be sustained. I understand them to have agreed further, in the opinion, that, in an action of slander, it is a good defence to show that the words spoken were but the repetition of what was uttered by some other person, whose name was given at the time, unless it were proved that the repetition was malicious. This position is supposed to be fully sustained by authority. In the case of Lord Northampton, 12 Coke, 134, it is reported to have been so resolved, that, "in a private action for slander of a common person, if J. S. publish, that he hath heard J. N. say, that J. S. was a traitor or thief, in an action on the case, if the truth be such, he may justify." And in the first of Comyn, 264, it is said, "if a man say, A told me B stole, &c. when A did really say so, an action lies against A but not against the relator." And Lord Kenyon, in *Davis* v. *Lewes*, 7 T. R. 117, incidentally held such to be the Law. And lord Ellenborough seems, in *Woolnorth* v. *Meadows*, 5 East, 463, to recognize such to be the law.

This must be admitted to be somewhat of a formidable array of authorities in support of the principle. But no one, now, will admit it to be law without qualification. My brethren, I understand, would qualify it, by admitting, if proof be made of express malice on the part of the relator, that the repetition could not be justified. And others, who have felt constrained to admit the rule, have found it necessary to surmise qualifications. Mr. Justice JOHNSON, in *Miller* v. *Kerr*, 2 M'Cord, in delivering the opinion of the Court, comes to the conclusion, that "this rule is only to protect one, who

without malice, and for purposes necessary to the very existence of society, inquires into and investigates the characters of men." Thus limited, no fault perhaps could be found with the rule.

But the unreasonableness of the resolution as found in 12 Coke, and from the authority of that case doubtless repeated by Comyn, and assented to by Lord Kenyon, has been so striking that, in England, it is at this day entirely repudiated. In *De Crespigney* v. *Wellesly*, 5 Bing. 392, C. J. BEST remarked, that "if even we were to admit, what we beg not to be considered as admitting, that in oral slander, when a man at the time of his speaking the words names the person, who told him what he relates, he may plead to an action brought against him, that the person whom he named did tell him what he related, such a justification cannot be pleaded in an action for the republication of a libel." In *Bennett* v. *Bennett*, 6 of C. & P. 552, it was held, that "it is no justification for him (the defendant,) that he, at the time he repeats the slander, gives up the name of the person from whom he heard it." It was said, however, in that case, that if such proof were made it might be admitted in mitigation of damages. In *McPherson* v. *Daniels*, 10 B. & C. 263, the subject underwent a thorough revision by Judges BAYLEY, LITTLEDALE and PARKE, the Chief Justice not being present, and their unanimous opinion was, that the *dictum* in Lord Northampton's case was not law. And TINDAL, C. J. in *Ward* v. *Weeks*, 7 Bing. 211, in delivering the opinion of the Court of Common Pleas, remarked, that "the resolution in Lord Northampton's case, which has at all times been looked upon with disapprobation, has, in the recent case of *McPherson* v. *Daniels*, 10 B. & C. 263, been in effect overruled by the Court of King's Bench, and with the judgment of that court, upon that occasion, we entirely concur."

In some of the United States, particularly Indiana, Kentucky and Mississippi, the rule has been considered, and perhaps admitted under modifications. But it may be doubted whether it has any where, this side of the Atlantic, been applied

in the broad terms presented in 12 R. It is certain that in Ohio, it has been rejected. *Haines* v. *Willing*, 7 Ham. 253. In New York it can scarcely be regarded otherwise than as overruled. The marginal abstract, by the Reporter, in *Inman* v. *Foster*, 8 Wend. 602, is, that "it is no defence, nor can it be given in evidence in mitigation of damages, that the defendant, at the time of the speaking the words gave his author, and was in fact told by another what he uttered against the plaintiff." The case, however, in those terms, does not directly decide the point; but the reasoning of the Chief Justice, in delivering the opinion, strongly tends to that effect; so much so that the Reporter understood such to be the decision. And the author of the digest of the N. Y. Reports, published in 1841, nine years after the publication of the case, adopted the above abstract as the decision in that case. And the abstract, and adoption of it in the digest have stood, so far as is known, uncontroverted in that State to this time; and after what has transpired in England, who can doubt that such is to be regarded as the established law on the subject in that State.

Mr. Greenleaf, in his Treatise on Evidence, vol. 2, in a note to § 424, holds this language: — "The fact that the defendant heard the words from another, whose name he mentioned at the time of speaking them, was formerly held a good justification, and therefore pleadable in bar;" "but this doctrine has been solemnly denied in the United States."

There has been no adjudged case, nor any *dicta* up to this time by any of the Judges of Massachusetts or Maine, recognizing the rule as laid down in Lord Northampton's case as good law, and it seems to me, that the decision, now for the first time proposed to be made in this case, will be received with surprise.

NAHUM HAYNES & *ux. versus* WILLIAM HAYNES.

Words spoken of another in themselves actionable, but under such circumstances as would not lead the persons present to believe they were spoken as truth, cannot support an action.

THIS was an action of the case for words spoken of one of the plaintiffs. On the trial, before SHEPLEY J., the plaintiff offered evidence tending to prove, that the words were spoken and published as alleged. There was also evidence that defendant was excited and both parties angry, and that there were circumstances of provocation.

The Judge, among other things, instructed the jury, that if the words were spoken under circumstances of excitement and anger, and under such circumstances as would not lead the persons present to believe they were spoken as truth, they were to be accounted a mere ebullition of ungoverned temper, and as such did not import malice, nor would they sustain a case for damages like the present case.

The jury returned a verdict for the defendant, and the plaintiffs excepted to the instruction.

Herbert, for the plaintiffs, contended that, malice is an inference of law. 10 B. H. 263; 3 Pick. 384 and 311. As to what words are actionable. 2 Greenl. Ev. § 418.

If the words are actionable, malice is an inference of law. Starkie on Slander, 334; 2 Stark. Ev. 461.

The general issue puts in issue the speaking, the colloquium, the malice and the damages. 2 Greenl. Ev. § 410, 417, 420; Stark. on Slander, 12, 17; 4 B. & C. 247; 2 Bing. N. C. 457 and 372; 10 B. & C. 263.

The circumstances are not such as can excuse or justify. I can find nothing in the books which sustain the instructions. Privileged cases are referred to in 2 Stark. Ev. 426, 464; 2 Greenl. Ev. § 421 and notes. It has been held, that words actionable will sustain an action, when spoken in jest. Provocation is no justification, but can only go in mitigation of damages. 2 Greenl. Ev. § 275.

Robinson, for defendant, argued, that when the words were

spoken in such manner as to lead to the conclusion, that they were not spoken in truth, they were not actionable. Starkie on Slander, 28.

Where the words spoken are capable of two meanings, it is for the jury to find, as matter of fact, in what sense they were spoken. 6 Cowen, 76; 3 Johns. 180; 3 Metc. 193.

The offence cannot be committed without malice. 13 Mass. 248; 15 Mass. 48; 3 Pick. 380; Selw. 1271; 3 Mass. 546.

In Massachusetts, it has been held, that although, where the actionable words were deliberately spoken, malice will be implied; still a party will be allowed to show, that the words were spoken through heat or passion and without malice. And in 2 Wheat. Selw. 1271, it is said the action should not be brought, when the words are uttered in a passion.

The opinion of the Court, (WHITMAN, C. J. dissenting,) was drawn up by

SHEPLEY, J. — The case, as presented by the bill of exceptions, does not state the words alleged to have been spoken, the circumstances under which they were spoken, or the instructions to the jury in full. It is not apparent, whether the words were in themselves actionable or not; but as no question of that kind is presented, the correct inference may be, that they were.

When the words are in themselves actionable, slander consists in communicating to the hearers, that the person, of whom they are spoken, has been guilty of some crime punishable by law. Without such a communication, there can be no slander in contemplation of law. Such a communication may be made by language, which according to its ordinary signification is unsuited to do it. On the contrary, language may be used, which according to its usual signification would do it, and yet no such communication be in fact made. That the circumstances, under which the words were spoken, may be shown by proof, and that the jury may infer from it, that words unsuited to do it, did in fact make such a communication, will not be denied.

Very numerous authorities might be cited, to sustain the position. By the application of the same principle, one may introduce proof of the circumstances, under which words suited in their ordinary signification, to charge another with the commission of crime, were spoken, and the jury may infer from such proof, that no such charge was made, and of course, that the speaker was not guilty of slander.

This position is also sustained by authorities not so numerous as those applicable to the former position, for the reason probably, that occurrences of this description, are not so frequent as those of the former.

Mr. Starkie says, "thus if the defendant call the plaintiff a thief, and it be doubtful under the circumstances, whether the term was meant to be applied in a felonious sense, it is for the jury to decide." 2 Stark. Ev. 461, ed. by Metc. He refers in a note to his authorities for the position. It will be sufficient to notice one of them. In the case of *Penfold* v. *Westcote*, 2 B. & P. N. R. 335, the words were, "why don't you come out, you blackguard rascal scoundrel Penfold, you are a thief." The jury were instructed that the burden of proof, was on the defendant to show, that felony was not imputed by the word thief, and a verdict was found for the plaintiff. A motion was made to set it aside, because that word was not intended to impute felony, but was merely used with others in the heat of passion. Sir James Mansfield, C. J. said, "the jury ought not to have found a verdict for the plaintiff, unless they understood the defendant to impute theft to the plaintiff. The manner in which the words were pronounced, and various other circumstances might explain the meaning of the word; and if the jury had thought, that the word was only used by the defendant as a word of general abuse, they ought to have found a verdict for the defendant. Supposing that the general words, which accompany the word thief, might have warranted the jury in finding for the defendant, yet as they have not done so, we cannot say, that the word did not impute theft to the plaintiff."

In the case of *Christie* v. *Cowell*, Peake's Cases, 4, the words

were, "he is a thief, for he stole my beer." Lord Kenyon "directed the jury to consider, whether these words were spoken in reference to the money received and unaccounted for by the plaintiff, or whether the defendant meant, that the plaintiff had actually stolen beer."

In the case of *Rex* v. *Horne*, Cowp. 672, lord Mansfield said, it was the duty of the jury, to construe plain words according to their obvious meaning, and as every body, who reads must understand them, but the defendant might "give evidence to show, they were used upon the occasion in a different or qualified sense."

In the case of *Jarvis* v. *Hathaway*, 3 Johns. 180, the words proved were, "you are guilty of forgery," or "you are guilty of absolute forgery." The parties were members of a church. The words were spoken before two other members convened for the purpose of taking the second step in church discipline. With other directions the jury were instructed, "that the circumstances, under which the charge was made against the plaintiff, were proper to be taken into consideration to determine the intention, with which it was made." On a motion for a new trial, the instructions were decided to have been correct.

In the case of *Norton* v. *Ladd*, 5 N. H. 203, the words as laid in one form were, "Norton has taken a sable out of my trap; he stole it, and I can prove it." The defendant offered to prove, that the sable being an animal *ferœ naturæ*, was taken from the trap of the defendant under such circumstances as not to make it the subject of larceny, and that this was known to the persons, in whose hearing the words were uttered; but the testimony offered was rejected. A new trial was granted, to admit the explanatory testimony.

In the case of *McKee* v. *Ingalls*, 4 Scam. 30, the words were, "You are a damned thief; if you have got money, you stole it. I believe you are a damned thief. I believe you *will steal*." The jury were instructed, "that if the jury believe from the testimony, that Ingalls at the time he called McKee a thief, did not intend to impute felony to him, the words are

not actionable, and they must find for the defendant." The instructions were approved. The opinion of the Court states, that the question of the defendant's malice was a question of fact for the jury, upon consideration of all the facts and conversation, and that if they believed the words were spoken in heat and passion, and without intention to accuse of stealing any article of personal property, they must find for the defendant.

The observation made in 2 Stark. Ev. 464, ed. by Metc., that it is no answer to the action to show, that the words were spoken carelessly, wantonly, or in jest, is not at variance with this doctrine. Words may be thus spoken and communicate to the hearers, that the person named has been guilty of the offence indicated by them. Nor would defamatory words appear to be less suited to make such a communication, or to injure the reputation of the person named, if the motive of the speaker were to derive some private gratification, or emolument to himself.

The rule is correctly stated by Mr. Greenleaf, 2 Geenl. Ev. § 423. "If from the plaintiff's own showing, it appears, that the words were not used in an actionable sense, he will be nonsuited. But if the plaintiff once establishes a *prima facie* case, by evidence of the publishing of language, apparently injurious and actionable, the burden of proof is on the defendant to explain it."

According to these authorities, the instructions in this case were suited to guide the jury to a correct result. For if the words in themselves actionable "were spoken under such circumstances as would not lead the persons present to believe, they were spoken as truth," they could not have communicated to those persons, that the wife of the plaintiff had been guilty of any crime. And if the jury were satisfied, that he did not make any such communication, it was their duty to find a verdict for the defendant. The remark made in the instructions respecting the words being "spoken under circumstances of excitement and anger," is fully justified by some of the decided cases. If it were not, it was immaterial. For it was unimportant, whether they were spoken under that or a different state

of feeling, if no criminal charge was made by them. In such case, they might perhaps with entire propriety, be characterized as a mere ebullition of ungoverned temper;" but it was of no importance, whether their character was properly described or not. If they communicated no criminal charge, they "did not import malice, nor would they sustain a case like the present." For malice cannot be inferred or the action be sustained, when the language used makes no such communication.

Exceptions overruled.

Dissenting opinion by

WHITMAN, C. J. — This is an action of slander. No question appears to have been made, but that the words charged as having been uttered were untrue; or that they were not actionable. But the Judge charged the jury, that, if the words spoken were uttered under excitement and anger, and under such circumstances as would not lead the persons present to believe they were spoken as true, it should be accounted a mere ebullition of ungovernable temper; and as such did not import malice; and would not sustain a case for damages. To this exception was taken.

There would seem to be no doubt, but that the ruling and instruction of the Judge would have been correct if they had applied only to diminish the damages to be recovered. 2 Greenl. on Ev. § 275. But it has been considered, that "it is no answer to the action to show that the words were spoken carelessly, wantonly, or in jest," and that the act of a party "is not the less malicious, because his primary object is to derive some private gratification, or emolument to himself." 2 Starkie on Ev. 264. Ordinarily a man's words are to be taken according to their manifest import; and it can scarcely be reasonable to allow one to excuse himself for uttering slanderous words of another upon the ground that he was angry with him. To allow of such a defence would be to encourage individuals to work themselves up to an excited state, and then expect to be allowed to slander those, against whom they might have a grudge, with impunity. It is un-

doubtedly true, that words of mere heat and passion, imputing no crime to one to whom they may be addressed may not be actionable, especially if attended with no specific damage. But if one, in a fit of anger, imputes a crime to another, he cannot make use of his ill feeling to excuse himself; and it cannot be admissible for him to pretend, that he did not intend what his language imported; and cannot set up in defence, that those who heard him did not believe what he said; nor can it well be predicated of one, who utters reproachful language against another, while infuriated with anger against him, does not do it maliciously.

In *Bromage* v. *Prosser*, 4 B. & C. 321, Mr. Justice BAYLEY, in delivering the opinion of the Court, remarked, that "malice, in common acceptation, means ill-will against a person; but in its legal sense it means a wrongful act, done intentionally, without just cause or excuse;" and that, "if I traduce a man, whether I know him or not, and whether I intend to do him an injury or not, I apprehend the law considers it as done of malice, because it is wrongful and intentional. It equally works an injury whether I meant to produce an injury or not; and if I had no legal excuse for the slander, why is he not to have a remedy against me for the injury it produces?" And in *Hooper* v. *Trescott*, 2 Bing. N. C. 457, Mr. C. J. TINDAL, in delivering the opinion of the Court, says, "the existence of express malice is only a matter of inquiry where the injurious expressions, which are the subject of complaint, are uttered upon a lawful occasion."

In the case of *Penfold* v. *Westcote*, cited by my brother, the position laid down was undoubtedly correct, that the defendant may show that felony was not imputed by the word thief. He may show it was spoken under circumstances, that, at the time, explained the meaning not to be what the word alone would imply, as that the word thief was followed by stating to what he alluded, as, for instance, cutting and carrying away trees; or, as in the case of *Norton* v. *Ladd*, cited from 5 N. H. Reports, of a wild animal, not the subject of larceny. Undoubtedly the whole of the circumstances may be

introduced to elucidate the meaning of the speaker. It might be shown also, in defence, that the slander imputed was uttered under circumstances rendering it entirely excusable, as in the case cited from the 3d of Johns. In the case from Peake the words were, "he is a thief, for he stole my beer," and it appearing that the plaintiff was an agent of the defendant, the jury were instructed to consider whether the words were spoken in reference to the money received, and unaccounted for by the plaintiff, which would be merely a breach of contract, and should explain the meaning understood at the time of speaking.

The positions in *Rex* v. *Horne*, were undoubtedly well grounded. The first was that words should be taken in their obvious sense, but that, secondly, the defendant might prove they were used and understood in a different sense. Lord C. J. DeGrey, in delivering the opinions of the Judges, in that case to the House of Lords, remarked, "If courts of justice were bound by law to study for any possible or supposable case or sense, in which the words used might be innocent, such a singularity of understanding might screen an offender from punishment;" and, again, "it would be strange to say, and more so to give out, as the law of the land, that a man may be allowed to defame in one sense, and to defend himself by another;" and, further, that "the court and jury must understand the record as the rest of mankind do."

The defendant, in the case at bar, offered no proof, and no circumstances appeared tending to show, that the language used by him meant any thing other than it obviously imported. The only case cited in support of the opinion of my brethren, which has a direct tendency to that effect, is from the 4th of Scam., which I have not seen, but presume its purport is correctly represented; and all I can say with regard to it is, that it seems to me to be wholly unsupported by any *dicta* or decision to be found elsewhere; and, indeed, to be directly opposed to the current of authorities before cited. The exceptions, therefore, should, in my opinion, be sustained.

NATHANIEL A. JOY, *Treasurer, versus* JASON PHILLIPS.

Where one was sentenced to pay a fine and costs, and be committed until the payment was made, and after lying in prison, thirty days, was liberated by the sheriff, upon giving his note for the fine and costs, without requiring him to make a schedule of his property, or take or subscribe any oath to any schedule; *it was held*, that an action was maintainable on the note, there being no corrupt agreement by the sheriff to allow these omissions of his duty.

THIS was an action upon a note of hand, given under these circumstances. Defendant was committed to the county jail for non-payment of a fine and costs to which he was sentenced by the District Court. After lying in jail thirty days, he was liberated from imprisonment by the sheriff, upon giving the note in suit for the amount of said fine and costs. The defendant neither made nor signed any schedule of any property by him owned; nor did he take or sign any oath whatever. Upon these facts, it was agreed that the Court might order a nonsuit, or default.

Hathaway & Peters, for defendant, maintained these positions: —

1. The note is void at common law for illegality in the consideration. 1 Comyn's Contracts, part 1, chap. 3, pages 26, 30, 34, 35; 4 Mass. 370; 5 Mass. 385; 22 Maine, 488, and authorities there cited.

2. It is also void for illegality of consideration, by Stat. of 1821, chap. 110, § 12.

3. As between the parties, there was no consideration, for, the discharge being illegal, defendant is liable to be re-committed.

Plaintiff can derive no benefit from the statute, because defendant did not perform the conditions required, to authorize his discharge.

By Stat. of 1821, chap. 83, § 2, a prisoner may be discharged by order of Court, on certain conditions, and by Stat. of 1822, chap. 190, § 2, the same power was transferred to the sheriffs on the same conditions. The case finds those conditions were not fulfilled.

If the sheriff authorized his liberation, it should appear by the record. Stat. of 1821, chap. 110, § 2.

It was the obvious intent of the Statute, that the prisoner should substantially disclose, and take the poor debtor's oath, to entitle him to his discharge, and it would be of pernicious example to give validity to a contract made in violation of the same, and setting the statute at defiance.

Wiswell, for plaintiff.

SHEPLEY, J. — The defendant was sentenced by the District Court, at its October session, during the year 1839, to pay a fine and costs of prosecution, and to be committed until that sentence was performed. Having been committed, he remained in prison for thirty days and his note for the amount of the fine and costs was taken, payable to the county treasurer, and he was liberated by the sheriff. This action was commenced upon that note.

The first ground of defence presented is, that between these parties there was no consideration for the note.

The defendant by the judgment of the Court, became indebted to the amount of the fine and costs. By giving this note he obtained a discharge of that judgment. His detention in prison was only to enforce a payment of it, and he was liberated. Although the plaintiff had no particular interest in the recovery of the fine and costs, the benefit thus received by the defendant was a sufficient consideration. The second ground of defence is, that the consideration was illegal.

By the act of March 17, 1821, c. 83, § 2, the Justices of the judicial courts were authorized to liberate poor convicts imprisoned only for the non-payment of a fine and costs upon certain conditions prescribed by the statute, taking their notes for the amount of their fines and costs. By the act of February 2, 1822, c. 190, the sheriffs of the several counties were authorized to exercise the powers conferred by the former act upon the Justices of the judicial courts.

The sheriff of this county, according to the agreed statement, appears to have omitted to take a schedule of the defendant's

property, and to cause him to take and subscribe the oath required by the statute, previous to his liberation. The course pursued by him was illegal. But there does not appear to have been any agreement or understanding between him and the defendant, that he should act illegally or omit any part of his duty. The note was not given to induce him to act illegally. It does not appear, that either the sheriff or the defendant knew, that he did act illegally. The consideration of the note does not therefore appear to have arisen out of any unlawful or corrupt bargain or contract.

The sheriff in taking the note, acted as a public agent, and by violating his duty and the law, by acts of omission, he could not deprive the public of its just and legal rights. The plaintiff, and those whom he represents, are in no way connected with any unlawful acts, and are not therefore disenabled to claim the aid of the Court for the recovery of their debt.

The action is not founded upon an illegal contract; nor is the Court called upon to lend its aid to execute such a contract. When the contract and its consideration are lawful, the plaintiff may recover, although he may have violated the provisions of a statute in acquiring a title to the property, which is the subject of it. *Marks* v. *Hapgood*, 24 Maine, 407. So he may in like case, if he be guilty of a violation of a statute in the execution of such a contract. *Branch Bank* v. *Crockerow*, 5 Ala. 250. The defendant cannot be discharged from the payment of a legal demand by showing, that the sheriff violated a statute, by omitting to require him to do other additional acts, there being no corrupt agreement that they should be omitted. *A default is to be entered.*

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF WALDO.

ARGUED AT JULY TERM, 1848.

MEM. — WELLS, J. during this term was engaged in the trial of issues in the county of Washington, and took no part in the decision of the cases in Waldo at this term.

PETER HARDY, 3d, *versus* JOHN W. SPROULE *& al.*

A part owner of a vessel is not relieved from his joint liability for the wages of a seaman, who was employed on the credit of the owners by the master, although the master was appointed by the other part owner, and although he had forbade both the master and said other part owner to employ the vessel at all, unless such prohibition was known to the seaman.

THIS was an action of assumpsit for wages as a mariner on board defendant's vessel, of which Billings P. Hardy was master. Joseph P. Hardy, one of the defendants, was defaulted.

It appeared that three quarters of the schooner were owned by Joseph P. Hardy, and the other quarter by the defendant; that the master, while he was sailing the vessel by the month, hired the plaintiff on the credit of the owners.

The same master had commanded the vessel for two summers previous, and a part of that time sailed the vessel on shares. He was employed by Joseph P. Hardy, and had laid out part of the earnings upon the vessel, and had never paid Sproule any thing. It also appeared, that before the plaintiff

rendered his services, Sproule forbade the master and Joseph P. Hardy having any thing to do with said vessel.

Upon these facts, TENNEY, J. intending to reserve the questions of law for the whole Court, ordered a nonsuit.

Hubbard, for plaintiff, argued, 1st. That the master was a competent witness for the plaintiff. Abbott on Shipping, 475, 476, 484; 8 Mass. 483; 15 Mass. 424.

2d. That the fact of the master and Joseph P. Hardy, being forbidden having any thing to do with the vessel, could not affect the plaintiff's right to recover, for he had no notice of it; and Hardy, owning three quarters of the schooner, had a right to appoint a master. Abbott, 70.

3d. There were shipping articles, over which plaintiff had no control; and he had a right to suppose that Billings was the master; besides, the U. S. statutes do not make contracts void, if there is no written agreement between master and crew, but only impose a penalty on the master.

Dickerson, for defendant, contended that a major owner of a vessel cannot make a minor owner liable against his will. For they are not partners. 6 Greenl. 76; 4 Pick. 13. The managing owner has only a general power. *Hall* v. *Thing*, 23 Maine, 461.

It has also been decided that a mortgagee out of possession is not liable for the necessaries of the vessel. *Winslow* v. *Tarbox*, 18 Maine, 132; 15 Johns. 298; 17 Pick. 441. Even if his name appears on the papers. 6 Greenl. 474; 20 Maine, 213.

The owner, *pro hac vice*, alone is liable for contracts of master. 4 Greenl. 264; 16 Maine, 413; 23 Maine, 17. The general owner is not liable for wages. 4 Pick. 298; 10 Mass. 483.

This is no hardship upon the seamen, for they have their remedy against the master and against the vessel. Abbott on Ship. 70. Besides the vessel was bonded, according to R. S. chap. 114, § 65, and when so bonded, the vessel sails at the risk of the bonding owner; he is of course, liable to all per-

sons. Furthermore it does not appear that the vessel ever returned from her voyage.

The opinion of the Court was read at the ensuing December term, as drawn up by

WHITMAN, C. J. — Sproule, one of the defendants, resists the claim of the plaintiff upon the ground that he had forbidden the other part owner of the vessel, in which the plaintiff's services were performed, to employ her at all; but it does not appear by the bill of exceptions, that the plaintiff had any knowledge that such was the case. It is laid down that one part owner may render his co-tenant liable for repairs, and other necessaries for the employment of the ship, by ordering them upon the credit of all concerned. Abbott, 92, c. III, § 8. The case might be different if it should appear, that the plaintiff was hired with full knowledge, that the master and other owner, had employed the vessel at the time he served on board of her, contrary to the expressed determination of this defendant. Without such knowledge, the plaintiff would have had a right to suppose himself employed by the consent and for the use of all the part owners.

The exceptions therefore are sustained.

JOHN W. SPROULE *versus* CHANDLER R. MERRILL.

Where one brings a suit in the name of another person, the same defence may be made, as if he were a party to the record.

Any illegality in the transfer of a negotiable note, will vitiate the title of one, who was a party to the illegality.

ASSUMPSIT on a note of hand made by defendant to Edward Fernald, and payable to him or bearer on demand, and by said Fernald transferred.

Defendant offered evidence to prove that the note, at the commencement of the suit, and at the time of the trial, was the property of one *Amos Sproule*, a *deputy sheriff*, and the same person who served the writ in this action; that said Amos purchased the note of Fernald and paid for it, and

that said purchase was made for the purpose of making a profit to himself from the fees to arise from the service of said writ. The suit was brought in the name of the plaintiff by his consent.

The evidence offered was objected to by plaintiff, on the ground, that the facts offered to be proved, would not constitute a defence.

The cause was thereupon taken from the jury in the Court below, REDINGTON J. presiding, the parties agreeing, that if, in the opinion of the Court, the foregoing facts, if proved, would not constitute a legal defence, defendant should be defaulted; but if the Court should be of opinion that the foregoing facts, if proved, would constitute a legal defence to the suit, then the action to stand for trial.

Merrill, for defendant. All the facts offered to be proved, are to be taken as established, and the first point in the case relates to the negotiation of the note. This was negotiated for an unlawful purpose and therefore was null and void. For all contracts, in violation of a positive law of the State, are null and void. No action can therefore be maintained upon the note in its present shape, unless in the name of the original payee. It never having been lawfully transferred, has not been transferred at all.

The purchase of this note by the plaintiff in interest, was in contravention of the R. S. c. 158, § 16, and it has been decided in Massachusetts, that no action can be maintained upon a contract which violates a similar statute in that Commonwealth. *Allen* v. *Hawkes*, 13 Pick. 79.

The purchase and negotiation of this note by Sproule was a *contract*, and liable to be impeached as such for any of those causes, which in law render a contract null and void; such as illegality, fraud, incompetency of the contracting parties, &c. 3 Metc. 164; 25 Maine, 410; 8 Johns. 97.

We hold it to be a general and universal rule of law, that no contract or agreement, made in violation of any statute, can be enforced in a court of law. 17 Mass. 281; 14 Mass.

322; 15 Mass. 35; Cooper, 343; Chitty on Cont. 667, and cases there cited.

It has been held that where the statute inflicts a penalty for doing a thing, it implies a prohibition, although there are no prohibitory words. *Bartlett* v. *Vinor*, Carthew, 252.

In *Holman* v. *Johnson*, 3 Cowper, Lord Mansfield says, "no court will lend its aid to a man, who founds his cause of action upon an immoral or illegal contract." And the "test, whether a demand connected with an illegal transaction, is capable of being enforced at law, is whether the plaintiff requires any aid from the illegal transaction to establish his case." In the case at bar, the plaintiff requires aid from the illegal negotiation to establish his case, and hence cannot maintain it.

The case at bar is precisely parallel in principle to *Strong* v. *Thompson*, 8 Johns. 97, and must be governed by the same rules.

Heath, for plaintiff, argued, that the action is rightfully brought in the name of plaintiff. *Brigham* v. *Markam*, 7 Pick. 40; *Gage* v. *Kendall*, 15 Wend. 640.

The evidence offered in defence cannot prevail, unless by R. S. chap. 158, § 16. The thing prohibited by this section is, what took place between the present owner of the note in suit and the payee, with which defendant had no connexion or concern. The offence, against which the statute guarded, was committed the moment that agreement was perfected. The commencement of this suit might perhaps be used as evidence that the agreement was made to obtain fees and cost, but after all, the commencement of this suit is not the thing prohibited by the statute. If the statute had forbidden the prosecution of a suit upon a note so purchased, then the defence offered would be available. But the law only forbids the corrupt agreement, and that agreement is not before the Court.

But it is said, the plaintiff in interest rests upon a violation of law, for his property in the note in suit, and the Court will sanction that violation by rejecting the defence offered.

But what right has the defendant to look into transactions between other parties for a defence to his own paper, voluntarily put into circulation for a lawful consideration? He has received his pay for it. Suppose it true that the owner purchased the note for a corrupt purpose, that *purpose* is, after all, something extra the *purchase* itself. The plaintiff rests upon the fact that the paper has been negotiated. His right to appear as plaintiff is, that he is possessor of the paper which has been put into circulation. His title to maintain the suit does not rest, in any case, upon his designs when he buys marketable paper. The note in this case was transferable by delivery; there was nothing wrong in the transfer, but a supposed wrong in the person buying it.

The proposed defence strikes a death blow to the negotiability of paper, for it undertakes to transfer the taint of the party to the paper he holds.

The cases cited by defendant are entirely distinct from this, and wholly irrelevant. Those from Mass., N. H., and N. Y., are all actions upon contracts made against law. And the English cases, from which those are supported, are actions upon the prohibited contract. In 12 East, 304, Lord Ellenborough gives the substance of all the cases, and said it was a settled rule that when a contract, which is illegal, remains to be executed, the court will not assist either party. And in 5 Johns. 327, THOMPSON, J. says, no case can be found where an action has been sustained, which goes in affirmance of an illegal contract, and when the object of it is to enforce the performance of an engagement prohibited by law.

The cases cited from N. H. and Mass. are upon the contracts prohibited by the statutes of those States. But what have these cases to do with the decision of the present question. If this action was between plaintiff and the payee, the authorities cited would bear upon it, for the illegality in all these cases attached to the identical contract declared on. The plaintiff failed, because he asked the Court to help him to do what had been forbidden. The general rule seems to be, "that when the undertaking, upon which plaintiff relies, was either upon an un-

lawful consideration, or to do an unlawful act, the contract is void.

The note in suit was not given upon an unlawful consideration, but is justly due from defendant. It was transferred to plaintiff by delivery; he may have had a wrong *purpose* in buying it, but how can the defendant set up that wrong, to justify the perpetration of a still greater one?

The opinion of the Court was read at the ensuing December term by

SHEPLEY, J. — The suit is upon a promissory note, payable to Edward Fernald or bearer on demand, with interest, and by him indorsed. The defendant offered certain proof, and the question presented is, whether if made, it would constitute a good defence.

The case does not in terms state, that the purchase of the note was made by Amos Sproule while he was a deputy sheriff, and for the purpose prohibited in the statute, c. 158, § 16. But as he is stated to have been such an officer without any limitation of time, and to have made the purchase for the purpose of making a profit from the fees for the service of the writ in this case, the fair inference is, that the purchase was made, while he was a deputy sheriff, and for that purpose; and as that fact will be open for proof on the trial, no injustice can be done by making it for the purpose of presenting the question for decision.

Amos Sproule must upon the testimony offered, be considered as the party plaintiff in interest; and the same defence may be made, as if he were a party to the record.

The statute c. 158, § 16, among other provisions, declares, that if any deputy sheriff shall give any valuable consideration, with intent thereby to procure any account, note or other demand, for the purpose of making a profit to himself from the fees arising from the collection thereof by a suit at law, he shall be punished by a fine not exceeding five hundred dollars, nor less than twenty dollars. Assuming that the testimony offered would prove, that the party in interest being the real

plaintiff in the suit, though not the nominal one, had violated the provisions of this statute by becoming the owner of the note in suit, it is contended that this would not prevent his recovery, because the note was justly due from the defendant, for a legal and valuable consideration. But in such case, any illegality in the transfer will vitiate the title of one, who derives it through a violation of law, to which he was a party; although one not a party to such violation of law and holding it *bona fide*, might recover it. The doctrine is stated in Story on Promissory Notes, § 193, and the cases are collected in notes appended to that section.

This doctrine has in some of the decided cases been denied, while in others it has been admitted to be applicable to the usurious transfer of a note. Whatever may be the true doctrine respecting usurious transfers, it does not prevent the operation of the rule in the case of a transfer absolutely prohibited or made penal by statute.

In such case the party obtains no title, which a court of justice will enforce. *Strong* v. *Tompkins*, 8 Johns. 97. If it were to do so, it would lend itself as an instrument to enable one to obtain the unlawful gains designed to be obtained by an act prohibited by law.

According to the agreement of the parties, the action is to stand for trial.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF YORK.

ARGUED AT APRIL TERM, 1849.

ZEBADIAH JACKSON *versus* AARON C. WOODMAN.

In a levy of execution upon real estate, a delivery of seizin to the creditor after the appraisement is essential to the passing of the title.

If the creditor refuse to receive the seizin, the previous proceedings, in making the levy, have no effect toward satisfying the execution.

The title must be proved by the return of the officer. The creditor's declarations are not evidence on the question of title.

DEBT ON JUDGMENT. An execution had issued. The cost part of judgment was satisfied by a sale of personal property. The defence was, that as to the debt part, the execution had been satisfied by a levy of the defendant's land.

The levy was regularly and legally made in full satisfaction of the execution, except in the proceedings relative to the delivery of seizin. As to those proceedings the officer's return is:

"On the same twenty-seventh day of June, 1844, by direction of the attorney aforesaid, I levied this execution on the said tract of land, and I then offered to the attorney of the creditor to go upon the same premises and deliver seizin and possession thereof, but he declined so to do, but before the appraisers had signed their return of their appraisement and before I offered to go upon the land, the said attorney did sign

a paper acknowledging the receipt of seizin thereof, which paper the said attorney demanded of me, and I returned the same to him, and afterwards, on the twenty-sixth day of September, 1844, before the end of three months from the time of the certificate of said appraisers, I offered to the said attorney of the creditor to go upon the premises and deliver seizin and possession thereof, but he refused so to do, or to receive seizin and possession thereof, and no other seizin or possession has been given by me than as above stated.

"I return this execution satisfied in part for the sum of nineteen dollars and fifty-four cents, the amount of the sales of the personal estate, as before stated on this execution. And I further return that this execution is satisfied for the further sum of four hundred and seventeen dollars and nine cents, being the amount of said appraisal of real estate, after deducting sixteen dollars and twenty-four cents for my fees and expenses of levying the execution, provided that the aforesaid real estate has become the property of said Jackson by reason of the proceedings aforesaid, but otherwise, I return the same satisfied only for the proceeds of the sale of the personal estate."

The defendant offered testimony to prove that the plaintiff, (after the return of a levy, as will appear on the execution, had been made,) claimed to be the owner of the estate levied upon, and that he offered it for sale. This testimony was excluded by SHEPLEY, C. J., before whom the trial was had.

The defendant then consented to be defaulted. The default is to be taken off, if the testimony was improperly excluded. But if it was properly excluded, and if the plaintiff is entitled to recover, judgment is to be entered upon the default.

The case was submitted without argument.

The COURT, by WHITMAN, C. J., orally.

When an execution is levied on lands, every thing required by statute to pass the property, must appear by the return of the officer to have been done, or there can be no valid title acquired by the creditor. *Williams* v. *Amory*, 14 Mass.

20; *Allen* v. *Thayer*, 17 Mass. 299; *Litchfield* v. *Cudworth*, 15 Pick. 23; Maine Rev. Stat. c. 94, § 24. It must appear by the record that the creditor acquired a title or he has none. No title can come by parol, by means of a levy, than by a parol deed. *Gorham* v. *Blazo*, 2 Greenl. 232, where the requisites are stated. They recognize the principle that a levy may be waived at any time before delivery of seizin. *Banister* v. *Higginson*, 3 Shepl. 73; *Munroe* v. *Reding*, *ib.* 153; 18 Maine, 405.

The return of the officer must show, that he delivered seizin and possession of the land appraised, to the creditor or his attorney, or no title will pass to the creditor. This is one of the essential particulars required by the Rev. Stat. c. 94, § 24, to be returned by an officer, also § 17, 18, 21, 22. *Darling* v. *Rollins*, 18 Maine, 405; *Pope* v. *Cutler*, 22 Maine, 108. Both the last cited cases are in point and decisive.

Judgment on the default.

INHABITANTS OF SACO *versus* NATHAN HOPKINTON *& al.*

Under the R. S. c. 114, § 33, a levy of real estate, made upon a judgment in a suit, wherein the declaration contained only a common money count and a count upon an account annexed, which account merely charged, balance due on an account and interest, is invalid as against a prior conveyance, although the party claiming under the levy offered to prove that the said conveyance was fraudulent and void.

Neither is the levy aided by a paper, in the form of a bill of particulars, not attached to the writ, though placed and continued within its folds. — Per WELLS, J.

Such an infolding of the paper is not an "annexation" within the statute, which authorizes a specification to be annexed. — Per WELLS, J.

The title of a purchaser will not be affected by proof that he knew of a prior attachment, if that attachment be made invalid by the statute. — Per WELLS, J.

WRIT OF ENTRY. The trial was before WHITMAN, C. J. The parties submitted the case to the decision of the Court.

The land belonged formerly to Samuel Woodsum.

The defendants claim under a deed from him made in 1833.

The demandants claim under a levy made upon the land in 1845, as the property of said Samuel Woodsum, and they contend that the *conveyance* was fraudulent and void.

The defendants then objected that the *levy* under which the plaintiffs claim was void. The objection is founded on a provision of the R. S. c. 114, § 33, which enacts, that no such attachment shall be valid, unless the plaintiff's demand and the nature and amount thereof are substantially set forth in proper counts, or a specification of it shall be annexed to the writ.

The writ in that action contained two counts, one upon an account annexed for $1500, the other for $1500, money lent and accommodated; had and received; and paid, laid out and expended. The account annexed was for "balance due on account and interest, $1500, April 1, 1841.

"Debt,	$593,00
"Interest from date of writ,	95,96
	$688,96"

A paper was found within the folds of the writ, of which the following is a copy. At the trial it was called paper A.

Samuel Woodsum's Estate to Joseph Woodsum		Dr.
	To cash, to pay Doctor Allen,	$75,00
July 20th, 1826.	To cash, one dollar,	1,00
November 15th,	To fifty dollars paid John Woodsum,	50,00
" 29th,	To one hhd. Rum,	92,00
October 7, 1826,	To cash paid for Moses Woodsum,	375,00
		593,00
	Interest on the above 16 years,	600,00
	Feb. 14, 1843.	$1193,00

J. Shepley, for plaintiffs.

The statute, on which the defendant relies, is in derogation of the common law. An attachment of personal estate, under a common count, would be valid. There is no principle, why it should not equally be so as to real estate. The statute is loosely worded. It needs construction. It seems to re-

quire more than one count in a declaration. But in this case, it was complied with. It requires one or the other of two things; one is, that *plaintiff's demand and the nature and amount of it be set forth in proper counts.* No one will deny that the counts are in proper form; and it is equally true that they exhibit the demand, and its nature and amount. The *nature* of the demand probably intends the form of action, as assumpsit, trover, debt or replevin, &c. The count is in assumpsit on a promise to pay, and to pay what was due on an account, which was annexed. The declaration, "*in proper counts*," sets forth the amount claimed. True, it was greater than the sum recovered. But who could foresee what sum a jury might allow?

The other alternative is, that "*a specification of the demand shall be annexed to the writ.*" The declaration seems to be dispensed with. But there was a specification. It was, and still continues to be annexed. And it was a sufficient specification. It showed the sort of claim sued, and its amount. If more be required, at what point, in the particularization, can the stop be made? The crockery-ware dealer may insert the number of plates and dishes which he gave credit for, must he describe their different sizes; and afterwards be required to specify their colors and the figures painted thereon? But, further, we contend, that the second count with the paper A was a sufficient compliance with the statute. That paper is a specification; it is a bill of particulars. It was part of the writ. Wafering or the tying with a string is one way of annexing. Equally so, (and such has been the practice as to amendments made,) is the filing of the document in the folds of the writ. It gave equal information as if stuck on with a wafer. It is not seen that wafering is demanded by the statute.

WELLS, J. — The demandants claim under a deed from Joseph Woodsum, who attached the demanded premises on the fourteenth day of February, 1843, as the property of Samuel Woodsum, under the administration of Jeremiah Gordon, and having obtained judgment in his suit, in which the attachment

was made, caused his execution to be levied on the premises, on the twenty-fourth of November, 1845.

Samuel Woodsum conveyed the same premises to John and Jabez Woodsum, on the nineteenth of March, 1833, and the deed of conveyance was recorded on the nineteenth of April of the same year. John subsequently obtained the title of Jabez Woodsum.

John Woodsum conveyed the premises to Edmund P. Dennett on the tenth of September, 1845, Edmund P. to Daniel Dennett, on the third of September, 1846, and the latter to the tenants and Orrin Dennett on the twenty-first of January, 1847.

It is contended that the deed from Samuel to John and Jabez Woodsum, was fraudulent and void against Joseph Woodsum a prior creditor of Samuel, and that the attachment in Joseph's suit, having been made before the deed to Edmund P. Dennett, the demandants are entitled to recover.

By the Revised Statutes, c. 114, § 33, "No such attachment, though made and notice thereof given as directed in the preceding section, shall be valid, unless the plaintiff's demand, on which he founds his action, and the nature and amount thereof are substantially set forth in proper counts, or a specification of such claim shall be annexed to such writ." This section is a revision of the fourth section of the act of March 23, 1838, c. 344.

The intention of the statute must have been to require an attaching creditor to furnish such information by his writ to subsequent attaching creditors and purchasers, as would enable them to know what his demand was, and that it should be so specific as to prevent any other demand from being substituted in the place of that sued. Where the demand is not exhibited by the counts in the writ, it must be made to appear by a specification of it, annexed to the writ. Information more certain and definite was required to be given, than could be obtained from the general counts.

Joseph Woodsum's writ against Samuel Woodsum contained two counts. The first was *indebitatus assumpsit* according to the account annexed. The second was for money lent and accommodated, had and received, and laid out and expended.

The account annexed to the writ was in the following words.

"Samuel Woodsum to Joseph Woodsum, Dr.

To balance due on account, and interest, $1500

"April 1, 1841."

Neither of the counts, nor the account annexed, furnish the necessary information, such as the statute requires. They are too general. No one could ascertain from the writ what the claim in reality was, except it was a "balance due on account and interest." It does not disclose the nature of the transactions between the parties, nor whether the account was for money, labor, or goods sold. And it could not be known whether the account, upon which the judgment was rendered, was the same as that for which the suit was brought.

It appears by the testimony, that paper marked *A*, containing four charges for money and one for a hogshead of rum, amounting to $593,00, was put into the writ when it was made, but was not annexed to it, and remained in the writ at the time when the judgment was rendered.

If this paper should be considered a sufficient specification of what the plaintiff in that suit claimed, still there is a failure to comply with the statute, for it was not annexed to the writ.

The laying a loose paper within the folds of a writ does not make it any part of the writ, nor can it be said with any propriety of language to be annexed to the writ. The removal of such paper by the plaintiff would not be a mutilation of his writ, nor render him amenable to any one.

The statute intended, that the exposition of the claim should be so annexed to the writ, that it could not, after the service, be lawfully removed.

It is stated in argument, that the conveyance to Edmund P. Dennett was not made in good faith, and that the attachment would be valid against him, and that Daniel Dennett and the tenants, having acquired their title after the levy, had by the record, constructive knowledge of it.

But there is no satisfactory evidence in the case, nor any offered to be shown, that Edmund P. Dennett was not an hon-

est purchaser for a valuable consideration. It does not appear that any such suggestion was made at the trial.

And if he had been informed before he purchased that the premises had been attached in the suit of Joseph Woodsum, a notice of an attachment not valid by the statute, could not affect his title.

It is not necessary to examine the other questions raised in the case.

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

NOTE. — HOWARD, J. had been consulted in this case, and therefore took no part in its decision.

SAMUEL S. BURNS, *in equity, versus* DAVID L. HOBBS, JOHN HOBBS AND JOSIAH DEARBORN.

In a bill for discovery and to set aside a mortgage, which the plaintiff alleges was taken by the defendant with intent to defraud the plaintiff, the defendant cannot by demurring to the bill, avoid answering and disclosing the time when his mortgage was executed; or whether he claims to hold the land by virtue of it; or from disclosing, and, (if in his power,) producing the note which the mortgage purports to secure; or from stating when, where, and in whose presence and for what, the note was given; or from whom the consideration was received, and to whom paid.

If a demurrer to a part of a bill be not good as to the whole of that part, it is not good for any part of it.

THE bill alleges that David L. Hobbs was indebted to the plaintiff, upon a contract made in 1833; that he brought suit upon said contract against said David, and attached a certain farm in Parsonsfield, in February, 1841. That in said suit, he recovered judgment in 1847, for $2579 damage and $49,59 costs; that within thirty days, he caused said farm to be levied and set off to him upon the execution issued on said judgment.

That in 1834 said David, then being seized of said farm in fee, conveyed it to his son, John Hobbs, one of these defend-

ants, by a deed conditioned to be void, if said John should fail to pay a note of even date with the deed, for $2000.

That it appears by the record that in 1840, John mortgaged the land to Josiah Dearborn, the other defendant, to secure the payment of $1310,66, but the mortgage was not recorded until 1846.

The bill further alleges, that said conveyances were fraudulent, intended to defraud the plaintiff, and that said John Hobbs and said Dearborn knew of and concurred in the fraudulent intent.

The plaintiff prays that subpœnas may issue to each of said defendants to appear and answer to the bill, and particularly to make answer under oath to certain interrogatories, specifically set forth, and which are sufficiently recited in the opinion of the Court.

The said David and John were each requested to produce and file with the clerk the $2000 note, if he had it.

The said Dearborn was requested to produce and file with the clerk the $1310,66 note.

The said David and John severally made answers to the bill. The said Dearborn made answer to a part of the bill, and demurred as to the residue.

The opinion of the Court exhibits the portion of the bill demurred to.

Dearborn of New Hampshire, in support of the demurrer, refers to Story's Eq. Pl. 659.

Documents and papers which wholly and solely respect the defendant's title or defence, he is not compellable by his answer to discover or produce. Cites Wigram's Points of Discovery, 18, 19, 90, 111 to 116. See also Mitford's Eq. Plead. by Jeremy, 9, 53, 54, 190, 191 ; Hare on Discovery, 183 to 244 ; Daniel's Chancery Plea. and Prac. pages 646 and 7 ; cites Story's Eq. Plead. 572, 574 ; 4 Sumner's Vesey, 72.

Plaintiff may have benefit of defendant's oath. This is limited to a discovery of such material facts as relate to plaintiff's case, and does not extend to the discovery of the manner in

which, or of the evidence by means of which, the defendant's case is to be established, or to any discovery of the defendant's evidence. Daniel's Ch. Plea. and Prac. 646, ed. of 1846. 1 Vesey, 37; 2 Vesey, Jr., 679; see authorities cited in Daniel's Ch. Plea. and Prac. 646, note c; 3 Daniel's Ch. Plea. and Prac. 2053.

A party has right to the production of deeds, sustaining his own title affirmatively, but not to those which are not immediately connected with the support of his own title, and which form a part of his adversary's. He cannot call for those which, instead of supporting his title, defeat it by entitling his adversary. Story's Eq. Plead. 858, 859; Gresley's Eq. Ev. pages 28, 29, 30.

John S. Abbott, for plaintiff.

HOWARD, J. — Dearborn, one of the defendants, has demurred to a portion of the bill and answered the remainder. This demurrer presents all the questions that arise, in this stage of the proceedings. Considerations of form or substance, not noticed by the parties, and not presented by the demurrer, are waived in the present examination.

The plaintiff claims to have acquired title to certain land, by virtue of an attachment and of a levy thereon, as the property of David L. Hobbs, one of the defendants; and he alleges that David L. Hobbs deeded the premises to his son, John Hobbs, another of the defendants; that John Hobbs pretended to convey in mortgage the same property to Dearborn, the other defendant, who has entered to foreclose the mortgage, and that these conveyances were not *bona fide*, but fraudulent, and effected in truth "to protect the property, and keep it for the use of said David L. Hobbs, and to cheat and defraud the plaintiff out of his just demand against him."

The plaintiff seeks for a discovery of the facts and circumstances attending these transactions; and particularly, calls on Dearborn to state whether he did not know of said Burns' claim and suit, before he took the mortgage from John, and before David L. conveyed to John, "and to produce and file in

Court, with his answer, the original note of $1310,66, and to state what said note was given for, and when; if for money, where? In whose presence, and to whom was it paid, and what was then done with it, and where and from whom did said Dearborn obtain the money?" "Said Burns further represents that it appears of record, that on the 22d of August, 1840, said John Hobbs executed to one Josiah Dearborn, of Effingham, N. H., a mortgage, to secure payment of $1310,66 payable in three years from that day, with interest annually, but he does not suppose that such mortgage deed was in truth, and *bona fide* executed at that time. It was recorded the 25th of June, 1846, book 192, pages 19, 20. And said Burns is informed and believes that said Dearborn claims to hold the premises by virtue of the mortgage."

The demurrer covers that portion of the bill above recited, and proceeds upon the position that the party demurring is not required to discover documents, or evidence which solely respect his own title. As an abstract proposition this may be true; but its direct or necessary application to this case, is not required.

The plaintiff presents *prima facie*, an equitable title, at least, to the premises, which he acquired in due form of law; and he calls upon a court of equity to sustain this title against what he considers the pretended title of Dearborn, originating and asserted in fraud of such equitable title.

Courts of equity acquired jurisdiction over almost all matters of fraud at an early date; and they address the conscience of the defendant, as one of the most direct means of detecting latent frauds and concealments, within his knowledge. If he do not know, such may be his answer; but if he do know, equity demands the discovery upon oath; unless such discovery would expose him to punishment, subject him to penalty or forfeiture, or render him infamous.

If Dearborn as mortgagee has legal or equitable rights they will be duly respected and guarded in a court of equity. But as mortgagee, he cannot, by demurrer to the bill, avoid answering and discovering the date of the execution of his mortgage,

and whether he claims to hold the premises by virtue of it; or from discovering and producing, if within his power, the note as exhibiting the mortgage debt; or from stating when, where, in whose presence, and for what such note was given; from whom the consideration was received, and to whom paid. All this may serve to enable the court to come at, and adjust the rights of the parties; and it may all be consistent with the plaintiff's claim under the mortgage. We cannot presume, in this state of the case, that an answer to such portions of the bill as call for this discovery will impeach or impair the defendant's title.

If he be a *bona fide* purchaser, without notice of the supposed fraudulent conveyance, he may avail himself of that fact in defence, but if he acquired his title with a full knowledge of the fraud, or if he knowingly participated in effecting such fraudulent transfer, then equity demands of him a discovery of all the facts and circumstances attending it.

A demurrer cannot be good as to a part, which it covers, and bad as to the rest; the whole must stand or fall. Wigram on Discov. 82, 83; Hare on Discov. 140 — 145; Story's Eq. Pl. § 603 — 605, 811; Cooper's Eq. Pl. 207, 208; Fonbl. Eq. B. 2, ch. 6, § 2; and B. 6, ch. 3, § 3; 1 Story's Eq. Jurisp. § 31, 32, 33; *Ovey* v. *Leighton*, 2 Sim. & St. 234; *Jewett* v. *Palmer & al.* 7 Johns. Ch. 65; *Varick* v. *Briggs*, 6 Paige, 329; *Jackson* v. *McChesney*, 7 Cowen, 360; *Frost* v. *Beekman*, 1 Johns. Ch. 302; *Meth. Ep. Church* v. *Jaques*, 1 Johns. Ch. 74; 3 Black. Comm. 437, 438; 2 Madd. Ch. 286; Story's Eq. Pl. § 443; *Livingston* v. *Livingston*, 4 Johns. Ch. 296; *Higinbotham* v. *Burnet*, 5 Johns. Ch. 186; Hare on Discov. 289, 290. *Demurrer overruled.*

STEPHEN H. DYER & *al. versus* ABRAHAM HALEY.

The lessors of a farm, adjoining a river, have no right to the drift-wood, which the lessee hauls upon the farm from the river, unless such right be deduced from the terms of the lease.

REPLEVIN. The defendant, who is a deputy sheriff, pleads

the general issue, and also by brief statement, that the property was in Isaac Dyer.

Isaac Dyer had long occupied a farm, adjoining the Saco river. The plaintiffs, who are his sons, purchased the farm and gave a lease of it to their father.

This is an action of replevin for some slab-wood, which had been found floating down the river, and had been hauled out upon that farm, and also for a cow.

The opinion of the Court supplies all the other material facts.

Wilkinson, for plaintiff.

Luques, for defendant.

TENNEY J. — To have maintained their action, the plaintiffs must have satisfied the jury from the evidence, that they were the joint owners of a part or of the whole of the property replevied. Evidence was introduced by them tending to prove, that Stephen H. Dyer, one of the plaintiffs, paid the sum of fifteen dollars, to redeem a cow, which Isaac Dyer had owned and mortgaged to one Dennett to secure a debt which he owed; that this cow and the sum of three dollars was given in exchange for another to one Dunn; by whom the money for the difference in the value of the two cows was furnished does not appear; there was also evidence, that the last of May or the first of June, 1845, the second cow was exchanged for the one replevied, and in the trade Alpheus Dyer, one of the plaintiffs, paid three dollars; that the last cow, after she was so obtained up to the time she was replevied, was kept upon the farm by Isaac Dyer, which he had occupied for a long time before the lease, that he took from the plaintiffs dated June 10, 1845, the plaintiffs the day before the date of the lease having taken from the owner a bond for a deed of the farm. There was no evidence of any contract between Stephen H. and Isaac Dyer, of any description, at the time the money was paid by Stephen for the redemption of the cow; it appears that it was sent to the wife of Isaac, and that he paid it to the mortgagee of the cow; and there

is no evidence of any agreement between Stephen and the mortgagee, that Stephen was to succeed to the rights of the latter; neither was there evidence of any bargain between Isaac and Alpheus, that Alpheus was to have any right in the cow replevied, by virtue of the payment of three dollars in the exchange. It is however stipulated in the lease, that Isaac shall sell and exchange stock for the lessors, and that no other stock shall be kept upon the farm, excepting that which may belong to the plaintiffs. The evidence that the cow was upon the farm when the lease was given and afterwards, was not consistent with the agreement that no stock but the plaintiffs' should be kept there, if it was considered the property of Isaac. This and the evidence that the plaintiffs had actually paid the sum of eighteen dollars, which had produced this cow, with other circumstances and facts, may have led the jury to conclude, that they were the joint owners of the cow. There was evidence introduced by the defendant tending in some degree at least to control that relied upon by the plaintiffs, and to show, that the lease of the farm and all the transactions between the plaintiffs and Isaac Dyer, in relation to the farm, the cow and other property, were fraudulent against creditors, one of whom the defendant represented. But the jury have passed upon the whole evidence, which was for their consideration, and there is not such proof of misconduct in them as would authorize the Court to disturb the verdict for this part of the property, if it was the whole subject matter of the suit.

The other property replevied, was slabs and drift-wood taken from Saco river, which passes by the farm, of which Isaac had a lease from the plaintiffs. From evidence introduced by them, this property was taken out of the river as it was passing down, by Isaac Dyer and his minor sons, who were under his charge and control, assisted one day by Alpheus, the plaintiff, and placed upon the bank, on this farm. It appeared that Isaac Dyer not only rescued it from the river, but that he hired men and teams to haul it; that portions of it he sold on his own account, treating it in all respects as his own, and exercising com-

plete dominion over it. Although Alpheus assisted in obtaining it, it does not appear, that previous to the commencement of this action, he ever exercised any acts of ownership in relation to it, or made any claim thereto. There was no evidence tending to prove, that any agreement or understanding existed between Isaac Dyer and the plaintiffs touching the wood, which could be construed into a binding contract, that it was to be their property. They could have had no legal claim to it by virtue of the lease. The parties to that instrument, contracted that Isaac Dyer should carry on, cultivate and manage the farm in a good and husbandlike manner; that he should buy and repair farming utensils; sell and exchange stock, sell produce and hay, and wood if any could be spared from the farm; to hire labor if necessary; to buy and sell any personal property belonging to the lessors; and that he should receive for his labor, the support of himself, his wife and minor children; and the excess over what was necessary for their support, he was to return to the lessors at the end of each year; and he was to hold the farm for the term of three years, on condition that he fulfilled the agreement.

If the wood had been the fruit of the labor, which the lessee was bound by the lease to perform upon the farm, by the authority of the case of *Garland* v. *Hilborn*, 23 Maine, 442, and other authorities relied upon by the defendant, there would even then seem to be impediments to the plaintiffs' recovery. But the lease does not require, that labor, such as was used in the obtaining of the wood in question, should be done for the benefit of the lessors; neither was Isaac required to devote all his time to their service. The avails of his labors, beyond what he was to do for them would be legally his own. He was under no contract or obligation, to obtain fencing stuff for them, from the forest, the river, or any other place, than from the farm of which he had a lease. To the drift-wood, which came down upon the waters of the river, they had no title, and when it was recovered by him, through his own labor or that of his procurement, they could enforce no claim thereto against him. The contiguity of the farm to the river, gave the plaintiffs no

right to the drift, which floated upon its surface. The real owner of the wood, alone, could disturb the lawful possession of him, who had acquired it. Isaac Dyer had that possession, on land to which he had all the right, that the plaintiffs had previous to the execution and delivery of their lease to him.

When the evidence relied upon by the plaintiffs is examined and considered, giving it the fullest weight which can be claimed, uncontrolled by any other in the case, it is not perceived that there can be a ground on which the action can be maintained for the wood, that was replevied by the plaintiffs.

Verdict set aside and a new trial granted.

NATHANIEL RICKER, *Libelant, versus* JANE RICKER.

The additional act of 1847, "respecting divorce," was not a repeal of any part of ch. 89, of R. S.

It only introduced some new causes, not previously provided for, which should justify divorces.

Desertion by one party, of less than five years continuance, is not a ground for divorce.

THIS libel for a divorce was filed 8th March, 1849. It alleges that the parties were intermarried on the 7th Dec. 1848, and resided at the libelant's house in Limerick until the 23d of the same December. On that day she went to an adjoining town to visit her friends, requesting her husband to come and bring her home in the evening; that he accordingly went for her in the evening, but she utterly refused to return with him; that again on the 26th of same December, and on 10th Jan. 1849, he went for her, and she refused to return with him, and declared that it was her intention never to return and reside at his home in Limerick.

The libelee was defaulted.

McDonald, for plaintiff. This process is founded upon the statute of July 13, 1847. That act was intended to remedy some serious defects in the R. S. For that purpose, it gives full power to the Court, in the exercise of a sound discretion,

to grant divorces. This case calls most manifestly for relief, and shows the wisdom of the new enactment.

But if that statute cannot reach this case, the Court is respectfully requested to consider the case in connection with R. S. ch. 89, sect. 2, clause 6, relative to marriages procured by fraud.

The COURT, by SHEPLEY, C. J., orally.

The enactment of 1847 was not intended to repeal any part of ch. 89, of the R. S. It only introduced some classes of causes which should justify a divorce, which were not embraced in the former law. That law was not altered as to causes of divorce, which had already been prescribed.

If all the facts alleged in the libel, are to be considered as proved, they, at most, only show a desertion; and that desertion was much less than the five years continuance, required by the R. S. *Libel dismissed.*

SAMUEL LORD *versus* WILLIAM WORMWORD *& al.*

The cattle of one man are not lawfully upon another man's land, unless by consent of its owner or of some one having an interest in it, even if it be unfenced, and they pass there directly from the highway, upon which they were permitted to go at large by vote of the town.

Although in such a case the recovery of damages may not be allowed by the statute, the landowner may keep them off by sentinels or guards, and their owner would have no right to complain.

If cattle being thus wrongfully upon land, pass therefrom to and upon the plaintiff's adjoining unfenced lot, not bordering upon the highway, he may maintain trespass therefor against their owner, for he was under no obligation to fence against them.

THIS is an action of trespass *quare clausum*, and the following are the facts agreed. The plaintiff's close is a tract of salt marsh; and the defendant's cattle passed from the highway across a tract of uncultivated land, the same being woodland owned by one Dependance Wells, which is unfenced; thence across a tract of salt marsh owned by one Doyle, unfenced, to the land of the plaintiff, also unfenced.

The town of Kennebunk at its previous annual meeting, "voted that neat cattle be allowed to go at large in school district, No 4." The highway referred to and all the closes are in that school district.

The questions submitted are: — Were the cattle lawfully going at large in the highway, in school district No. 4? If so, were they lawfully on the close of said Wells? If so, could they lawfully cross the close of said Doyle, and thence to the close of the plaintiff, where the trespass was committed?

If the defendants' cattle were trespassing, the defendants are to be defaulted. If not, the plaintiff is to become nonsuit.

D. Goodenow and *Dane, Jr.*, for defendants.

In the establishment of a highway, the herbage is taken for the public, because it is placed in a condition to be of no value to the owner. It is compensated for in the estimate of his damages. The vote of the town, under the authority of the State, was therefore valid and effectual. It was manifestly the intention of the Legislature to protect the owners of cattle so going at large, not only against all *forfeitures*, but all *damages* in actions of trespass. Else the privilege would have been a poor one indeed.

By the common law of Massachusetts and Maine, the owners of improved land bordering on the highway are bound to *fence* it and *keep it legally fenced* at their *peril*. Or they will not be entitled to recover damages in trespass, against the owners of cattle lawfully in the highway. The common law of England on the subject, if ever adopted, was modified and adapted to the condition of this country. Blackstone says the "common law of England, as such, has no allowance or authority" in our American plantations, and he gives the reason, because they were obtained by "conquest and driving out the natives." The laws of the conquered remained till altered by parliament or some colonial Legislature, or by *general consent*. 1 Bl. Com. 108. It would not be necessary that such *general consent* should extend beyond the limits of a single State to make it *lex non scripta*, in that State. This country has been

settled long enough to have a common law of our own, and we have such upon many subjects, different from the common law of England, and adapted to our condition. A large uncultivated country sparsely peopled might require a very different law in relation to *cattle* and *fences* from a small country highly cultivated with a dense population.

The colony law of 1662, ch. 19, § 8, left the owners of land *unfenced* without any remedy, for damages done by cattle "any other law, custom or usage to the contrary notwithstanding." From this a common law has arisen in Massachusetts and Maine, different from the common law of England. It has from that time to the present, been the *custom* to fence *cultivated* lands bordering on the highway. And of this *general custom* the Court will take notice, as a part of the law of the land.

It is true, in *Rust* v. *Low*, PARSONS, C. J. says, the colonial statutes *expired* with the repeal of the first charter. They were not repealed; the principle has ever since been acted upon by general consent, the same exigencies existing after the repeal of the charter as before. What makes *common law? General consent.* Lord Ch. Just. WILMOT has said, "The statute law is the will of the Legislature in writing; *the common law is nothing else but statutes worn out by time.* All our law began by consent of the Legislature, and whether it is now law by *usage* or *writing* is the same thing." 1 Bl. Com. p. 74, note 7.

All the colony laws, the province laws, the statutes of Massachusetts and Maine, as well as the conduct of the whole people, are in harmony with the principle for which we contend. If any judicial decision has been in conflict with it, it has remained as an *abstraction*, and has not been acted upon by the people. *Town* v. *Dodge & al*, *Potter* v. *Jewett*, and *Dodge* v. *Cross*, reported by Dane, ch. 66, art. 1, § 1.

Some Judges in their decisions, seem to have rested very much on the *ancient* and general principle, which required the owner of cattle *to keep them at his peril.* And some very much on the other general and more *modern principle*,

which requires the owner or occupier of land to keep it *enclosed with legal fences at his peril.* Dane, ch. 66, art, 1, § 1.

The reason of this conflict in the decisions was this: Some of the Judges adopted the common law of *England*, and the other Judges adopted the common law of *Massachusetts.*

In this case there is no ground to impute fault to the defendants. They were not bound to make any part of the fence, nor had they the right to do it, nor had they any power to compel others to do so.

If the owner of lands adjoining the highway will not fence his lands, he *consents* that all cattle lawfully in the highway shall run upon them.

The defendants' cattle therefore were lawfully on the close of Wells, and if Doyle wished to keep them from his land he should have made a fence. But not having made any, he *thereby* must be considered as *consenting* that they should run on his land. The defendants' cattle were then *rightfully* on Doyle's land and the plaintiff was bound to fence against them *at his peril.* He could drive them away, or keep them off by fences, but could not maintain *trespass* against the owners.

The many provisions in our law as to fences, show that the *law* is not regarded by the Legislature as a *fence.* It is most remarkable that we should have so many provisions requiring fences, if in fact every man is bound by law to take care of his own cattle, and keep them at all times from the lands of other persons.

The doctrine in *Stackpole & al.* v. *Healey*, 16 Mass. 33, was a surprise upon the profession and the public. The people have continued to fence on the highways the same as before.

The provision in the statute of 1834, ch. 137, § 3, was only in affirmance of what we contend the law was before, in relation to fences, and hence there was no necessity for incorporating it in the Revised Statutes. The same also is the case with the statute of 1821, ch. 128, § 6.

In *Gooch* v. *Stephenson*, 13 Maine, 377, Ch. Jus. WESTON says, "Lands in this country cannot be profitably cultivated, if at all, without good and sufficient fences. To encourage

their erection, it is undoubtedly competent for the Legislature to give to the owners of lands thus secured, additional remedies and immunities." This was a case between adjoining owners, and rested upon the statute of 1834.

The point that we have a common law in Massachusetts and Maine, on this subject, different from the common law of England, we respectfully contend, has not been duly considered by the Courts.

Bourne, for plaintiff.

WELLS, J. — The plaintiff's close is a tract of salt marsh, not fenced, the cattle of the defendants passed from the highway across a tract of woodland owned by Dependance Wells, and not fenced, thence across a salt marsh, not fenced, belonging to one Doyle, to the close of the plaintiff. The cattle, by a vote of the town of Kennebunk, were allowed to run at large in the highway, from which they passed on to the land of Wells.

At common law the tenant of a close was not obliged to fence against an adjoining close, unless by force of prescription, but he was, at his peril, to keep his cattle on his own close. *Rust* v. *Low*, 6 Mass. 90; *Little* v. *Lathrop*, 5 Greenl. 356.

The rights of the parties are to be determined by the provisions of the Revised Statutes, c. 30, § 6. This section provides a remedy for the injury done to the owner of the close, by an action of trespass or by distraining the beasts, "provided that if the beasts shall have been lawfully on the adjoining lands, and shall have escaped therefrom, in consequence of the neglect of the person, who had suffered the damage, to maintain his part of the partition fence, the owner of the beasts shall not be liable for such damage."

The law now in force, is different from that of 1821, c. 128, § 6, and 1834, c. 669, § 3.

To sustain the defence of this action, it must appear that the cattle were lawfully on the adjoining lands, that they escaped through the neglect of the plaintiff to maintain his part

of the partition fence. It is not shown that the defendants had any interest in the close of Doyle, or any authority from him to put their cattle on it. If the plaintiff were bound to fence against Doyle's cattle, it would not be inferred that he was also bound to fence against those of a stranger. Cattle are lawfully on an adjoining close, when they have a right to be there, by the consent of the owner or of one having an interest in it. *Rust* v. *Low*, before cited, where the subject is very ably discussed by PARSONS, C. J.

The defendants had no right to require, that their cattle should remain on Doyle's land. To exercise such right they must have had a title in the close, or justified under some one who had. And the same remark will apply to the close of Wells. For if Doyle were bound to fence against the cattle of Wells, so that he could maintain no action against the latter, for the escape of his cattle on to Doyle's close, that obligation would not extend to the cattle of others, having no interest in the close. So also if Wells were required to fence against cattle running in the highway, and they should break into his enclosure, although he could maintain no action for the damage done, yet he could remove them, and guard against their ingress. The owner of the cattle could not claim to have them remain upon the close, because he has no interest in it. They are not rightfully or lawfully on it, and cannot be so, unless by authority of the person owning the close, who may be deprived of redress for any injury, which they have done, but no rights accrue to their owner against the tenant of an adjoining close.

The cattle of the defendants were not then lawfully on the land of Doyle or Wells.

Nor does it appear, that the cattle escaped on to the plaintiff's land in consequence of his neglect "to maintain his part of the partition fence." This provision was intended to apply to those cases, where there had been a division of the fence between owners of adjoining lands. And until a division takes place, there cannot be said to be any neglect. There had been no partition of the fence between the plaintiff and Doyle, nor

between Doyle and Wells. But the plaintiff could only be held liable for his own neglect, in maintaining his portion of the fence, between his close and that of Doyle, after it had been ascertained, by a division between them. No division having been made, no neglect could arise.

This construction has been put upon a statute in Massachusetts, which is nearly in the same words as our statute. *Thayer* v. *Arnold*, 4 Metc. 589; *Sheridan* v. *Bean*, 8 Metc. 284.

The defendants have neither shown that their cattle were lawfully on the adjoining lands, nor any neglect of the plaintiff to maintain his part of the fence. Failing in either of these positions, their defence fails entirely.

It is hardly necessary to add, that the rights of the owners of lands, adjoining highways, remain as they were at common law, unaffected by the statute. The case of *Stackpole* v. *Healy*, 16 Mass. 33, contains a full and elaborate exposition of them.

According to the agreement of the parties, the defendants are to be defaulted.

RUFUS BANKS & *als. appellants from a decision of the County Commissioners of York and Cumberland.*

Exceptions do not lie to the rulings of the District Court, in cases appealed from a decision of County Commissioners. Errors, if any, are to be corrected on *certiorari*.

There is no right of appeal from the District Court to a *joint* decision of the county commissioners of *two or more* counties.

THE appellants had petitioned for the location of a highway from Saco to Gorham, extending into the counties of York and Cumberland.

A joint meeting of the county commissioners of the two counties was duly held. Their decision was, that the way prayed for was "not of common convenience and necessity," and that the prayer of the petition ought not to be granted.

From that decision, the present appeal was taken to the District Court.

At the District Court, Leland, County Attorney, moved the appeal be dismissed. The Judge refused the motion, and sustained the appeal. The appellants then moved that a committee be appointed to view the route, &c.

To that motion the County Attorney objected, but the Court appointed the committee.

To the order of the Court sustaining the appeal, and also to the order appointing the committee, the County Attorney excepted.

Leland, for county of York.

The statute, giving the right of appeal to the District Court, does not apply to the *joint* action of the commissioners of *two or more* counties. Many serious incongruities, [which the counsel points out with much lucidness,] must attend such an appeal, if allowed.

Bradley, for appellants.

The statute allows the appeal. It is an appropriate and needful remedy. It will work well in practice. Three committee men are preferable to six. The case will belong to the county where the original petition was presented. Jurisdiction having attached there, it would, in all its subsequent stages, be retained there. That county would pay the expenses. The two boards constitute but one court. *Sanger* v. *County Commissioners*, 25 Maine, 291. The act gives an appeal from "*any*" board of county commissioners. A statute is not to be superseded merely because its operation may be attended with some inconveniences.

WELLS, J. — This case comes before us, by exception to the decision of the Judge of the District Court. The proceedings, relative to highways, are not according to the course of the common law, and errors in the record could not lay the foundation for a writ of error. Nor does our statute, c. 97, § 13, 18 and 19, R. S., provide for exceptions, in such cases.

If this Court should entertain jurisdiction, and sustain the exceptions, as it could not remit the case to the District Court, it would draw to itself the supervision and control of highways, in those cases, where the exercise of that power is conferred upon the District Court. There is nothing in the existing laws, which indicates the purpose of the Legislature, to confer upon this Court such power.

The remedy, for illegal proceedings in such cases, is by *certiorari.*

The exceptions therefore must be dismissed. But at the request of the parties, there being several petitions pending involving the same inquiry, we have concluded to express an opinion upon the question presented, relative to the right of appeal, claimed by the petitioners, from the decision of the county commissioners of the counties of York and Cumberland.

By c. 25, § 23, R. S., there may be a joint action of the commissioners of two or more counties, upon "petitions for laying out, altering or discontinuing any highway, extending into or through two or more counties." But no provision is made in this chapter, for any appeal from their determination.

The act of August 2, 1847, c. 28, provides for an appeal from the decision of any court of county commissioners, on an application, to lay out, alter or discontinue any highways, "to the *District Court* held in the *county* where the *location*, &c. is prayed for."

In the subsequent sections of the act, similar language is used, in relation to the Court, having jurisdiction, and is limited to the *District Court*, in the *county*, in which the highway is sought to be established. There is nothing in the terms of the act extending to a highway, requiring the action of commissioners of more than one county. And it is very clearly confined to that class of cases.

If it had been intended to effect a highway, extending into or through two or more counties, provision would have been made, to carry into effect such intention, either by giving the right exclusively to one Court, or to the several Courts, existing

in the counties, into or through which the highway might extend, and for a meeting of the several committees, appointed in the two or more counties, and that acting in concert, their decision should embrace the contemplated highway in its full extent.

But if the right of appeal should now be conceded, then there would be one in each county, with no provision whatever, for unity of deliberation or adjudication by the committees.

The committee, authorized to be appointed by the District Court, is by the act to determine, whether in its opinion, the judgment of the county commissioners shall be, in whole or in part affirmed or reversed, and the District Court, upon the acceptance of the report, is directed to render judgment, in conformity to it. If such judgment is against the location, &c., no further proceedings can be had by the county commissioners, but if it is otherwise, the commissioners are to proceed agreeably to said judgment, in the same manner, as if no appeal had been taken.

Thus appeals taking place in different counties, the committees might arrive at different conclusions. In one county, the committee might be in favor of establishing the highway, while that, acting in another county, might be opposed to it, and a highway, contemplated to extend through two or more counties, might be located in one, and refused a location in another. And the like result might take place, upon a proposed alteration or discontinuance of the highway.

We cannot believe, that the Legislature could have intended, that such a construction of the act should be adopted. The right of appeal must therefore be limited to the action of the commissioners of one county, and cannot be extended to cases, requiring the concurrence of commissioners of two or more counties.

It belongs to the Legislature, to provide for a further right of appeal, and to enact those provisions, which are clearly necessary to give it effect.

NOTE.—HOWARD, J. did not act in this case. He had been consulted professionally respecting the subject.

George H. Adams & *al. versus* The Rockingham Mutual Fire Insurance Company.

In the charter of an insurance company it was enacted that, if the insured should alienate the property, the policy should be void.

Held, an alienation had occurred when, upon his own application, he had been decreed a bankrupt and his assignee in bankruptcy had been appointed.

Held, further, an alienation had occurred, when the insured, by an absolute deed, had conveyed the property, although he received from his grantee an unsealed agreement to re-convey upon the payment of a specified sum.

Assumpsit on a policy of insurance against fire.

At the trial, before Shepley, C. J. the defendants submitted to a default which is to be taken off and a nonsuit entered, if the plaintiffs are not entitled to recover.

Several grounds of defence were set up.

In relation to one of them, the important facts were as follows: —

B. R. Dolloff and R. Leighton had been owners of a mill and machinery, and had mortgaged the same.

They then procured insurance of said mill and machinery by the policy now in suit, stating in their application, that the property was "encumbered by a mortgage to the amount of $1000;" the sum insured "to be paid, in case of loss, to the mortgagee."

The insurance was for six years from July, 1841, "subject to the provisions of the defendants' charter and by-laws," and "payable in case of loss, to the mortgagee." Dolloff and Leighton were accepted as members of the company, and gave their note for the premium.

In September, 1842, Dolloff mortgaged his interest in the premises, to secure $400, and, in June, 1843, upon his own request, was decreed a bankrupt. His discharge was obtained in February, 1847, soon after which, his assignee conveyed all his interest in the premises.

Leighton, in 1842, conveyed his interest in the premises, by an absolute deed, to one Tewksbury, taking back an agree-

ment for a re-conveyance, if in ten years he paid his debt to Tewksbury.

The property was consumed by fire in March, 1844.

This action is brought by one of the mortgagees and by the administrator of the estate of the other.

The twelfth section of the defendants' charter provides, "That when any house or other building shall be alienated by sale or otherwise, the policy shall thereupon be void."

The case was decided upon the fourth ground set up in defence, which was, that the policy had become void, because the property had been alienated by the insured.

Leland, for defendants.

Dolloff's interest had been alienated by his bankruptcy, and an alienation by one, was as effectual as by both, to defeat the policy. In admitting members, the company had reference to the character of applicants. If the alienation by one did not defeat the policy, members might be introduced against the consent of the company. But, in fact, Leighton had also alienated his interest; for he had given an absolute deed of the property.

Eastman, for plaintiffs.

Neither Dolloff nor Leighton had parted with all his interest. At the time of the fire, Dolloff's interest had not been conveyed by his assignee. He had not been discharged. The bankruptcy proceedings might have been stayed. His assets might have overpaid.

Leighton also had a remaining interest. On payment to Tewksbury, he was entitled, in equity, to a re-conveyance. If either Dolloff or Leighton retained any interest in the premises, the policy is in force. *Strong* v. *Manuf. Ins. Co.*, 10 Pick. 40; *Columbian Ins. Co.* v. *Lawrence*, 2 Pet. 25; *Wilson* v. *Hill*, 2 Metc. 71; *Carroll* v. *Boston Mutual Ins. Co.*, 8 Mass. 515; *Jackson* v. *Mass. Mutual Fire Ins. Co.*, 18 Pick. 418; *Goden* v. *Mass. Fire and Mutual Ins. Co.*, 2 Pick. 249; *Lane* v. *Maine Mutual Fire Ins. Co.*, 3 Fairf. 47.

TENNEY, J. — Several objections are made to the right of

the plaintiffs to maintain this action; some of which relate to the form only; others are founded in a denial of its merits. From the view, which we have taken, it will not be important to consider them all.

A contract of insurance is not in any manner incident to the estate, running therewith; but a special agreement with the underwriters against loss or damage, which the assured may sustain; and not the loss or damage, which may fall upon any other person, having an interest as grantee, mortgagee, creditor or otherwise, by reason of the subsequent destruction by fire.

An equitable interest may be insured, although it may arise under an executory contract, if the contract is still subsisting. The contingency, that the title may be defeated by subsequent events, does not prevent the effect of the policy according to the design of the parties. Ordinarily, the value of the interest of the assured in the property is not material. If he had an insurable interest at the time the policy was executed, and also an interest at the time of the loss, he is entitled to recover the whole amount of the damage to the property, not exceeding the sum insured. *Strong* v. *Manuf. Ins. Co.* 10 Pick. 40; *Wilson* v. *Hill*, 3 Metc. 66; *Carpenter* v. *Providence Ins. Co.*, 16 Pet. 495.

But contracts of insurance with mutual insurance companies, are made upon principles somewhat different. In policies like the one in suit, the assured become members of the company, and are bound to pay their proportion of all losses happening, or accruing in and to the company; and the buildings insured, with the right, title and interest of the assured, to the land on which they stand, are pledged to the company, and they have a lien thereon, during the continuance of the policy. By the charter which makes a part of every policy, when a house or other building shall be alienated, by sale or otherwise, the policy shall thereupon be void. This last provision is essential to the entire security of the purposes of the company. If the land on which the building insured stands, should be wholly or partially alienated, the pledge for the payment of assessments for losses is gone or impaired. Hence in mutual insurance

companies, it is usual to require that the state of the title of the land on which the building insured is situated, should be disclosed; this is material to enable the officers of the company to judge of the security, which the land will afford for the payment of the premium notes, if an assessment should be resorted to. *Etna Fire Ins. Co.* v. *Tyler*, 16 Wend. 385.

Dolloff and Leighton caused their interest in the property described in the policy, to be insured. They thereupon and thereby became members of the company; their interest was the right in equity of redeeming the property from the mortgage to Adams and Merrill. The mortgagees as such had no connection with the defendants, or interest in the policy; it was not their estate which was protected thereby. The money in case of a loss, was by a special provision to be paid to them, but it was for the benefit of the assured, by operating as a discharge *pro tanto* of their indebtedness, which was secured by the mortgage. The mortgagees did not become members of the company, and an assignment or transfer of the mortgage, could have no effect upon the policy.

The company in their defence, rely upon the change which has taken place in the rights of the assured, to the building destroyed since the insurance; and insist that there has been an alienation of the property within the meaning of the charter and the policy; and that when the loss occurred, the insurable interest, which was in them at the time of the execution of the policy, had ceased, so that the policy became void.

The most usual and universal method of acquiring title to real estate, is that of alienation, conveyance or purchase in its limited sense; under which may be comprised any method wherein estates are voluntarily resigned by one man and accepted by another. 2 Black. Com. 287.

The mode of alienation is immaterial. The language of the charter is, "when the house or other building insured shall be alienated by sale or otherwise, the policy shall thereupon be void." Whatever act of the assured operates to divest them of all interest in the property upon which insurance was effected would be such an alienation as is contemplat-

ed in the charter; they thereupon cease to be members of the company, and its risk is terminated, unless continued in the manner provided in the policy.

The assured were the joint owners of the building and machinery upon which insurance was obtained, and afterwards destroyed. Subsequent to the execution of the policy and before the loss, Dolloff conveyed in mortgage his interest for the security of the sum of four hundred dollars, and was afterwards decreed a bankrupt upon his own petition. And the remaining right in him after his bankruptcy was sold by his assignee subsequent to the loss. Leighton, conveyed by a deed absolute upon its face, his interest, after the insurance and before the loss, and took back a written instrument, not under seal, for a reconveyance of the same upon payment of the amount due to his grantee, and the amount, for which he was liable for the grantor.

By the petition of Dolloff to be decreed a bankrupt, and the subsequent decree, he was absolutely divested of all his property and the same was vested in the assignee. U. S. Bankrupt law of 1841, § 3. It is suggested in argument, that the proceedings in bankruptcy might have been stayed and the decree of bankruptcy reached; consequently the property would revest in the former owner. This is a contingency too remote to be considered the foundation of a remaining insurable interest in the bankrupt. He had no power to reclaim the property after it had vested absolutely in the assignee. He had no right thereto in law or equity by any contract executed or executory; and the case finds that a discharge was obtained. It is insisted also, that if the assets had been more than sufficient to pay all the debts of the bankrupt, the surplus would have belonged to him, which created an interest in him; or if he had failed to obtain his final discharge, he would have been holden to satisfy all claims, not extinguished from the assets, and consequently he retained an interest in the property. At the time Dolloff was decreed a bankrupt, these supposed events were within the range of possibility. But it is apprehended, that this is not the test whereby to determine,

whether there has or not been an alienation. One may be interested in the avails of property alienated and have no right whatever to the property itself in law or equity. The amount of the purchase money to be received may depend upon some contingency, but when the property is transferred by a title, which is indefeasible, no right therein remains with the party who made the transfer. The company in this case reserved to itself the right to exercise the discretion of its officers in the selection of those who should become members, and whose property should be insured. It may well be presumed that they confided in the members of the company, that while they retained the right of controlling and directing the possession of the building insured, there would be a security, which would not exist after that control and direction should be surrendered. The lien upon the property and the land for indemnity for losses generally, ceased with legal transfer under the bankrupt law; and it was clearly intended, that with the loss of the lien, the policy should fail to be valid.

By the conveyance of Leighton, the fee passed to his grantee; the consideration was his indebtedness, and the liability of his surety. The transaction between the parties to the conveyance was not a mortgage of the property, and had not the equitable incidents of a mortgage. Under the written agreement, the grantor had the right of preemption; on a fulfilment of the condition, and a refusal to reconvey on the part of the grantee, after a proper demand, he might obtain a decree for specific performance in a suit in equity. The document, which was the evidence of the agreement to reconvey is in the case; by that contract, the grantor had the period of ten years within which he could perform the condition and thereupon be entitled to a deed of the land, as the agreement stood at the time of its execution. But that agreement has since been canceled by the erasure of the name of the grantee in the deed who signed it. There is no evidence in the case, showing at what time, the instrument was canceled. If it was since the loss of the property insured, there was at the time of the fire a remaining interest in the grantor; if otherwise the

alienation was perfect. When the building was consumed, the conveyance was absolute upon the face of the deed, and it cannot be assumed, that the title under the deed was then defeasible. The default must be taken off and the plaintiffs become nonsuit.

ALBERT G. THORNTON *versus* NATHAN D. APPLETON *& al. Administrators.*

A contract may be avoided by proof of defendant's insanity at the time of contracting.

For such purpose, the proof may be offered by the defendant himself.

If one, without consent of the maker, affix his name, as subscribing witness to a note which had been executed without attestation, it is a material alteration of the note. — Per HOWARD, J.

But such alteration will not vitiate the note, if done without intention to defraud.— Per HOWARD, J.

HOWARD, J. — This suit is founded upon two promissory notes, signed by Sarah Thornton, the intestate, and payable to the plaintiff. One given August 14, 1835, for $620; and the other dated August 2, 1843, for $1825, and purporting to be witnessed by G. Perkins. The defence applies, exclusively, to the note last mentioned. The case was withdrawn from the jury, and submitted to the Court, upon a report of the evidence at the trial to determine the law and the facts.

It is contended that this note has been materially altered since its execution, and that it is, on that account, void.

The attesting witness, Perkins, being called by the plaintiff, testified that he saw the intestate sign the note; that the plaintiff requested him to go to the house of the intestate, and that when there, the plaintiff said, "I (the witness) would see the signature of the note; she said very well, or something to that amount." The witness testified further, that he did not sign as a witness that day, but that he did so afterwards, in March, 1844, by request of the plaintiff, but without any request from the deceased.

Procuring a person to sign a promissory note, as an attesting witness, without the consent of the maker, and after it has been executed without attestation, is effecting a material alteration in the instrument. But this does not annul the note, if the alteration were made without an intention to defraud. In this instance, the attesting witness was present, and by request, saw the maker sign the instrument, and could then have perfected the attestation with legal propriety; and his completing afterwards, what he might have done, legally and properly, at the date, does not, in the absence of all other evidence, furnish proof of fraud. The act may have been consistent with honesty on the part of the witness, and the payee, although nugatory and inoperative. For such alteration, under such circumstances, the note cannot be avoided. *Smith* v. *Dunham*, 8 Pick. 246; *Adams* v. *Frye*, 3 Metc. 103; *Willard* v. *Clarke*, 7 Metc. 435; *Rollins* v. *Bartlett & al.* 20 Maine, 319; *Eddy* v. *Bond & als.* 19 Maine, 461.

The insanity of a contracting party may be shown by himself, in avoidance of his contract. Formerly this rule of law, so consistent with humanity, and natural justice, was doubted and denied; and was made to yield to a misconceived maxim of the common law, that "a man shall not stultify himself." But it is a relief to know that the claim, which has been asserted for the common law, as being the perfection of human reason, whether just or not, cannot be impaired by this ingrafted maxim, so justly condemned, as mischievous and absurd, in its general application. Fitz, N. B. 202, (466, 467;) *Gates* v. *Boen*, 2 Str. 1104; 2 Black. Comm. 291; Just. Inst. Lib. 3, Tit. 20, § 8; 1 Fonbl. Eq. B. 1, c. 2, § 1; 2 Evans' Poth. on Oblig. App. No. 3, p. 25; 2 Kent's Comm. 451; 1 Story's Eq. Jurisp. § 225; 1 Chit. Pl. 470; *Mitchell* v. *Kingman*, 5 Pick. 431; *Seaver* v. *Phelps*, 11 Pick. 304; *Hix* v. *Whitmore*, 4 Metc. 545; *Rice* v. *Peet*, 15 Johns. 503; 2 Greenl. Ev. § 369, 370.

In questions involving the sanity of a party to a contract, these general principles have a dominant application to the inquiry. Sanity is to be presumed, until the contrary is

proved. General mental derangement being established, the party alleging sanity must prove it; and monomania, or derangement of a single faculty of the mind, or in reference to particular subjects, should, with regard to that faculty, and to those subjects, be submitted to the same rules, and attended with the same consequences, as general mental derangement. But if the insanity be temporary, or accidental, it forms an exception to these general rules, so far as to vary, or relax their application. 1 Greenl. Ev. § 42; 2 Greenl. Ev. 371; 2 Poth. on Obligations, by Evans, App. 24; 2 Madd. Ch. Prac. 756; 2 Co. Litt. 246, B, note 185; 3 Stark. Ev. 1283; *Attorney General* v. *Parnther*, Bro. Chan. 443.

It appears by the evidence reported, that there was a manifest change in the intestate, about ten years before her decease, and that she then "became more beside herself, in matters of business," showing marked indications of insanity, on particular subjects. She had previously closed the administration on a large estate of her husband. About twenty years since, she had advanced to four or five of her elder children, (the plaintiff being one of the younger children and not included,) between two and three thousand dollars each. She died in 1845, at the age of seventy years.

The deceased pretended to be poor, although the evidence in the case shows, that she possessed property worth $20,000 or $30,000, after a loss of $20,000 in 1829. She claimed to own the whole of Cutt's island, in Saco, formerly the property of her father and of great value; also a large portion of Boston; the city of Washington; Louisiana, on account of the French claims; the whole world, and "the cattle upon a thousand hills." She preferred large claims against some of her own family, and complained that some of her children had cheated her out of large sums; all, apparently without foundation. She frequently sought to recover these claims by suits at law, but counsel, to whom she resorted for legal advice, declined to prosecute them. "She would run from one office to another, upon the idea that she had lost every thing, and wished suits to recover it." "She was a great lover of money, miserly, and liked to lay it up," as stated by the witness.

The deceased claimed a right to the advancements she had made many years before, to her elder children, and insisted upon a repayment, as that would bring the millenium. There does not appear to have been any foundation for her claim to repayment; but she insisted these advancements were cheating her other children, including the plaintiff, out of the same property. Long after the estate of her husband had been settled by administration, she went to the Judge of Probate, and wanted to administer, and to show that the estate was not settled right, by the 58th Psalm.

In January, 1839, the deceased wrote to the Representative in the Legislature, from Saco, and this letter was produced in evidence. It contains a caution to the Legislature against the Governor, as a dishonest man, and as being indebted to her $4000, and as having been chosen by the people, and not by God. She then complains of Congress, for not paying the French claims, amounting to $16,000,000; states that we want a king to go and take Louisiana, to pay the debt, and that the millenium was, for all men to be honest, and pay their debts. After this the deceased grew worse, as the witness expressed it.

She pretended to be the daughter of Abraham and Sarah; the Virgin Mary; the Messiah, and afterwards, the Living God.

The testimony shows that the deceased managed her own domestic affairs, and her private business, with, perhaps, something less than ordinary skill. She leased property and collected rents; paid her taxes, and received her dividends at the banks, generally herself, but at times was aided by her sons. She made purchases at the stores, suitable for her condition.

Some of the witnesses speak of the *insane seasons* of the deceased, while others testify to her insanity, and delusions, upon the particular subjects referred to, as if permanent, and not temporary. One of the latter, and a connection of the family, and intimate with the deceased, testifies that he saw her every day. In transacting business, she would generally exhibit no indications of her delusions, until she had finished the

particular business of the time ; and after that, in the language of the witness, "she would get on her insanity track."

The evidence conclusively establishes the fact, that the deceased was insane, for several years before giving the note in question, and afterwards, until her death, upon the subjects of *religion, her property and claims,* and the *advancements to her elder children.*

From this state of mental disease of the deceased, there does not appear to have been any restoration. No lucid interval was proved, in which she correctly recognized her true condition, and when her delusions had disappeared, and her faculties and affections had returned to their natural channels.

Being insane upon these subjects, the deceased was not competent to dispose of her property by contract, or conveyance. Although the note in question, was, in form, a legal contract, yet it was made after these peculiar delusions had paralyzed the intellect and the affections; and when the power to contract was in abeyance ; and it may therefore, be avoided upon legal principles.

Judgment for the plaintiff, for the amount of the note of August 14, 1835, not disputed, deducting the indorsements and the set-off, as filed and admitted.

WILLIAM BOURNE, *Adm'r in equity, versus* WALTER LITTLEFIELD.

The condition of a mortgage deed was, that if the mortgagor or his assigns, should pay $500, *at a future specified time*, then the deed as also a note bearing even date with it, given by the mortgagor to the mortgagee to pay said sum at the time aforesaid, should both be void.

In a bill to redeem by the mortgagor's assignee, *it was held*, that parol evidence was admissible, before the master, to show that a note of $500, payable *on demand with interest*, was the one secured by said mortgage.

A party who comes into a court of equity to redeem a mortgage, although entitled to redeem, must pay cost to a defendant who is not in fault.

BILL by an assignee of a mortgagor to redeem land mortgaged.

Bourne, for plaintiff.

The only question is, what amount was due upon the mortgage.

The mortgage is, of itself, plain, intelligible and complete. No parol testimony to explain is admissible. None is needed.

The note received in evidence by the master, was essentially different from that secured by the mortgage. It was not admissible.

The plaintiff is an assignee. As to *him*, the record alone is the evidence. 4 Kent's Com. 176; 1 Story on Eq. § 176, 165.

Geo. F. Shepley, for defendant.

The opinion of the Court, (WELLS. J, dissenting,) was read by

SHEPLEY, C. J. — This case upon the bill and answer was committed to a master to ascertain and report the amount due to the defendant upon the mortgage. His report having been made, exception is taken to his admission of certain testimony and to the allowance of interest on the debt secured by the mortgage.

The mortgage was made by Dimon Hill to the defendant upon condition "that if the said Dimon Hill, his heirs, executors or administrators pay to the said Walter Littlefield, his heirs, executors, administrators or assigns, the sum of five hundred dollars on or before the twentieth day of June, which will be in the year of our Lord one thousand eight hundred and forty-six, then this deed as also a certain note bearing even date with these presents, given by the said Dimon Hill to the said Walter Littlefield, to pay the same sum of five hundred dollars at the time aforesaid, shall both be void; otherwise shall remain in full force."

The defendant produced a note bearing even date with the mortgage, for the sum of $500, made by Hill and payable to the defendant or order "on demand with interest." The master admitted parol evidence, which clearly proved, that it was the note which the mortgage was made to secure, although it differed from the description in the mortgage by being payable on demand instead of four years from its date, and by being made payable with interest.

The objection made to the proof is, that it contradicts the description of the note contained in the deed.

There are reports of decisions made in numerous cases, that a debt secured by mortgage will continue to be secured by it, although there may have been an entire change made in the paper or evidence of indebtment, by which the existence of the debt is shown. *Davis* v. *Maynard*, 9 Mass. 242; *Wilkins* v. *Hill*, 8 Pick. 522; *Pomroy* v. *Rice*, 16 Pick. 22; *Elliot* v. *Sleeper*, 2 N. H. 525; *Bank* v. *Willard*, 10 N. H. 210; *Osborne* v. *Benson*, 5 Mason, 157. In such cases the paper or evidence of indebtment does not correspond to that described in the mortgage, and parol evidence is necessarily received to identify it with that so described.

In the case of *Johns* v. *Church*, 12 Pick. 557, the mortgage described a note for $236. The note produced was for $256. And parol evidence was held to be admissible to prove, that it was the note secured by the mortgage.

In the case of *Hall* v. *Tufts*, 18 Pick. 455, the note described in the mortgage made to Ebenezer Hall, 3d, was dated on March 13, "one thousand seven hundred and ninety-eight, for the sum of $495,21, payable on demand and on interest, had and signed by Hall Tufts." The note produced was dated on March 13, 1798, for $495,21, payable to Ebenezer Hall, not the same person named as mortgagee, on demand with interest, and was signed by Hall Tufts. Parol evidence was held admissible to prove, that it was the note secured by the mortgage.

In the case of *Jackson* v. *Bowen*, 7 Cow. 13, the mortgage was made on Nov. 8, 1817, to Rufus and Obadiah Boies and Asahel Lyman, to secure $750, according to the condition of a bond bearing even date therewith, executed by the mortgagor to the mortgagees. The bond produced, was dated on Nov. 18, 1817, and was made to the mortgagees and two other persons. Parol evidence was held to be admissible to prove the bond produced, to be the one secured by the mortgage.

In the case of *Pierce* v. *Parker*, 4 Metc. 80, a note was described in a schedule annexed to an assignment, as dated on

October 18, 1833, and as payable on May 21, 1834. The note produced was payable on April 21, 1834. Parol evidence was held to be admissible to prove it to be the note described in the schedule. The opinion states, "in the case before us, the evidence is not offered to vary the written contract, but to show, that there was a mis-description of the time of payment of the note in the schedule annexed to the assignment, which happened through inadvertence. And it is a well settled principle of law, that where an instrument, which is offered to prove the subject matter described, differs in one or more particulars from the thing described, evidence is admissible to show their agreement or identity, notwithstanding such mis-description."

In the case of *Doe* v. *McLoskey*, 1 Ala. 708, parol evidence was held admissible to identify the debt secured by a mortgage.

When the mortgage does not refer to any bond, note or other contract as secured by it, the parties may well be regarded as trusting to the deed alone to ascertain the amount to be paid, or the duty to be performed. But in this case and in others of the like kind, the decision of the master to admit parol evidence to prove, that the contract produced was the one, for the security of which the mortgage was made, was fully authorized by the decided cases.

It is further insisted, that the plaintiff, who represents an assignee of the mortgagor, cannot be legally compelled to pay interest on the note, or more than five hundred dollars, because the deed of mortgage declares, that it shall be void upon the payment of that sum.

It also declares, that the note also shall be void upon the payment of that sum. And both would become void upon such payment made according to the literal import of the language. Testimony having been legally received to prove, that the note produced was the one secured by the mortgage, it becomes apparent, that the literal import of the language does not exhibit the intentions of the parties. Their intentions cannot be misunderstood; and when clearly ascertained, they de-

cide what the contract is, and by it the rights of the parties are determined.

The grantee of the mortgagor cannot by his conveyance acquire rights in the estate conveyed, superior to those of his grantor.

There is little danger that the purchaser of an equity could be deceived respecting the amount due by a statement of it contained in the mortgage, in cases where a note, bond or other contract is referred to as secured by it. He would in such cases be informed, that other and more certain means of knowledge existed, and of the source, to which he might resort for more exact information. When the rule is once established, that the mortgage debt will remain secured after a change in the evidence of its existence, it becomes apparent, that it would be wholly unsafe to rely in any case upon the statement of the amount in the mortgage. The amount to be paid, may have been increased by the accumulation of interest, by costs or litigation, and by repairs and improvements, made upon the estate by a mortgagee, who has entered into possession.

The report of the master is in all respects confirmed.

The rule respecting costs is, that a party, who comes into a court of equity to redeem a mortgage, although entitled to redeem, must pay costs to a defendant, who is not in fault. *Vroom* v. *Ditmas*, 4 Paige, 527. The defendant not appearing to have been in fault, is allowed costs.

A decree is to be entered, that plaintiff may redeem within three years from June 21, 1846, by making payment of the amount of the note with interest thereon to the time of payment, and of the further sum of $29,15 for excess of the amount expended for improvement and repair, over the amount received for rents and profits.

Elisha Perkins *versus* The Eastern Railroad Co. and The Boston and Maine Railroad Co.

A railroad company is not bound to maintain fences on the lines of their road, except when the same passes through enclosed or improved land.

If an injury to another's cattle happen, (through want of such fences,) upon common and unenclosed land, it is not legally imputable to the negligence of the company.

Cattle are not to be presumed as lawfully going at large. There must be proof that the town gave permission.

Case for killing plaintiff's cow, by negligence of the defendants in not maintaining fences on the line of their railroad.

The declaration alleges that the defendants had the exclusive use and management of the Portsmouth, Saco and Portland railroad, with its cars and engines; that they were bound to maintain fences or other safeguards, to prevent cattle from passing upon said railroad; that the defendants had neglected to maintain such fences or safeguards at a certain spot in Biddeford; that the plaintiff's cow, through that neglect, passed upon the railroad and was killed by a collision with the defendants' engine.

It appeared in evidence, that there was (near the depot in Biddeford,) an open, unfenced street, called Chestnut street, leading from the main highway, by which cattle from the adjoining lands, (which are common and uninclosed,) may pass into the railroad; that, for a few rods on each side of the junction of Chestnut street with the railroad, and adjoining said common and unimproved land, the fence on the southerly line of the railroad, had recently been removed by the defendants, and that the plaintiff's cow was killed by collision with the defendant's engine, not far from said junction.

The trial was had in the District Court, Goodenow, J., who ordered a nonsuit, and the plaintiff excepted.

Statute of 1842, ch. 9, § 6, provides that "every railroad corporation shall erect and maintain substantial, legal and sufficient fences on each side of the land taken by them for their railroad, where the same passes through enclosed or improved lands."

Luques, for plaintiff.

1. The defendants' negligence and carelessness caused the injury. It was their duty to maintain the fences. Their road was formerly fenced, and they had recently removed the fence. They knew that cattle were on the adjoining land. The omission to keep up a fence on the line of their road was a heedless disregard to the rights of others. Their intention is of no consequence. If one injures his neighbor, the natural and legal inference is, that he intended it. Let the defendants show some justification. *Johnson* v. *Patterson*, 14 Conn. 1.

2. The plaintiff is not chargeable with want of care. It does not appear that he knew there was a want of fences on the railroad lines. The legal presumption is, that the cow was rightfully on the adjoining lands. 1 Greenl. Ev. 39. But it is not incumbent on plaintiff to prove himself entirely without fault. Even a trespasser is not out of the protection of law. Good faith must still be preserved toward him. No more force shall be used toward a trespasser, than is necessary to accomplish the object. *Bennett* v. *Appleton*, 25 Wend. 371; 15 C. L. R. 91; Maule & Selwyn, 198; *Illidge* v. *Goodwin*, 24 C. L. R. 272; *Lynch* v. *Nurdin*, 41 C. L. R. 422; Stephen's Nisi Prius, vol. 2, 1013; *Cook* v. *C. T. Com.* 1 Denio, 91. In this last case, the Court say, "that if the plaintiff's negligence concurs with that of the defendant in producing the injury, the law will not aid him in obtaining redress. This principle, however, admits of qualifications and exceptions." Our case is within the exceptions.

Howard, J. — It appears by the evidence stated in the exceptions, that the defendants had the entire and exclusive use and management of the Portland, Saco and Portsmouth railroad, with all its structures, cars and engines, by their servants and agents, when the alleged injury occurred. They were liable therefore, in this form of action, for all damages sustained by any person, in consequence of the neglect of their agents or the mismanagement of their engines. R. S. c. 81, § 21; *Yarborough & al.* v. *The Bank of England*,

16 East, 6; *Mathews* v. *West Lond. W. W. Co.*, 3 Camp. 403; *Gibson* v. *Inglis*, 4 Camp. 72; *Smith* v. *B. & S. Gas Light Co.*, 1 Adolph. & Ellis, 526; *Riddle* v. *The Prop. of Locks, &c., on Merrimack River*, 7 Mass. 186; *Foster & al.* v. *The Essex Bank*, 17 Mass. 502, 503; *Lowell* v. *Boston & Lowell Railroad*, 23 Pick. 24; *Harlow* v. *Humiston*, 6 Cowen, 189; *Beach* v. *Fulton Bank*, 7 Cowen, 485; *Hawkins* v. *The Dutchess & Orange Steamboat Co.*, 2 Wend. 452; *Dater* v. *Troy Turnpike & Railroad Co.*, 2 Hill, 629; *The Rector of the Church of Ascension* v. *Buckhart*, 3 Hill, 193; *Bailey & als.* v. *The Mayor of New York*, 3 Hill, 351; 2 Kent's Comm. 284.

It was proved that the plaintiff's cow was killed upon this railroad, by the engine of the defendants, about one hundred rods westerly of the depot in Biddeford; that there was not any fence on the southern side of said railroad, for about ten rods easterly and three rods westerly of the depot; that Chestnut street, leading from the depot, southerly to Maine street, was the only road leading from the depot to Maine street; that there was not any fence across, or on either side of Chestnut street; and that the lands on either side of this street, were "common and uninclosed, or vacant," to the extent at least, of the deficiency of the fence upon the railroad.

To sustain his action, the plaintiff must prove negligence, wilful or otherwise, on the part of the defendants, and ordinary care on his own part; or if he did not exercise ordinary care, that this did not contribute to the alleged injury.

The only evidence of negligence or misconduct by the defendants, was the deficiency of the fence, before mentioned. Every railroad corporation is required by law to erect and maintain sufficient fences, on each side of the land taken by them for a railroad, where the same passes through enclosed or improved lands. Stat. 1842, c. 9, § 6. In this case the lands adjoining the railroad, where there was no fence, being common or vacant and uninclosed, and there being no evidence that they were improved, under existing laws, the defendants were not bound to fence against them; and omitting to erect and main-

tain a fence on that portion of their road, cannot be imputed as negligence.

But if required to fence the entire track, the defendants would not be responsible for killing the plaintiff's cow, if she were wrongfully upon the adjoining close. The animal was not lawfully at large unless under permission from the town. R. S. c. 30, § 3, 5, 6. There was no evidence that the town gave any such permission, and none could be inferred, as an exemption from the operation of the general law. The burden was on the plaintiff to prove the permit, or establish the exemption; and, as he failed to do either, he cannot recover for the loss which his own want of ordinary care and prudence has contributed to produce. *Little* v. *Lothrop*, 5 Greenl. 359; *Kennard* v. *Burton*, 25 Maine, 49; *Rust* v. *Low*, 6 Mass. 90; *Lane* v. *Crombie & al.* 12 Pick. 177; *Howland* v. *Vincent*, 10 Metc. 371; *Hartfield* v. *Roper & al.*, 21 Wend. 615; *Bush* v. *Brainard*, 1 Cowen, 78; *Brownell* v. *Flaglee*, 5 Hill, 282; *Rathburn & al.* v. *Payne & als.* 19 Wend. 399; *Chaplin* v. *Hawes*, 3 C. & P. 554; *Pluckwell* v. *Wilson*, 5 *ib.* 375; *Williams* v. *Holland*, 6 *ib.* 23.

Admitting all the testimony offered by the plaintiff to be true, with all admissible inferences, he failed to make out his case in law and fact; and there being no other testimony offered at the trial, a nonsuit was properly ordered by the District Judge. *Exceptions overruled.*

NOTE. — WELLS, J. being a proprietor in the railroad took no part in this decision.

DAVID LITTLEFIELD *versus* INHABITANTS OF BIDDEFORD.

The plaintiff traveling with a hired horse met an accident through a defect in the highway, by which the horse was entirely ruined. He paid its value to the owner. In his damages recovered of the town *it was held*, that the value of the horse was rightfully included.

CASE to recover for injury sustained through a defect in the highway, tried before WHITMAN, C. J.

The plaintiff had hired a horse for the day. It was so badly hurt by the accident, that it was necessary to kill it at once. The plaintiff afterwards paid its value to the owner. The legal question reserved was, whether the instruction to the jury was correct. The instruction was, "that the defendants, if liable at all, were liable to general damages, and full value of said horse; that it was enough, that the plaintiff had hired the horse; that that fact gave him the right to maintain an action for the full value of the horse, as he had paid that amount to the man of whom he hired him."

The verdict was for plaintiff, including the value of the horse.

J. Shepley and *Luques*, for defendants, cited, R. S. c. 25, § 89; *Reed* v. *Belfast*, 20 Maine, 246; *Kennard* v. *Burton*, 25 Maine, 39, not contradictory, but confirmatory of *Reed* v. *Belfast*; 1 Chitty's Pl. 50—52.

Bourne, for plaintiff.

SHEPLEY, C. J. — The question presented by the instructions is, whether one in possession of a hired horse, can recover damages for the loss of him, occasioned by defects in a highway.

The statute, c. 25, § 89, provides that any person, who "shall suffer any damage in his property," through any defect in a highway, may recover of the town liable to keep the highway in repair, the amount of such damage.

The hirer acquires a special property in the article hired, and is regarded as the owner of it, for the purpose of recovering damages of one, who has injured or destroyed it, while in his possession. *Croft* v. *Alison*, 4 B. & A., 590; *Boynton* v. *Turner*, 13 Mass. 391. This rule, it is said, cannot be applicable to the present case; for if the horse was injured without any fault of the hirer, the loss would not fall upon him, but upon the general owner. And if the loss were occasioned by any fault or neglect of the hirer, he would not be entitled to recover of the defendants.

These positions, although founded upon acknowledged prin-

ciples of law, do not show, that the plaintiff is not entitled to recover. They assume, that the hirer of a horse would not be guilty of any fault, as it respects the owner, by driving him upon a highway defective and unsafe.

This cannot be admitted. And yet, so far as it respects those liable to keep the highway in repair, he could not be chargeable with any neglect or fault. The relations existing between the hirer and owner, and between the hirer and those liable to keep a highway in repair, are not the same. The argument, therefore, although very plausible, is not sound.

Under a motion to set aside the verdict, it is contended, that there is no satisfactory proof, that the plaintiff was in exercise of ordinary care. The law cannot determine, what is ordinary care. It depends upon the application of the facts and circumstances proved to the position of the party. In this case it is not perceived, that the jury might not have found, that the plaintiff was in the exercise of ordinary care, without being chargeable with acting under some improper influence, or that they could not have found, that the highway was not safe and convenient, or that, the plaintiff had suffered damages to the extent of their finding, without being subject to such an influence. *Exceptions and motion overruled.*

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF CUMBERLAND.

ARGUED AT APRIL TERM, 1849.

INHABITANTS OF HARPSWELL *versus* INHABITANTS OF PHIPSBURG.

An omission of the presiding Judge to charge the jury in relation to certain principles, not then brought to his consideration, and no request being made for such instruction, forms no ground of exception.

It is within the scope of the official powers of overseers of the poor, to adjust and pay claims against their town, made for supporting any of their paupers by another town.

In an action by one town against another, for the expense of a pauper, whose settlement is contested, evidence of a former suit, for previous expenses of the same pauper and of payment of the same by the overseers of the defendant town, is admissible.

ASSUMPSIT, for the support of one Sarah Alexander, alleged to be a pauper, and to have a legal settlement in Phipsburg.

It appeared that she went from her father's in Harpswell, about Sept. 22, 1834, to reside as a domestic servant in the family of one Batchelder in Phipsburg, and continued to reside there and work by the year, (excepting that in the fall and spring of each year, she went to her father's, as she said, on visits and staid two or three weeks at a time,) until she left during the month of February, 1842, and returned to her

father's in Harpswell. She became 21 years of age on the 31st of August, 1836.

A former suit had been commenced by the plaintiffs against the defendants to recover for expenses incurred in 1842, for the support of said Sarah. The plaintiffs offered a bill of the expenses sued for in the former action, and evidence that the same was paid by the overseers of Phipsburg, which was objected to, but admitted.

The counsel for the defendants, in argument to the jury, contended that the contracts and engagements of Sarah to work with Mrs. Batchelder, being contracts from year to year, and terminating with each year, and settlements taking place each year and she returning to Harpswell at the termination of several of the years, did not constitute a continued residence of five years after she became of age, sufficient to gain her a new settlement in Phipsburg, and that, in order to give her such new settlement, she should have had a right to return and live with Mrs. Batchelder, under contract or otherwise, which could not be interfered with.

No request was made to the Court to give any specific instructions, and SHEPLEY, C. J. instructed the jury, that, although it appeared that the alleged pauper did not reside in Phipsburg for all the days or weeks of five years together, yet, if satisfied that she resided there with the intention of making that her established residence and home, and that, when she left that place and went to Harpswell, she did so on visits only, to her father's, with an intention to return; such occasional absences from Phipsburg would not prevent that town from being considered her residence for five years together. That the burden of proof was upon the plaintiffs to satisfy them that she had, after becoming 21 years of age, resided in Phipsburg with the intention to make that her established place of residence and home for five years together, without receiving supplies from any town as a pauper. The law respecting residence and intention, was also explained and illustrated.

A verdict was rendered for the plaintiffs, and exceptions taken.

Fessenden, Deblois & Fessenden, for defendants, main-

tained the position they took before the jury, and cited, *Billerica* v. *Chelmsford*, 10 Mass. 394; *Hampden* v. *Fairfield*, 3 Greenl. 436; *Knox* v. *Waldoboro'*, 3 Greenl. 455; *Parsonsfield* v. *Kennebunk*, 4 Greenl. 47; *Turner* v. *Buckfield*, 3 Greenl. 229. And to the point that the admission of the settled account was wrong, *Northfield* v. *Taunton*, 4 Metc. 433; *Peru* v. *Turner*, 10 Maine, 185; *Northfield* v. *Exeter*, 4 Metc. 433.

W. P. Fessenden, for plaintiffs.

WELLS, J. — This was an action to recover expenses incurred for the support of Sarah Alexander, a pauper, whose legal settlement was alleged to be in Phipsburg.

No request having been made to the Judge, presiding at the trial, to charge the jury in any particular manner, an omission to do so in relation to certain principles, not then brought to his consideration, forms no ground of exception. If in the judgment of a party, the Judge omits to give appropriate instructions, his attention must be called to them, before any objection can be taken to the alleged omission.

It may often happen, upon subsequent examination, after a verdict has been rendered, that a party will be able to discover, that instructions, more appropriate and fit than those given, could have been presented to the jury. But if such subsequent discoveries were just cause of objection to a verdict, it might be difficult to sustain any, that could be rendered.

But we do not perceive in the present case, any want of appropriate instructions.

It is not contended, that those which were given, are erroneous.

But it is denied by the defendants, that the admission of the evidence of a former suit by the plaintiffs against them, and the settlement of what was claimed in that suit for the support of the pauper, was properly received. The settlement was made on the part of the defendants, by two of its overseers.

What is done by the officers of a town, within the scope of

their authority, must necessarily affect the town in the same manner as if done by the town itself.

As where a person is taxed, or his name is entered on the list of voters, and he is allowed to vote, it is evidence of residence where he is so taxed or votes, not conclusive, but its weight and effect are to be determined by the jury. *Westbrook* v. *Bowdoinham*, 7 Greenl. 363.

Overseers of the poor have the care and oversight of paupers. They are empowered by statute c. 32, § 52, to prosecute and defend actions relating to the same. Nothing is said in this section concerning the settlement of actions. And we must look to other portions of the statute, to ascertain whether they possess such power.

They have authority to create expense and do acts, as much affecting the interests of the town, as the settlement of an action, brought for supplies furnished a pauper, whose settlement is alleged to be in their town.

Upon notice that a pauper, whose settlement is supposed to be in their town, has become chargeable to another town, they may cause his removal to their own town and provide for his support.

And if such removal is not affected, and they neglect to answer the notice within two months, their town is barred from contesting the settlement of the pauper, with the town giving the notice, and is bound to receive and provide for him.

So too when persons fall into distress, they are required to provide for them, and if their settlement is in another town, to give notice to such town. The powers, with which overseers are clothed, require an exercise of judgment, by which they may charge their towns with the support of paupers.

The payment of expenses, when claimed for supplies furnished to a pauper, whose settlement they believed to be in their town, would be no greater exercise of power, than the removal of such pauper to their town and furnishing him with support. If they may incur future, why not be permitted to discharge past, expenses for the same pauper? It may therefore be fairly inferred from the powers and duties of overseers,

that they are authorized to pay expenses incurred for the support of one of their paupers by another town, when their town, in their judgment, is liable by law for such expenses. And the power to pay the expenses would embrace that of settling an action commenced to recover them. *Belfast* v. *Leominster*, 1 Pick. 123. The evidence of the settlement and payment, in its effect, is like an admission, that at that time and according to the circumstances then developed, the settlement of the pauper was then in Phipsburg. But it was admitted as evidence only, not as conclusive, and was open to explanation on the part of the defendants, who would have been permitted to show, if they could, that the overseers acted under an entire misapprehension as to the facts. It was not a mere declaration made by an overseer, as was the case in *Corinna* v. *Exeter*, 13 Maine, 321, but an act done by two of the overseers. And all that was decided in *Peru* v. *Turner*, 1 Fairf. 185, was, that the note signed by the overseers of Peru, and which contained an admission, that the pauper was chargeable to Peru, was not conclusive by way of estoppel. The question made in that case was upon the effect, and not upon the admissibility of the evidence.

Judgment on the verdict.

NATHANIEL WALKER *versus* THE PROTECTION INS. CO.
HIRAM JORDAN *versus* SAME.
HIRAM JORDAN *versus* THE WARREN INS. CO.

It seems, that in cases relative to the impracticability of saving a vessel, which has been wrecked at sea, the probable expense of repairs if she could have been saved, and the course to be pursued in making them, the opinions of experienced masters of vessels are admissible in evidence.

In a contract of insurance upon time, the time is to be reckoned, according to the longitude of the place where the contract was made, and is to be performed.

If, by reason of the violence of the winds and waves, a vessel upon the high seas has become a wreck, incapable of being brought into port, she is to be considered an *actual* total loss.

THESE three suits were upon policies of insurance, effected

upon the barque Elizabeth. The policies were effected on December 17, 1845, for one year, commencing and ending at 12 o'clock at noon.

At the trial, before SHEPLEY, C. J., it was admitted that the plaintiffs were owners of the parts of the vessel on which they had procured insurance; that the preliminary notices were duly given and that offers of abandonment were made on January 8, 1847, and not accepted.

The cases were all by consent put to the jury together.

It appeared that the vessel was wrecked on the 17th of December, 1846, between four and five hundred miles from Bermuda, in the forenoon of that day, and that the master and crew remained upon the wreck a day or two, before they were taken off and the wreck abandoned. In the deposition of the master, who had had a long experience, the opinion was given that the vessel could not have been saved. And there was other testimony introduced by the plaintiffs, of experienced shipmasters, as to the expense of repairing vessels thus damaged in the West India islands, all which testimony was objected to, but admitted by the Court.

There was much other testimony, but without reciting it, the case may be understood by the opinion delivered. The plaintiffs claimed to recover for a total loss, contending that the proof established both a *constructive* and an *actual* total loss. The defendants insisted that they could be held at most only for a *partial* loss, and that to determine the amount of it, a *general average* should be taken into consideration.

Instructions were given in relation to all these matters, and the jury were requested to be ready on their return into Court to state, if they found for the plaintiffs, whether they found their verdicts upon an *actual* or *constructive* total loss, or upon a *partial* loss. They found verdicts for the plaintiffs, and also stated therein, that they found an *actual* total loss. The instructions upon the claim for an *actual* total loss were, that the policies being executed and to be performed in Portland, the risk would not expire until the expiration of the year, the time being reckoned according as it would be 12 o'clock at noon, at Portland, on Dec. 17, 1846.

That a vessel on the high seas might be considered as *an actual total loss* if she were found, by reason of the violence of the winds and waves, to have become a wreck, incapable of being saved and brought into port. Yet, however great might have been her injury, so long as it continued to be doubtful whether she might or might not be brought into a port, there would be no *actual* total loss. The mere fact that the master and crew might remain upon the wreck, would not prevent the loss from being considered total, if the vessel were incapable of being brought into any port. Nor would the mere fact that the vessel continued, as such a vessel, to float upon the seas, prevent the loss from being considered total, if she could not be brought into any port.

If these rulings and instructions were erroneous, the verdicts were to be set aside, and new trials granted.

Fessenden, Deblois and *Fessenden*, for defendants, contended that the policy being for one year, the rule of law is, and the jury should have been so instructed, that the insurers are answerable only for those consequences of the loss which take place before the termination of the risk; and that inasmuch as the "Elizabeth" was still a vessel and sailing at said termination of the risk, the defendants were liable only for such injuries as she had received during the risk, though she might have been lost, after the termination of the time mentioned in said policy, from injuries received during the term for which she was so insured. Phillips on Ins. 708, 709, 710; *Lockyer* v. *Affley*, 1 T. R. 252; Marsh. on Ins. 174; *Amer. Ins. Co.* v. *Hutton*, 24 Wend. 330; *Howell* v. *Cincin. Ins. Co.*, 7 Ham. 284; *Eyre* v. *Marine Ins. Co.*, 6 Wheat. 247; *Coit* v. *Smith*, 3 Johns. Cases, 16.

That the Judge erred in allowing the opinions of the witnesses objected to, to go to the jury. 1 Phil. Ev. 227; *Dickinson* v. *Barber*, 9 Mass. 227; Greenl. on Ev. 490; *Hathorn* v. *King*, 8 Mass. 371.

W. P. Fessenden, for plaintiffs, as to the last point raised by defendants, relied upon Greenl. Ev. 1, § 440. That the in-

structions were correct, he cited Phillips on Ins. 1, 708—712; 2, *ibid*, 230—240; 6 Mass. 482.

The opinion of the Court, (HOWARD J. concurring only in the result,) was delivered by

WELLS, J. — These actions were upon policies of insurance, effected upon the barque Elizabeth, on the seventeenth of December, 1845, for one year, commencing and ending, at twelve of the clock, at noon. The preliminary notices were duly given, and offers of abandonment were made, on the eighth of January, 1847.

1. The opinion of master mariners, relative to the impracticability of saving the vessel, the probable expense of repairs, if she could have been taken to some port in the West Indies, and the course to be pursued, in making them, was admitted in evidence. As the jury have found a total loss, the two last named branches of testimony become immaterial.

On questions of skill, science or trade, or others of the like kind, persons of skill, sometimes called experts, may not only testify to facts, but are permitted to give their opinions in evidence. A shipbuilder may give his opinion as to the seaworthiness of a ship, even on facts stated by others. So of nautical men as to navigating a ship. 1 Greenl. on Evi. § 4, 40; *Beckwith* v. *Sydebotham*, 1 Camp. 117; *Malton* v. *Nesbit*, 1 C. & P. 70.

The opinions of experienced masters of vessels fall within the same principle. *Cuique in sua arte, credendum est.* The reasons for their opinions may be required, and the jury will be able to decide upon their correctness. The testimony was properly received.

2. The jury were instructed, that the risk would not expire, until the expiration of the year, the time being reckoned, according as it would be 12 o'clock, at noon, at Portland, on Dec. 17, 1846. The vessel having been lost, on the day when the policies expired, and as the defendants contended, after noon, at the place where she then was, this instruction was material.

The contract of insurance was for a year, and if the time of noon should be taken, at a place, east or west longitude of Portland, on the day when the risk expired, the period of time would be lessened or extended, and might be less or more than a year. Such a construction would be in violation of the contract. The parties must be considered, as regarding the meridian of the place, where the contract is made, unless some other one is mentioned in it.

3. The jury were instructed, "that a vessel, on the high seas, might be considered as totally lost, if she were found by reason of the violence of the winds and waves, to have become a wreck, incapable of being saved and brought into port. Yet however great might have been her injuries, so long as it continued to be doubtful, whether she might or might not be brought into a port, there would be no actual total loss. The mere fact, that the master and crew might remain upon the wreck, would not prevent the loss from being considered total, if the vessel were incapable of being brought into any port. Nor would the mere fact, that the vessel continued as such a vessel, to float upon the seas, prevent the loss from being considered total, if she could not be brought into any port."

It is unnecessary to consider, whether the jury might not have been well warranted, by the facts, in finding a total *constructive* loss. For as they have specially found an actual total loss, the correctness of the instructions must be tested, by such finding.

This is not a case, where an injury happens before the time specified in the policy, and a loss after the time, resulting from that injury. But the jury must have found, under the instruction, that the loss happened before the time, for which the vessel was insured, had elapsed.

Where there is a destruction of the property insured, so that nothing remains, which would be valuable upon abandonment to the insurers, it is an actual total loss. And in such case, no abandonment is necessary, for the obvious reason, that there is nothing to abandon. But if any part of the property survives the peril, as in case of a shipwreck, without a total

destruction of the thing insured, or if any rights or claims remain to the insured, as owner of the property, it is a case of technical or constructive total loss, and an abandonment is necessary, for it is just, that the insured should transfer to the underwriters the remains of the property, or the rights accruing to him as owner, upon his receiving of them the amount insured. 2 Phil. on Ins. 230, 231.

According to the instructions, the jury must have found, that the vessel became a wreck, *incapable of being saved and brought into port.* The instructions imply that the jury must find the wreck to be incapable of being brought into port *by any human agency*, and that it must be a case beyond all doubt in that respect, to constitute an actual total loss. If there were a doubt, that the wreck could be saved or brought into port, they were not at liberty to determine it to be an actual total loss. There then could be nothing, of which the underwriters might avail themselves upon an abandonment, and such an act would be useless.

If a vessel is sunk in the ocean, so deep that no human agency can raise her, she is lost to all beneficial purposes, although she may remain in *rerum natura.* Her existence is valueless, and no benefit could accrue to the underwriters upon an abandonment.

It may be said, that if the wreck could float, it might have been found and brought into port, and after the payment of salvage, the underwriters would be entitled to what might remain. The jury have not found any such state of facts, but on the contrary, that the wreck was incapable of being brought into port. Whether the verdict, for an actual total loss, could be sustained by the evidence, is not now the question presented, but whether the instructions were correct. If the finding of the jury, upon the point on which the verdict was rendered, should be considered questionable, still they might have found, with the most perfect propriety, a constructive total loss, and as an abandonment was in fact made, there could have been no just ground of objection to such conclusion.

But the instructions, upon a careful examination of them,

will be found, we believe, to be correct, and not introducing any new doctrine as to what constitutes an actual total loss.

Judgment on the verdict.

MILO A. TAYLOR *versus* JAMES E. ROBINSON & *ux.*

In actions of slander, the defendant cannot give the truth in evidence, *under the general issue*, either as a defence to the suit or in mitigation of damages. The defendant cannot make a defence under a brief statement, which was inadmissible under a special plea.

Where the defendant uttered actionable words without a lawful object, and there are no pleadings under which their truth may be given in evidence, he cannot show the misconduct of the plaintiff to rebut the presumption of malice; nor, unless the misconduct gave rise to the charge and lead the defendant to believe him guilty, could it be given in evidence in mitigation of damages.

It seems, in all civil cases, excepting in actions of *crim. con.*, proof of marriage may be established by evidence of collateral facts and circumstances, from which its existence may be inferred.

If in an action of slander, the presiding Judge instruct the jury upon a supposed case wherein actionable words might be spoken with propriety and, to prevent misapprehension, should remark that the case supposed was not intended to be represented as the one before them, it is not erroneous.

ACTION FOR SLANDER. It was tried before WELLS, J. and a verdict was rendered for the plaintiff. Exceptions were taken to the rulings at the trial.

W. P. Fessenden, for defendants.

1. The testimony offered was admissible both as to malice and as to damages. Starkie on Slander, chap. 27, also 25, p. 240; *Larned* v. *Buffington*, 3 Maine, 546; *Alderman* v. *French*, 1 Pick. 1; *Brickett* v. *Davis*, 21 Pick. 404.

2. The testimony as to the marriage was inadmissible.

3. The direction of the Court, that such a state of facts did not exist as to repel the malice, was wrong. *Bourage* v. *Prosser*, 4 B. & C. 247; *McDougal* v. *Claridge*, 1 Camp. 267.

R. A. L. Codman, for plaintiff.

Strict proof of actual marriage was not requisite, it was

sufficient to present proof from which the jury could infer a marriage.

The instructions of the Judge were unexceptionable and embodied, plainly and distinctly, the familiar, well recognized and fully established principles of law, applicable to actions of this character, and were such as any Court, having regard to justice and right, would be solemnly bound to give.

TENNEY, J. — The action is for slanderous words, alleged to have been spoken by Hannah P. Robinson, one of the defendants of and concerning the plaintiff, charging him with cohabiting, with the woman, who he avers is his lawful wife, without being married to her, and also in keeping one Jerusha Brackett as a prostitute, and living with her as such. The defendants pleaded the general issue, and filed a brief statement, in which they say that Hannah P. Robinson never used the words or made the charges alleged in the writ; that if such words as are imputed to said Hannah were used by her, they were not spoken maliciously or with a design to do injury to the plaintiff; but in the house of her husband, and in the presence of him and her sisters; and had reference to matters and transactions interesting to her and to them as family affairs, and were not designed or expected to be made public or reported; and that whatever was said by said Hannah was spoken of as matter of report and not as facts, known by her, and not maliciously or with a design to injure the plaintiff; and as to any words spoken by said Hannah of and concerning the plaintiff and said Jerusha Brackett, (the said Jerusha being a sister of said Hannah) that the character of said Jerusha, and the conduct of the plaintiff with and towards her, were such as to furnish strong grounds of suspicion against the plaintiff of the truth of such words as were spoken on the occasion and times alleged.

Evidence was introduced showing that Jerusha Brackett had lived at the plaintiff's house in Cabotville in Massachusetts, after she had lived in Portland; that she came from Cabotville to Portland, and thence to Fryeburg, to which place the plain-

tiff went for her, and that they rode together from Fryeburg to Portland. The defendants offered evidence to show that Jerusha Brackett's character for chastity was bad, for several years before, and up to the time when she left Portland for the purpose, with other circumstances before shown, to rebut the presumption of malice, and in mitigation of damages. The evidence being objected to, was excluded. To prove his marriage the plaintiff was allowed, against the objection of the defendants, to show that the plaintiff had lived in Cabotville with a woman whom he recognized as his wife, and by whom he had several children; that for six years before the trial, they had lived together as man and wife. The Judge remarked in his instructions to the jury, "If in the present case, the persons to whom the words were spoken, had been under the care and protection of Mrs. Robinson, and as their adviser and in a proper manner, she had warned them against the plaintiff, although she might use words, which under other circumstances might be actionable, still such a state of facts might repel malice, but such a state of facts did not exist."

1. Was the evidence offered and rejected admissible for the purpose expressed? "The defendant may in all cases plead the general issue, which shall be joined by the plaintiff, and he may give in evidence any special matter in defence, where the issue is to be joined to the country; provided, he shall at the same time file in the cause, a brief statement of such special matter." R. S. c. 115, § 18. This provision was intended for the purpose of allowing special matter to be introduced in defence of actions, under the general issue, instead of the requirement, that it should be done under a special plea. It was not designed to allow a greater latitude in defence, by the introduction of evidence, not before admissible. The notice of the special matter, to be offered under the general issue, must contain as clear and distinct grounds of defence as was necessary under a special plea, previous to the passage of the statute; and evidence incompetent under the pleadings formerly required would also be inadmissible under the general issue and brief statement. Some facts may be given in evidence under

a plea of justification, in an action for slanderous words, that the words alleged to have been spoken by the defendant were true, when they would be inadmissible under the general issue; in such cases the brief statement must, when filed with the general issue, contain as full and precise an allegation of the truth of the charge, as the special plea should do. *Brickett* v. *Davis*, 21 Pick. 404.

It is a general rule, that whatever will in equity and conscience preclude the plaintiff from recovering, need not be pleaded, but may be given in evidence, under the general issue. Stark. on Slander, 326. In an action for slander, a malicious intention to injure the plaintiff is an essential ingredient; and it is therefore necessary to introduce into every declaration, an averment of the defendant's malice. Stark. on Slander, 316.

And it follows, that the defendant may give in evidence any matter, which tends to rebut presumption or evidence of malice, under the general issue, without averring in the form of a plea or brief statement, the truth of the words alleged to have been spoken. 2 Stark. Ev. 873; 2 Greenl. Ev. sect. 421.

If the plaintiff in proof of malice, relies on the falsity of the charge made by the defendant, the defendant may rebut the inference by proof of the charge under the general issue. And when the occasion and circumstances attending the speaking of the words, are such, that malice is not presumed, without proof of its existence, the defendant may prove these circumstances, without alleging the truth of the charge. This is allowed where the words complained of, are communications concerning the plaintiff as a public officer, to the appointing power, and in confidential information made in the ordinary course of lawful business from good motives and justifiable ends. If the words are used by the defendant, acting in his character of a judicial officer, legislator, witness, attorney or party in the trial of a cause, before a competent tribunal, these circumstances may be shown under the general issue. But if the plaintiff makes out a *prima facie* case, by evidence, that the defendant used the words, which were actionable, the burden of proof is on the defendant to explain it. Without any

explanation, the presumption remains, that the defendant intended, what the words import, in their ordinary signification.

And if he does not attempt under proper pleadings to show the truth, it will not be permitted him, to adduce misconduct of the plaintiff, for the purpose of rebutting the evidence of malice. *Lawrence* v. *Knies*, 10 Johns. 142; *Shepard* v. *Merrill*, 13 Johns. 475; *Usher* v. *Severance*, 20 Maine, 9. If the evidence offered and rejected, had tended to show misconduct on the part of the plaintiff, from the view, which has been taken, it was incompetent for the purpose of rebutting the presumption of malice. It was not accompanied by any evidence, or the offer of any, showing in the least degree, that the words charged were uttered for such lawful object.

At this day, it is regarded as settled, that under the general issue, the defendant cannot be permitted to give the truth in evidence, as a defence to the suit, or in mitigation of damages. 2 Greenl. Ev. sect. 424. But evidence has been allowed for the latter purpose, showing the misconduct of the plaintiff, which gave rise to the charge, in attempting to commit the crime, or in leading the defendant to believe him guilty. *East* v. *Chapman*, 2 C. & P. 570; 2 Greenl. Ev. sect. 275. But it is believed that no case can be found, where such evidence of the plaintiff's misconduct as was offered in this case, has been admitted. The character of Jerusha Brackett for chastity may have been notoriously bad at Portland while she resided there, and for a long time before. But it does not follow that the plaintiff was guilty of misconduct in doing all which the evidence, in its most unfavorable aspect for him, would indicate that he did do. She may have reformed, before his acquaintance with her, or he may have been entirely ignorant of her character. There is no evidence reported, and there was none offered, that he was aware that her character was at the time, or had been previously, bad for chastity. Her character, unknown to him in this respect, could not tend to throw any just suspicion over his conduct, if it were otherwise unobjectionable.

The instruction to the jury complained of, cannot be regard-

ed as erroneous. The Judge had stated under what circumstances words, in themselves actionable, might be spoken with propriety, and when malice would not be imputable to their author. To illustrate the proposition, a case was stated, and to prevent any misapprehension, the remark was made, that the case supposed was not intended to be represented as the one before them; and from the evidence reported, it was certainly not in all respects the same.

3. Was the evidence allowed in proof of the plaintiff's marriage incompetent? "It seems to be a general rule, that in all civil personal actions, except that for criminal conversation, general reputation and cohabitation are sufficient evidence of marriage." 2 Stark. Ev. 939. Mr. Greenleaf in his treatise on Evidence, vol. 2, section 461, says, "the proof of marriage as of other issues, is either by direct evidence establishing the fact, or by evidence of collateral facts and circumstances, from which its existence may be inferred. Evidence of the former kind, or what is equivalent to it, is required upon the trial of indictments for polygamy and adultery and in actions of criminal conversation; but in all other cases, any other satisfactory evidence is sufficient." And he says in sect. 462, "It is competent to show their conversation, addressing each other as man and wife. Their cohabitation also as man and wife is presumed to be lawful, till the contrary appears. The evidence introduced in proof of the marriage, was such as has been allowed in all civil cases. And we find no authority for a distinction in cases where the party to the marriage is a party to the suit, and wishes to prove the marriage, and where the attempt to establish the marriage, is by one who is a stranger thereto. *Fenton* v. *Reed*, 4 Johns. 52.

Exceptions overruled.

STATE OF MAINE *versus* ELIZABETH ANN NELSON.

If an indictment against a *feme covert* describes her as "matron," the error, if it be one, is not sufficient cause, under our statute, for quashing the indictment or arresting the judgment.

Where offences are of the same nature, more than one may be embraced in the indictment.

If the counts are so numerous as to embarrass the defence, the Court, in the exercise of its discretion, may compel the prosecutor to elect on which charge he will proceed.

The buying, receiving and aiding in concealing stolen goods, mentioned in R. S. c. 156, § 10, constitute but one offence, which may be committed in three different modes.

In indictments for larcenies, where the goods of several persons are taken at the same time, so that the transaction is the same, one count may embrace the whole.

In an indictment, one count may refer to another, to save unnecessary repetition, thus: a count for receiving stolen goods, though it does not mention the names of the owners, may, by referring to the other counts in which the names were set out, be sufficient.

In an indictment against a married woman, for receiving stolen goods, it is unnecessary to allege that the offence was not committed by the coercion of her husband.

AN indictment, tried in the District Court, GOODENOW, J. The defendant filed a plea in abatement, that she was not rightly designated, being styled "matron," when she was a married woman, which plea the Judge overruled. The defendant then moved to have the indictment quashed for several reasons, which motion was also overruled; and a trial was had, and the defendant convicted.

After verdict, the respondent's counsel moved the Court to arrest the judgment, for the cause set forth in the plea in abatement, and for the several reasons which were urged to quash the indictment, which were: —

1. Because, as he alleges the indictment charges three distinct and different larcenies, committed at different times, of the goods and chattels of different persons.

2. Because, as he alleges, the indictment in one count, charges the respondent with three distinct and separate felonies, viz: — 1. buying, 2. receiving, 3. aiding in concealing

stolen goods, knowing the same to have been feloniously stolen, taken and carried away.

3. For not alleging in the count which charges the respondent with buying, receiving and aiding in concealing said stolen goods, &c. the names of the owners of said goods, and for omitting to allege in said count, of the goods and chattels of the right owners.

4. For omitting to allege that the offence was not committed in the presence of, or by the coercion of her husband, or by the authority of her husband, express or implied.

And this motion, the Court also overruled. To these rulings the defendant excepted.

A. W. & J. M. True, for defendant.

1. This defendant should have been described truly by her right name and addition, " the addition must be inserted truly." 3 Bac. Abr. 103; 2 Hawk. c. 23, § 111; c. 25, § 70; *State* v. *Bishop*, 15 Maine, 122.

2. To make out the offence, the indictment should have alleged, that the act was done in the *absence* of her husband, and without his coercion or authority, express or implied, for if the law does not presume a married woman, when away from all control of her husband, to act by his coercion, yet surely it would clearly make him the only guilty party, if she in fact acted in his presence, and under his actual coercion, and in compliance with his express command; and this would have been a good defence on demurrer, if it had appeared by the indictment that she was married, and if so, it is good now. *The People* v. *Wright*, 9 Wend. 96. And the common law need not be *pleaded*, nor is it subject to the same rule that a proviso in a statute is. But like the enacting clause, if there is an exception it must be expressly set forth in the indictment, that the offence does not come under that exception. *State* v. *Godfrey*, 24 Maine, 233.

3. It is not alleged, in the count charging this defendant, who was the owner of the goods, of which she was charged with committing the felony. The right owners' names should have been in this count, and the general reference to the for-

mer counts is not sufficient; the owners' names nowhere appear in the count charging this defendant. *Commonwealth* v. *Manley*, 12 Pick. 174; *Commonwealth* v. *Morse*, 14 Mass. 217. And *non constat* but these goods had changed owners before the receiving.

4. If this indictment shall not be deemed insufficient for the reasons already given, then it brings us to our fourth objection; which is, that this defendant is charged with *three distinct and separate felonies in one count of the indictment.* 1. In being charged with *buying*, *receiving* and *aiding in concealing* stolen goods, &c. which is expressly against law. "The defendant must not be charged with having committed two or more offences in any one count of the indictment." Arch. 32—35. For if so, and the verdict being general, the Court cannot know of which the defendant is convicted or whether it be of all three, and because it may also prejudice the defence, &c. *Wright's case*, 9 Wend. 196; *Lambert* v. *The People*, 9 Cow. 586; *Rex* v. *E. J. Holland*, 5 T. R. 623; *Rex* v. *Horn*, Cowp. 682.

But it will be contended, that the three acts constitute but one offence, but it is equally objectionable, as the indictment now stands, the verdict being general, although the statute be a little ambiguous, for the Judge cannot know if it be called one offence, nor what judgment is to be given. She is charged with all three of "the acts," as they are called, c. 156, § 12, R. S. and has been found guilty generally as charged. Our statute § 10, c. 156, describes these offences, "every person who shall buy, receive *or* aid in concealing any stolen money, goods," &c. This indictment does not use the language of the statute, and why not, if it be all one offence? But is it not because using it disjunctively you could not tell which of the acts they intended to charge? Again, § 12, same statute, uses the same language placing it disjunctively, and further calls them *the three distinct acts* of buying, receiving or aiding in the concealment of stolen property. What are those three distinct acts, to be guilty of all which, is a crime of such magnitude over and above a single offence? Are they not three dis-

tinct *offences*, as well as three distinct acts? If not, then how is the commission of one of those acts an offence?

S. H. Blake, Attorney General, for the State: —

1. The title of "matron" was well, and if not, the misstatement could not avail, as it would not prejudice defendant. R. S. ch. 172, sec. 38.

If the title of "married woman" had been given, as contended for by respondent, it would not have aided her "4th objection," as a married woman is liable *alone*, to indictment for receiving stolen goods. 1 Russell, 26. And the *presence* of her husband, from which the *coercion* might be *presumed*, could not be inferred from the fact or averment of her coverture, but must be proved, if true, in defence, to excuse the wife. And the presence and the command of her husband could both, or either, be shown in defence, under averment of "matron."

The title, therefore, has not prejudiced defendant, hence, not fatal; an indictment need not negative presence of husband, as that is matter of defence, hence 4th objection is not sustained.

2. The offence charged is, of receiving stolen goods, *one offence*, being all received at *one time*, and the averment of three larcenies by Williams, all prior to the act charged upon defendant of *receiving*, is in the nature of inducement, or narrative, or overt acts, leading to the *one* charge, alleged. But an indictment may well charge, and in same count, felonious acts with respect to several persons, as the taking at *one* time, in *one* bundle, the goods of A, B & C. *Commonwealth* v. *Williams*, Thatcher's Crim. Cases, 84; Hale's P. C., 531; *Reg.* v. *Giddings*, C. & Mar. 694; Archbold's Crim. Plea. 53. It cannot, therefore, be a valid objection, that the goods of A, B & C, *received* at *one* time, are charged in *one* count.

3. 2d objection of defendant is, that three felonies, "*buying*, "*receiving*," and "*aiding in concealing*," &c., are charged in same count.

If these three acts, ch. 156, sec. 10, do constitute, as assumed by counsel for respondent, *three felonies*, the assumption is,

that they coexist in relation to *one receipt* at *one time*, of *one lot* of goods, by same person, and if so, what sound objection can there be, to their being charged in same count? The time, evidence, grade of offence and judgment are same, with this difference, that if *all three acts* are proved, it may expose defendant to ten years imprisonment, sec. 12, — if only one or two of the three, to 5 years only, sec. 10.

If on the contrary, sec. 10 contemplates but *one* offence, but *three* acts, either one of which makes out the offence, and which are merged one in the other, when they apply to one lot of goods, or to one article, as a knife, for instance, then but one felony is here charged in fact. And is there not some reason to infer the Legislature contemplated in sec. 12, the penalty is so severe, that the three acts must have reference to three different *times*, or at least to three different lots of goods or articles, the three *acts* applying, each one of them, only to one of the times or one of the lots?

4. Name of owner of goods need not be averred in count for *receiving*, as it is averred in charge against Williams for stealing, and same articles are referred to, "the goods and chattels aforesaid." Archbold's Precedent, on pages 272 and 273, in which name of owner is not averred.

"The 20th sec. of chap. 126 of the Revised Statutes, (of Mass.) prescribing the punishment of "every person who shall *buy, receive* or *aid in the concealment* of any stolen goods, knowing the same to have been stolen," *describes but one offence*, which may be committed *either* by *buying, receiving or aiding in the concealment* of such goods. And an indictment which charges a defendant with *receiving and aiding* in the *concealment of such goods, charges but one offence. Stevens* v. *Commonwealth*, 6 Metc. 241.

The language and provisions of the statute of Massachusetts, are like those of the statute of Maine upon which the indictment in this case was drawn. R. S. chap. 156, sec. 10.

The indictment charges but *one offence. This* is described in *two counts*, (in order to meet the evidence,) one count alleging that the goods were stolen by a *person known and named*;

the other that the goods were stolen by a *person unknown.* It is *legal, safe* and *proper* so to plead.

I do not notice that this indictment differs from Davis' Precedents, a work upon which, if only two bad forms have been found in it in so long a time, we may rely with much confidence, and particularly so, in a case where it is not perceived that the form adopted did, or could by possibility, prejudice the respondent.

WELLS, J. — Whether the title of matron, given to the defendant in the indictment, would have been sufficient before the provision of the statute, c. 172, § 38, it is not necessary to consider, for the statute prohibits the quashing of any indictment or arresting judgment, for any omission or misstatement of title, occupation, &c., if such omission or misstatement do not tend to the prejudice of the defendant. And it is not apparent, that she was prejudiced, in any manner, by being called a matron.

The decision of the District Court, sustaining the demurrer and overruling the plea, was in accordance with the statute.

The first ground upon which it is claimed, that the judgment should be arrested is, because three distinct larcenies of the goods of different persons are charged in the indictment. But each one of these larcenies is charged in separate counts. And such course is admissible, where the offences are of the same nature. *State* v. *McAllister*, 26 Maine, 374.

If the counts are so numerous, as to embarrass the defence, the Court in the exercise of its discretion, may compel the prosecutor to elect on which charge he will proceed. *State* v. *Flye, ibid.* 312.

The second ground alleged for arresting the judgment is, that buying, receiving and aiding in concealing stolen goods, constitute three distinct and separate felonies, which are all embraced in one count.

The statute, c. 156, § 10, makes the buying, receiving, or aiding in the concealment of stolen goods, but one offence, although it may be committed in three modes. If it is charged

in all three of the modes, still but one offence is committed, and only one punishment can be inflicted. The offence is established by proof of either of the modes, but the penalty is the same for one as for all three of them. There is, therefore, but one crime charged. The eleventh and twelfth sections of the same chapter, speak of it as but one offence. The language of the twelfth section is supposed to be at variance with this construction. It provides for an increased punishment in case of the commission and conviction of the crime, subsequently to the first conviction, "or if any person, at the same term of the court, shall be convicted of the three distinct acts of buying, &c." he is liable to a greater punishment than is provided in the tenth section.

But taking the whole statute together, the meaning of the Legislature must be, that if any person is convicted, at the same term of the court, of three distinct and independent offences under the tenth section, then the increased punishment is to follow upon such convictions. Any person convicted of "three distinct acts" or three distinct offences, is made amenable to a more severe punishment than if guilty of but one offence.

A like construction has been put upon a similar statute in Massachusetts. *Stevens* v. *Commonwealth*, 6 Metc. 241.

It is contended, that the count under consideration is bad, because the defendant is charged with receiving the goods of three different persons, in the same count. But this ground is not contained in the motion. And if, after the exceptions are overruled, a new motion should be made, as was done in *State* v. *Soule*, 20 Maine, 18, it could not avail the defendant. For in the first three counts, the names of the owners are separately alleged, and the ownership could have been tried in each count. Besides, it appears by the indictment, that the defendant received all the goods, at the same time. And in indictments for larcenies, where the goods of several persons are taken at the same time, so that the transaction is the same, one count may embrace the whole. 3 Chit. Crim. Law, 723. No reason is apparent why the same rule, should not prevail for receiving stolen goods, as for larcenies.

It is generally true, that but one offence can be charged in one count. *Commonwealth* v. *Symonds*, 2 Mass. 163.

There is but one offence alleged in this count, although the goods of several are received at one time. If the owners should be so numerous as to prejudice the defence, the Court, in its discretion, might limit the prosecution to such bounds as justice would require. *Commonwealth* v. *Eaton*, 15 Pick. 273; *Commonwealth* v. *Tuck*, 20 Pick. 356.

The third ground, for which an arrest of judgment is claimed, is, that the names of the owners of the goods are not stated in the count, charging the defendant with the buying, receiving, &c. The goods stolen, the names of the owners and the person by whom stolen, are stated in the first three counts; in the fourth, which is the one in question, the defendant is charged with receiving "the goods and chattels aforesaid, to wit," then follows an enumeration of the same goods, which had been described in the first three counts. And after the enumeration is finished, it is further alleged, "so as aforesaid feloniously stolen, &c., by the said John D. Williams, in manner aforesaid," &c.

One count may refer to another to save unnecessary repetition. The charge of receiving the goods and chattels aforesaid, so as aforesaid stolen by Williams, carries with it the allegation of that, which had been previously declared to be an incident to the goods, that is, the property of the persons named. The defendant could not have been convicted of receiving the goods of any other persons, than those which were named. If she had been, she would have been convicted of receiving goods which were not, "the goods and chattels aforesaid." The phrase "goods and chattels aforesaid," must be understood to declare, that they were those previously stated, as being the property of the persons named.

It is moreover contended in the fourth place, that the judgment should be arrested for omitting to allege, that the offence was not committed by the coercion of the husband.

It appears by the plea in abatement, that the defendant, at the time of the commission of the offence, was a married woman, and the demurrer admits such to be the fact.

It is true, that the matrimonial subjection of the wife to her husband exonerates her from responsibility, for certain crimes committed by his coercion or in his company, but where she offends alone, she is responsible for her offence, as much as any *feme sole.* 4 Black. Com. 29. And she may be indicted for receiving stolen goods of her own separate act, without the privity of the husband. 1 Russell on Crimes, 16.

Where a *feme covert* is liable in the same manner as if *sole*, there can be no necessity of alleging in the indictment a negative allegation, that she did not act under the control or coercion of the husband. If such were the case, she could show it in defence, by proof exhibited on trial. And if she were not described in the indictment as a *feme covert*, she would have the right to show, that such was her condition, whenever that fact became material to her defence.

The exceptions are overruled, and the case remanded to the District Court.

EDWARD MOTLEY *versus* MANUFACTURERS' INSURANCE CO.

If one, having an interest in mortgaged property, procure insurance in his own name, with a stipulation that the loss, if any, shall be paid to the mortgagee, a suit on the policy may be maintained in the name of the mortgagee. The bringing of such a suit ratifies the act of procuring the insurance for his benefit.

ASSUMPSIT on a policy of insurance. It came before the Court upon a statement of facts.

In 1846, one *Ryerson* mortgaged to the plaintiff the tavern stand and lot upon which the property insured stood, to secure three thousand dollars. Soon after this mortgage, *Ryerson* leased the property to *S. Ryerson* and *L. Stowell*, for a term of years, and among the covenants on the part of the lessees, was one to keep the property fully insured.

The policy in suit was procured by the said lessees, and the company was to make good to them the amount insured, but

therein was inserted a stipulation that, in case of loss on the buildings, "the same to be paid to Edward Motley, mortgagee." During the life of the policy, the buildings were destroyed by fire; but after their destruction, the land was a sufficient security for the mortgage debt. The mortgager, soon after making his mortgage died, leaving six heirs, one of which was the said *S. Ryerson*, and another the wife of said *Stowell*.

The said lessees had no other right to said property than under their lease, and as heirs of said mortgager.

W. P. Fessenden, for defendants, made the following points: —

1. The action cannot be maintained on the policy in the name of the plaintiff. 1. Because the promise is not made to him, nor expressed to be for the benefit of any but the persons named. 2. Because the land is sufficient to pay him. *Carpenter* v. *Ins. Co.* 16 Peters, 495; Phillips on Insurance, title, Parties in Interest.

2. No recovery can be had for more than the shares of the persons insured, and for whose benefit it was made. Phillips on Insurance, chap. Interest, Ownership.

Fox, for plaintiff.

First. — Action is maintainable in name of plaintiff. 1 Chitty's Pleadings, 4, 5; *Maryland Insurance Co.* v. *Graham*, 3d Harris & Johnson, 62; 2 Phillips' Ins. 595, 593.

Second. — Plaintiff is entitled to recover full amount insured, even if Ryerson & Stowell could not. *Reed* v. *Cole*, 3 Burrows, 1512; *Oliver* v. *Greene*, 3 Mass. 133; *Bartlett* v. *Walter*, 13 Mass. 267; *Walker* v. *Mailland*, 5 B. & Ald. 171; *Crowley* v. *Cohen*, 3 B. & Adol. 478; *Bow. Ins. Co.* v. *N. Y. Fire Ins. Co.* 17 Wend. 359; 1 Phillips' Ins. 285, 286; *Tyler* v. *Etna Ins. Co.* 12 Wend. 507; *Tyler* v. *Etna Ins. Co.* 16 Wend. 385; *Strong* v. *Manuf. Ins. Co.* 10 Pick. 40: 1 Phillips on Ins. 287, 288.

HOWARD, J. — This is an action of assumpsit on a policy of insurance, not under seal. By the statement of facts, it appears that N. Ryerson mortgaged to the plaintiff, September

24, 1846, a tavern stand, and lot upon which the buildings and property insured, stood, to secure the payment of three thousand dollars; that there is still due upon the mortgage more than the amount of the loss proved or claimed; and that the mortgager leased the premises to S. Ryerson and L. Stowell, October 22, 1846, jointly, for five years; the lessees stipulating to pay a fixed amount annually, and perform certain acts, and extend certain privileges to the lessor, and the different members of his family, as rent; and, among other things, stipulating "to keep the premises fully insured," and reserving a right to make additions and improvements.

The mortgager and his lessees continued in possession of the premises. The former died Nov. 22, 1846.

The policy, covering the dwellinghouse, furniture, and stable, was executed Nov. 10, 1847, upon the application of the lessees; they being in possession, and occupying the premises, and paying the premium. S. Ryerson & Stowell had no other interest in the property than as lessees, and as heirs with several others, of N. Ryerson.

The policy describes the property, as occupied by Ryerson & Stowell, as a tavern stand, and contains the following stipulation, "*and in case of loss on the buildings, the same to be paid to Edward Motley, mortgagee.*"

The dwellinghouse and other property, were consumed by fire, August 10, 1848, while the lessees were occupying, as beforementioned, under their lease.

It was admitted that the value of the dwellinghouse was $2500, the amount for which it was insured; that the stable was damaged to the amount of $50; and that the real estate, after the fire, was sufficient security for the debt.

The principal question raised by the parties is, whether the plaintiff can maintain an action upon the policy in his own name. No suggestion was made, that the true interest of the assured, and of all parties, was not stated to the company; or that any matter was concealed, which might influence the defendants in making the contract.

The mortgager and mortgagee have an insurable interest in

the property; and every person having, *bona fide*, an interest in property, though without any title to it, may protect such interest by assurance. 1 Phillips on Ins. 2d ed. 105, 6, 7, 131, 2; *Locke* v. *North American Ins. Co.* 13 Mass. 67; *Higginson* v. *Dall*, 13 Mass. 101; *Bartlett & al.* v. *Walter & al.* 13 Mass. 267; *Columbian Ins. Co.* v. *Lawrence*, 2 Peters, 25; *Tyler* v. *Etna Ins. Co.* 12 Wend. 507; *Cromley* v. *Cohen*, 3 B. & Adolph. 478; 1 Burr. 495; 8 Term Rep. 154; 2 East, 544; 11 East, 619; 14 East, 522.

The lessees in this case, occupying the property under a lease for five years, to transact their business as innholders, and under a special covenant to keep the same fully insured, had an insurable interest in such property. But their interest was subordinate to the plaintiff's rights as mortgagee; and they appear to have procured the contract of assurance in good faith, for his benefit, as well as for their own security.

It is sound doctrine, applicable to simple contracts generally, and the appropriate, and well established doctrine of contracts of insurance, that if one make a promise to another, for the benefit of a third, the latter can maintain an action upon it in his own name. 1 Chitty's Pleadings, 4, 5; 3 Bos. & Pul. 149, note; 2 Phillips on Ins. 593, 595; *Schemerhorn* v. *Vanderheyden*, 1 Johns. 139; *Pacific Ins. Co.* v. *Catlett & al.* 4 Wend. 75; *Felton* v. *Dickinson*, 10 Mass. 287. Bringing this action is a sufficient ratification, by the plaintiff, of the acts of the lessees, in procuring the insurance for his benefit.

A mortgagee is entitled to recover the full amount of the insurance in case of a loss, if such sum does not exceed the amount due, and secured by the mortgage. *Finney & als.* v. *Fairhaven Ins. Co.* 5 Metc. 192; 1 Phillips on Ins. 286, 7, 8; *Strong* v. *Manuf. Ins. Co.* 10 Pick. 40; *Etna Ins. Co.* v. *Tyler*, 16 Wend. 385; *Carpenter* v. *The Prov. Wash. Ins. Co.* 16 Peters, 495.

Upon these principles the plaintiff is entitled to recover, and by agreement of parties, the defendants are to be defaulted.

Judgment is to be rendered for the plaintiff, for the amount insured upon the dwellinghouse, and the damage to the stable,

with interest from the time when the loss was payable, by the terms of the policy.

FREDERICK A. MARSTON *versus* DANIEL KNIGHT.

Where one, though without fraud, sells property with a warranty of its quality, the vendee may rescind the contract, if the property be not of the warranted quality.

REPLEVIN for a bay mare. At the trial before WELLS, J. the plaintiff showed that he swapped the mare in controversy for an iron gray horse, and paid defendant fifteen dollars for the exchange. There was testimony tending to show that the defendant, at the time of and before the exchange, represented said gray horse to be sound, and by one witness, that he said the horse was sound, and that the exchange was made in the evening by candle light; and that plaintiff relied upon defendant's representations of soundness.

It also appeared that several witnesses saw the gray horse on the next morning after the exchange, and that he had the heaves very badly, and consequently was of little value. It also was shown, that he had had the heaves for several years previous, and there was testimony tending to show that the defendant knew of the defect at the time of the exchange.

It appeared that, on the next day after the exchange, the plaintiff went with the horse to the defendant and requested him to take him back on account of his unsoundness, and left him with the defendant and demanded the mare. The defendant refused to receive the horse or deliver the mare.

The defendant introduced testimony tending to show, that the horse was valuable, and when fed on wet hay, did not exhibit the heaves except at intervals. He also introduced much testimony to show that he could not have known the horse was unsound, and by one witness, that his words were, "the horse was sound as far as he knew."

Among other instructions to the jury, the Judge said, if they

were satisfied that the defendant represented the gray horse to be sound absolutely and unqualifiedly, even if he did not know the horse was unsound, when in fact he was unsound; or if he represented him to be sound as far as he knew, when in fact he was unsound, and the defendant knew him to be unsound; and that the plaintiff relied upon those representations and they were not mere matters of opinion; in either case, the plaintiff would be entitled to recover; but if they found otherwise, their verdict should be for the defendant.

A verdict was found for the plaintiff, and exceptions were taken to this ruling.

Butler and *G. F. Shepley*, for defendant.

A mere breach of warranty, without fraud, would not entitle the plaintiff to rescind the contract of exchange and recover back the horse in an action of replevin. Long on Sales and notes, p. 126. *Kaze* v. *Johnson*, 10 Watts, 109; *Voorhees* v. *Earl*, 2 Hill, 288; *Carey* v. *Grayman*, 4 Hill, 626; 12 Wheat. 193.

In order to rescind a contract not executory, and one in which there is no agreement to rescind, fraud must be shown and found by the jury to have been practiced at the inception of the contract. But there was nothing in the instructions about fraud.

But if the Court should be of opinion, that the question of fraud was submitted to the jury with sufficient distinctness, then we contend, that if the jury found that defendant made an absolute and unqualified representation, as a matter of fact and not as mere matter of opinion, that said horse was sound, when in fact he was unsound, and the plaintiff relied upon said representation, still this would not constitute fraud in fact or in law, unless the defendant knew said horse to be unsound.

But the case, (if submitted at all on the ground of fraud,) was submitted as a fraud in law or constructive fraud. The jury were instructed, that if they found certain facts, they were bound to return a verdict for the plaintiff. No case, it is believed, can be found that has carried the doctrine of constructive fraud, so far as this.

The degree of fraud necessary for the rescision of a contract is laid down by C. J. Mellen, in *Cross & al.* v. *Peters*, 1 Greenl. 336, and it must render the party subject to an indictment, or at least subject him to an action of deceit.

The language of nearly all the cases is, that the *scienter* by the vendor must be proved.

The cases in 18 Pick. 109, and 4 Metc. 151, are not similar to this, for the defendant had means of information and used them, and even if they did apply in principle, this cause was not put to the jury on the grounds set forth in those cases.

A. W. and *J. M. True*, for plaintiff.

Wells, J. — The question raised in this action is, whether in case of a warranty, or representations, which amount to a warranty, by the defendant, upon an exchange of horses between the parties, and there is a breach of the warranty of soundness, but no fraud on the part of the defendant, the plaintiff can rescind the contract, and recover back his horse.

There appears to be some conflict in the authorities upon this question.

In *Emanuel* v. *Dane*, 3 Camp. 299, which was an action of trover for a watch, that the plaintiff had exchanged with the defendant for a pair of candlesticks, warranted to be silver, but turned out to be of base metal, and upon a return of the candlesticks to him, the defendant refused to deliver up the watch, Lord Ellenborough decided, that the contract might be rescinded for fraud in the defendant, but if there was no fraud, the watch remained the property of the defendant, though the plaintiff might recover damages for a breach of the warranty, and that he could not try a question of warranty in an action of trover.

In *Blay* v. *Street*, 2 Barn. & Adol. 456, a similar doctrine was held by Lord Tenterden. In that case, the defendant had warranted the horse to be sound, but the plaintiff, after the purchase, had sold him to a third person without warranty, and had repurchased him, at fifteen pounds less than he gave the de-

fendant for him, and then, after seven days from the time he had received the horse of the defendant, offered to return him. The plaintiff having sold the horse, and made a profit by him, his right to rescind the contract was denied. And it is also said in that case, that a contract cannot be rescinded, upon a breach of warranty, without fraud. *Power* v. *Wells*, 2 Cowp. 818, was decided upon the same principle. But in *Curtis* v. *Hannay*, 3 Esp. 82, lord Elden says, he took it to be clear law, that if a person purchases a horse which is warranted, and it afterwards turns out, that the horse was unsound at the time of the warranty, the buyer might, if he pleased, keep the horse and bring an action on the warranty, or he might return the horse and bring an action to recover the full money paid; but in the latter case, the seller had a right to expect that the horse should be returned in the same state he was when sold, and not by any means diminished in value.

In *Buchanan* v. *Farnshaw*, 2 T. R. 745, which was an action on a warranty against the seller, and upon a discovery of a breach of the warranty, the horse sold was offered to be returned. Lord Kenyon said there is no doubt but the defendant ought to have taken the horse again.

In 2 Kent's Com., 480, it is said, in the case of a breach of warranty, the vendee may sue upon it without returning the goods; but he must return them and rescind the contract in a reasonable time, before he can maintain an action to recover back the price. An offer to return the chattel in a reasonable time, on breach of warranty, is equivalent in its effect upon the remedy, to an offer accepted by the seller, and the contract is rescinded, and the vendee can sue for the purchase money, in case it has been paid.

The rule is laid down in 2 Stark. Ev., 644 to be, that the vendee upon breach of warranty may rescind the contract, and recover back the consideration paid.

The principal objection, made to an action of assumpsit to recover the consideration paid, when the chattel has been returned or offered to be, for a breach of warranty, is, that the defendant would not have notice of what was to be tried.

Payne v. *Whale*, 7 East, 275. But it is well settled, that such an action can be maintained where the contract is rescinded for fraud, although the declaration in the writ does not disclose the grounds of it. The inconvenience arising from want of notice may be obviated by a bill of particulars, or by a continuance, when a party is really surprised by the exhibition of evidence, which he had no good reason to expect. Such objection has not prevailed in those numerous cases, where assumpsit, upon the general counts, not disclosing the cause of action, has been allowed.

There does not appear to be any good reason why a purchaser should be compelled to retain a chattel, purchased upon a warranty, which is broken, and be put to his action for damages, when it may be altogether unsuitable to his wants, and not possessing those essential qualities absolutely necessary to make it useful to him. He relies upon the warranty, and the breach of it is equally injurious to him, whether the seller acted in good or bad faith.

A chattel warranted to be sound, if not sound, does not correspond to what the warrantor affirms, and though he may not have conducted *mala fide*, the whole detriment growing out of his affirmation, should be suffered by him. As the purchaser is in no fault, he ought to be allowed to pursue that course, by which he can be most expeditiously relieved from the injury done to him, to restore the chattel, and reclaim the price.

There does not exist any difference in principle between an exchange and a sale, as to the right to rescind, and the consequences following the exercise of it. Whether the price is paid in money or goods for the chattel warranted, the breach of the warranty is to be regarded in the same light, and the contract being rescinded, either can be recovered back, by an appropriate remedy.

The plaintiff, having rescinded the contract, can maintain replevin for his horse, which had been delivered to the defendant, for a horse warranted to be sound, but which was unsound at the time of the exchange.

Exceptions overruled, and judgment on the verdict.

JONATHAN C. MERRILL *versus* WILLIAM GORE *& als.*

In the construction of a contract, the situation of the parties, the acts to be performed under it, and the time, place and manner may be considered, to ascertain the intention of the parties; and that construction should be adopted, which would carry such intention into effect, though a single clause alone would lead to a different construction.

Thus, where the plaintiff agreed to procure for the defendant a ship frame, "the timber to be of good quality and hewn to the moulds in a workmanlike manner, and to the acceptance of a master builder appointed by defendants, and at the expense of the plaintiff, the defendants paying $16 per ton, of 40 feet measured, to be surveyed by a sworn or competent surveyor; and the timber was accepted by the master builder, but a portion of it was condemned as refuse by the surveyor at the place of delivery; *it was held*, that if the master builder decided honestly upon the quality of the timber, his decision would be conclusive.

ASSUMPSIT upon an account and written contract. The contract declared on was to furnish a ship frame for the defendants, and among other things, it provided that the timber should be of good quality and hewn to the moulds in a workmanlike manner, and to the acceptance of such master carpenter as the said defendants might select to superintend the building said ship, or the hewing and moulding said timber, the said master carpenter's service to be paid for by the plaintiff; which was to be delivered in Freeport, as soon in the spring of 1848 as boats could pass through the Cumberland and Oxford canal. The defendants agreed to pay the plaintiff $16 per ton, of 40 feet measured, to be surveyed by a sworn or competent surveyor."

At the trial, before WELLS, J., the contract showed, by an indorsement upon it, that *John Maxwell* of Freeport, was agreed upon to superintend the moulding of the timber. And the plaintiff showed that said *Maxwell* was a master carpenter; that he superintended the hewing and moulding of the timber in the woods in Fryeburg, where it was cut, and selected the most of it while standing, and also superintended the building of the ship for which the timber was furnished.

The defendants proved, that when the timber was surveyed at the place of delivery in Freeport, a portion of it was de-

fective and was surveyed as refuse timber; and they contended they were liable to receive and pay for timber of good quality only; that the moulding of the timber only was to be to the satisfaction of *Maxwell;* and that he was not agreed upon by the parties to determine upon the quality. And there was evidence that the word "survey," in the language of shipwrights and dealers in all kinds of lumber, means a determination of the quality of the lumber as well as of the quantity.

The Judge instructed the jury, that the true construction of the contract was, that *Maxwell* was agreed upon by the parties to determine upon the quality of the timber, and that if *Maxwell* decided to receive it under the contract, the defendants were bound by his decision, notwithstanding a portion of it should prove to be defective, or should be pronounced refuse timber by the sworn surveyor. And the Judge further said, that if *Maxwell* in pursuance of the contract, with notice from the parties, and intending to act under it, did decide upon the quality of the timber, his determination would be conclusive, if honestly made, notwithstanding some of it should prove defective, when it arrived at Freeport. But if he was not notified by either party that he was to decide under the contract, and if he had had no knowledge of the contract, the parties would not be bound by his decision, nor by any thing he did in the woods.

The jury returned a verdict for the plaintiff for the full amount of the timber, and defendants excepted to the instructions.

Shepley and *Dana,* for defendants, contended: —

1. That by the contract, *Maxwell* was selected only to superintend "the moulding of the timber." The decision upon the "quality" of the timber was not referred to him by the parties.

2. The survey, which is a determination of the "quality" as well as the quantity, was by the terms of the contract, to be made "by a sworn or competent surveyor."

W. P. Fessenden, for plaintiff.

SHEPLEY, J. — The plaintiff made a written contract with the defendants to furnish timber for the frame of a ship.

It was contended in defence, that part of the timber furnished was of a bad quality and was rejected as refuse by a sworn surveyor. There was a memorandum indorsed upon the contract, that John Maxwell had been selected to superintend the moulding of the timber. The case is presented on exceptions taken to the instructions given to the jury.

They were instructed, "that the true construction of the contract was, that Maxwell was agreed upon by the parties to decide upon the quality of the timber, and that if Maxwell decided to receive it under the contract, the defendants were bound by his decision, notwithstanding a portion of it should prove to be defective or should be pronounced to be refuse timber by the sworn surveyor."

The effect of this language would appear to be, to make the presiding Judge instruct the jury, that the contract determined, that Maxwell was agreed upon by the parties, to decide upon the quality of the timber. Yet it is obvious, that he could not have been so understood by the jury, for by a subsequent clause of the instruction, they were called upon to determine, whether Maxwell, "in pursuance of the contract, with notice from the parties and intending to act under the contract, did decide upon the quality of the timber."

To ascertain the true construction of a written contract, the situation of the parties, the acts to be performed under it, and the time, place, and manner of performance may be considered. The intention of the parties is to be ascertained by an examination of the whole instrument and of its effect upon any proposed construction, and such a construction should be adopted as will carry that intention into effect, although a single clause alone considered would lead to a different construction. The contract in this case shows, that the timber was to be cut and hewn, in conformity to certain moulds, at a distance from its place of delivery. That it was expected to be transported through the Cumberland and Oxford Canal to Portland, and from thence shipped to the place of delivery. It was

to be delivered in the spring of 1848, as soon as boats could pass through that canal. There was to be a master-builder or competent person present, when the timber was cut and shaped to inspect it and to ascertain, that it was shaped in a workmanlike manner to the moulds. If the quality of the timber was not also to be determined by him at that place, the plaintiff, after having worked it according to the moulds to his acceptance, might be subjected to the loss of all that labour, and to the loss of the cost of transportation to the place of delivery, and might there find himself unable to fulfill his contract in season. It would be difficult to conclude, that the parties understood, that such might be the effect of their contract, and, that it was their intention, that the plaintiff should be subjected to such loss and damage on account of his own want of good judgment, respecting the quality of the timber, when it had been formed to the moulds of that ship, under the eye and to the acceptance of a master carpenter, selected by the defendants, who might well be supposed to be more competent to judge of the quality of timber suitable for a ship, than the plaintiff or any common sworn surveyor of lumber could be. A literal and grammatical construction of the clause might determine, that the plaintiff agreed absolutely, that the timber should be of a good quality, and that the master carpenter should only determine, whether it was hewn to the moulds in a workmanlike manner. The clause is, "The timber to be of good quality and hewn to the moulds in a workmanlike manner, and to the acceptance of such master carpenter as the said Gore & Holbrook and Isaac F. Goodrich, may select to superintend the building of said ship, or the hewing and moulding of said timber." By a transposition of the language it may be all used and yet clearly exhibit the construction adopted at the trial. The timber to be hewn to the moulds in a workmanlike manner and of good quality and to the acceptance of such master carpenter.

It is insisted, that this could not have been the intention of the parties, because the contract provided, that the timber should be surveyed after delivery by a sworn or competent

surveyor; and that such survey, legally and practically determines the quality as well as the quantity of the article surveyed. While this is true, it is also true, that the parties may provide for and call a survey after the quality has been determined in some other mode. The language used in the contract providing for such a survey, appears to have been introduced rather to ascertain the quantity and thereby the amount to be paid by the defendants at "$16 per ton, of 40 feet measured, to be surveyed by a sworn or competent surveyor."

The contract was evidently drawn by an unskillful hand and the language is so arranged as to leave the intention of the parties somewhat obscure or doubtful. Yet taking into consideration the circumstances as before named and the effect of a different construction, the conclusion is, that the construction adopted at the trial, cannot be regarded as an erroneous one.

The case states, that Maxwell testified, that he never saw the contract before the timber was cut and moulded, and was not requested by either party to act under it, and that he did not understand, by what he did in the woods, that he was determining upon the quality of the timber under the contract. The case also states, that there was no opposing testimony. Yet it is obvious, that the jury, under the instructions given, must have found that he was notified and did act under the contract. They might perhaps have inferred it from the facts, that his name was indorsed upon the contract as the person selected for that purpose, and that he was found at the place and performing the duties required by it. However this may be, there does not appear to have been any just cause to complain of the instructions upon this part of the case.

Exceptions overruled.

CHARLES JONES, *in eq. versus* AUGUSTUS C. ROBBINS *& al.*

In a bond conditioned to convey land upon the payment of a note, time is not considered, *in equity*, to be of the essence of the contract, unless the parties have expressly agreed that it shall be so regarded, or unless it follows from the nature and purposes of the contract.

Generally, in such contracts, the time of payment is regarded, in equity, as formal and as meaning only that the purchase shall be completed within a reasonable time, and substantially, according to the contract, regard being had to all the circumstances.

Time is not made of the essence of such a bond, by inserting in it a clause that, "in case the obligee shall neglect or refuse to pay the note according to its tenor, the bond shall be void.

In such a case, a delay to pay the note was excused by proof that the obligee was intending to pay it, but that, before and at, and a few weeks after the pay-day, he was prevented by sickness from attending to any business affairs, and that upon his recovery, he sought permission of the obligor to pay it.

In such a case, it having appeared that the obligor had determined to insist upon the forfeiture, as soon as the pay-day of the note had expired, and that therefore, no subsequent tender would have been accepted, it was decreed that he should convey the land, a tender having been made prior to the suit.

THIS was a bill in equity, praying that the defendants might be decreed to convey certain specified real estate, according to their bond to the plaintiff.

The opinion of the Court, (HOWARD, J. dissenting,) was delivered by

SHEPLEY, C. J. — By this bill the specific performance of a written contract, for the conveyance of real estate is sought. The defendants by their bond made on October 28, 1845, engaged to convey to the plaintiff, certain premises therein described upon condition, that he should pay to them two promissory notes made by him on that day, and payable to the defendants with interest annually, one payable in one year and the other in two years from that time. The notes were for one hundred dollars each, and one hundred dollars had already been paid as part of the purchase money. The condition of the bond contained the following clause. "In case said Jones

shall neglect or refuse to pay the above described notes according to their tenor or any part thereof, then this bond shall be void, otherwise to remain in full force and effect."

The plaintiff did not pay the first note, when it became payable, and did not make any tender or offer of payment until December 17, 1846, when he tendered an amount sufficient to pay that note, but not sufficient to pay it together with the interest, which had accrued on the second note during the first year. When the second note became payable, an amount sufficient to pay both notes was tendered.

The plaintiff presents proof of certain circumstances in excuse for the delay of payment; and the question presented for decision is, whether according to the established principles of equity jurisprudence they can be regarded as sufficient.

It becomes necessary in the first place, to disencumber the case of certain other matters, introduced by each party.

The plaintiff alleges, that he placed confidence in the defendant Robbins, that being a lawyer he would make the bond correctly, that it did not exhibit the contract fairly, and that he received it without reading it.

These allegations are denied, and they are wholly unsupported. There does not appear to have been any just cause for their insertion.

He further alleges, that having taken possession of the premises, he expended about five hundred dollars in making improvements upon them. The parties have taken testimony to prove and to disprove the amount alleged to have been expended, all of which is of no further importance than to exhibit the expenditure of some money as an indication, that the plaintiff intended to complete the purchase.

The defendants in their answers allege, that the plaintiff committed trespasses upon their adjoining lands. If he had, the law would afford them protection, and compensation, and his right to have a conveyance will not thereby be affected.

They further allege, that he unexpectedly changed his business and occupied the premises for purposes, for which they had not before been occupied. The premises do not appear to have

been sold subject to any restriction respecting their use, and the rights of the parties will not be changed by their application to a different use.

Courts of equity have frequently decreed the specific performance of contracts for the conveyance of estates, when there had been a failure to comply with the terms of the contract, in point of time. That is not considered to be of the essence of the contract, unless the parties have expressly agreed, that it should be so regarded, or unless it follows from the nature of and purposes of the contract. A reasonable regard is to be had to the convenience of man, and to the accidents and infirmities incident to all the transactions of business. The effect of neglect to make punctual payment upon a contract for the purchase of lands was considered by this Court in the case of *Rogers* v. *Saunders*, 16 Maine, 92, and it has found no occasion to change the opinions then expressed. In the ordinary cases of sales of estates, the general object being to make a sale for an agreed sum, the time of payment is regarded in equity as formal and as meaning only, that the purchase shall be completed within a reasonable time, and substantially according to the contract, regard being had to all the circumstances.

The party seeking relief from a forfeiture must show, that circumstances, which exclude the idea of willful neglect or of gross carelessness, have prevented a strict compliance, or that it has been occasioned by the fault of the other party, or that a strict compliance has been waived. *Hepwill* v. *Knight*, 1 Younge & Collier, 415; *Brashier* v. *Gratz*, 6 Wheat. 533; *Wells* v. *Smith*, 2 Edw. 78; *Dumond* v. *Sharts*, 2 Paige, 182.

The excuse presented by the plaintiff, for his neglect to pay at maturity the note, which first became due, is, that he was at that time unable to attend to business on account of illness.

The testimony shows, that he was quite unwell, occasioned by a severe attack of influenza, from October 23, to the very last of the month of November, 1846. He was found walk-

ing out on a pleasant day, October 29, by a physician, who observed to him, that he looked very sick. He replied that he was, and requested the physician to visit him that day. The physician states, that he did so, and after examination concluded that he had been sick some time, that his symptoms were alarming, that he considered his case a critical one, and that he attended upon him through the month of November. The testimony of the physician was introduced by the defendants. The testimony would seem to be sufficient to show, that he ought not to be subjected to a forfeiture of a right for not attending to the transaction of business of no more importance to others than the payment of a small sum of money, a month or two earlier or later.

The bill states, that he had made an arrangement with Samuel Thompson before the middle of October, to obtain the money to pay the note becoming due on the 28th of that month. This is proved by the testimony of Thompson.

It further states, that about the first of December, and on the first occasion of his being able to ride out, the plaintiff met Robbins and stated to him, that he wished to take up the note which had become due during his illness, and would also take up the note becoming payable the following year, and that Robbins replied, that he would see Mr. Parshley and let him know about it. The answer of Robbins admits, that he met the plaintiff walking in the street about that time, but it denies, that the conversation is correctly stated in the bill; and asserts that the plaintiff said to him, my first note is out, if you will wait about three weeks, I will pay you that, and also the other, which becomes due next year, and that he made no answer to that proposal. The conversation as stated by the plaintiff is not proved, and that stated in the answer must be regarded as correct. From this silence, so noticeable, and from the conduct and observations made by the defendants, when the tenders were subsequently made, a fair inference arises, that the defendants did not intend to waive the strict performance for a day on account of the plaintiff's illness, but intended to insist upon a forfeiture. If this be so,

they cannot have been injured by the delay to tender until the 17th of December, for if that tender had been made on the first day of that month, it would not have been accepted. The omission to tender the interest, which had accrued during the first year upon the note last payable, rests upon the same position.

There is no reason to believe, that the defendants would have varied their course in any degree, if it had been tendered. If the defendants had intended to overlook the omission to perform during his illness, and to insist upon an immediate performance on his recovery, and to set up an omission to do that as a cause of forfeiture, fair dealing would seem to require that an answer should have been given to his proposal, and that he should have been informed, that any further delay would be considered as a forfeiture of his rights. The conclusion seems unavoidable that the defendants have not refused to perform on account of the delay, which occurred after the plaintiff's health was so far restored, that he could attend to business, or on account of the insufficiency of the amount tendered. The hostile feelings, which had existed between the parties before the first note became payable, and the conduct and remarks made by the defendants show, that they intended to avail themselves of the first omission to perform. The forfeiture was occasioned only by that omission, not by any subsequent delay. Upon the principles already stated, that omission having been occasioned or accounted for by occurrences not within the power of the plaintiff to avert, and for the happening of which he was not in fault, should not be allowed to prevent a decree for specific performance. The plaintiff had failed to perform in time. No exertion to make immediate payment after his recovery, could restore him to his former position, without the consent of the defendants or the interposition of the Court. He appears to have sought their favor and to have been met by silence. Subsequent delay could only be evidence of laches or abandonment, which would prevent a court of equity from preserving his rights from forfeiture by the first omission. That he

had no intention to forfeit those rights by laches or by abandonment may be inferred from the facts, that he had paid one third part of the purchase money, that he had expended money to improve the estate, that he had before his illness made an arrangement to obtain the money to pay, that on his recovery he endeavored to obtain time to perform and offered to make compensation for the delay in payment of the first note by paying the second before it was payable. The defendants have suffered no loss, which the law does not presume to be compensated by the interest, which accrued. The estate was not of a character to be subject to unusual rise or fall in value.

A decree for specific performance, is to be entered, with costs.

Willis and *Fessenden*, for complainant.

Barnes and *McCobb*, for respondents.

HENRY S. DAGGETT *versus* WILLIAM CHASE *and trustee.*

When exceptions shall have been filed and allowed in the District Court to any of its preliminary, collateral or interlocutory judgments, directions or opinions, the exceptions must remain among the proceedings of that Court, without being entered in this Court, until the action shall have been prepared by nonsuit, default or verdict for its final disposition between the plaintiff and defendants in that Court.

A trustee disclosed in the District Court, and filed exceptions to its rulings and entered the exceptions in this Court, before service had been made upon the principal defendant; *Held*, the exceptions must be dismissed, because prematurely brought into this Court.

THE opinion of the Court, (WELLS, J. dissenting,) was delivered by

SHEPLEY, C. J. — This action was commenced and entered in the District Court. Service was made upon the trustee, and no service was made upon the principal defendant. The person summoned as trustee appeared and made a disclosure and was adjudged trustee in that Court, and a bill of exceptions was in his behalf taken and allowed at the same term.

Thereupon further proceedings were stayed in that Court, and the action was entered at the next term of this Court by the trustee.

It is provided by statute, c. 97, § 18, that "the exceptions shall be allowed and signed by the presiding Judge of the Court before the adjournment thereof without day." It has been accordingly decided, that exceptions could not be legally taken to an order made at a prior term of the Court, permitting the declaration to be amended. *Sutherland* v. *Kittredge*, 19 Maine, 424. After exceptions have been taken and allowed, the statute provides, "that all further proceedings in said Court shall be stayed, excepting that any trial before a jury shall proceed until a verdict is rendered." The language of the section appears to have been used, having in mind only exceptions to be taken, while the action was on trial before a jury. And in such case it has been decided, that the exceptions should be taken before any judgment is rendered upon the verdict. *Mudget* v. *Kent*, 18 Maine, 349.

Exceptions may be taken to "any opinion, direction or judgment of the District Court in any matter of law, in a cause not otherwise appealable." They may, therefore, be taken to any such opinion, direction or judgment respecting a preliminary or collateral matter; such as an order permitting a declaration to be amended, or a judgment that a trustee is or is not charged. In such cases the exceptions must be taken and allowed at the term, when the opinion, direction or judgment is pronounced, and becomes operative upon the rights of the parties.

The question now presented is, whether, when exceptions have been taken and allowed, respecting such preliminary and collateral matters, they should remain as part of the record and proceedings in the District Court, until a nonsuit, default or verdict has been entered in that Court, preparing the action for a final disposition between the plaintiff and defendant, or be entered at the next term of this Court, and all further proceedings be stayed in the District Court, without any further proceedings in that Court for a disposition of the action upon the merits.

The nineteenth section of the statute provides, that "the party alleging exceptions shall enter the action in the Supreme Judicial Court at the next term thereof in the same county, and produce all the papers as in case of appeal." It is therefore clear, that the exceptions cannot be pending in this Court, while the action remains in the District Court. The proceedings in one action cannot be the foundation of two final judgments in different Courts at the same time. In the class of cases now under consideration, the statute does not by words determine, whether the person taking the exceptions shall enter the action in this Court, "at the next term thereof," after the exceptions have been allowed, or at the next term thereof after there has been a verdict or other disposition of the action between the plaintiff and defendant upon the merits; for the reason probably, that the framers of the statute did not contemplate, that cases would occur, in which those events would take place at different terms of the District Court.

If exceptions taken and allowed, respecting proceedings on preliminary and collateral matters are to stay all further proceedings in the action in the District Court, the effect will be, that all actions pending in that Court, may thus be brought into this Court for trial, without any disposition of them upon the merits, in that Court. And yet the thirteenth section of the statute permits appeals from judgments of that Court to this, only in actions, in which the debt or damage demanded exceeds two hundred dollars, and in certain other actions particularly designated, showing, that it was the intention, that such actions not appealable, should be tried or otherwise prepared for a final disposition upon the merits in that Court. And that this Court should not be burdened with the trial and disposition upon the merits of every description of action, which might be pending in that Court. If such is to be the construction, other serious mischiefs will occur in the course of the proceedings. Exceptions taken to an amendment allowed in the District Court, being immediately brought with the action into this Court, may be the occasion of an argument by counsel, of the deliberate consideration and decision of this Court, and of all

the delay and expense arising out of such a course of proceedure, and the plaintiff may afterward settle the action, become nonsuit, discontinue, have a verdict rendered against him followed by a judgment, or otherwise fail to support his action, and all the labor, expense and delay attending a discussion and decision of the point presented by the exceptions, become wholly useless. A like result might take place, in case exceptions were taken and allowed to a judgment, upon the disclosure of a trustee, and the action were thereby brought into this Court. After the question whether the trustee should or should not be charged, had been elaborately argued and fully considered and decided, the plaintiff might utterly fail to maintain his action, and the labor, expense and delay occasioned by the exceptions prove to be entirely useless.

If the construction be adopted, that the exceptions in such cases are to remain as a part of the proceedings in the District Court, until the action is there prepared by verdict, nonsuit, default or otherwise, for a final judgment between the plaintiff and the defendant, and then be brought into this Court with the action, the rights of all parties will be fully preserved, and all such waste of time, labor and expense will be saved. If an amendment be permitted and exceptions thereto be taken and allowed, and the plaintiff at a subsequent time should fail to maintain his action, or it should be adjusted between the parties, or be referred, the exceptions allowed would become of no importance. If the plaintiff should prosecute his action, until it was prepared for judgment against the defendant, such defendant would have the full benefit of his exceptions by entering the action at the next term of this Court.

In the present case, if the exceptions, after they had been allowed, had remained with the proceedings in the District Court, until the plaintiff had caused a service to be made upon the principal defendant and had prosecuted his suit against him so far as to have it prepared for a final judgment against him, the trustee might then have entered the action in this Court, at the next term, by virtue of his exceptions, and all his rights would have been fully preserved to him, and all useless expense

and labor would have been saved. If the action should now be considered as correctly brought into this Court, and the rights of the trustee should be now determined, it may prove to be a useless expense and labor; for the plaintiff may fail to procure a legal service of his writ upon the principal defendant or to maintain his action upon an investigation of the merits.

Considering that the different provisions of the statute may all be allowed to have their full effect, that the rights of all parties may be fully preserved, that the actions may all be prepared for a final disposition in the Court designated for that purpose, and that all useless delay, expense and labor, may be saved by the latter construction; and that these results cannot be produced by the former, the conclusion would seem to follow, that although the language may not upon a first reading be most favorable to it, yet such must have been the intention of the Legislature.

The action having been irregularly brought into this Court, is dismissed.

Willis and *Fessenden*, for trustee.

G. F. Shepley, for plaintiff.

LUCY E. SMITH, *plaintiff in error*, *versus* JOHN H. RHODES.
SAME *versus* SAME.

When errors of fact are assigned for the reversal of a judgment, a plea of "*in nullo est erratum*," admits the truth of the facts assigned.

A judgment, rendered against an administrator, within twelve months from his assuming his trust, for demands affected by the insolvency of the estate, and not by way of appeal from the decision of the commissioners of insolvency to ascertain the amount of a claim in dispute, is erroneous, and may be reversed.

WELLS, J. — Where an error is manifest upon the face of the proceedings, the judgment is erroneous in law; an error in law must appear by the record itself. 3 Black. Com. 407; *Kirby* v. *Wood*, 16 Maine, 81.

In these cases, there is nothing upon the record, which indi-

cates any error. It does not appear by the record, when the plaintiff took upon herself the trust as administratrix, nor that the judgments were rendered within the year after she assumed it. There is not therefore any error in law.

But a reversal may take place for errors of fact, as where the defendant was a minor, or *non compos mentis*, being legally incapable of making a defence, or where he was absent from the State, and had no actual notice of the suit and was defaulted and judgment rendered at the first term, without a continuance, as the statute requires. *Knapp* v. *Crosby*, 1 Mass. 479; *White* v. *Palmer*, 4 Mass. 147; *Gay* v. *Richardson*, 18 Pick. 417; *Blanchard* v. *Wilde*, 1 Mass. 341.

The errors alleged by the plaintiff are errors of fact, in commencing the actions against her, within twelve months after she took on herself the trust, and not continuing them at the expense of the defendant in error, until the expiration of the twelve months, but taking judgment within that time. The plea in *nullo est erratum*, is an admission of the truth of the facts assigned.

By the R. S. c. 120, § 21, "no executor or administrator shall be compelled in any court to defend a suit, commenced against him in said capacity, within the term of twelve months next after taking on him such trust; unless brought for a recovery of a demand, not affected by the insolvency of the estate," &c.

And by § 22, "all such suits, except as mentioned in the preceding section, shall be continued at the expense of the plaintiff, till the year from the time the trust was accepted shall have expired; and any tender of a debt to a creditor, within such year, shall bar any action improperly commenced in the course of said year." By the act of 1821, c. 52, § 18, which was a transcript of the act of Massachusetts of Feb'y 14, 1789, § 2, the same provisions are in substance made. If then an action is commenced within the year, the plaintiff must continue it at his own expense, and the executor or administrator is not bound to answer to it within the year,

but within that time may tender the debt, and by so doing bar the action.

The executor or administrator is allowed that period to investigate the affairs of the estate and ascertain its solvency, and ought not within it to be compelled to notice suits brought against him, unless they are commenced for demands, not affected by the insolvency of the estate, or by way of appeal from the decision of the commissioners of insolvency to ascertain the amount of a claim in dispute. The causes of action were for demands, as appears by the declarations, which would be affected by the insolvency of the estate, and not coming within the excepted class, and the errors assigned are confessed by the plea. The judgments are therefore erroneous, and must be reversed.

Morgan, for the plaintiff in error.

Rand, for the defendant in error.

JEREMIAH WINSLOW *versus* JOHN RAND.

When real estate is conveyed, all the rents and income, which have then accumulated, and which have not been so disconnected with it, as to become personal property, will pass by the conveyance.

Thus, where the defendant with others conveyed a share which they had held as trustees, in a wharf, and in one month after the conveyance, a dividend upon the share for the year previous, was declared by the wharf company, and paid to one of the trustees aforesaid; and it did not appear that the earnings of that year, or any part of them, had before the conveyance, been in any manner disconnected with the estate, as rent in arrear, or as money collected and set apart as personal property; the said trustee was held liable to the grantee, for the dividend thus received.

ASSUMPSIT for money had and received. The action was tried in the District Court before GOODENOW, J., when it appeared that the President, Directors & Co. of the Exchange bank, conveyed all their property to the defendant and two others, in trust for the stockholders of said bank. Among the property thus conveyed, was a share in Union wharf in Portland. On the first day of December, 1847, said store and

share were sold and conveyed by said trustees to the plaintiff. On the first of January, 1848, a dividend of $60,25, was declared upon the share aforesaid by the proprietors of said wharf, and said dividend was paid by the treasurer of said wharf company, to the defendant, as one of the trustees of the said stockholders. The dividend was of the earnings and profits of said wharf for the year 1847, and was demanded by the plaintiff before the commencement of the suit.

Upon this evidence the defendant requested the Judge to instruct the jury, that he was not personally liable to the plaintiff in this action at common law, for the whole of the dividend aforesaid; and further, that he was not liable in this action for any portion of said dividend. But the Court declined giving such instructions, and instructed the jury that the plaintiff was entitled to recover the whole of said dividend. A verdict was returned for the plaintiff for $60,25. To the instructions and refusal to instruct, exceptions were filed and allowed.

Adams, for defendant.

1. If the plaintiff can recover any part of the sum sued for, it is but one-twelfth part thereof, viz. $5, or the rent and income for the month of December, 1847. *Burden* v. *Thayer & al.* 3 Met. 76.

2. If the plaintiff, in his own name, could have recovered the year's rent or dividend of the lessee, or proprietors of the wharf, it does not follow, that he can recover it of the defendant. Eleven month's rent having accrued to the bank or their said trustees, they being the legal owners of the store and share *during that period*, eleven-twelfth parts, viz. $55, are legally and equitably in the defendant for the benefit of the stockholders of the bank.

3. Admitting that the rights of the parties are equal, the defendant cannot now be disturbed; *potior est defendentis.*

4. If the plaintiff has a right to the whole sum claimed, his claim should be made against the stockholders of the bank.

Fox, for plaintiff.

First, — The deed from the trustees of the share in the

Union wharf, passed the accruing dividends, which were subsequently declared. *Burden* v. *Thayer & al.* 3 Metc. 76; *Wm. Clun's case*, 10 Coke, 128; *State* v. *Waldo Bank*, 20 Maine, 475.

Plaintiff could alone receive the dividend of the wharf, as the share stood in his name at the time it was declared, and the dividends were composed of earnings, both before and after date of deed, and no rule to divide them.

Second, — Defendant, having received plaintiff's money, is liable to an action, for money had and received. Chitty on Contracts, 605; *Hall* v. *Marston*, 17 Mass. 578; *Mason* v. *Waite*, 17 Mass. 560.

If defendant was a trustee, he was for himself and others, who were the original stockholders, and he should have plead in abatement non-joinder of other stockholders.

Defendant was only an agent for himself and other stockholders, and had not paid over the money to his principal. *Hathaway* v. *Burr*, 21 Maine, 572; *Garland* v. *Salem Bank*, 9 Mass. 414.

Shepley, C. J. — The bill of exceptions states, that the defendant and two other persons, as trustees of the Exchange bank, received a conveyance of "a store and share in Union wharf in Portland." "On the first day of December, 1847, said store and share were sold and conveyed by said trustees to the plaintiff. On the first of January, 1848, a dividend of $60,25 was declared upon the share aforesaid, by the proprietors of said wharf, and said dividend was paid by the treasurer of said wharf to the defendant, as trustee of the stockholders of the Exchange bank, on January 25, 1848, the defendant giving a receipt therefor as such trustee." The case does not state, whether the proprietors had been organized as a body corporate under the provisions of the statute, or whether periodical dividends were made; or in what manner the income or rents were collected or accrued. It does not appear, that the earnings of that year or any part of them, had, before the conveyance was made to the plaintiff, been in any manner discon-

nected with the estate, as rent in arrear or as money collected and set apart as personal property.

When a conveyance of an estate is made, all the rents and income, which have accumulated and which have not been so disconnected with it as to become personal property, will pass by the conveyance. By the common law, the rent of an estate under lease not then payable, is conveyed by a conveyance of the reversion. The assignee or grantee of the reversion may maintain an action of debt against the lessee, to recover such rent, founded upon the privity of estate, and not upon the privity of contract.

The same rule in substance, prevails with respect to sales of public stocks. When dividends are made at certain known periods, and a sale is made between those times, the interest or income, which has accrued since the last dividend was made, passes by a sale of the stock as a part of it. While the amount of rent which accrues from one pay-day to another, or of dividend or interest from one time to another, and which is in arrear, or which has been declared and ordered to be paid, before a conveyance, does not pass by conveyance of the estate or stock. There is in these cases no apportionment. *Thursby* v. *Plant*, 1 Saund. 241, note 6; *Birch* v. *Wright*, 1 T. R. 378; *Clun's case*, 10 Coke, 128; *State* v. *Waldo Bank*, 20 Maine, 475; *Burden* v. *Thayer*, 3 Metc. 76.

It does not appear, that the earnings of that year, or any portion of them, had been in any manner separated from the estate, by being in arrear as rent or by any dividend or by their being collected and set apart as personal property. The accruing income must therefore be considered to have been conveyed with the estate.

The defendant having received the money of the plaintiff, cannot avoid the responsibility imposed upon him by law, to account for it by showing, that he received it in his capacity or under colour of being a trustee for others, who were not entitled to it. *Exceptions overruled.*

JOHN HARRIS *versus* ISAAC STURDIVANT.

The adjudication by fence viewers, as to the sufficiency and value of a fence built by one party, is invalid, unless previous notice to the other party be given, of the time and place of their meeting, to examine into the subject, that he may have opportunity to appear before them, to present his views and protect his rights.

CASE, under chap. 29, § 9, R. S., to recover double the value of that portion of a partition fence, assigned by fence viewers to the defendant, which was built by the plaintiff on account of the neglect of defendant. The action was tried in the District Court before GOODENOW, J., and a verdict returned for the plaintiff. No evidence was introduced by the defendant. Exceptions were taken to many of the rulings during the trial, and to many of the instructions to the jury, and for withholding those requested by the defendant. Only one point in the case was noticed by the Court, and consequently the others need not be mentioned.

No previous notice of the time and place for adjudicating by the fence viewers, upon the sufficiency and the value of the fence was alleged in the declaration, to have been given to the defendant, nor was any such notice proved. The defendant requested the Judge to instruct the jury, that on the whole evidence in the case, this action could not be maintained. But the Court declined to give the instruction.

W. P. Fessenden, for plaintiff.

Sweat, for defendant.

HOWARD, J. — The plaintiff brought this action under c. 29, of the R. S. to recover double the value of a fence, which he claims to have built, in pursuance of an assignment by fence viewers, and in consequence of the neglect of the defendant to comply with their assignment and adjudications. Various objections to the maintenance of the action were taken at the trial, in the District Court, and were made the subject of exceptions.

But the principal question presented to us is, whether the defendant was entitled to previous notice of the adjudication

of sufficiency of the fence, by the fence viewers, and of their adjudication, or estimation of its value.

Such notice was not alleged, or proved, and is not required by the express terms of the statute. Notice, however, has been held requisite to parties, and those interested in suits and proceedings under penal and remedial statutes, by reasonable and necessary implication, where no express provision was made therefor, upon the general rule and principle of justice, that, where the rights of persons are to be adjudicated, some notice should be given to enable the parties to appear, and assert and protect their rights. We cannot infer in this case, that the adjudications were to be *ex parte*, because the statute is silent upon the subject, without invading this salutary rule and principle.

In *Scott* v. *Dickinson*, 14 Pick. 276, the appraisal by the fence viewers, without notice to the delinquent party, was held to be void. The proceedings upon which that case was founded, were under the act of Massachusetts of February 21, 1786, § 2 and 3, of which the act of this State, 1821, c. 44, § 2 and 3, is a transcript.

In *Abbot* v. *Wood*, 22 Maine, 541, this Court have recognized the principle settled in *Scott* v. *Dickinson*. *Harlow* v. *Pike*, 3 Greenl. 438; *Commonwealth* v. *Chase*, 2 Mass. 170; *Same* v. *Coombs*, 2 Mass. 489; *Same* v. *Peters*, 3 Mass. 229; *Same* v. *Cambridge*, 4 Mass. 627; *Chase* v. *Hathaway*, 14 Mass. 222; *Bouton* v. *Neilson*, 3 Johns. 468; *Rathburn* v. *Miller*, 6 Johns. 281; *Kinderhook* v. *Claw*, 15 Johns. 538; *The King* v. *Venables*, 2 Ld. Raym. 1407; *The Queen* v. *Dyer*, 1 Salk. 181.

We hold, therefore, upon principle and authority, that if the adjudication and appraisal, by the fence viewers, were made without notice to the defendant, this action cannot be maintained.

Exceptions sustained.

New trial granted.

SAMUEL FESSENDEN *& als. versus* MOSES CHESLEY *& als.*

Where a debtor under the R. S. chap. 148, discloses notes, accounts and executions, and the oath is administered to him without any measures taken on his part, to have an appraisal of the property, the condition of the bond is not thereby fulfilled.

DEBT, on a poor debtor's bond. The action was tried before GOODENOW, J., June term, 1848, when the defendants set up a performance of one of the conditions of the bond.

The debtor duly cited the creditors, within the six months allowed him by his bond, and made a disclosure of his business affairs, before two justices of the peace and quorum. From his disclosure, it appeared that he had notes, accounts and executions in his hands to the amount of four hundred dollars, belonging to him.

The justices thereupon decided, that he was entitled to have the oath prescribed by the R. S. administered, and they did administer it, and made a proper record of their doings.

The attorney of the plaintiffs was present and after the disclosure and before the oath was administered, did object to their allowing the debtor to take the oath, but did not call for an appraisement of said demands, nor in his argument make any objection because the demands were not appraised.

There was evidence that the said notes, accounts and executions were of no value at the time of the debtor's discharge, or at the time of the trial.

The Court thereon ordered a judgment for the defendants, from which order and judgment, the plaintiffs appealed.

The parties agreed that if upon this statement the order and ruling of the Court below was right, the judgment should be affirmed, but if otherwise, the action was to stand for trial.

Dunn, for defendants, submitted the case without argument.

Fessenden & Deblois, pro se.

1. There being certain notes and executions disclosed by Chesley, the execution debtor, it was his duty to have them appraised, and by not doing so the bond became forfeited. R.

S. c. 148, § 29; 1839 statutes, c. 412; *Metcalf* v. *Hilton*, 26 Maine, 200; *Harding* v. *Butler*, 21 Maine, 191.

2. The decision in *Harding* v. *Butler*, was made under statute of 1839. The language is the same in the Revised Statutes; and the Court, in the case of *Metcalf* v. *Hilton*, refer to the case of *Harding* v. *Butler*.

3. The evidence of the demands disclosed at the time of trial, being worthless, makes no difference, as they might subsequently become good, and if so, then if appraised and set off, might have been valuable to the plaintiff.

The question arising under the act of August 11, 1848, relates only to the amount of damage.

WELLS, J. orally. — In this case the judgment debtor disclosed notes, accounts and executions as his property, which the R. S. require to be appraised, and without any appraisal, the oath was administered to him. This proceeding was void, and the condition of the bond was not performed by taking the oath under this state of facts. Evidence of worthlessness of those demands was introduced in the trial below, and the Court ruled that the action could not be supported. This was before the act of 1848, under which act the whole matter is open to the jury. According to the agreement of the parties,

The case must stand for trial.

JOSEPH FREEMAN *& als. versus* ASA THAYER, JR. *& al.*

Where the creditor levies upon land to which his judgment debtor had no title, the debtor is not estopped to assert a subsequently acquired title to the same land.

TRESPASS, for taking certain mill logs. The defendants pleaded severally the general issue, and Thayer, one of the defendants, justified the taking by brief statement, as a deputy sheriff, on a writ of attachment, as the property of *Moses Chesley*.

At the trial, before WELLS, J., at the last term of this Court,

it appeared that the logs were cut in the winter of 1848, on lot 95, in Poland, by *Chesley* and hauled by him to Craigie's Mills, where they were attached by the other defendant, and while thus in the custody of Thayer, Chesley rolled them into the pond, and the logs had been sawed.

The plaintiffs, to show their title to the land where the logs were cut, put in a deed of warranty from *Godfrey Grosvenor* to them, dated and acknowledged October 12, 1842, and recorded April 12, 1848, which covered the premises.

It also appeared, that Grosvenor attached said land June 15, 1835, on a writ against said Chesley, and duly levied his execution in July, 1836.

It also appeared, that lot 95 was taxed to Chesley by the assessors of Poland in 1829, but in 1830 and 1831, it was not on the valuation books. It was also taxed to Chesley in 1832, 1833 and 1834. In 1835, 1836 and 1837, it was not in the valuation, and in 1838, 1839, 1840, 1841 and 1842, the part of the lot levied on was taxed to said *Grosvenor*, and in 1843 and succeeding years, to plaintiffs. It also appeared, that *Chesley* complained of his taxes in 1832, on lot 95, and said it was a wild lot and not worth much, and at the time of the levy, the land was uncultivated. There was no other evidence that *Chesley* had any title to the land at the time of the levy.

The defendants then offered in evidence a collector's deed, of said lot 95, from *Tillson Waterman* to one *Daniel Jackson* dated April 1, 1816, acknowledged Nov. 21, 1845, and recorded Dec. 13, 1848, and testimony to show the validity of said tax title. There was also testimony as to acts of ownership of *Jackson*, of lot 95, soon after he bought it, and that *Chesley* had paid something towards his purchase of it, from *Jackson*. A deed was also put in from said *Daniel Jackson* to *Moses Chesley*, dated and acknowledged March 23, 1840, and recorded Dec. 13, 1848, of lot 95.

The presiding Judge instructed the jury, that they might consider, for the purposes of this trial, that *Jackson* acquired a good title by virtue of the sale of lot 95 to him for taxes, but that the purchase of that title by *Chesley* after the levy, would

not defeat and avoid the levy, and that the plaintiffs' title must be considered good, notwithstanding the deed from *Jackson* to *Chesley;* and that *Chesley* had no legal right to purchase the title aforesaid, to defeat the title acquired by the levy, even were the title good in the hands of *Jackson;* that the plaintiffs must prove property in the logs, or possession of them, in order to maintain an action of trespass; that property ordinarily drew the possession to it; that the trespass must be a joint one, and if they found the logs in question were cut on the land levied on by *Chesley*, after the plaintiff's title accrued, and were attached by *Thayer*, and that subsequently, there was a joint exercise of dominion and control over them by *Thayer* and *Chesley*, before the commencement of this suit, their verdict should be for the plaintiffs.

The jury returned a verdict for the plaintiffs, and the defendants filed exceptions.

G. F. Shepley, for defendants.

Plaintiffs claim title under a deed from Godfrey Grosvenor, dated October 12, 1842, which is a deed of warranty of the land levied upon on an execution, *Grosvenor* v. *Chesley.* Grosvenor derived title, if at all, only by virtue of this levy.

At the time of this levy, Chesley had no title to the property, as the defendants contend. *Grosvenor therefore took nothing by his levy.* The plaintiffs took nothing by their conveyance from Grosvenor, who had nothing to convey.

At the time of the levy the title was in Jackson. The jury were instructed, "that they might consider, for the purposes of this trial, that Jackson acquired a good title by virtue of the sale of lot 95 to him, for taxes."

For the purposes of this hearing, it is unnecessary to examine the title of Jackson. That is to be taken as good for the purposes of this hearing, under the instructions of the Court.

Jackson's title was, *subsequently to the levy*, to wit, March 23, 1840, conveyed to Moses Chesley.

The Court instructed the jury, "that the purchase of that title by Chesley, after the levy, would not defeat and avoid the levy, and that the plaintiffs' title must be considered good, not-

withstanding the deed from Jackson to Chesley, and that Chesley had no legal right to purchase the title aforesaid, even if it were good, in the hands of Jackson, to defeat the title acquired by the levy."

The principal questions in the case arise under the foregoing instructions.

Defendants contend, 1st. Where an execution has been extended upon land, as the land of the judgment debtor, he is not estopped thereby from subsequently acquiring an outstanding better title and setting it up against the title claimed under the levy, there being no warranty, express or implied. *Jackson* v. *Wright*, 14 Johns. 189; Co. Litt. section 446, 265 and 266; *Davis* v. *Hayden*, 7 Mass. 257; *Blanchard* v. *Brooks*, 12 Pick. 66; *Jackson* v. *Hubble*, 1 Cowen, 616; *Jackson* v. *Bradford*, 4 Wend. 622; *Pelletreau* v. *Jackson*, 11 Wend. 110; *Jackson* v. *Waldron*, 13 Wend. 178; *Baxter* v. *Bradbury*, 20 Maine, 263; *Comstock* v. *Smith*, 13 Pick. 116.

All the foregoing cases limit the estoppel to the case of a grantor, conveying with covenants of general warranty, and the case of *Comstock* v. *Smith*, decides, that if the grantor convey with covenants of special warranty, he is not thereby estopped from setting up a subsequently acquired title.

Woodman, for plaintiffs.

1. The ruling of the Judge, "that if Jackson acquired a good title by virtue of the sale of lot No. 95, the purchase of that title by Chesley would not defeat the levy," &c., was correct.

Estoppels may be by record, by deed or *en pais*. The estoppel in the present case, partakes of them all perhaps. It is by record. It is virtually a deed; and it implies a declaration *en pais*, on the part of Chesley, by choosing one appraiser, that he owned the land.

A man shall never be permitted to claim in opposition to his deed, by alleging he had no estate in the lands; and if a man makes a lease of land, by indenture, which is not his, or levies a fine of an estate not vested, and he afterwards purchases the land, he shall, notwithstanding, be bound by his deed, and not be permitted to aver he had nothing in it. *Jack-*

son v. *Bull*, 1 Johns. Cases, 90; *Jackson* v. *Murray*, 12 Johns. 204; *Jackson* v. *Stevens*, 16 Johns. 114; *Flagg* v. *Mann*, 14 Pick. 481; *Ham* v. *Ham*, 14 Maine, 353, 354; *Somes* v. *Skinner*, 3 Pick. 59; *Russel* v. *Coffin*, 8 Pick. 153; *Goodtitle* v. *Morse*, 3 Term Rep. 365.

A man may not only be estopped by his warranty, but he may be estopped by his conveyance without warranty. *Comstock* v. *Smith*, 13 Pick. 120; see also, *Hatch* v. *Kimball*, 16 Maine, 148; *Campbell* v. *Knights*, 24 Maine, 333; *Hurd* v. *Hall*, 16 Pick. 459; *Sayles* v. *Smith*, 12 Wend. 57; *Swan* v. *Saddlemire*, 8 Wend. 676; *Varney* v. *Stevens*, 22 Maine, 331, 334.

Whatever may be the doctrine as to estoppels by quitclaims, or a conveyance by release, it has been settled in Massachusetts, and recognized in Maine, that the statute conveyance by levy of an execution, operates as an estoppel, forever preventing the debtor from claiming the land. *Varnum* v. *Abbott*, 12 Mass. 476; *Ham* v. *Ham*, 14 Maine, 354; *Fairbanks* v. *Williamson*, 7 Greenl. 101; *Bryant* v. *Tucker*, 19 Maine, 383; *O'Neal* v. *Duncan*, 4 McCord, 248.

For this there is good reason. The debtor virtually agrees, being a party to the conveyance, that the creditor shall have the land for his debt, especially where he chooses an appraiser as in this case.

The debtor and creditor shall be estopped in such a case for the same reason as by covenant of warranty, to prevent circuity of action.

A reason why in certain cases, mere releases and quitclaims have been held not to amount to an estoppel, is because they do not purport to *convey the land*, but only the *right, title and interest* which the releasor then had, in the land. In such case the releasee, must be satisfied with the interest for which he stipulated, but not where the conveyances purport *to convey the land* itself. In the present case, the conveyance by Chesley purports to convey the land itself. So Chesley is estopped from claiming it against Grosvenor and his assigns.

2. But Jackson was never seized of the land at all. He

never went into possession. He never went on the land but once, in the summer of 1816. By this he could not gain a seizin by disseizin.

3. As this was wild and uncultivated land, and there could be no tenant of such land for hire, because the temporary use was worth nothing, as the land was taxed to Chesley, in 1829, 1832, 1833 and 1834; as Daniel Jackson then lived in Poland, the presumption arises that Chesley was the owner of the land. He appears to have been seized in fee. How long he had held it does not appear. But Jackson never went on the land after the summer of 1816.

Chesley may have been the original proprietor of the soil. He may have bought under a subsequent sale for taxes. At any rate, it does not appear that Jackson was seized when he conveyed to Chesley in 1841 or 1842, or that he ever had been before, certainly not within 20 years. On the contrary, it appears that Grosvenor and the plaintiffs were seized under the levy. Jackson's deed to Chesley conveyed nothing, and Chesley does not rebut the presumption that he was the true owner at the time of the levy.

4. The deed from Waterman to Jackson conveyed nothing; the requirements of the law were not complied with.

"If a man suffer a great length of time to elapse without asserting the claim, which he at last makes, a presumption arises, either that no real claim ever existed, or that, if it ever did exist, it has since been satisfied, because in the usual course of human affairs, it is not usual to allow real and well founded claims to lie dormant. So the uninterrupted enjoyment of property or privileges for a great length of time, raises a presumption of a legal right." 1 Stark. Ev. part 1, § 15, pp. 33 and 34.

No presumption from lapse of time, could in any event have arisen, that all was rightly done, because whatever we may say of the possession of Chesley, the levy reaches back by relation to the 15th of June, 1835, the time of the original attachment, which was less than 20 years after Waterman's deed to Jackson.

Jackson undoubtedly made inquiry of some attorney at the time, and ascertained that the sale was not good, and abandoned it, and no presumption can now, after the lapse of 32 years, be made in his favor.

It was unlawful for Chesley to buy up this old stale claim, and it cannot operate in his favor, even if Chesley would not be estopped by the levy.

HOWARD, J. — The title to the premises, from which the mill logs in controversy were taken, was contested at the trial. The plaintiffs claimed it, as grantees of Grosvenor, whose title was acquired by attachment and levy of execution upon the land, as the property of Chesley, one of the defendants, in 1836. The defendants contended, that one Jackson acquired the title in 1816, at a sale for taxes, and by a collector's deed; and that Chesley, under whom the other defendant justified, purchased this title from Jackson in 1840, and took conveyance by deed of warranty.

The presiding Judge instructed the jury, "that they might consider, for the purposes of the trial, that Jackson acquired a good title, by virtue of the sale of the lot for taxes, but that the purchase of that title by Chesley, after the levy, would not defeat and avoid the levy; and the plaintiff's title must be considered good, notwithstanding the deed from Jackson to Chesley; and that Chesley had no legal right to purchase the title, even if it were good in the hands of Jackson, to defeat the title acquired by the levy.

The exceptions were urged upon these instructions, and waived as to other rulings and directions of the presiding Judge.

If the title of Jackson were good, as assumed in the instructions to the jury, then Chesley was without title at the time of the attachment and levy, and nothing would pass to Grosvenor by such levy. It was inoperative and void; and would not estop the creditor from reviewing his judgment; nor would it estop the debtor, for the estoppel must be reciprocal and mutual.

All interest then in the debtor, which could be reached by the levy, would pass as effectually by such levy, as by his deed. But, as presented, the case finds that he had no title to the premises when the levy upon them was effected. Therefore, by purchasing in the title, subsequent to the levy, Chesley did not violate any covenant, contradict any declaration or act, or impair the effect of any record, upon which his creditor could have properly relied to acquire, or protect any rights; and he would not be estopped to assert this title, upon any settled principle of estoppel.

It does not appear to be necessary, for the purposes of justice, to extend the doctrine of estoppel beyond its established rules and principles. *Exceptions sustained.*

CHARLES C. MITCHELL *& al. versus* THOMAS CUNNINGHAM.

Confession, made by the owner of a vessel, upon record in the Courts of the United States, that the vessel has been forfeited for a breach of the navigation laws, is not conclusive against him of that fact. It may have been made under a mistake of the facts or of the law.

After a seizure of the vessel and cargo for such a supposed breach of the law, and after such confession by the owner, and while the property is in custody of the law under the seizure, he still has such an interest as would enable him to make a valid mortgage to some of his creditors, as against other creditors, who should attach after final restoration of the property by the government.

REPLEVIN for goods, which the defendant, sheriff of the county of Lincoln, had attached as the property of one Barnes.

Barnes was owner and commander of the schooner Palo Alto, which was under a fishing license. He purchased of the plaintiffs in Portland, the goods replevied in this suit, and transported them in the schooner to his residence in Wiscasset. The vessel, with the goods, was seized and libeled on the ground that she had been employed in a business not justified by the fishing license. Afterwards, on the 23d July, 1847, Barnes filed in the U. S. District Court a petition, admitting

the forfeiture, and praying that it might be remitted. Due proceedings being had, the forfeiture was remitted on the 19th of September, 1847, under the hand and seal of the secretary of the treasury.

Afterwards the secretary revoked the remittitur, and ordered that it should be returned to him, and that the property should be withheld from Barnes.

Barnes insisted upon having the property restored, and denied that the secretary could revoke the remittitur. The question was presented before the District Judge, who decided that the goods should be restored to Barnes, and that the libel should be dismissed, and that a writ of restitution should issue, which was accordingly issued. From this decree and these proceedings the United States appealed to the Circuit Court of the United States, where, upon a full hearing, the decree of the District Court was affirmed.

On the 24th July, 1847, while the goods were in custody of the law, under the seizure by the collector as above named, Barnes mortgaged the goods to the plaintiffs to secure their purchase money. And the mortgage was duly recorded.

Henry Ingalls, called for defendant, testified that he made the writs, and was present when the attachments were made; that the goods were stored in the lower story of the custom house; that the collector unlocked the door and went into the room where they were stored; that deputy marshal, Nichols, having a writ of restitution, followed him; that the sheriff, having the writs, followed him, and the witness followed the sheriff. The collector said to the deputy marshal, "here are the goods;" the sheriff then said, "I attach these goods as the property of Barnes," then standing among the goods and touching some of them. Some conversation then took place between Barnes, (who was present,) and the deputy marshal, who said to him, "I deliver you these goods according to my precept." The sheriff then said, "I attach these goods again; I attached them before a delivery, and I now attach them again after a delivery." This took place on December 22, 1847. This action of trover was brought December 24, 1847.

It appeared that the goods, from the time of seizure to the time of such delivery, had remained locked up in that place, in the custody of the collector.

The case was taken from the jury by consent, and submitted to the decision of the Court, with authority to enter judgment, by default or nonsuit, as the rights of the parties may require.

Fessenden, Deblois & Fessenden, Willis and *Fessenden,* for plaintiffs. Argument by *Deblois,* furnished in writing.

There was, at no time, such a forfeiture as precluded Barnes from making a valid mortgage of the goods. *Fire department* v. *Kip,* 10 Wendell, 266. "A forfeiture, &c. "The right to the property does not, *ipso facto,* vest in the party to whom the property is given, but a proceeding in a court at law must be had, adjudging the forfeiture and declaring the party entitled to the property." *Mars,* 1 Gall. 192 to 198; *Jones* v. *Ashhurst,* Skinner, 357; *U. States* v. *Grundy,* 3 Cranch, 337; *Margaretta,* 2 Gall. 516. In this last case it is settled that, "until *final judgment,* no part of the forfeiture vests absolutely in the collector; but after final judgment, his share vests absolutely and cannot be remitted. *U. States* v. *Palo Alto,* Circuit Court U. S. October term, 1848, and the cases there cited.

At common law, it cannot be disputed that the "forfeiture relates to *the conviction* and not to the *commission* of the offence." Bac. Abr. Forfeiture, D; Com. Dig. Forfeiture, B. 6; 4 Black. Com. 387. "Goods and chattels are forfeited by *conviction.*" 4 Hawk. P. C. 481.

And in the case of the Mars, just cited, Judge Story says, "I take the rule to be universally true, that until the offence is ascertained by *conviction* and attainder, no title vests in the sovereign." And very shortly after he adds, "that the crown hath but a mere possibility, which in no wise restrains the exercise of ownership over the property." See also 4 Black. Com. 382.

Again, in the case of the Mars, Judge Story says, "for all purposes of alienation and sale, therefore, the property in the

goods and chattels remains in the owner, notwithstanding the commission of an offence, subjecting it to forfeiture, and consequently he may convey *a good title against every person but the crown*, and against the crown also, unless in cases where the anterior relation applies."

The common law of forfeiture prevails, where the United States have not provided otherwise.

2. If the goods were forfeited at the time of the mortgage, the remission of the forfeiture revested the title immediately in Barnes, and through him, (in virtue of implied covenants,) in Barnes's mortgagees. *Somes* v. *Skinner*, 3 Pick. 52; *Dorsey* v. *Garraway*, 2 Harr. & J. 402; *McCalla* v. *Bullock*, 2 Bibb, 288; *Ash* v. *Savage*, 5 N. H. 545.

3. If the property in the goods was forfeited by any of said proceedings in said courts, or by the commission of an act by Barnes forfeiting said goods, or by his confession of forfeiture, for the purpose of making his application to the secretary of the treasury for a remittitur; the judgment of the Circuit Court, rendered in said case, by its own proper vigor, *revested* the title in Barnes to the goods, and by the same act, in Mitchell & Co. before, *and without*, any writ of restitution or any service of the same, such writ only operating to give Barnes, or those who claimed under him, the actual possession of the goods and the fruits of the judgment. *Palo Alto*, Circuit Court, U. S., Maine, Oct. Term, 1848.

"The forfeiture being waived by the proper authority, the original *title* and *rights* under it *revived without the warrant or its execution.* The act of the secretary is the gist of the remission, and not the act of the Court." *United States* v. *Morris*, 10 Wheaton, 296.

Again, in the Palo Alto: —

"The judgment and warrant were only the proper modes of restoring the possession, as that possession was in the officers of the law. But the title was not in them, and those officers could not restore the title. It is a mere custody in the Court until an adjudication of forfeiture and condemnation. *Jennings* v. *Carson*, 4 Cranch, 2; *Burk* v. *Trevett*, 1 Mason, 96;

Skinner v. *Maybery & al.* 2 Wheat. 1; *Brig Ann*, 9 Cranch, 289. Such remission may be made at any time until the proceeds, *after judgment and sale*, are actually paid over. *McLane* v. *United States*, 6 Peters, 423; *United States* v. *Morris*, 10 Wheat. 246.

The case of *Ann*, 9 Cranch, 289. After a seizure and voluntary relinquishment, all prior rights acquired by the seizure *are purged away*. Much more would this be the case where there is a remittitur. Judge WOODBURY says, in the Palo Alto, "the remission is a *waiver* of the forfeiture, dispenses with it and is *per se* complete." He also goes on to say, "that whether the *act of remitting* by the secretary, be judicial, semi-judicial or ministerial, having been once exercised on condition, *which condition was performed*, the secretary has not right to reconsider and withdraw that remittitur." Further, he says, "actual redelivery of the property by the officers, appears not to be necessary to revest the title, and it would seem to be sufficient, merely for the secretary to make a remission and communicate it to the claimant."

4. At the time Barnes executed the mortgage to Mitchell & Co., he was the true and lawful owner of the goods, as to all the world except the United States, or those claiming immediately under the United States. Neither the creditors of Barnes, nor the defendant, (not acting under the authority of the United States, nor claiming title under the United States,) can avail themselves of a forfeiture of the goods to the United States. There is *no privity*, between the defendant, or those whom he represents, and the United States. *McCalla* v. *Bullock*, 2 Bibb, 288; *Bullock* v. *Williams*, 16 Pick. 33; *Smith* v. *Smith*, 24 Maine, 555; *Forbes* v. *Parker*, 16 Pick. 462.

5. The effect of the remission of the forfeiture was simply to place the title to the goods in the same situation, that they would have been in, had there been no forfeiture, or seizure for a forfeiture.

6. The Palo Alto was not subject to a forfeiture, *she having committed no offence* against the revenue laws of the United States.

7. His *confession of forfeiture*, accompanied by an application to the secretary of the treasury for a remittitur, and alleging that the forfeiture was not incurred through "willful negligence or any intention of fraud," did not of itself make the vessel forfeit. Such a confession of forfeiture in such collateral proceedings, and with the averment aforesaid, *is not an admission of forfeiture.*

8. Whatever may have been the state of the title of Barnes and however the same title may have been affected prior to Sept. 30, 1847, at that time all forfeitures were remitted by the District Court, and a warrant of restoration issued, on the performance of the *condition* ordered by the secretary of the treasury, and on said 30th of Sept. the whole title was *restored, revested* in Barnes. This was after the mortgage and long before the attachment. This state of things was judicially determined in this case in the appellate court. On the 30th of Sept. then, at all events, Mitchell & Co's title under the mortgage was perfected. The pretended claim by attachment did not present itself until Dec. 22d after.

Shepley and *Dana*, for defendant, submitted the following brief.

1. The bill of sale from Barnes to the plaintiffs conveyed to them no interest in the property. Barnes had at that time no interest to convey. He had previously confessed a forfeiture to the United States, and the title was then in the United States.

2. The bill of sale being without any covenants of warranty, did not operate to convey any title, which Barnes *might subsequently acquire*, but only such as he *then had* in the property.

3. The remittitur was a reconveyance of the property from the United States to Barnes, not to Mitchell. It operated to vest the property in Barnes. The writ of restitution directed the officer to restore the property to *Barnes*. Until the service of the writ of restitution, neither Barnes nor Mitchell had any title in the property. After that was served, the property, being *revested* in *Barnes*, it became liable to attachment as his,

unless it passed to Mitchell by virtue of the prior conveyance, and that it could not do, that being a mere release without covenants of warranty.

WELLS, J.—By the common law, the forfeiture of lands has relation to the time of the offence committed, so as to avoid all subsequent sales and incumbrances. But the forfeiture of goods and chattels, by the common law has no relation backwards; so that those only, which a man has at the time of conviction, shall be forfeited.

The distinction grows out of the fluctuating nature of personal property, and of its rapid passage from one person to another. 4 Black. Com. 387.

It was decided in the case of the brig Mars, 1 Gall. 191, that a *bona fide* purchaser, without notice, is protected against an antecedent forfeiture to the United States. But this decision was overruled in the same case, 8 Cranch, 417, and it was held, that a forfeiture would overreach such sale. It was there considered, that the Act of Congress had provided a different rule, in relation to goods and chattels from that of the common law; that the forfeiture took place upon the commission of the offence; and that it was not in the power of an offender to purge it by a sale. *United States* v. *Nineteen hundred and sixty bags of Coffee.* 8 Cranch, 398.

Where a forfeiture is given by statute, the thing forfeited may vest immediately, or on the performance of some particular act, according to the intention of the Legislature. This must depend upon the construction of the statute. *United States* v. *Grundy & al.* 3 Cranch, 337; *Wilkins* v. *Despard,* 5 T. R. 112.

When a vessel or goods have become forfeited by a breach of the revenue laws, they must generally be libeled and the suit prosecuted in the Court, having cognizance thereof. The mode of proceeding to final judgment of condemnation or restoration is prescribed by law, for the alleged forfeiture in the present case. Acts of Congress of Feb. 18, 1793, c. 52, § 6 and 35, and of Aug. 4, 1790, c. 62, § 67.

Although the liability to forfeiture takes place upon the commission of the offence, the title of the government, when goods are required to be libeled, does not become perfected until there is a judgment of condemnation. *The Margaretta*, 2 Gall. 522; *United States* v. *Palo Alto*, 3 Wood. & Minot.

Where the right of a party depends upon its establishment in a court of record, by a prosecution directed by statute, such right is not attained, unless the prescribed course is followed. *Fire Department* v. *Kipp*, 10 Wend. 266.

In the present case, the government had an inchoate right to the property, arising from the violation of the law, if such were the fact, and could make that right absolute, if there were no laches in its officers, and the claim were duly prosecuted.

The title cannot therefore be said to be conclusively and entirely fixed by the offence, until the condemnation. The legal proceedings constitute the only effectual mode of determining whether the forfeiture has accrued.

If such acts have been done, as show the property liable to forfeiture, still the officers making the seizure cannot protect themselves from accountability for it, unless they have duly instituted the proceedings required by law. As soon as the offence is committed, a foundation is laid for a proceeding *in rem*, and no alienation can deprive the government of the property.

After the libel had been entered in Court, Barnes, the claimant, filed a petition, confessing a forfeiture of the goods, praying for a remission of the same, and denying any intention of violating the law, or any belief, at the time of doing the acts, that they were in violation of it.

But such confession does not necessarily ensure a condemnation; it is interlocutory.

In the case of the *United States* v. *Morris*, 10 Wheat. 246, it is said, by Johnson, J., that many defences are not only consistent in the claim for remission, but furnish in themselves the best ground for extending the benefit of the act to the party defendant, resisting the suit on the one hand, while

he sues for remission on the other, amount to no more than this, that he denies having violated the law, but if the Court thinks otherwise, he then petitions for grace, on the ground of unaffected mistake.

So also in the case of the *Palo Alto*, it is said by Woodbury, J. who questions, whether a forfeiture had been really incurred, that rather than enforce a forfeiture in a doubtful case, and where confession of it had been made in a collateral proceeding to obtain a remission, and has been accompanied by a denial of any intent to violate the law, it would be a legitimate exercise of the discretion of the Court, even on the appeal, to permit amendments, so as to enable the claimant to try his rights. Barnes was therefore still at liberty to contest the right of the government to the property; the final determination, in relation to it, depended on the judgment subsequently to be rendered.

A remission was granted by the secretary of the treasury, and notwithstanding an attempt was afterwards made to recall it, it finally took effect, and there was a judgment of restoration, When the property was delivered to the claimant by the deputy marshal, it was attached by the defendant, upon writs in favor of Barnes's creditors.

On the next day after the confession of forfeiture, Barnes made a mortgage of the goods to the plaintiffs, and it was duly recorded. The question presented is, whether Barnes then had such an interest in the property, as would enable him to convey a title to the mortgagees, who were creditors, against other creditors, that caused it to be attached, after its final restoration.

No one can determine whether there would have been a judgment of condemnation, if the confession of forfeiture had not been interposed. That result would have depended upon the opinion of the Court, which had jurisdiction of the case.

We cannot be governed by the intermediate proceedings, but only by the final judgment; legal proceedings were properly instituted, no decree of forfeiture followed, but that of

restoration, by a court of exclusive jurisdiction, over the whole subject of inquiry.

If we should investigate the facts relative to the alleged forfeiture, and should decide that the goods were forfeited, such decision would not place the title in the government, nor affect in any manner that, which has been made in relation to them. The investigation has been closed, and it cannot be overhauled collaterally, and we must regard the property as if no offence had been committed.

Between Barnes and third persons, the property was his, at the time of making the mortgage, subject to the claim of the government. Between him and the government, if there had been an offence creating a forfeiture, a right in the latter to the property was to be consummated only by a prosecution, and a final decree in its favor.

But it is contended, that the property being in the custody of the law, no possession of it could be given to the plaintiffs.

When the mortgage was made, the goods were in the custody of the collector.

Whatever interest Barnes had in the property, he could transfer by a sale. And if he could sell it, subject to the claim of the government, there does not appear to be any reason why he could not mortgage it. If he could make an absolute, he could also a conditional sale. And if it was incapable of delivery, then none was necessary to vest his interest in the purchaser, except a symbolical one. *Whipple* v. *Thayer*, 16 Pick. 25. In that case, the debtor, after the attachment of his property by an officer, made an assignment of it, while it was held under the attachment; subsequently to the assignment, the officer made another attachment of the property in his possession, subject to the first. It was held, that the delivery of the bill of sale, or assignment with an authority to collect, receive and take possession, was such a symbolical delivery, as would pass the general property in the debtor, subject to the first attachment only, and that the officer had no right to hold it under the second.

In addition to the delivery of the mortgage by Barnes to the plaintiffs, it was recorded several months before the attachment.

The recording is made by statute, c. 125, § 32, equivalent to a delivery and retention of the possession. And a mortgage of personal property, if recorded, is effectual against third persons, without a formal delivery of it. *Smith* v. *Smith*, 24 Maine, 555.

The statute does not declare what shall make a valid mortgage, but that no mortgage shall be valid, except between the parties, unless possession be delivered to and retained by the mortgagee, or the mortgage is recorded.

If the recording is sufficient evidence of notoriety, when a delivery can be made, there is more necessity of regarding it as sufficient, when a delivery is incapable of being made, as when the property is under attachment, replevied out of the hands of the rightful owner, or held for alleged violations of law, on the ground of forfeiture.

The result is, that Barnes having power to make the mortgage, it being a valid one, and its record constructive notice to all persons, attempting to acquire a title subsequently through him, the plaintiffs are entitled to recover, and a default must be entered.

NOTE. — Upon the announcement of the decision, a suggestion was made of the death of C. C. Mitchell, one of the plaintiffs, and the counsel inquired of the Court how the execution should issue, and requested that authority should be given to the clerk upon the subject. The Court replied that no special authorization was necessary; that the clerk upon receiving evidence that Mitchell was dead, would issue execution in favor of the survivor.

NOTE. — HOWARD, J. having been of counsel in this case, took no part in the decision.

ISAAC STURDIVANT *versus* JOHN U. SMITH *& als.*

A defendant pleaded in abatement that two others should have been joined with him; whereupon the plaintiff, without making any replication, summoned in the two persons named in the plea; the three defendants then pleaded in abatement, which resulted in an issue in law, the first defendant still insisting upon his former plea; *held*, that said first plea was of no effect.

Though a plea in abatement is bad, yet if there be no issue upon it, the rule, that judgment should be rendered against the party who has committed the first fault, cannot be applied.

A plea in abatement, that the plaintiff and defendants were part owners of a vessel, and that one of the defendants was the administrator of W. S. deceased, who also was a part owner of the vessel, is not bad for duplicity.

One of four owners of a vessel, cannot maintain an action of assumpsit for the use and charter of it, against the other three jointly.

ASSUMPSIT. It was originally brought against *John U. Smith*, for the use or charter of one fourth part of a brig. He put in the following plea: — "And now the said John U. Smith comes, &c., when, &c., and prays judgment of the writ and declaration aforesaid, because he says that, at the time of making the said supposed promise to the plaintiff, one Joseph E. F. Cushman and one Greeley Sturdivant, were jointly concerned with this defendant in the said supposed chartering therein set forth, and that such promise, if any, was only made by this defendant, together with the said Cushman and Greeley Sturdivant, who are still living, viz. at said Cumberland, and ought to have been named and joined as parties in said suit, and that the same ought not to be prosecuted," &c.

The plaintiff put in no replication, but summoned in *Cushman* and *Sturdivant* according to the provision of the R. S.

At the next term, the defendants filed the following plea: — "And now at this term, the said plaintiff having undertaken to amend his writ by making a new declaration and inserting the names of Joseph E. F. Cushman and Greeley Sturdivant, as co-defendants with said John U. Smith as surviving owners of the brig Vincennes, and setting forth other cause of action against them as such, for charter of one quarter of said brig; the said Joseph E. F. Cushman and Greeley Sturdivant, come,

&c. and with the said John U. Smith, who does not waive, but saves his plea filed at the former term, at which this action against him was entered, they pray judgment of the said writ and declaration, and pray that the same may be abated, because they say, that at the time of making the said supposed promise in the plaintiff's writ and declaration mentioned, the said Isaac Sturdivant was co-owner of said brig of the one-fourth part, as he has set forth, together with the said John U. Smith and Greeley Sturdivant, who was also administrator of William Sturdivant, deceased, part owner of said vessel and Joseph E. F. Cushman, and that the said suit cannot be so prosecuted by said Isaac Sturdivant, as one part owner, against them the said John U. Smith, Greeley Sturdivant and Joseph E. F. Cushman jointly, and this," &c.

To this plea the plaintiff filed this replication. "And now the plaintiff says, that his writ ought not to be abated; because he says, that said Smith, Cushman and Greeley Sturdivant at the time of making the promise declared on and at the several times particularly set forth and described in the plaintiff's writ, were owners of and interested in certain parts of the brig Vincennes aforesaid, and at the times aforesaid, took and exercised the sole control of the said brig, and navigated and employed the said brig, and took and appropriated to their own use, the whole of the proceeds of said brig, and the whole of the profits and proceeds of the use and charter of said brig, during the times aforesaid, and the plaintiff says, that at the times aforesaid, he was the owner of one-fourth part of said brig, and was entitled to have and recover of the defendants, one-fourth part of the reasonable profits and proceeds of the charter of said brig, and one-fourth part of what the use of said brig was reasonably worth for the space of time aforesaid," &c.

The defendants rejoin that they, with said William, though without the consent of the plaintiff, repaired the brig and sent her to sea; that the expenses, repairs and dockage much exceeded the earnings of the voyage.

The plaintiff surrejoins that the earnings of the voyage were

not appropriated to pay any expenses, repairs or dockage, for which he was in any part accountable.

To the surrejoinder the defendants demur generally.

C. S. & E. H. Davies, for defendants, maintained the following positions.

1. That the action cannot be maintained by one part owner against three others jointly. *Fanning* v. *Chadwick*, 3 Pick. 423; Story on Partnership, § 449; Abbott on Shipping, page 113.

2. The defendants, being a majority of the part owners, in possession of the vessel, and making necessary repairs, have a right to appropriate the first earnings to pay for the repairs. Story on Partnership, § 442 and note; § 443; § 444 and note; Abbott on Shipping, page 113.

G. F. Shepley, for plaintiff.

1. The plaintiff's surrejoinder is good.

2. Defendant, Smith, is estopped by his first plea from denying the *joint liability* of the defendants.

3. The rejoinder of the defendants admits the *joint liability* although it sets up a several ownership.

4. Upon a demurrer, the Court will go back to the first error in pleading. 1 Chitty's Pleading, 580.

The defendants' second plea sets up both a joint and a several interest, at least so far as Smith is concerned; he insisting, in the second plea, upon the first plea and not waiving it.

The rejoinder is bad for duplicity. It avers two separate and distinct matters of defence.

It first sets up that they were owners in several proportions; and then that they took the joint control, but are not liable because the amount received, has all been expended. 1 Chitty's Pleading, 456.

The opinion of the Court, (Howard, J. having been of counsel in this case, and taking no part in the decision,) was delivered by

Shepley, C. J. — The plaintiff appears to have commenced an action of assumpsit against Smith to recover for the use or

charter of one fourth part of the brig Vincennes. To this action Smith pleaded in abatement, that two other persons named were jointly concerned with him in the supposed charter and promise. The plaintiff appears to have submitted to this plea without making any replication, and to have, under the provisions of the statute, summoned those two persons to appear and answer as parties defendant.

At the first term after they appeared, the three defendants, Smith still insisting upon his former plea, pleaded in abatement. A replication, a rejoinder and a surrejoinder, were put in, and to the latter there was a demurrer.

There having been no replication to the plea made by Smith alone, it does not compose any part of the pleadings, which were closed by an issue of law.

When insisted upon, after the other persons had become parties defendant, it was clearly bad, for it only alleged a joint promise with the other defendants without alleging, that the defendants were part owners of the vessel or tenants in common with the plaintiff. It was quite erroneous to insist upon it as a plea after that time. Yet the rule, that judgment should be rendered against the party who has committed the first fault, cannot be applied, for, as before observed, there is no issue upon it. The attempt of Smith to insist upon and to keep it alive after it was *functus officio*, can have no effect, but to exhibit it as an excrescence of the pleadings. The counsel for the plaintiff insists, that Smith is estopped by it to deny the joint liability of the defendants. If it could be regarded as part of the pleadings presented for decision by the issue, there might be occasion to consider the position. Presented only as it has been, it can have no effect.

The plea of the three defendants, instead of making a distinct statement that they were part owners of the vessel with the plaintiff, and were joint tenants or tenants in common with him, alleges that the plaintiff " was co-owner of said brig of the one fourth part, as he has set forth, together with the said John U. Smith and Greeley Sturdivant, who was also administrator of William Sturdivant, deceased, part owner of said vessel,

and Joseph E. F. Cushman." These allegations, omitting those having reference to the interest of the deceased person, are that the plaintiff was the owner of one fourth part "together with the said John U. Smith and Greeley Sturdivant, and Joseph E. F. Cushman," or in other words, that the plaintiff and defendants were the owners of a fourth part of the vessel. Amalgamated with these allegations is one, that one of the defendants was the administrator of William Sturdivant, deceased, who was a part owner of the vessel. This might have been true without having the least influence upon the plaintiff's right to maintain the action. It does not however make the plea bad for duplicity. The plea presents the question, whether one of four owners of a vessel can maintain an action of assumpsit against the other three to recover for the use or charter of it; and it is quite clear that he cannot.

The replication in substance admits, that the defendants were at the time owners of certain parts of the vessel, and it alleges, that they exercised the sole control of her and appropriated the whole of the proceeds of the use and charter of her to their own use, and that the plaintiff was the owner of one fourth part of her.

This replication does not exhibit a state of facts, upon which this action can be maintained. The plea therefore must be adjudged to be good and the replication bad.

Judgment that the writ be abated.

RICHARD DAVIS *versus* JEFFERSON BRIGHAM *& als.*

A lease of so much land adjoining a stream, as shall be necessary and convenient for making and using a canal to "slip lumber" from an upper to a lower pond, does not by implication grant any right to flow the lessor's land by the erection of a dam.

A complaint for flowing land, will lie against the occupant as really as against the owner of a dam.

A right to flow lands for the working of a mill, may be acquired by prescrip-

tion, although the flowing was occasioned by different dams, owned by different persons.

THIS was a complaint for flowing about 10 acres of land. The respondents pleaded that they had a legal right to flow without compensation. The respondents claimed the right to open and close, and were allowed to do so, the complainant objecting thereto.

It appeared in testimony, that Joseph Walker caused a dam to be built across a stream between Crotched pond and Long pond, for the purpose of floating logs through a canal or slip from one of those ponds to the other, during the summer season of the year 1822. To exhibit his right to do so, and to show that the flowing caused by that dam was of such a character, that no right to flow the lands would be acquired by flowing them for more than 20 years, the complainant read a lease from Artemas Brigham to Joseph Walker, dated Jan. 14, 1822; also a deed from Billy Emerson and Joseph Sears to Joseph Walker and others, dated March 15, 1826; also a lease from Joseph Sears to Joseph Walker, dated Jan. 14, 1822.

It appeared that Emerson and Sears, when these conveyances were made, were the owners of the lands flowed, from whom the title came to the complainant. It also appeared that Artemas Brigham was the owner of the land upon which the dam was built, and there was testimony tending to prove and to disprove the fact that he became an owner or part owner of the dam, by allowing Walker to cut a considerable portion of the timber for building it upon his land. Artemas Brigham erected a mill for dressing cloth, during the same season that the dam was erected, and used the same for that purpose during the fall and winter before Walker slipped logs the next spring. He conveyed by deed to James Flint and Aaron Littlefield, on May 20, 1823, a part of the land and privileges for mills; and Brigham, Flint and others, during the year 1823, erected mills below the dam to be operated by means of a flume extending from the dam about thirty feet to the mills. These mills, and others erected below the dam,

have been continued and operated to the present time. A new dam in connection with a bridge, which bridge was built by the town across the stream, was built 10 or 12 years ago, and there was testimony tending to prove, that it was at one end 30 feet further up the stream and near the middle 10 feet; and that the water was stopped by it, 30 feet further up the stream than the piles of the old dam, except so far as it flowed through the flume, which was extended after the new dam was erected about 30 feet on one side, and about 25 feet on the other side to connect the new dam and the old flume, which remained unaltered. There was much testimony introduced by the parties, tending to prove that the old dam flowed the water as high or higher upon the land, owned by the complainant, than the new dam and flume, and to disprove it and show that the water for several years, had been flowed higher and continued longer upon the land; and there was testimony tending to prove that Joseph Walker, and others under him, made a slip from one of the ponds to the other before named, and used and controled the dam for the purpose of running logs through the same; that this was done in the spring of the year ending usually by the middle of May; and that the time occupied for such purpose, was from 2 to 4 weeks, when there was a freshet; and that occasionally, the water and dam were used by him in the summer or autumn, for a short time for the same purpose, to run the logs through (when there was a sufficient freshet,) which were left in the spring. This use was continued from the year 1822 up to the year 1836 or 1837, when all the timber had been removed, and it ceased.

It appeared that there were two openings through or under the bridge, one of 40 feet and one 20 feet, and there was testimony tending to prove, that these were wider than the natural stream, and that the water was wholly controled by the old flume, both during the former and present dams. No water had appeared to have flowed over the new portions of the flume.

The title of the respondents to the land on which the dams were built, and to the mills, was by several conveyances, de-

duced from Artemas Brigham, the former owner of the lands, and from former owners of the mills.

James Flint, Aaron Littlefield and Artemas Brigham, were called as witnesses for the respondents, and being examined on the *voire dire*, it appeared that they had each of them conveyed portions of the dam and mills to the respondents, or others from whom respondents derived their titles, and had so conveyed by deeds with the usual covenants of warranty. These witnesses were objected to as interested. But the objection was overruled and they were permitted to testify.

The jury were instructed to determine from the testimony, whether the owners and occupants of the mills had or had not caused the lands of the complainant to be flowed higher, or the water to be continued on longer, during the last three years before the complaint was filed, than during any period of more than twenty years successively, before that time, doing damage to the lands during that period; that, if they should find that the lands had been so flowed to a greater extent, they should find a verdict for the complainant. If they did not so find, it would become necessary to consider the circumstances attending the former flowing, and by whom such flowing was caused; to ascertain whether the respondents had acquired a legal right to flow the lands, without the payment of damages; that, to acquire such a legal right to flow the lands, the respondents must prove that the owners or occupants of the mills, had caused the lands to be flowed as high and to as great an extent for more than twenty successive years, doing damage to the lands during that time, as they had been flowed during the last three years before the complaint was filed. And that if they found that the lands had been thus flowed for more than twenty years successively, by the mill owners, without taking into account or estimating any flowing of the lands caused by Walker and others for the purpose of floating logs from Crotched pond to Long pond, the right to continue to flow them to such extent, would be acquired; that in behalf of the complainant it was contended, that the respondents' or mill owners' right to flow, would be affected by the deed from Artemas Brigham

to Joseph Walker and others, but as it did not appear that Brigham had ever owned the lands flowed, he could not convey any right to others to flow them; and that conveyance would not prevent the owners of the mills from acquiring a right to flow the lands by the flowing as before stated, for more than 20 years; that it appeared, that Emerson and Sears were the owners of the lands flowed, when they made their deeds on Jan. 14, 1822, and on March 15, 1826, and that by those deeds they conveyed to Walker and others, the right to flow the lands now owned by the complainant, for the purpose of floating logs from Crotched pond to Long pond, and for no other purpose; that such flowing would be caused rightfully, and could not therefore be estimated or taken into account, while considering the extent to which the lands had been flowed for more than 20 years by the mill owners. The trial was had before SHEPLEY, C. J. The jury found a verdict in favor of the respondents, which is to be set aside and a new trial granted, if these instructions or rulings were erroneous.

Fessenden, Deblois & Fessenden, and *Littlefield,* for plaintiff.

1. The user, to confer the right claimed, must have been, for twenty years, *exclusive, uninterrupted, continuous, successive. Whipple* v. *Cumb. M. Co.*, Story; Angell on Water Courses, c. 4, sect. 4, p. 114; 2 Chitty's Precedents in Pleading, note to p. 600; *Tyler* v. *Wilkinson*, 4 Mason, 397; *Williams* v. *Morland*, 2 Bar. & Cress. 910; *Beally* v. *Shaw*, 6 East, 215; *Palmer* v. *Mulligan*, 3 Caines, 316; *Blanchard* v. *Baker*, 8 Greenl. 266; Angell on Water Courses, 83, note 1; *Balston* v. *Bensted*, 1 Campb. 163.

2. The defendants admit the flowing as alleged in the complaint, and justify by claiming a right to flow to the extent alleged, without the payment of damages. The defendants are therefore by the pleadings bound to prove the fact of flowing in manner alleged, for more than 20 successive years, at all times exclusively, uninterruptedly and continuously. And the jury should have been so instructed.

3. The grant to Walker and the Warrens of a right to build

a slip, *implied* a right to build and maintain the necessary dams to carry out their object, slipping timber. *Elliot* v. *Shepherd*, 25 Maine, 371, 378; *Nelson* v. *Butterfield*, 21 Maine, 229 237.

4. There cannot be two persons, each claiming and exercising the entirety of the right to flow, by means of the same dam, and in exclusion of all others.

5. Consequently, the right of Walker and the Warrens to flow, in manner and for the purpose they did, having and exercising the exclusive right while they chose, for the purpose of slipping logs, broke up and interrupted the continuity of the defendant's occupation, and this interruption continuing till 1836, the defendants have had no twenty years in which to acquire a right.

6. The alteration made by building a new dam further up stream, and extending the flume, was a new flowing and by means of a new dam. It was a new wrong done to the owners of our lot; and cannot be legally connected with the former flowing, so as to make out 20 years. Here were two different dams on different sites. They cannot be so coupled together, as to make a continuous disseizin. The principles are the same as those relating to disseizin of land.

7. Walker and the Warrens being the exclusive owners of the dam up to 1836, and always occupying every year at the time the lands were flowed, the defendants could not be called on to answer in damages to the owners of our lot, the defendants not owning the dam. *Lowell* v. *Spring*, 6 Mass. 398.

The charge to the jury was not sufficiently comprehensive or sufficiently definite and explicit, and was therefore calculated to mislead the jury.

Carter, *Willis* and *Fessenden*, for respondents.

1. The witnesses were rightfully received. *Bliss* v. *Thompson*, 4 Mass. 448; *Ely* v. *Forward*, 7 Mass. 25; *Phillips* v *Bridge*, 11 Mass. 242.

2. The instructions were correct. The new dam was substantially the same as the old one. It flowed no more than the old one. So the jury have found. The effect of the

lease from Bigelow, and of the supposed license from Emerson & Sears was correctly laid down.

The right to slip logs gave no right to erect a dam. Walker built the dam in 1822, on Brigham's land. There is evidence that Brigham owned a part of it. He built a mill and flowed the land now owned by the complainant. He occupied it for a year as owner. Suppose Walker had been prosecuted for the flowing; it must have been by complaint under the statute. Walker and Warren's occupancy was for a special purpose and concurrently with Brigham, whose permission, that others should occupy under him, could not impair his rights derived from user.

It is objected, that the respondent did not use the water *continuously*. It is enough that he used it when wanted. The use of it too was *exclusive*. For Walker occupied under him. A purchase by Walker from the complainant of a right to flow cannot affect Brigham's rights. There was no occupation adverse to his. The maintenance of the bridge by the town was no occupation of the water.

Not necessary for defendant, that the successive dams should be precisely on the same spot. It is the back-flowing of the water, not the position of the dams, this is the material question. R. S. c. 126; *Stowell* v. *Flagg*, 11 Mass. 364; *Farrington* v. *Blish*, 14 Maine, 423.

It is also objected that the instructions were not sufficiently full and explicit. If they were correct, it is enough. But they covered the whole inquiry, were clear and distinct. If one have the entire occupation, no other can have it; and it was expressly stated, that the acts of Walker and Warren could not avail the defendant.

S. Fessenden, for plaintiff, in reply. — It is the owner of the dam and not of the mill, that is responsible for flowing. The owner of the dam can alone acquire rights by occupancy. During the time that Walker and Warren occupied *under us*, they, as owners of the dam, could acquire no rights against us. We could enforce no rights against them, even though they

claimed to flow under Brigham. Neither had we any remedy against the latter, for he did not own the dam.

Defendant says, that Walker and Warren occupied as his servants. But they occupied under us. Then, if his servants occupied under us, his occupancy was under us also.

SHEPLEY, C. J. — I understand the argument to be, that Walker and Warren acted under a written authority from both parties, each authorization being entirely independent of the other.

The opinion of the Court was by

SHEPLEY, C. J. — The process is a complaint for flowing lands. The defence is a right acquired by prescription to flow them without compensation. A verdict was found in favor of the respondents under instructions which are alleged to have been erroneous. The more important positions presented in argument by the counsel for the complainant, deserve consideration.

1. The first has reference to the conveyance or lease made on January 14, 1822, by Artemas Brigham to Joseph Walker. The jury were instructed that it "would not prevent the owners of the mills from acquiring a right to flow the lands, by the flowing as before stated for more than twenty years." The argument is, that by implication it granted the right to build a dam upon the lands of the grantor, and to flow them for the purpose of floating logs from Crotched pond to Long pond.

It recites, that Walker is about to make a canal from Crotched pond to Long pond, for the purpose of slipping timber from one of those ponds to the other; that Brigham is the owner of land in and adjoining the natural stream, which empties the waters of one pond into the other, which will be necessary to be had for the aforesaid purpose.

Brigham leases to Walker "so much of my said land at and adjoining said stream of water, as shall be found necessary and convenient for him or them to use and occupy for the purpose of making and using a canal, for the object and use aforesaid, and for no other purpose." Nothing can be considered as

granted by implication, which is not necessary or convenient for making and using the canal. A supply of water would be necessary for its use, but it would not be necessary, that it should be supplied by the erection of a dam or feeder, upon the lands of the grantor.

The grant of lands, " for making and using a canal," is quite different from the grant of lands, for the erection of a dam to raise a head of water, to supply the canal. The right to occupy land to make and use a canal, and the right to occupy it, to raise a head of water to feed it, are so different, that the one does not by implication or otherwise in the ordinary use of language, or in the construction of such improvements, include the other. A canal may be made and used across the land of a person without injury to his lands, not within the line of the canal and pathway adjoining it. If a grant of land to make and use a canal were to be considered as conveying by implication the right to do all that might be necessary or convenient to procure and continue a supply of water for its use, the grantor might find the value of his estate materially lessened without being aware, that he had in any manner yielded such a right.

If the construction insisted upon were conceded, the conclusion deduced in argument from it, could not be sustained. That appears to be, that Walker owning and occupying the dam, rightfully to float timber and thereby acquiring the right to flow the lands owned by the complainant, such use of the dam and right to flow, would preclude the respondents from obtaining a prescriptive right to flow them. This argument assumes, if one person has by grant or license obtained an easement or servitude in the land of another, for a particular purpose, that a third person may not by prescription obtain a right to an easement in the same land, for a different purpose. The fallacy of the argument, is found in its application of the terms uninterrupted and exclusive to the whole flowing of water upon the land, and not to the particular flowing or use of the land, by the respondents. The question is not, whether the respondents alone or exclusively had caused the land to be

flowed, but whether they had flowed it for a particular purpose, without interruption by the owners of the land, and excluding them from interference with such flowing.

Prescription rests upon the presumption of a grant, which has been lost. The owner of land may grant to one person a right to flow his lands, for the purpose of floating timber, and to another the right to flow the same lands for the purpose of working mills. If one has lost his deed containing the grant, and can prove, that he has exclusively and without interruption exercised the right of flowing for his purpose, for more than twenty years, he will not lose it, because it can be shown, that the other has retained and can produce his deed granting to him a right to flow the land for his own purposes. The right of Walker and others, to flow the lands for floating timber, could not prevent the respondents from acquiring a prescriptive right to flow them for the purpose of working their mills. In the case of *Kent* v. *Waite*, 10 Pick. 138, the opinion of the Court states, "different persons may have a right of way over the same place by different titles, one by grant, another by prescription, and a third by custom; and each must plead his own title, and if he proves it, it is sufficient, although he may also prove a title in another, provided the titles are distinct and not inconsistent."

Nor would the interruption of the use of the water for working the mills during some weeks of each year, occasioned by its use for floating timber, prevent the respondents from obtaining a prescriptive right to its use for their own purposes subject to that interruption. It would only show, that their right to its use was a qualified one. In the case of the *Bolivar Manuf. Co.* v. *Neponset Manuf. Co.*, 16 Pick. 241, it was decided, that a right to the use of water in a trench or canal from Mashapog brook to Steep brook, might be acquired by prescription, subject to an interruption by third persons, for an indefinite portion of each year. The argument therefore, that "the occupation of Brigham during a portion of every spring was interrupted, the continuity of that occupation broken," cannot prevail.

2. Another position presented in argument is, "a complaint for flowing must be brought against the owner of the dam."

"Hence, while Walker and others owned and occupied the dam and also the right to flow acquired by deed, the defendants could not be acquiring any right to flow. No complaint could be maintained against them." The position that a complaint could be maintained only against the owner of the dam is not correct.

The statute of Massachusetts, passed on February 27, 1796, provided, "it shall be lawful for the owner or occupant of such mill to continue the same head of water to his best advantage," and the verdict and judgment founded upon a complaint for flowing "shall be the measure of the yearly damages, until the owner or occupant of such mill, or the owner or occupant of such lands, so flowed, shall on a new complaint" "obtain an increase or decrease of said damages." The act of February 8, 1821, c. 45, in all the sections giving the right to flow and authorizing the process, speaks of the owner or occupant of the mill, without using the word dam. The ninth section speaks of the owner or occupant of the dam. Hence it was stated in the case of *Nelson* v. *Butterfield*, 21 Maine, 237, "the owner or occupant of the mill, for the use of which the water is raised, is by the statute made liable for the payment of the damages. And the ninth and tenth sections of the act would seem to require such a construction, as would make the owner or occupant of the milldam, which raised the water for the use of the mills, also liable." The case of *Lowell* v. *Spring*, 6 Mass. 398, does not decide otherwise. The complaint was brought against the owner of the dam, and the Court, therefore, only spoke of the owner of the dam. A complaint could therefore have been maintained against the respondents as owners of the mills, for flowing the lands, or against them as occupants of the dam for the purpose of working their mills. The fact that the dam was owned by another would have been no excuse or justification. That it was occupied to raise a head of water for the use of the mills would be sufficient to render the owners liable. A plea by the respondents, that Walker and

others were the owners of the dam and were rightfully entitled to flow the lands for the purpose of floating timber, could afford them no protection. Such a plea would clearly be bad.

3. It is contended, that no prescriptive right to flow the lands, could be acquired, because the flowing was occasioned by two dams built by different persons, and because the flowing was occasioned differently by the different dams. If, as has been already shown, a mill owner may be liable for damages, by making use of a dam owned by another to raise a head of water to work his mill, it will be unimportant, that the dams were built by different persons or owned by different persons. Nor can it be material in what manner the flowing was occasioned, if it were for the working of the mills, and the lands were flowed to the extent required. If the question presented, were, whether the respondents had acquired a right to maintain a dam in a particular place, the fact, that it had been kept up in different places, might be material. The question here presented, has no reference to the particular location of the dam, or to the persons by whom it was built. It has reference to the use of the water flowed to a certain height and continued for a certain time, during each season for the working of mills, whereby the lands were flowed and injured. The positions assumed in argument, do not appear to be fully sustained by the facts reported. The water, so far as it was obstructed by the dam last built, was obstructed by it thirty feet above the place, where it was obstructed by the former dam, while the actual obstruction, which caused the water to flow back upon the land, was at all times, during the existence of each dam, the same. The case finds, that it was occasioned by the flume, which had never been altered. That, which caused the water to flow for the use of the mills, was at all times the same and situated in the same place. Both dams were occupied by the owners of mills, as means to gather the waters into that place for the use of the mills.

4. It is insisted, that the instructions were erroneous, because they did not require the jury to find, that the flowing was adverse, exclusive, and uninterrupted. The value of in-

structions consists in the presentation of the particular points in contest clearly, unincumbered by other considerations, with the testimony directly applicable to them. When the question is, whether a right to flow has been obtained by prescription, and one part of the definition of a prescription is so necessarily involved in the inquiry, that it is not alluded to as matter of contest or investigation, it would be quite useless, and only suited to introduce obscurity, to proceed in a formal manner to define a prescriptive right, or to declare how it could be acquired. No point appears to have been made, nor any testimony to have been introduced to prove, that the flowing occasioned by the owners of mills, was or was not adverse. The fact, that it was done without the exhibition of any grant or license from the owners of the lands, and that their lands were thereby damaged, precluded all formal consideration of its adverse character. The jury were required to find, that the flowing occasioned damages during each season, of more than twenty years, which must necessarily exhibit the exercise of an adverse claim of right, when no grant or license was offered or pretended. If there had been any controversy respecting it, and the charge had omitted to notice it, the counsel should have requested instructions upon it.

The instructions requiring the jury to find, that the owners of the mills had caused the lands to be flowed as high and to as great extent, for more than twenty successive years, as they had been for the last three years, necessarily required them to find, that there had been no interruption to the enjoyment of the right asserted.

The word exclusive, when used with reference to the acquisition of such a right, can only mean, that the enjoyment of the easement as claimed, whether it be a limited or more general enjoyment, should exclude others from a participation of it. It is in this sense, that it is used in the cases cited. That the enjoyment by those claiming a prescriptive right should not be an enjoyment by them and others, strangers to them and to their claims. The instructions did require, that the enjoyment should be exclusive, in the sense in which that term

can be applicable, that is, that it should be by the mill owners, and not by them and other persons. The jury were required to find, that the mill owners had caused the land to be so flowed.

Perhaps the best test, of what is by law required to establish a prescriptive right to an easement, is a good special plea setting forth such a right in bar of an action. The terms adverse, exclusive and uninterrupted, so much insisted upon in argument, to show that the instructions were defective or erroneous, will not be found in the best precedents for such pleas. 2 Chitty's Pl. 518, 561, 563, 569, 573; *Stennel* v. *Hogg*, 1 Saund. 222; *Potter* v. *North*, *idem.* 348; *Mellon* v. *Walker*, 2 Saund. 1. The instructions required that the jury should find facts sufficient to have sustained such a special plea. And yet there is no doubt, that the terms insisted upon are appropriate to ascertain, whether a prescriptive right has been acquired; when they are not necessarily included in the facts found, and are material points of contest, they should receive attention. In the present case the complainants do not appear to have been aggrieved, by the omission to use either of those terms in the instructions. *Judgment on the verdict.*

MOSES JOHNSON *versus* WILLIAM WINGATE.

When a master of a vessel, in selling the same under instructions of the owner, exceeds his authority, the principal is not bound.

One dealing with a master, who is acting under special authority, is bound to know the extent of it.

If a principal does not, in a reasonable time after actual notice of his agent's act, or after notice is to be presumed, disapprove of the conduct of his agent, a presumption of assent and ratification will arise.

But when an agent, who has exceeded his authority, omits to inform his principal of his proceedings and there is nothing from which he can be presumed to know them, if the principal, within a few days after making the discovery, disavows the proceedings, he cannot be held to have ratified them, although performed more than five years previously.

TROVER for the brig Hero. The case came before the

Court upon a statement of facts. In 1840, the plaintiff was the owner of the brig, and was indebted to the defendant for supplies furnished the vessel. The master, as the agent of the plaintiff, was then called on for payment. He wrote to the plaintiff, who in reply authorized him as his agent "to make conveyance of the brig to said Wingate, together with her appurtenances and all earnings then on hand, provided said Wingate shall give back to you an agreement to reconvey the vessel to me whenever I pay him the amount of my indebtedness and all bills which he may pay against the vessel, it being understood, that he is to retain all the net earnings of the vessel while in possession, he to pay all the debts now due from her."

In Nov. 1842, the master, under this authority, executed a bill of sale of the vessel and appurtenances to the defendant and paid over to him the earnings on hand, taking back an agreement to reconvey to plaintiff "whenever he shall pay the amount of his indebtedness to me, being $4575,00, together with all sums which I may pay on debts now due from the vessel, it being understood that I am to retain all the net earnings of the vessel while in my possession without any liability to account for the same."

The vessel was not delivered to the defendant until one year afterwards. The master took possession of the agreement at the time it was made and ever since kept the same, without giving any notice of its particular contents to the plaintiff, nor was there any evidence that the plaintiff knew any thing of its contents, or that it was not in conformity with his instructions, until about the first of January, 1849.

Since the defendant took possession, he has received all the net earnings, amounting to $3650,00, the same master having continued in command.

On the 10th Jan. 1849, the plaintiff demanded of the defendant the possession of the vessel, and he refused to deliver it.

Upon these facts, the Court were to enter a nonsuit or default. In case a default should be entered, damages were to be assessed by an auditor.

G. F. Emery, for defendant, contended that there was in reality no transcending of his authority by the agent of the plaintiff. It was expressly stipulated by the principal that the defendant was to retain all the net earnings of the vessel, and this must have been designed for the defendant's own use. Why this stipulation unless for him? Unless the plaintiff had so understood it, he would have added a clause to have it accounted for to himself. If it is said such a construction is not tenable, for it would operate as a hard bargain, the reply is, that the Court cannot infer that from the agreement itself. The instrument itself is to be a guide to the intentions of the parties, and not the consequences which have resulted from it.

But the bargain was no harder than the defendant had a right to exact. He did not want the vessel, but his pay, and it was thus put into his hands, the earnings to go to the defendant, to quicken the plaintiff to discharge the debt. Wingate might have attached and sold the brig, and raised his pay immediately, and thus have deprived Johnson of the power of redeeming her, but this trade was made instead, and quite as much to the advantage of the plaintiff as defendant.

But if the master did not precisely follow the instructions of the plaintiff, the conveyance was valid, because it has been assented to and ratified by the plaintiff. Both parties have treated the transaction as binding. The defendant has been in possession under the bill of sale nearly six years, and the Court might well have presumed, the property to have passed to defendant, even if there had been no bill of sale. *Proprietors of Canal Bridge* v. *Gordon*, 1 Pick. 297; 7 Cranch, 299; Smith's Mercantile Law, page 100.

If the plaintiff did not know the contents of the agreement, that is not the fault of the defendant, who had no control over it; and the delivery of it to the master, was in law a delivery to the plaintiff. *Shaw* v. *Nudd*, 8 Pick. 9; 8 Pick. 56.

But again, the transaction was in the nature of a mortgage, and therefore this action cannot be maintained for two reasons: —

1. The mortgage debt has not been paid or tendered by the plaintiff.

2. The property became forfeited by a foreclosure, the defendant having had possession more than "sixty days," the period named in the statute.

Again, trover cannot be maintained except on the ground of *fraud* on the part of the defendant, and the only pretence by the other side is, that the agent transcended his authority.

Shepley and *Dana*, for plaintiff.

SHEPLEY, C. J. — This is an action of trover for the brig Hero. The case is presented upon an agreed statement of the facts. A conveyance of the vessel was made by the master, acting as the agent of the plaintiff, to the defendant on November 1, 1842. The questions presented are, whether the master had authority to make such a conveyance as he did make; and if not, whether his proceedings have been ratified by the plaintiff.

A principal is bound by the acts of his general agent, performed within the scope of his general authority, although such agent may exceed or violate his instructions, relating to that particular transaction.

The master of a vessel is the general agent of the owner for certain purposes, but such general authority is not sufficiently broad to authorize him to sell her except in case of wreck or other extreme necessity.

An agent acting under a limited power to do a particular act, must conform to the authority given, or his acts will not bind his principal. A special authority must be strictly pursued, and those dealing with one thus authorized, must ascertain the extent of his authority. *Fenn* v. *Harrison*, 3 T. R. 757; *De-Bouchout* v. *Goldsmid*, 5 Ves. 211; *Munn* v. *Commission Co.*, 15 Johns. 44; *Denning* v. *Smith*, 3 Johns. Ch. 345; *Keith* v. *Purvis*, 4 Descau, 114.

In the present case, the defendant appears to have known upon what conditions the master was authorized to convey the vessel to him. The agreement, which obliged him to reconvey

shows, that it must have been made with a knowledge of the letter authorizing the reconveyance. By the agreement to reconvey, which it required, he was authorized to retain her net earnings while she continued in his possession. If he had executed such an agreement, there can be no doubt that he must have accounted for them towards payment of the debt due him, for the object of the conveyance was to secure the payment of that debt. He gave to the master, not such an agreement, but one authorizing him to retain those earnings "without any liability to account for them." The master was not authorized to make a conveyance of the vessel upon such terms. It would seem that the defendant must not only have known this, but must have inserted such a clause, in fraud of the plaintiff's rights. In another respect, the agreement to reconvey does not appear to have been in conformity to the authority given to the master. But as it may not have been material, it may be permitted to pass without observation.

The only serious question presented by the case is, whether the plaintiff must be presumed from the long lapse of time, to have ratified a conveyance made without authority.

It is the duty of an agent to keep his principal informed of his proceedings, and in the absence of proof to the contrary, he may be presumed to have done so, within a reasonable time. And if the principal does not within a reasonable time after actual notice, or after notice is to be presumed, disapprove of the conduct of his agent, a presumption of assent and ratification will arise.

The application of these rules would wholly preclude the plaintiff after such a lapse of time, from disavowing the authority of the master and from claiming the vessel as his property, if it were not agreed, that the master did not perform his duty by giving information of his proceedings, and that there is no evidence that the plaintiff in any other way came to the knowledge, that he had acted contrary to his instructions, until a few days before his disavowal of his acts was made known to the defendant.

The principal cannot be held to have ratified the unauthor-

ized acts of an agent, until he either has a knowledge of them, or must be presumed to have had, from the nature or course of the business, or from the presumed performance of duty by the agent in giving him the proper information.

In the present case the nature or course of the business, would not bring that knowledge home to the plaintiff. The case admits that the master continued in the vessel in the employment of the defendant. It does not appear how constantly he was at sea, or what opportunities the plaintiff had to obtain a knowledge of his proceedings. So far as appears, the plaintiff may have supposed, that the master conformed to his instructions, and that the defendant was in possession of the vessel and receiving her earnings in payment of the debt due to him, until after the lapse of years he obtained information that the vessel had earned $3650, which instead of being applied to pay his debt was to be retained by the defendant without any account, and that he was to be left to pay the whole debt with accumulated interest.

Under such circumstances, presenting an unfair course of dealing on the part of the defendant, suited to act oppressively upon the plaintiff, the Court cannot be called upon to presume from the mere lapse of time, that the plaintiff had ratified a conveyance made without authority and so destructive of his interests, especially when there does not appear to have been any change of circumstances during the time.

It is contended that the action cannot be maintained, because the transaction was of the nature of a mortgage; that the money to be secured, has not been paid, and that the property has been forfeited by a foreclosure.

It is undoubtedly true, that the conveyance, had it been effectual, would have been a mortgage. Having been made without authority it was ineffectual for any purpose; and there could be no foreclosure.

The defendant having possession of the property of the plaintiff without any legal right to it, the demand and refusal operated as a legal conversion. The defendant is to be defaulted and the damages are to be assessed by an auditor.

CHARLES G. PHILBROOK *& als., in equity, versus* ELIZA DELANO, *adm'x, & als.*

An absolute deed, which purports to be given for a good and valuable consideration, carries with it the presumption that the grantee holds the land conveyed to his own use, and this presumption cannot be rebutted by parol evidence.

No trust, of which a court of equity can take cognizance, results merely from the want of consideration for a deed.

It seems, a bill, which alleges that land conveyed by such a deed was taken in trust by the grantee, need not set forth the manner in which the trust is to be proved; and that, therefore, a demurrer to a bill, because it does not contain such allegations, may be set aside to let in proofs of the trust.

Mere want of consideration will not create a resulting trust.

The English doctrine of a lien upon an estate, (which has been sold and conveyed,) for the payment of the purchase money, has never been admitted in this State, and is unsuited to our condition.

W. P. Fessenden, for plaintiffs.

The stat. chap. 9, § 31, R. S. page 374, does not apply, because it has no reference to trusts then existing.

On the main point, I cite *Unitarian Soc.* v. *Woodbury*, 2 Shepl. 281; 7 Gill & Johns. 157; 25 Maine, 354; *Botsford* v. *Keble*, 12 Ves. 74; *Hanley* v. *Sprague*, 20 Maine, 431; *Miller* v. *Pearce*, 6 Watts & Serg. 97; *Rutledge's Adm'r* v. *Smith's Ex'rs*, 1 McCord's Ch. 119; 2 Story's Eq. p. 442, § 1199, note, particularly what is said as to a *lien* on the estate sold, for the consideration *stated* in the deed; Story's Eq. p. 444, § 1201.

The case in 2d Shepley, applies to all the points raised, both as to general principle, and the correctness of seeking a remedy against the administratrix.

J. Shepley, for defendants.

Upon the facts stated in the bill, there is no such trust, which may "arise or result by implication of law," as makes it the duty of the Court to compel the defendants to convey to the plaintiffs the estate, which descended to these children from their father. R. S. c. 91, § 31, and c. 96, § 10, as to the authority by statute.

Parol testimony not admissible to vary the terms of a deed or contract in writing, in equity more than at law. *Elder* v. *Elder*, 1 Fairf. 80; *Brown* v. *Haven*, 3 Fairf. 179; *Eveleth* v. *Wilson*, 15 Maine, 111.

Nor is it competent for the plaintiffs, under the name of a resulting trust, to give to the deed, by parol proof, a meaning and effect directly contrary from what the terms of the deed import, to make, by parol proof, a deed to the grantee and his heirs, in fact, a deed to the wife and children of the grantor, no consideration being paid by any one. 4 Kent's Com. (3d Ed.) 306, 308, 309; *Jackson* v. *Moore*, 6 Cowen, 706; *Buck* v. *Pike*, 2 Fairf. 24, respecting resulting trusts. *Thomaston Bank* v. *Stimpson*, 21 Maine, 197; *Bryant* v. *Mansfield*, 22 Maine, 360; *Wilton* v. *Harwood*, 23 Maine, 131; *Marston* v. *Humphrey*, 24 Maine, 514; *Cowan* v. *Wheeler*, 25 Maine, 267; *Botsford* v. *Burr*, 2 Johns. Ch. 405; *Hopkins* v. *Mazyck*, 1 Hill's Ch. 242. And from Barbour & Harrington's Dig. without seeing the cases, *Tubman* v. *Anderson*, 4 Har. & McHenry, 357; *Vick* v. *Flowers*, 1 Murphy, 321. *Hickman* v. *Grimes*, 1 A. K. Marsh. 87; *Leman* v. *Whitley*, (English case,) 4 Russ. 423.

The objection here made may be taken advantage of on demurrer. If the bill, as presented, does not exhibit a case for the interference of a court of equity, it will be dismissed on demurrer. *Reed* v. *Johnson*, 24 Maine, 322; *Chase* v. *Palmer*, 25 Maine, 341; *Woodman* v. *Freeman*, *ib.* 531.

And it is not enough to allege, merely, that a conveyance of land by an absolute deed from a third person to the defendant, was made in trust for the plaintiff. It should appear, that the conveyance was made in trust expressly or by implication; and if by implication, such facts should be stated, as would clearly show it to have been so made. *Rowell* v. *Freese*, 23 Maine, 182.

Shepley, C. J. — The plaintiffs by this bill seek to obtain a conveyance of certain real estate alleged to have been convey-

ed and held in trust. The defendants have demurred to the bill. A material question presented is, whether such a trust, as this Court can enforce, is set forth in the bill.

The substantive charge made in the bill is, that Samuel Philbrook, since deceased, conveyed to Ebenezer Delano, the father of his wife, on February 4, 1838, an estate described, without any consideration, but for the express purpose of keeping the property safe for the use of his wife and children. That Delano received and held the estate in trust for the wife and children of the grantor, and died after the decease of the grantor and his wife, without making a conveyance of it. There is no allegation in the bill, that any trust was exhibited or declared by the deed of conveyance; or that any written declaration of trust was made or could be proved, by which the grantee could be charged with the execution of a trust. It may not be necessary, that the bill should set forth the manner, in which the alleged trust is to be established by proof. The demurrer might therefore be overruled, to permit any written evidence or declaration of trust to be introduced. But no suggestion is made in the arguments, of the existence of any such proof; and the case has been presented for decision upon the position assumed, that no such proof can be made. No other than a resulting trust, can therefore be established. It is not alleged in the bill, or contended in argument, that a resulting trust can arise, or be implied, or proved, unless one can be inferred, from the facts stated in the bill and admitted by the demurrer.

There are no facts stated in the bill, out of which such a trust can arise, or be implied, unless it be the allegation, that the conveyance was made without any consideration. It is well settled, that a mere want of a consideration will not of itself create a resulting trust. If the doctrine be admitted, that, when a conveyance of an estate is made without any consideration named, or declared in the deed to have been paid, a resulting trust arises by implication, that the grantee holds the estate for the benefit of the grantor, this will not be

sufficient to sustain the bill. The allegation is not, that the conveyance was made without any consideration expressed in the deed as received, but without any consideration paid. When a conveyance purports to have been made for a good or valuable consideration paid by the grantee, the presumption of law is, that the estate is held by him for his own use. This presumption cannot be rebutted by parol evidence. If in such case, parol evidence were admitted to establish a trust for the benefit of another, it would destroy all confidence in titles. All valuable property in the grantees might be annihilated, and they be converted into trustees, holding estates for the benefit of others by parol testimony showing, that no consideration was in fact paid. Among the very numerous cases sustaining this position, is that of *Leman* v. *Whitley*, 4 Russell, 423. The plaintiff in that case, conveyed to his father by deeds of lease and release, a certain estate for the expressed consideration of four hundred pounds paid. The bill alleged, that the estate was thus conveyed by the advice of an attorney, so that the father could raise money by a mortgage of it, for the use of his son. That no part of the consideration named in the deed was paid. That the father died without having raised the money, or made any conveyance; and that he devised all his real estate by general words. The prayer of the bill was, that the devisees of the father might be decreed to be trustees of the plaintiff. The master of the rolls said, "there is no pretence of fraud." "There is here no trust arising or resulting by the implication or construction of law." "Unfortunately there is here no evidence in writing, which is inconsistent with the fact, that the father was the actual purchaser of the estate; and it does appear to me, that to give effect to the trust here, would be in truth to repeal the statute of frauds." The facts alleged in the bill had been admitted or established by parol testimony.

The late Mr. Justice Story, speaking of this case, [2 Story's Eq. § 1199, note 2,] observed, it "stands upon the utmost limits of the doctrine of the inadmissibility of parol evidence as to resulting trusts." He did not assert, that it stood with-

out the true limits of that doctrine. It appears to rest upon principles well established, and to be in accordance with numerous decisions, which have been made and acted upon in that country, as well as in this and other States.

These remarks are not applicable to any conveyance tainted with fraud. No fraud is alleged in the present case.

The counsel for the plaintiffs relies upon decisions made by this Court.

In the case of the *Second Unitarian Society* v. *Woodbury*, 14 Maine, 281, the answer of the administrators of the grantee admitted the trust; and the heirs at law of the grantee were defaulted, which by our law is an admission of the plaintiff's case as stated.

In the report of the case of *Hanley* v. *Sprague*, 20 Maine, 431, it is stated that the statute of frauds was not interposed as a defence. The decision appears to have been made as much upon the ground of fraud as of trust.

Whatever may be the impression respecting the correct application of the rules of law to the facts proved or admitted in these cases no doctrines are asserted, which are inconsistent with those now presented.

In the case of the *Methodist Chapel Corporation* v. *Herrick*, 25 Maine, 354, the opinion states, that much of the testimony was inadmissible. The bill was dismissed.

If he must fail upon this aspect of the case, the counsel for the plaintiffs presents it as a lien upon the estate conveyed, for the amount of the purchase money unpaid. In the case of *Leman* v. *Whitley*, there appears to have been a decree establishing such a lien. The report of that case does not show how the bill was framed. In this case, the bill is not prepared to present a claim to enforce a lien upon an estate actually sold. Such a claim would seem to be inconsistent with the case as presented.

The doctrine of a lien upon an estate sold and conveyed, for the payment of the purchase money, has never been admitted in this State. Such a doctrine may be unobjectionable in a country, where the lands have been cultivated for a great

length of time, and where the change of property is comparatively infrequent. But in this State, where so great a portion of them are uncultivated, and where titles are subject to such constant change, the doctrine would be so unsuited to the actual condition of things, as to act unfavorably if not oppressively upon our citizens.

The policy of our law is opposed to that of Great Britain in this, that it encourages the distribution of estates and property among all the people; and any rule of law suited to restrain it, cannot be received as a part of our law merely, because it has been long the established law there.

In this State, the public registry is designed to exhibit to all persons the state of the title, while in that country such means of information have not existed except to a limited extent. To admit such a lien, would tend greatly to diminish the confidence held out by the law, as fitting to be reposed in such records. The case of *Manley* v. *Slason*, as reported in the Law Reporter, for November, 1849, decided by that highly respectable Court, the Supreme Court of Vermont, admitting the doctrine to be applicable in that State, has failed to convince this Court, that it is or ought to be the law in this State.

Bill dismissed with costs.

ATHERTON USHER *& ux. versus* NATHANIEL M. RICHARDSON.

A married woman, who joins her present husband in a conveyance of real estate, by relinquishing her right of dower therein, is estopped to claim dower in the same, under her former husband.

AN action of dower. The case came before the Court upon an agreed statement of facts.

Scolly G. Usher was married to Sarah, the demandant, in 1823, and he acquired title to the premises by deed, dated Jan. 1, 1816. He mortgaged the same in 1818, and died in 1826. The demandant, as his administratrix, sold the land to Atherton Usher, whom she afterwards married. Atherton

sold the land by warranty deed, in which the demandant joined, "in token of relinquishing her right of dower in the premises." Out of the avails of that sale, she paid the mortgage debt, and discharged the mortgage.

The defendant has the title which that deed from Atherton and the demandant conveyed.

A. W. & J. M. True, for demandant.

Her relinquishment of dower in the deed executed by Atherton Usher, her second husband, was but a relinquishment of her contingent right to dower acquired by her marriage with him, and not the absolute estate before obtained by the death of her first husband. *Powell & ux.* v. *Mon. & B. Manf. Co.* 3 Mason, 348; *same case*, 4 Mason, 275; *Catlin* v. *Ware*, 9 Mass. 220, 172; *Bolton* v. *Ballard*, 13 Mass. 227; *Smith* v. *White*, 1 B. Mum. 16. The words of relinquishment are not broad enough to include this separate estate. 13 Pick. 383; 13 Mass. 223; 4 Mason, 275.

But even if she conveyed away her right in the equity of her first husband's estate, as well as her right under second husband, by signing this deed, she afterwards acquired an equitable right to dower in the legal estate, by paying up the mortgage debt.

Swasey, for defendant.

Shepley, C. J. — Sarah M. Usher, the wife of the other demandant, claims dower in the premises as the widow of Scolly G. Usher, deceased. Her rights are presented upon an agreed statement. It is admitted, that her former husband was seized of an equity of redemption in the premises during the coverture. That the estate has been redeemed from the incumbrance. That Atherton Usher, her present husband, conveyed the premises on January 29, 1830, by a deed containing covenants of general warranty, to Andrew Wiggin, from whom the tenant derives his title. That his wife, Sarah M. Usher, became a party to that conveyance by signing and affixing her seal to it, "in token of her relinquishing her right of dower in the aforesaid premises."

The question is presented, whether she thereby relinquished all her right of dower, as well that derived from her former, as from her present husband.

The solution of it must depend upon the construction of the statute then in force, c. 40, § 6, and the language used by her in that conveyance.

By the provincial act of 1697, a widow could not be deprived of her dower, "who did not legally join with her husband in such sale or mortgage, or otherwise lawfully bar or exclude herself from such dower or right." The language quoted was re-enacted by the act of Massachusetts, passed on March 10, 1784. The statute, c. 40, did not contain the same language. Other language was substituted. She was no longer required to join with her husband, or otherwise lawfully to bar herself of dower, but was to have her dower, "except where such widow by her own consent, may have been provided for by way of jointure prior to the marriage, or where she may have relinquished her right of dower by deed under her hand and seal." No particular form of words or union with any particular person, is by this statute required. She may relinquish her right of dower by any legal conveyance containing language suited to effect that purpose. She could therefore relinquish her right of dower by uniting with her former husband during his life, or with her present husband in a conveyance, or by making a release of it, while she remained a widow. Nor would it be necessary, that any title should pass by the conveyance of the husband with whom she thus united. *Stearns* v. *Swift*, 8 Pick. 532.

Her right of dower being contingent during the life of her first husband, became absolute upon his decease; but it would continue to be a right of dower merely and not an estate, until it had been assigned. *Rex* v. *Northweald Bassett*, 2 B. & C. 724; *Siglar* v. *Van Riper*, 10 Wend. 414. The statute makes no distinction between the contingent and the absolute right of dower. All that is required to bar either or both is, that she should relinquish her right of dower by deed under her hand and seal. Nor could it have been the inten-

tion to limit her power to the relinquishment only of her right, while it continued to be contingent. Such a construction would require restrictive words to be introduced, where none are found. It would deprive a widow of the power to relinquish her right of dower, either while she remained a widow or after her marriage with a second husband before her dower had been assigned. It would be opposed to the construction of the former statutes, from which the statute, c. 40, was derived, with the use of more general and comprehensive language. *Fowler* v. *Shearer*, 7 Mass. 14; *Rowe* v. *Hamilton*, 3 Greenl. 63; *Stearns* v. *Swift*, 8 Pick. 532.

If Atherton Usher had never become the owner of the premises, it would seem to be quite certain, that Sarah M. Usher, his wife, by uniting with him in the deed of conveyance of the premises to Wiggin, and using the language contained in it, must have relinquished her right of dower in the premises. The language used by her would have been appropriate and sufficient for that purpose. There would have been nothing else, to which it could have been applicable. If the design had been to accomplish that object alone, the covenants contained in the deed being omitted, no more appropriate conveyance could have been desired. No court could have refused to give it that effect without denying it to be effectual for any purpose. The fact, that it was an operative conveyance on the part of the husband, cannot alter its effect upon the rights of the wife. It cannot therefore be correct to assert, that she must have united as a grantor in the deed with her husband to relinquish her right of dower derived from her former husband. Nor can the fact, that she became entitled to a contingent right of dower as the wife of her present husband, in two-thirds of the premises, prevent her conveyance from operating, as it would otherwise have done, to relinquish her right of dower derived from her former husband. By the language used in that deed she relinquishes "her right of dower in the aforesaid premises." This embraces all her right of dower, whatever it might be. The language does not admit of any interpretation, which will limit it so as to include only

the contingent right of dower in two third parts of the premises. There is nothing leading to the conclusion, that it was used or intended to be, as applicable rather to the contingent, than to the absolute right. It is equally applicable to either, and it embraces both. So far as the intention of the parties can be collected from the circumstances presented, it will lead to the same conclusion. If a statement had been made at the time, when the deed was executed, that her relinquishment of dower, would only prevent her claiming dower in two-thirds of the premises, if she outlived her husband, and that it would not prevent her from claiming and obtaining dower immediately in the whole premises as the widow of her first husband, can there be any doubt, that she, as well as the purchaser, would have been greatly surprised, and that the sale and purchase would not have been completed without the insertion of language designed to prevent such a result.

If the language used by her be sufficiently comprehensive to include all right of dower from whomsoever derived, and the intention to have it so operate be clear, no court can properly refuse to allow it to have its legitimate effect to bar her right of dower in the premises. *Plaintiffs nonsuit.*

JEREMIAH WINSLOW *versus* THOMAS NORTON.

Bills of lading are transferable by indorsement, and when thus transferred by the consignee, to a *bona fide* purchaser, without notice of adverse claims, they pass the legal title, and operate as a sale and transfer of the property to the indorsee.

Where no laches are imputable to the indorsee in taking possession of the property, as soon as its arrival from sea, the sale to him cannot be defeated.

TROVER for twenty barrels of ale. At the trial, before WELLS, J., it appeared that one Carroll shipped at New York, twenty barrels of ale, and took a bill of lading from the master, for the delivery of it at Portland, to R. R. Robinson or to his assigns. The bill of lading was sent to Robinson, together with a draft

for the payment of the ale, and was accepted by him before the arrival of the vessel.

Robinson not being able to pay the draft, indorsed the bill of lading to the plaintiff. Nathan Winslow acted as the plaintiff's agent in doing the business. Nathan paid the draft from the funds of the plaintiff, kept a lookout for the vessel, and as soon as he heard of her arrival, which was the next day after she arrived, he called on the captain for the ale, and was informed that it was attached by the defendant as a deputy sheriff, on a demand against Robinson, and the sheriff refused to give it up.

Nathan Winslow was offered as a witness for plaintiff, but objected to. His testimony was received, evidence being furnished that he had a discharge from the plaintiff of all liability in this matter, but which could not be found at the time of the trial.

It was agreed that the Court might enter a nonsuit or default as the law might require, and if a default was entered, the Court should assess the damages.

Goodenow, for defendant, maintained these positions.

1. Norton justifies as an officer, attaching the property as R. R. Robinson's, on a writ in favor of Elisha Hinds. The property was Robinson's, and was attached before any legal transfer to the plaintiff. There was no delivery to plaintiff, and an indorsement of the bill of lading, without delivery of the property, did not pass the property as to third parties. *Lanfear* v. *Sumner*, 17 Mass. 110; *Buffington & al.* v. *Curtis & al.*, 15 Mass. 528.

2. The indorsement of the bill of lading and delivery of it to Nathan Winslow, did not pass the property to plaintiff. Nathan was not the agent at the time. A subsequent ratification by plaintiff of Nathan's acts could not affect the vested rights of an attaching creditor. *Clark* v. *Peabody*, 22 Maine, 500.

Fox, for plaintiff.

Howard, J. — The property, which is the subject of contest in this suit, was shipped by Carroll, at New York, for Portland,

January 10, 1848, and consigned to Robinson, or his assigns; and a bill of lading, in the usual form, with a draft on Robinson for the amount, payable at sight, were transmitted at the same time. Robinson received the bill of lading, and accepted the draft, and not being prepared to pay it, indorsed and delivered the bill of lading to the plaintiff, upon the verbal promise of his agent, N. Winslow, to pay it. The draft was paid on that, or the following day, by the agent, for the plaintiff, from the funds of the latter, and several days before the arrival of the vessel, in which the property was shipped.

The agent testified that he made frequent inquiries for the vessel; that he was on the lookout for her, and having heard, about noon, of her arrival one day, he called on the master, for the property, and was then informed that it was attached by a creditor of Robinson. The defendant was the attaching officer, and defends this suit for such creditor.

Bills of lading are transferable by indorsement, according to well settled principles of commercial law; and when thus transferred by a consignee, whether buyer or factor, or the mere agent for the owner, to a *bona fide* purchaser, for a good consideration, without notice of adverse claims, they pass the legal title of the property to the indorsee.

The indorsement of the bill of lading, by Robinson, appearing to have been *bona fide*, and for a valuable consideration, operated as a sale and transfer of the property, then at sea, to the plaintiff. Abbott on Shipping, 381, 382; *Walley* v. *Montgomery*, 3 East, 585; *Cuming* v. *Brown*, 9 East, 506; *Evans* v. *Marlett*, 1 Ld. Raym. 271; *Newcomb* v. *Thornton*, 6 East, 22, (Day's Edition) note, opinion of BULLER, J. in *Lickbarrow v. Mason*, before the House of Lords; *Conard* v. *Atlantic Ins. Co.* 1 Peters, 445; 2 Kent's Com. 548, 549; *Gardner* v. *Howland*, 2 Pick. 599; *Peters* v. *Ballistier & al.* 3 Pick. 495; *Lanfear* v. *Sumner*, 17 Mass. 112.

But the agent of the plaintiff being on the lookout, took possession of the property, as soon as its arrival was known to him; or was prevented in effecting actual possession, by the interference of the defendant. No laches can be imputed to the plain-

tiff, in this respect, by which the sale to him can be defeated. *Joy* v. *Sears*, 9 Pick. 4; *Turner* v. *Coolidge*, 2 Metc. 350; *Brinley & al.* v. *Spring*, 7 Greenl. 241; *D'Wolf* v. *Harris*, 5 Mason, 515.

After the assignment of the bill of lading, Robinson ceased to have any interest in the property, either as consignee, or owner. The attachment, therefore, was inoperative, and the defendant a mere stranger.

Objection was made to the competency of N. Winslow, as a witness for the plaintiff; but this objection was fully obviated by the plaintiff's release at the trial. Greenl. Ev. § 416.

The nature and extent of N. Winslow's agency for the plaintiff, although disputed by the defendant, is not now properly in controversy. It is sufficient for the disposition of this case, and for these parties, that the plaintiff recognized, ratified and adopted his acts as agent, in purchasing the property, and in commencing and prosecuting this suit to recover it.

Upon the law of the case, and the evidence submitted to us, the defendant must be defaulted, and the plaintiff must have judgment for the value of the property claimed, when converted, deducting freight, with interest since that time.

Francis O. J. Smith, *in equity, versus* Benjamin H. Ellis *& al.*

The authority of this Court to issue writs of injunction, is limited to the equity jurisdiction, given by the statute.

The rules of set-off in courts of general chancery jurisdiction, cannot prevail in this State, when at variance with the provisions of our statute upon that subject.

E purchased of W, a contract against S, and gave his note for the purchase money, to be paid "as soon and as fast as it may or can be collected" on the contract, and if not so collected, to be paid in four years. *Held*, the contract was not made the fund, out of which the note was to be paid.

In settling the contract, S gave to E, a negotiable note marked A, and a bond. E assigned the bond to secure some of his creditors, and negotiated the note. S, then purchased of W, the note against E. *Held*, the Court has no equitable jurisdiction to enjoin the holders of the bond and of the

note A, from proceeding upon them at law against S, or to compel them to be set off against the note which S purchased of W.

A defendant cannot claim to set off the plaintiff's demand against a note indorsed to the defendant, unless the plaintiff had agreed with the defendant to pay him such note or to receive it upon his demand.

SHEPLEY, C. J. — This case is presented upon an original with a supplemental bill, answers and proofs, accompanied by arguments in writing. The testimony with the documents is voluminous. The arguments are extensive and elaborate. The material facts may be briefly stated.

On October 23, 1835, the plaintiff, J. S. Sibley and Samuel Ward, made a contract with William, Benjamin and Nathan Weston, doing business in the name of William Weston & Co., and with Alden Flint and Jefferson Crowell, to have a large quantity of timber cut and hauled from a tract of land owned by them. William Weston & Co. and Flint & Crowell entered upon the performance of that contract. Benjamin H. Ellis, Joseph Ellis and Peter S. Ellis, became sub-contractors under Flint & Crowell, and entered upon a performance of their contract.

Suits were subsequently commenced. One by Weston and others against Smith and others, to obtain payment for cutting and hauling the timber, and another by Smith and others against Weston and others, to recover damages for violations of their contract. The Ellises were permitted to represent and to act in behalf of Flint and Crowell in the management of those suits; and on July 9, 1839, they purchased of Weston & Co. all their interest in the contract for the sum of $4096,81, for which they gave their promissory note of that date, and an agreement to prosecute the suit at their own risk and expense. Both of these suits were subsequently referred to Edward Swan and others, who made their report in the month of September, 1841, that there was a balance due from Smith and others to Weston and others, of $6139,12. Subsequently, and during the same month, the plaintiff obtained from

Benjamin H. Ellis a discharge of his liability to pay the sum thus reported to be due, for the sum of $3000 and gave him therefor his negotiable promissory note for $1500 payable in one year, the payment of which was secured by a mortgage of real estate; and gave him a bond obliging himself to pay $1500 more in four months, unless, he should procure for the use of Ellis the notes of another person for that amount. The notes of that other person were not procured, and the sum of $250 was paid upon the bond.

On January 14, 1842, Ellis made a conditional assignment of that bond, to James W. Bradbury and others, to secure to them the payment of all sums due to them from him, and to save them harmless from all liabilities assumed by them for him.

On March 8, 1842, Ellis indorsed the note for $1500, and delivered the mortgage made to secure the payment of it to Ephraim Woodman, to secure the payment of a note then made by him and others to Woodman for $600, for a loan of money.

In the month of November, 1841, Weston & Co. commenced a suit upon the note for $4096,81, against the Ellises, and caused Smith to be summoned as their trustee. This suit does not appear to have been entered in Court or further prosecuted.

On April 29, 1842, Smith made a contract to purchase of Weston & Co., so much of that note for $4096,81, as would be sufficient to discharge his note for $1500, and the balance of $1250 due upon the bond, and the note indorsed by Weston & Co. to Smith.

There are many other facts exhibited by the testimony and documents, which are not regarded as material in coming to the conclusion which is to be stated.

The bill seeks to have the note and bond made by Smith, and payable to Ellis, discharged or annulled by a set-off against so much of the note made by the Ellises, and payable to Weston & Co. and indorsed to Smith, as may be sufficient for that purpose, or to have a perpetual injunction against any suits being commenced or prosecuted upon them against Smith.

The counsel for the plaintiff present the case as within the equity jurisdiction of this Court upon three grounds, fraud, trust, and the power to issue writs of injunction.

1. The last will be first noticed. This is said to be "an original power," and "not strictly confined to those heads, under which final relief is found," that "it reaches where other relief would not extend."

The power of this Court to issue writs of injunction is derived from statutes. It may be exercised as an independent power in certain specified cases, not including this case. The only power applicable to a case like the present is derived from the statute, c. 96, § 11, providing, that "the Court may issue writs of injunction in all cases of equity jurisdiction, when necessary to prevent injustice. Before a writ of injunction can properly be issued by virtue of this provision, the case must be determined to be one within the equity jurisdiction. By the use of the terms "cases of equity jurisdiction," those cases only were designed to be designated, which were within the equity jurisdiction of this Court. That jurisdiction, conferred by the tenth section, is not in any degree enlarged by the eleventh section.

The jurisdiction of the Court in cases of fraud and trust, when the party has not a plain and adequate remedy at law, is ample. It remains for consideration, whether a case for relief is presented, under either of those heads of equity jurisdiction.

2. It appears, that Benjamin H. Ellis has appropriated the promissory note and bond received from the plaintiff, to other uses than to pay the note given by the Ellises to Weston & Co. and indorsed to the plaintiff. This, it is contended, was a fraudulent act. There is no other proof of fraud.

A debtor may pay one creditor in preference to another, except in certain cases not including this case, without committing any fraud upon those creditors, who may thereby be prevented from obtaining payment. By the assignment of the bond and indorsement of the note made by the plaintiff, no fraud upon him was committed, unless he had before that time

become legally entitled to have them set off or annulled by their application in part payment of the note given by the Ellises to Weston & Co. Whatever may be the rules of set-off in equity, they can not prevail in this State, when they are at variance with the provisions of our statute, relating to that subject. A court of equity acting upon an existing state of facts, may in conformity to its own rules decree, that a set-off should be made, when if either party had before acted in such a manner, as would have prevented the existence of such a state of facts, and thereby have prevented any set-off, he would not have been guilty of any fraud.

Two persons might hold negotiable promissory notes, one made by each and payable to the other, and either might negotiate his own note without committing any fraud upon the other; and yet, if those notes were found remaining in the hands of each payee, a court of equity or even a court of law might cause a set-off to be made. A person can have no such right, to have one chose in action set off against another, that another person would commit a fraud upon him by taking such a course, as would prevent it, unless that right to have a set-off made is no longer contingent and dependent upon future events, but has become absolute and legally established.

The right of set-off is regulated by statute, c. 115, § 24 to 48 inclusive. The provisions of the twenty-ninth section are, "no demand shall be set off, unless it was originally payable to the defendant in his own right, except as hereinafter provided." The only subsequent provisions applicable to a case like the present, are contained in the thirtieth section. Its provisions are, "any demand which has been assigned to the defendant with notice to the plaintiff of the assignment, before the action was commenced, may be set off in like manner, as if it had been originally payable to the defendant, if the plaintiff shall at any time have previously agreed to receive it in payment or part payment of his demand, or to pay the same to the defendant, and not otherwise."

If suits were pending in the name of Benjamin H. Ellis against Smith, upon the bond and note made by him, he could

not file the note made by the Ellises, and payable to Weston & Co. and indorsed to him, and have a set-off made; for there is no proof, unless it be derived from the language used in that note, which will be noticed under the head of trust, that Ellis had agreed to receive the note payable to Weston & Co. in payment of his demands against Smith, or to pay that note to Smith.

The plaintiff does not prove by any testimony not contained in the language used in making the note, that he had acquired any legal right to have the note payable to Weston & Co. applied to pay the debts due from him to Ellis, or any legal right to prohibit Ellis from indorsing and assigning those demands. Such indorsement and assignment cannot therefore, be regarded as fraudulent acts committed upon his legal rights, unless those rights arise out of the language used, in making the note to Weston & Co.

3. The trust alleged is, that the Ellises by their contract with Weston & Co., made on July 9, 1839, were obliged to apply the money collected of Smith and others, to the payment of the note given by them to Weston & Co.

If such be the legal effect of that contract, the moneys so collected would constitute a trust fund to be applied for that purpose. And the Ellises, by an appropriation of it to other purposes, would be guilty of fraud.

The only evidence or declaration of the alleged trust, is to be found in the language used in making the note to Weston & Co.

It is quite certain, that the purchase made by the Ellises of the interest of Weston & Co. in the contract, was absolute; that they could legally assign and dispose of the interest thus acquired, according to their own pleasure, and of the money collected or received on that account, unless they had engaged to do otherwise. If their note to Weston & Co., was made payable out of money thus collected, it would not be negotiable, and the plaintiff, by the indorsement of it, will have acquired only an equitable interest in it. That it was not intended to be payable out of that fund, is quite apparent, for it

was payable absolutely in four years, although no money should have been collected of Smith and others.

The Ellises agreed to pay, "as soon and as fast as the same may be or can be collected, on a contract this day assigned by Weston & Co., to us." They did not engage to apply the very money thus collected, to pay Weston & Co., or to collect it for their use. The language appears to have been used for the purpose of fixing the time, when Weston & Co. would be entitled to demand payment; and not for the purpose of designating any fund out of which payment should be made. Weston & Co. could have maintained no action against the Ellises founded solely upon an allegation, that they had assigned all their interest in that contract, and in the money to be collected of Smith and others, to another person.

The proof being insufficient to establish the alleged fact, that the note payable to Weston & Co. was to be paid out of the money collected of Smith and others, no such case is presented as would authorize this Court to entertain it for the purpose of granting relief.

It does not appear to be essential to notice particularly, the other points and positions presented in the arguments. But to prevent any misconception, it may be proper to observe, that it is not intended to intimate, that all the necessary parties are before the Court to authorize a decree for the plaintiff; or that all the depositions could be regarded as legal testimony; or that the plaintiff would be entitled to relief in a court of unlimited equity jurisdiction.

Bill dismissed with costs for defendants.

HARRISON J. LIBBY & *als. versus* EDWARD T. CUSHMAN.

The mortgagee of personal property, who has taken possession of the property, may, before foreclosure, waive his lien under his mortgage and attach the same upon the debt secured by it.

A mortgagee who by attaching the property waives his lien, has no longer a title to the property as owner, and consequently is not obliged to account for its value.

The right of possession of personal property mortgaged is in the mortgagee, before as well as after a breach of the condition, unless controlled by some agreement between the parties. — Per TENNEY, J.

ASSUMPSIT upon a note, given by the defendant to the plaintiffs.

The defendant filed an account in set-off, for a stock of goods, for which he contended the plaintiffs were bound to account to him. Said stock of goods was conveyed by defendant to the plaintiffs by a mortgage duly executed and recorded on the third day of August, 1848, to secure the note in suit and two other notes. On the 28th day of September following, the plaintiffs, for better security, took possession of the goods under the mortgage. Subsequently, on the 30th day of the next October, the plaintiffs, while said mortgage was not foreclosed, commenced this action, and attached said mortgaged property.

The case was taken from the jury by consent, and the Court was authorized to render such judgment on default or nonsuit as the facts might require.

G. F. Shepley, for defendant.

1st. The entry of plaintiffs was to foreclose. *Hunt* v. *Stiles*, 10 N. H. 466. This case is to be distinguished from *Green* v. *Dingley*, 11 Shepl. 131.

2nd. Although the mortgagee may proceed by attachment, or under his mortgage, as he may elect, yet he must use this advantage in a legal manner, and so as not to violate any of the rights of the mortgager. *Buck* v. *Ingersoll*, 11 Met. 226. Plaintiffs in this case pursued both methods, and in a manner most onerous to defendant. They treated the property as both their own and his, at the same time.

3d. After plaintiffs had been in possession sixty days without payment on the part of the defendant, their right to the property became absolute by statute, and defendant's right to demand of them an account of the value of the goods at the time they took possession, became just as absolute.

4th. Foreclosure of a mortgage operates as payment of the debt to the value of the mortgaged property. *Hunt* v. *Stiles*, 10 N. H. 466; *Amory* v. *Fairbanks*, 3 Mass. 562; *Omaly* v. *Swan*, 3 Mason, 474; *Lansing* v. *Goelet*, 9 Cowen, 346; 4 Kent's Com. 183.

M. M. Butler, for plaintiff.

1st. The defendant as mortgager, must show that the mortgage has become foreclosed, and that the property has vested absolutely and indefeasibly in the plaintiffs as mortgagees, in order to hold them liable to account to him for the value of said goods in payment in whole, or *pro tanto* of said mortgage debt.

It is not enough for him to show merely that the plaintiffs took possession of the property. *West* v. *Chamberlin*, 8 Pick. 336; *Portland Bank* v. *Fox*, 19 Maine, 99.

The mortgage has never become foreclosed. The case finds, that "while said mortgage was yet subsisting and not foreclosed, said stock of goods was attached and taken into the custody of the law, where they have remained ever since." The property in said goods has never vested absolutely in plaintiffs.

The case does not find even, that there had been a breach of the condition of the mortgage, until this suit was commenced, (when of course one of the notes must have become due,) much less that the sixty days after said breach, allowed to the mortgager of personal property by the R. S. c. 125, § 30, in which to redeem the property mortgaged, had elapsed. The sixty days in this case had not begun to run, or if the Court should be of opinion that the sixty days of redemption commenced running when plaintiffs took possession, viz. on the 28th of Sept., still only 32 days had elapsed when said attachment was made, on the 30th of the next October.

Could the goods have been attached as the property of the plaintiffs at any time between their taking possession, and said attachment? Could not any creditor of the defendant have attached as defendant's property, by tendering to plaintiffs the amount of their debt, as provided by R. S. chap. 114, § 70?

But even if this attachment was illegal and invalid, it does not affect the question whether the defendant has a right to charge the plaintiffs with the value of said goods by means of his account in set-off. The attachment did not operate in any way to foreclose the mortgage, and if it was illegal, and by making it the plaintiffs violated any of defendant's rights, he has his appropriate remedy against the plaintiffs, or the officer, and through him against plaintiffs in an action of trespass or replevin.

Nor can defendant waive *the tort*, (even supposing one to have been committed) and charge plaintiffs with the value of said stock of goods on implied contract, since plaintiffs have never converted said goods to their own use, or to money, or in any ways realized any benefit from them. *Wood* v. *Gould*, 5 Pick. 285.

2d. *The plaintiffs had a right to attach said mortgaged property to satisfy the mortgage debt, they waiving their rights under the mortgage.*

On general principles of law, one can waive a security made for his benefit.

And the mortgage once waived, and the property exposed and open, why cannot he who was once mortgagee attach this property as well as any other to secure his debt.

The very act of attaching, it has been decided, operates as a waiver of the pledge. *Swett* v. *Brown*, 5 Pick. 178.

Nor are any of the mortgager's rights violated by thus attaching. The property goes to pay the debt the same as it would, if the mortgage had been foreclosed.

"The mortgage," say the Court, in the case of *Porter* v. *King*, 1 Greenl. 299, "was intended to increase the certainty of the payment of the debt, *not to place any part of the*

debtor's estate beyond the ordinary and common process of law."

The case of *Buck & al.* v. *Ingersoll*, 11 Metc. 231, declares *a mortgagee of personal property may waive his rights under the mortgage and attach the mortgaged property to satisfy the mortgage debt.*"

If it is said, we have elected to claim under the mortgage by taking possession, we reply, the case finds, we took possession, not to foreclose but for "better security."

TENNEY, J. — A mortgage of personal property as well as of real estate, is collateral to the contract intended to be secured thereby, and until foreclosure will not of itself prevent a recovery of the full amount due upon the contract in a suit brought upon it. The right of possession, as in a mortgage of lands, is in the mortgagee, before as well as after the breach of the condition, unless controlled by an agreement between the parties; and possession of the mortgagee prior to foreclosure, in no wise affects the right of redemption of chattels, by the mortgager. A mortgage of real estate becomes foreclosed in three years from the time possession is taken for condition broken. R. S. c. 125, § 6. The title of personal property mortgaged, becomes absolute in the mortgagee in sixty days after the breach of the condition. R. S. c. 125, § 30. And payment made within that time, will restore to the mortgager the property, if the mortgage still subsists, notwithstanding the possession may be in the mortgagee. *Ibid.*

It has been held in Massachusetts, that a mortgagee of personal property may waive his claim under the mortgage, and attach the property to secure his debt, if he see fit, without violating any of the mortgager's rights, or exposing him to any greater loss in consequence of such attachment. *Buck & al.* v. *Ingersoll*, 11 Metc. 226; and the attachment of mortgaged personal property on a writ, brought to recover the sum due upon the claim secured, extinguishes the lien. *Sweet* v. *Brown*, 5 Pick. 178. Consequently such property, so attached, is the property of the debtor, subject only to the attachment,

and the creditor has no title thereto, as an owner. After the attachment, the legal possession is in the officer who made it and the goods are in the custody of the law, and cannot be appropriated by the creditor to his own use, without the consent of the debtor, and he is not obliged to account for their value.

If the mortgagee of personal property, cannot legally waive his lien, so that an attachment upon the claim secured by the mortgage can be valid, the right of redemption will remain in the debtor, till foreclosure, and the mortgager cannot claim its value of the creditor, till that takes place.

The defendant does not resist the right of the plaintiff to maintain the action upon the note secured by the mortgage, for any balance due, after deducting the value of the property mortgaged, but insists that he is entitled to such deduction. The mortgage was recorded on August 3, 1848. The defendant retained possession of the property till Sept. 28, 1848, when the plaintiffs took it into their own hands for their better security; and on the 30th of October, 1848, the mortgage still subsisting and not foreclosed, he caused the same goods to be attached in this suit, upon the note secured by the mortgage, they claiming the right to waive the security.

Prior to the attachment, the goods were not absolutely the property of the plaintiffs, being subject to the right of redemption in the defendant, and the plaintiffs were not bound to account for their value in money. If the attachment was valid, it was because the previous lien upon the goods was extinguished; and it follows that the plaintiffs had no right to the property, excepting such as is acquired ordinarily by an attachment. If it was invalid, the plaintiffs had no greater right to the property, than he had before, and the relations of the parties and their several interests remained unchanged.

The defendant is to be defaulted, and judgment for the amount of the note declared on.

WILLIAM H. BAXTER *versus* E. F. DUREN.

One who sells a promissory note by delivery, upon which the names of indorsers have been forged, is not liable upon an *implied* promise, to refund the money received therefor, if he sold the same as property, and not in payment of a debt, and if he did not know of the forgery.

In an action by the purchaser against the seller of such a note, *so sold*, the broker, through whom the sale was negotiated, is a competent witness for the plaintiff if he was ignorant of the forgery, and if he did not make himself liable by any promise or representation concerning the note. For, in such case he would not be liable to the plaintiff, and would have no interest that the plaintiff should recover.

Any one dealing with a person whom he knows to be a broker, may be presumed to know, from the nature of a broker's business, that he is acting as agent for some third person. — Per SHEPLEY, C. J.

THIS was an action of assumpsit upon a supposed warranty of the genuineness of the signatures of two indorsers upon a promissory note.

At the trial, before WELLS, J., it appeared that on the 17th day of June, 1847, *C. & J. S. Bedlow* made their note payable to *J. P. Wheeler*, or order, for $368,00, at thirty days, payable at the Suffolk Bank, Boston, which note purported to be indorsed by J. P. Wheeler and William Deming.

William H. Wood was called by plaintiff, and testified, though objected to by defendant, that he had been a broker in Portland for a number of years past, and that defendant applied to him to get this note discounted, sometime before it fell due; that in conversation he said the note was such paper as he would sell goods for. The witness applied to the plaintiff to buy the note. The plaintiff authorized Wood to take it, and said he would pay for it, $300, with the further sum of $25 more, if the note was paid at maturity. And the money was paid through Wood to defendant, by the plaintiff, who took the note. Witness was employed by the defendant, and his services paid for by him. At that time there was no suspicion that indorsers' signatures were not genuine. The witness knew defendant was acting for the *Bedlows*, but could not certainly say that he informed the plaintiff, that the de-

fendant was acting as agent for them or any one else. The defendant did not indorse or guarantee the note. In regard to the whole matter, the witness testified, that he acted in his ordinary mode of business. It further appeared, that the signatures of the indorsers were forgeries, and that before the commencement of this action the plaintiff tendered to the defendant, the execution issued upon a judgment recovered by him upon this note against the *Bedlows*, and that he demanded of the defendant the money he had paid him for it. Before the note became due the *Bedlows* failed.

The money received for the note was deposited in one of the Portland Banks to the credit of the *Bedlows*.

The case was then taken from the jury by consent, for the decision of the full Court upon so much of the testimony as was legally admissible, and a nonsuit or default to be entered according to the rights of the parties.

Fox, for plaintiff.

1st. There was sufficient evidence for a jury to find an express warranty on the part of Duren.

Wood testifies that Duren represented to him, that the "note was such paper as he would sell goods for" and that he so informed plaintiff, when he applied to him to discount the note, "the paper was spoken about and there was no suspicion about the genuineness of the paper at any time." "The makers had but little credit, the indorsers were good."

All this conversation, we say, is equivalent to a representation, that the indorsements of Wheeler and Deming were genuine, and brings the case within the decision of *Coolidge* v. *Brigham*, 1 Metc. 552.

The whole together must be considered as a description of the note sold, or discounted.

2. If there is no express warranty, there is an implied one, that the indorsements were genuine.

Whoever sells or puts in circulation a note, impliedly warrants that it is what it purports to be, the genuine, valid, legal contract of all who are parties to it apparently, and that they

are legally competent to contract. *Fuller* v. *Smith*, 1 C. & P. 197, is almost directly in point.

Plaintiffs discounted for defendants, a bill of exchange which was a forgery. Defendants were agents for one Simpson to whom the money was paid over, before defendant had any knowledge of the forgery. ABBOT, C. J. ruled, that defendants were liable for amount whether it was paid over or not. *Young* v. *Cole*, 3 Bing. N. C. 730; *Jones* v. *Ride*, *vide* 5 Taunt. 488; Chitty on Contracts, 5th ed. page 629; *Lobdell* v. *Baker*, 3 Metc. 472.

The fact that defendant was an agent and acting for others, does not affect the principle. He disclosed his agency to Wood, who was his agent only, and not the agent of both parties, and Wood did not disclose to plaintiff, that Duren was acting for another. *Fuller* v. *Smith*, before cited, settles this.

That Wood was defendant's agent and not ours, and that defendant must be answerable for Wood's doings, and his not disclosing that Duren was acting as agent. See *Lobdell* v. *Baker*, 1 Metc. 193.

In that case, *Winslow*, the broker, who sold the note, was held to be the agent only of the seller.

The remarks of the Court, on page 202 and 204, in the conclusion of the opinion, are decisive on this point.

There was an implied warranty of title, and nothing passed by this note. *Coolidge* v. *Brigham*, 1 Metc. 551.

We claim as damages, the amount paid for the note, $300 and interest. *Coolidge* v. *Brigham*, 5 Metc. 72.

G. F. Shepley, for defendant.

1st. Wood, the broker, was improperly admitted to testify, since, dealing in his own name, without disclosing his principal, he is directly liable to plaintiff, and not a competent witness for him without a release. *Hickling* v. *Fitch*, 1 Miles, 208, (Pennsylvania.) "Where the agent contracts in such a form as to render himself personally responsible, he cannot afterwards relieve himself from responsibility." Lord DENMAN, C. J. in *Jones* v. *Littledale*, 6 Ad. & El. 486. The rule for admit-

ting agents to testify, does not extend to one who is agent merely in the particular transaction. *Edmonds* v. *Lowe*, 8 Barn. & Cres. 407.

2d. Wood was the agent of the Bedlows, and not of defendant, who never pretended to act for himself in the transaction; the agent of the owners of the note, and not of one whose office was merely to put it in the broker's hands. The rights and liabilities of a person acting in such manner are fixed by law, and it is not competent for him subsequently, and of his own motion, without more, to hold himself out as having acted for any others than those for whom, under the circumstances, the law presumes him to have acted. Story on Agency, p. 30, and seq. and note; *Freeman & al.* v. *Loder*, 11 Ad. & El. 589.

Wood testifies that he did not act in any manner as agent of plaintiff; hence his knowledge that he, (Wood,) was acting for the Bedlows was not, constructively, the knowledge of the plaintiff; and hence he is liable, by custom, to him, and interested and incompetent without a release. *Vide Freeman & al.* v. *Loder*, *ub. sup.*

3d. Duren is not liable by reason of either an express or implied contract. An agent is not personally bound upon a contract made as agent, unless first, credit was given to him exclusively, or secondly, he has given no right of action against his principal. *Rathbone* v. *Budlong*, 15 Johns. 1; *LaFarge* v. *Kneeland*, 7 Cowen, 456; *Bradford & al.* v. *Eastburn*, 2 Wash. C. C. R. 219; *Smout* v. *Ibbery*, 10 Mees. & Welsby, 1; *Bradley* v. *Boston Glass Manuf. Co.* 16 Pick. 347; 3 Starkie on Evidence, 1198; 1 American Leading Cases, 449.

If money is paid to agent, and becomes recoverable back, on account of mistake or failure of consideration, the agent himself is not liable to a suit, if he has paid it over to his principal, *bona fide*, before notice. *Gray* v. *Otis*, 11 Vermont, 628; *Gates* v. *Winslow*, 1 Mass. 66; 1 Am. Leading Cases, 464, *Fenn* v. *Harrison*, 3 Term Rep. 757.

There was no express contract to render defendant liable. The words used by him, clearly did not amount to a warranty. In order that they should do this, it is requisite, that

they should have been received and relied on by plaintiffs, as such. *Osgood* v. *Lewis*, 2 Har. & Gil. 495.

But it is very plain, that they were neither meant nor received as a warranty, either of the genuineness of the paper, for that was not questioned by any one, or of the responsibility of the indorsers, for both plaintiff and Wood knew them to be "undoubted." And as it does not appear that plaintiff knew that defendant ever had any thing to do with the note, he must have relied on them. The words therefore, could have been meant or received only as a mere commendation, and *simplex commendatio non obligat. Morrill* v. *Wallace*, 9 W. H. 111. *Ricks* v. *Dillahunty*, 8 Port. 133; *Erwin* v. *Maxwell*, 3 Murphy, 246; 2 Kent's Comm. 630, and seq.

The doctrine that a person who transfers a negotiable security, shall be held impliedly to warrant its genuineness, if true in any case, is not applicable to agents for a special purpose, trustees, or persons who are acting *bona fide* for others who are disclosed, themselves having no interest. 2 Kent's Comm. 478, and analogous cases of *Bree* v. *Halbeck*, 2 Douglass, 654; *Mackbee* v. *Gardner*, 2 Harr. & Gil. 176.

This case differs widely from *Jones & al.* v. *Ryde*, 5 Taunt. 488, since the plaintiff *speculated* on the value of the note, not *discounting* but *buying* it. In *Jones* v. *Ryde*, there was no evidence that defendants did not hold themselves out as owners. And in *Fuller* v. *Smith*, Ryan & Moody, p. 49, "the payment to the defendants was made on the strength of their possession and negotiation of the bill," disclosing no principal.

The opinion of the Court, HOWARD, J. taking no part in the decision, having formerly been engaged in the cause, was delivered by

SHEPLEY, C. J. — A promissory note was made at Calais on June 17, 1847, by C. & J. S. Bedlow, for $368, payable to J. P. Wheeler or order, in thirty days from date, at the Suffolk bank, Boston, and purporting to be indorsed by J. P. Wheeler and by William Deming. This note the defendant handed to

William H. Wood, a broker, without indorsing it, for discount or sale. The broker sold the note at a discount to the plaintiff. The note was not paid. The indorsements of the names of Wheeler and Deming were forged. Of this fact, the plaintiff, defendant, and broker were entirely ignorant. The broker was informed that the defendant was acting as agent of the Bedlows. There is no proof, that the broker informed the plaintiff, that he was acting for the defendant, or that the defendant was acting for the Bedlows.

The plaintiff may be presumed to have known from the nature of the broker's business, that he was acting as the agent of some person unknown. The broker is, therefore, in the position of one dealing with the plaintiff as an agent, without disclosing his principal.

When a person deals with a broker, knowing him to be acting as the agent of some person unknown, the rights of the parties are governed by the rule, which prevails, when a person not known to be an agent, deals with another as agent, without disclosing his principal. *Thompson* v. *Davenport*, 9 B. & C. 78. Wood, the broker, in this case, is therefore in the position, as it respects the plaintiff, of an agent dealing with him without disclosing his principal. The defendant is in a like position dealing with the plaintiff by an agent, and yet dealing with him as an agent, without disclosing his principal. It would therefore seem to be clear, that if the plaintiff can maintain an action to recover back the money, which he paid for the note, of the defendant, on the ground alone, that he sold the note without disclosing his principal, he may upon the same principles, maintain an action for the same purpose against the broker, because he sold the note without disclosing his principal. For the broker cannot be considered as having disclosed his principal by stating, that the defendant said he would sell goods for the paper, when he says, that he could not positively say, that he informed the plaintiff, that he was acting for the defendant. The broker might have stated the opinions of many persons respecting the paper, without making any disclosure that he was acting as their agent or as the agent of any one of them.

If Wood be liable to refund the money to the plaintiff, he will be relieved from that liability by enabling the plaintiff, by his testimony, to recover the amount of the defendant, for a recovery against the principal relieves the agent from his liability. *Thompson* v. *Davenport*, before cited. When a witness is so situated, that his testimony will relieve him from liability and place him in a state of security, if the party calling him recovers judgment, he is regarded as interested in the event of the suit, and as incompetent. 1 Greenl. Ev. § 393, 396.

It becomes therefore necessary to inquire whether Wood, by making sale of the note, by delivery merely without indorsement, and without making as of his own knowledge any representations respecting it, and without disclosing his principal, became liable to refund the money, which he obtained by the sale of it.

The determination of this question will also determine, whether the defendant is in like manner liable, unless he shall prove to be liable on account of what he said respecting the note.

The cases decided upon this point are apparently rather than really in conflict, although it may be difficult to reconcile all the observations made by different Judges in communicating their opinions. This apparent conflict arises from an omission to notice a distinguishing feature.

When an innocent holder of negotiable paper parts with it by delivery without indorsing it, in payment of a debt due, or then created, as for example, in payment for goods then purchased, or by way of discount for money then loaned by a bank, banker or individual, and the paper proves to have been forged, the debt or loan, not being paid by it, may be recovered. In such case there is a warranty implied by law, that the paper is genuine, as there is, that coin or bank notes used for like purposes, are genuine. *Jones* v. *Ryde*, 5 Taunt. 488; *Fuller* v. *Smith*, 1 C. & P. 197; *Camidge* v. *Allenby*, 6 B. & C. 204, per LITTLEDALE, J.; *Coolidge* v. *Brigham*, 1 Metc. 547.

When no debt is due or created at the time, and the paper

is sold, as other goods and effects are, the purchaser cannot recover from the seller the purchase money. There is in such case no implied warranty of the genuineness of the paper. The law respecting the sale of goods is applicable. The only implied warranty is, that the seller owns or is lawfully entitled to dispose of the paper or goods. *Bank of England* v. *Newman*, 1 Ld. Raym. 442; *Fenn* v. *Harrison*, 3 T. R. 757; *Fydell* v. *Clark*, 1 Esp. R. 447; *Emly* v. *Lye*, 15 East, 6; *Ex parte Shuttleworth*, 3 Ves. 368; *Ex parte Blackburne*, 10 Ves. 204; *Ellis* v. *Wild*, 6 Mass. 321.

This distinction is recognized and stated to be the law, in Chitty on Bills, 10th American ed. 245, 246.

The same doctrine, although not stated in the text, is cited with approbation as derived from Chitty, by Story on Promissory Notes, in note 4, under § 118.

The principal difficulty appears to have been experienced in coming to a conclusion, whether the paper when discounted or sold, was received in payment of a debt or loan due or then created, or taken by way of purchase and sale. The use of the word discount in two different senses, has also contributed to introduce obscurity. It being used in some of the cases, and by some Judges to designate the reception of paper in payment of a loan, or debt, and in other cases and by other Judges, in the sense in which it appears to have been used by the broker in this case, to designate the reception of it on a sale as a piece of property.

In the present case there can be no such difficulty, for although the broker speaks of the transaction as a discount of the note, there was no proposal to obtain a loan, and the paper was sold at its estimated value, being much less than the sum, for which the note was made.

Wood therefore, not being liable to refund the amount received for the note, is a competent witness.

It results also from the application of the same rule of law, that the defendant is not liable without proof of an express warranty, for he had a right to dispose of the note as a piece

of property, deriving his authority from the makers, who were liable to pay it.

The only remark, which according to the proof the defendant made respecting it, was, that "he would sell goods for the paper." This cannot be regarded as a warranty that the signatures were genuine or that the makers or indorsers were responsible. It was the expression of confidence or of an opinion by way of recommendation, that the paper was good, and that it would be paid. The expression of such confidence renders the person liable only, when fraudulently made with a knowledge, which would prevent its being truly made. It is evident also, that it was not regarded as a warranty or relied upon by the plaintiff as such, for according to the testimony of Wood, he knew, that the credit of the indorsers was undoubted.

Plaintiff nonsuit.

NOTE. — HOWARD, J. had been of counsel and took no part in this decision.

BOWEN S. FOSTER *versus* LUTHER B. DOW.

In an action against the defendant, for commencing a suit against the plaintiff, in the name of a third person, without his consent, that third person is a competent witness for the plaintiff.

In such a case, where the writ upon which the plaintiff was arrested is lost, parol evidence of the arrest is admissible, and also of the commitment.

In such an action, the defendant, in order to show, that he had authority to bring the original suit, offered to prove, that the person in whose name it was brought, suffered himself to be defaulted in an action brought for services, in the commencing and prosecuting it. *Held*, the evidence was inadmissible.

It seems, a person who rightfully obtained a license to peddle, from the County Commissioners, is not liable to a penalty for not having one, although the Commissioners had omitted to complete their records concerning it.

It seems, unexpired licenses under an act which is repealed, are not annulled by the repeal, when in conformity with existing laws.

An action brought in the name of another person, without his authority, is a groundless and unlawful suit.

For damage done to the defendant in such a suit, he may recover against the person by whom it was brought.

In an action brought to recover for such damage, the amount would not be lessened by proving that the person named as plaintiff in the original suit had a right of action.

ACTION on the case, tried before WELLS, J. for suing the plaintiff in the name of E. P. Farris, and causing him to be arrested and "committed" without any authority from Farris. That action was for peddling without license.

The plaintiff offered as a witness, E. P. Farris, who was objected to as the plaintiff of record in the suit complained of. But he was admitted. To prove the loss of his license, the plaintiff offered his own affidavit, that he had such an one, and that he did not then have it or know where it was, though he had diligently searched for it. The affidavit was objected to, but was received to prove the loss.

The plaintiff also proved the loss of the writ, *Farris* v. him, and was allowed to prove the arrest and commitment of himself on said writ by parol, though objected to.

In defence, it was contended, that the action was in substance an action on the case for malicious prosecution, and that it was incumbent on the plaintiff to prove a want of probable cause in the original suit. But the Judge ruled otherwise, inasmuch as the plaintiff claimed to recover only upon the ground that the action was brought without authority.

The defendant also offered to prove by the attorney for plaintiff, in *Farris* v. *Foster*, that he made his charges for counsel fees and costs against Farris only, and that he afterwards sued him and recovered judgment by default. That testimony was excluded.

The defendant contended that the license, required by statute for peddlers, is to be granted by an official act of the County Commissioners, and that their decree or order granting it should be recorded, and the license also recorded and that as no record of such decree or license existed, the parol proof in regard to the license was not only inadmissible, but insufficient. But the Judge ruled that the license would be valid, though not recorded, and although there was no record of the decree or order granting it.

The clerk of the County Commissioners exhibited their docket of entries of licenses, among which was the following:

"Bowen S. Foster, Portland, July 10, 1846, one horse, $15,"

"Bowen S. Foster, Portland, July 13, 1847, one horse, $15,"

and testified there was no other record of licenses, nor of any memorandum of any license to plaintiff; and hereupon the defendant contended, that the supposed license was "*functus officio*," because of the repeal of the law under which it was granted, and the enactment of a new one. But the Judge ruled, that the repeal of the law by virtue of which the license was granted, and the enactment of a new one before the expiration of the time limited in the license would not annul the license.

The Judge was requested to instruct the jury that if *Dow* commenced the action, *Farris* v. *Foster*, in Farris' name, even without his consent, for a just cause of action, or for what *Dow* had probable cause to believe just, then this action cannot be maintained; and also that, if the plaintiff by the proof left his case in doubt, he must fail. These instructions were refused, but the jury were instructed, among other things, that the plaintiff, having limited his claim to recover on the sole ground that the defendant had brought the action of Farris against plaintiff in Farris' name, without his consent, the residue of the declaration need not be regarded by them; that the plaintiff must prove his case to their satisfaction, not beyond all doubt, but must satisfy them that he was entitled to recover upon the balance of the testimony.

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

Codman, for defendant.

E. P. Farris ought not to have been admitted as a witness; he had a direct interest; he was called to testify to facts which, if true, *exonerated* him from liability to the plaintiff in this case, whatever the Court may decide the nature or form of action to be.

Though parol evidence of the "arrest" on the original writ may have been admissible on proof of loss of the writ, yet

parol evidence of the "*commitment*," was inadmissible without proof of the loss of the gaoler's record of commitment, which was not proved.

The ruling of the Judge that the declaration in the writ was sufficient to enable the plaintiff to recover damages for suing out and enforcing the writ, *Farris* v. *Foster*, without the consent or authority of Farris, was erroneous, because the declaration is in form and substance exclusively an action of the case for malicious prosecution, in which case proof of probable cause would be a conclusive defence.

The Judge erred in excluding the offered evidence of Charles Harding, as to whom he made his charges against, for counsel fees, &c. in the original suit, *Farris* v. *Foster*, and of the judgment recovered by said Harding against said Farris, and the execution issued on said judgment. The evidence tended directly to prove that the action, *Farris* v. *Foster*, was brought by direction of the former, and consequently to disprove the allegations in the present plaintiff's writ.

The ruling of the Judge, that the license was valid though not recorded, and though there was no record of the decree or order granting it, was erroneous. The statute impliedly requires that license should be granted by the official act of the *Court* of County Commissioners, and there should be a record both of the act or decree of the Court, and of the license granted under it. Stat. of 1843, chap. 27.

The ruling of the Judge that the supposed license of the plaintiff was not inoperative, because the law under which it was granted, had been repealed and a new one enacted, was incorrect, in a prosecution against him for peddling without license; it could not be deemed a legal defence. Stat. of 1843, chap. 27; Stat. of 1846, chap. 200.

G. F. Shepley and *Joseph H. Williams*, for plaintiff.

The opinion of the Court, (HOWARD, J. taking no part in the decision, because formerly of counsel in the case,) was delivered by

WELLS, J. — The witness, Farris, was the person, in whose

name the defendant brought the action against the plaintiff, without any authority derived from the witness. He could neither gain or lose by the result of the suit, and the verdict would not be evidence for or against him.

The affidavit of the plaintiff in relation to the loss of the license contains sufficient facts to show a loss, and to admit the secondary proof.

The original writ of *Farris* v. *Foster*, having been lost, and the return of the arrest upon it, parol proof of the arrest was admissible. And the commitment was an act done by the officer in pursuance of the writ, and may be proved in the same manner as any other fact. Whether the jailer made a record of the commitment or not, his reception and confinement of the prisoner, was a commitment.

This action is not brought for a malicious prosecution, in suing out a writ, without probable cause, but for commencing an action without the authority of Farris, and in his name, against the plaintiff. And the construction given to the writ, at the trial, appears to be free from objection.

The acts and doings of the attorney, who had the care of the suit of Farris against the plaintiff, in suing Farris for his services and obtaining judgment by default and execution against him, could have no effect upon the rights of the plaintiff. They were *res inter alios*. If Farris had notice of the suit, they might affect him, by way of admission. But if he gave no authority for instituting the action against the plaintiff, nor in any manner ratified it, his subsequent admissions could not be received to prejudice the plaintiff. The testimony offered was properly rejected.

The validity of the license did not depend upon the recording of it, nor upon the recording of the order of the County Commissioners granting it. A person having a license to peddle, legally obtained, would not be liable to a penalty for not having one, because the County Commissioners had omitted to complete their records. It is their duty, to cause a record of their proceedings to be kept; chap. 99, § 9 and 10 of the

Revised Statutes; but there is no law requiring the license itself to be recorded at length.

The license, which the plaintiff had, was granted July 10, 1846, under the act of 1843, c. 27, and by the provisions of that act, it continued in force for one year. The action brought against the plaintiff by the defendant, in the name of Farris, for peddling without a license, was commenced June 8, 1847.

The act of 1846, c. 200, which took effect on the first day of October of that year, repealed the act of 1843, and it is contended, that the license of the plaintiff was thereby annulled, and that he was peddling without a license on the eighth day of June, 1847.

But although the act of 1846 repeals that of 1843, it does not by any provision in it, vacate the unexpired licenses, granted by virtue of the latter act. Nor is it inferable, that such was the intention of the Legislature.

A prosecution for a penalty cannot be sustained, after a law is repealed, without any saving clause, yet a right obtained under a statute may exist after its repeal.

But the law of 1846 does not require the license to be obtained under that act. It enacts that the person, who travels to vend goods, "shall first obtain a license therefor, from the County Commissioners," &c. And the plaintiff had obtained a license in conformity to the act of 1846, although it was granted under that of 1843.

The duty required to be paid is the same in both acts.

The plaintiff had such a license as was required by the act of 1846, and it was therefore valid, though obtained under a law, which had been repealed.

The objection to the instruction, that the plaintiff was bound to exhibit his license to Farris and to the defendant, is without foundation, neither of them being a justice of the peace, or constable of any city, town or plantation. To such persons only does the law require it to be exhibited.

It may not be inappropriate to remark, that the license and the questions raised in relation to it, are entirely irrelevant.

Whether the plaintiff had a valid license or not, would furnish no foundation for a suit against him, by the defendant, in the name of Farris, without his consent. The use of the name of Farris, under such circumstances, was an unlawful act, and the plaintiff is entitled to recover the damages arising from it.

Where one commences a suit in the name of another, but without his authority, it is a groundless suit, irrespective of its merits if it had been legitimately brought. If it could have been maintained by the person having a right to bring it, that circumstance would afford no reason for lessening the actual damages sustained, and if it could not, no reason for enhancing them.

No objection was made to the testimony for its irrelevancy.

But assuming it to be relevant, no error is perceived in the rulings concerning it, nor in the instructions given or withheld.

The exceptions are overruled.

LEVI PATCH *versus* SAMUEL H. KING.

When a creditor has a note against two joint promisers, secured by mortgage upon real estate, and he acknowledges payment upon the margin of the record, from the promisers, and discharges the mortgage; the acts and declarations of one of the promisers may control and overcome the evidence of payment from the margin of the record, so that an action may be maintained upon the note against the other promiser.

Partial payments, made by one joint promiser upon a note, before the Revised Statutes went into operation, may prevent the statute of limitations from attaching as to the other.

If the principals upon a note, after it has become effectual in the hands of the payee, so alter their relations among themselves, that one becomes the mere surety of the other; this arrangement cannot restrict the rights of the payee.

ASSUMPSIT upon a note of hand, dated Nov. 9, 1832, for $1300, payable to plaintiff and signed by Jacob D. Brown and defendant as principals, and others as sureties. Plea, the general issue and statute of limitations. The action came on for trial before SHEPLEY, C. J., when it appeared, that the

There was an accidental misplacing of five lines of this case, published in vol. 29 Maine Reports, which the reader is requested to note. *The first five lines on page* 457 *should have been inserted at the top of page* 449. — M., S. & Co.

for about $200, in the handwriting of Brown's clerk, who had since died.

The defendant read a copy of a deed of mortgage, Jacob D. Brown and defendant to plaintiff, dated September 4, 1834, and recorded September 6, 1834, conveying six thousand acres of land, to secure the note. Also, copy of discharge of same, on the margin of the record, acknowledging payment thereof, signed by the plaintiff on January 4, 1836. Also an obligation from Jacob D. Brown to defendant, dated April 6, 1835, engaging to save him harmless from the note.

It also appeared that, before the mortgage was discharged, the plaintiff said that Brown told him it was his debt to pay, and that Brown offered to pay him all that was due as soon as he could go to Boston and back again, if he could raise the mortgage.

The case was taken from the jury by consent and submitted on this testimony, or so much as may be legal, to the decision of the Court, with power to enter judgment by nonsuit or default, as the rights of the parties may require.

Shepley and *Dana*, for defendant, maintained the following positions.

1. The payments by Brown on the note can not operate to create a new debt against King, after it had once been paid or discharged. *Atkins* v. *Tredgold*, 2 B. & C. 23; *Bell* v. *Morrison*, 1 Peters, 371; *Jones* v. *Moore*, 3 Binney, 573; *Hackley* v. *Patrick*, 3 Johns. 536; *Walden* v. *Sherbourne*, 15 Johns. 409.

2. At the time of the alleged acknowledgments by Brown, there was no joint interest existing between him and the defendant. The debt had been paid and absolutely discharged. If the existence of the joint debt be established by other evidence, then the admission of one of the persons jointly liable will so far affect the other as to take the debt out of the operation of the statute of limitations. But the very existence of a joint debt is in issue here, and that cannot be proved by the admission of one party. *Gray* v. *Palmer*, 1 Esp. 135; *Nich-*

olls v. *Dowding & al.* 1 Stark. R. 81; *Burgess* v. *Lane & al.* 3 Greenl. 165.

3. Before Patch discharged the debt and released the mortgage, he knew that King stood in the relation of a mere surety for Brown. Knowing this fact he put it out of his own power to collect the note, and out of the power of King to pay it and recover of Brown on his bond. This was sufficient to discharge King, even if the note had not actually been paid. *Pierce* v. *Whitney*, 9 Shepl. 113; *Leavitt* v. *Savage*, 4 Shepl. 72; *Rathbone* v. *Warren*, 10 Johns. 587; *Sprigg* v. *Bank of Mt. Pleasant*, 10 Peters, 257; *Greeley* v. *Dow*, 2 Metc. 176; *Gifford* v. *Allen & al.* 3 Metc. 255.

Fessenden, Deblois & Fessenden, for plaintiff.

1. The statute of limitations does not present a bar. *Getchell* v. *Heald*, 7 Greenl. 26; *Jackson* v. *Fairbanks*, 2 Hen. Black. 340; 5 Dane's Abridg. ch. 161, art. 9; *Whitcomb* v. *Whiting*, 2 Doug. 562.

2. The entry on the margin of the record, dated January 4, 1836, by force of the statute of mortgages, operates only as a discharge of the mortgage and not of the debt. R. S. c. 125, sect. 28.

3. Such being the only operation of the statute, the residue of the paper or entry is a mere receipt, and may be explained, contradicted or rebutted, — *Gerish* v. *Washburn*, 9 Pick. 338, *Badger* v. *Jones*, 12 Pick. 371, — even if absolute in its terms. *Hunt* v. *Law*, 2 Johns. 378; *McKinsley* v. *Pearsall*, 3 Johns. 314; *Tobey* v. *Barber*, 5 Johns. 68.

4. The same evidence which contradicts the payment by Brown, binds King, so far as the plaintiff is concerned. *Getchell* v. *Heald*, 7 Greenl. 20; *Whitcomb* v. *Whitney*, 2 Doug. 562; 2 Starkie's Evid. 897; *Johnson* v. *Beardsonley*, 15 Johns. 3.

5. The obligation of April 6, 1835, is clearly inadmissible as evidence, being a matter with which the plaintiff had no connection, and he is in no wise bound by it. The defendant and Brown being principals, are jointly and severally bound *Sprigg* v. *Bank of Mt. Pleasant*, 10 Pet. 257; *Paine* v.

Packard & als. 13 Johns. 174; *Nickols* v. *Parsons*, 6 N. H. 30.

The opinion of the Court, (HOWARD, J. taking no part in the decision, having been engaged in the case, and SHEPLEY, C. J. not concurring,) was delivered by

TENNEY, J. — This suit was commenced in 1842, and is upon a promissory note of hand, dated on Nov. 9, 1832, for the sum of $1300, signed by the defendant and one Jacob D. Brown, as principals, and other persons as sureties. An indorsement was made by Brown, in 1838, of one dollar, and another by his clerk, who has since died, of $200, in the year 1840. On Sept. 4, 1834, the two principals upon the note, conveyed in mortgage certain real estate to the plaintiff, as security for the note. Upon the margin of the record of this mortgage, are the words and figures following: —

"Oxford, ss. Jan. 4, 1836. I hereby acknowledge to have received of the within named Jacob D. Brown and Samuel H. King, the full and just sum, to secure the payment of which sum, the within mortgage was executed, and do therefore hereby discharge the same. Levi Patch."

"Attest, Alanson Mellen, Register."

The plaintiff was proved to have said, that Brown told him, it was his debt to pay, and that Brown offered to pay him all which was due, as soon as he could go to Boston and back, if he could raise the mortgage. The plea of non-assumpsit, and the statute of limitations was relied upon in defence.

It is insisted that the acknowledgment of payment on the record, is proof of the discharge of the debt; and that the subsequent recognition by Brown of the existence of the note as an outstanding claim, cannot revive it against the defendant, especially as the plaintiff had declared subsequent to the execution of the mortgage, that it was his debt to pay.

If it can be shown, that a note of two joint promisers is paid, one of the makers cannot revive it, so as to create any liability in the other. A mortgage has for its basis, the contract, the obligation of which is intended to be secured; and

it ceases to have validity by the discharge of that contract. It is undoubtedly competent, for the parties to annul the collateral security without affecting the debt secured. And a deed of release of an estate conveyed in the mortgage, from the one having the right of the mortgagee, would not be conclusive proof of the payment of the debt secured thereby. The mortgagee may also discharge his claim, as provided in R. S. c. 125, § 28. This is similar in most respects to the statute of 1821, c. 39, § 1; which was in force when the mortgage in this case was discharged. This provides that "the mortgagee may also discharge his claim, by causing satisfaction and payment to be entered on the margin of the record of such mortgage in the register's office, and shall sign the same, which shall forever discharge and release the mortgage, and perpetually bar all actions to be brought thereupon, in any court of record. It was probably contemplated by the authors of this statute, that ordinarily the mortgage would continue effectual, as long as any part of the indebtedness secured by it, should remain; and hence the form prescribed. The manifest purpose of the provision was to furnish and perpetuate the proof, that the incumbrance no longer existed, and that the constructive notice of the mortgage by the record, should be accompanied by that of the discharge. Accordingly the statute has declared expressly the effect of such a discharge, and it cannot have a more enlarged construction than was manifestly designed. And when we consider the object to be secured, and the language used limiting the discharge to that object, the acknowledgment of the receipt of payment cannot have given to it, a character and importance which it would not have, when unconnected with the discharge of the mortgage. And it is a well settled principle, that a receipt, simply acknowledging that a debt referred to therein, has been paid, is *prima facie* evidence only of such payment; and it is open to explanation. If so explained that its effect according to its terms is controlled, the debt is not to be regarded as having been discharged by the receipt, and revived by the controlling proof, but as always having subsisted, notwithstanding the receipt.

By the agreement of the parties, the determination of the facts as well as the law, is submitted to the Court upon the case reported. The entry made upon the margin of the record, unaffected by any other proof, is sufficient to show payment of the note, and it is to be ascertained by all the evidence, whether this acknowledgment is rebutted and controlled. The indorsements upon the note, may both be regarded as made by Brown, one being in his own and the other in the handwriting of his clerk. These were made after the discharge of the mortgage. The case exhibits nothing, which could constitute a reasonable motive in him, to make these indorsements at the time of their respective dates, unless it was in discharge *pro tanto* of a known indebtedness. So far as it regards Brown, therefore, no doubt can exist on this point. But he is not a party to the suit, and his liability is material for our present purpose, only as having an influence upon the question, whether the note is unpaid or not. There is no declaration or act of the defendant reported, which tends to show that he has admitted his continued indebtedness, since the discharge of the mortgage; but there are facts and circumstances sufficient to lead us to the conclusion, that the note was not paid at the time of this discharge. The entry upon the record must be treated as an act of deliberation. The plaintiff must have gone to the registry of deeds, and there have made the discharge. This was evidently the result of an understanding between him and the principals upon the note. There was either an agreement, that the mortgage should be discharged, and the note remain effectual, or the money due thereon was actually paid. No attempt is made to explain, why the note should be permitted to remain uncanceled in the hands of the payee after it ceased to be obligatory, if it was really paid. If no collateral security had been given for its payment, and it was really intended to be outstanding, it is difficult to imagine a motive which could influence the plaintiff to give to the makers a written acknowledgment of full payment. But the note being secured by a mortgage upon real estate, there was an important object to be obtained by the entry, which was made upon the records. This

object was the discharge of the mortgage ; and it could be done without affecting in the least the personal security. If the design of the parties to the transaction, when the entry was made upon the record was for this purpose alone, they adopted one of the modes provided by the statute for its accomplishment, and the purpose entertained was secured.

For some purpose it might have been desirable on the part of the principals on the note, that the incumbrance should be removed from the land, before the note secured should be paid ; and the defendant has shown by the declaration of the plaintiff, that Brown offered to pay him all which was due, after his return from Boston, if the estate could be previously relieved from the mortgage. It was not unreasonable that the plaintiff should have expected, that if Brown could present in Boston, an unincumbered title to the land, about the first of January, 1836, when it was notorious as matter of history, that lands in Maine were believed to possess great value, and were much sought after by purchasers, he would be able to pay all which was due to the plaintiff, and take up the note. The plaintiff had taken and held the same note for a considerable time, with no collateral security which the case discloses, and there is nothing, which shows a want of confidence in Brown's ability through the land, to obtain the means of payment after the discharge of the mortgage.

Is this action barred by the statute of limitations? The payments made by Brown and indorsed on the note were before the revision of the statutes, which took effect in 1841, and the provision in chap. 146, § 20 and 24, are by the 27th section of the same chapter, to have no effect thereon. In this State, before the operation of the Revised Statutes, a new promise made by one of two joint promisers would take the case out of the statute of limitations as to both. *Greenleaf* v. *Quincy*, 3 Fairf. 14 ; *Pike* v. *Warren*, 3 Shepl. 390 ; *Dinsmore* v. *Dinsmore*, 8 Shepl. 433 ; *Shepley* v. *Waterhouse*, 9 Shepl. 497.

It is contended, that as Brown had made a contract with the defendant, on April 6, 1835, in which he engaged to save

harmless the defendant from all liability on the note in suit, which was known to the plaintiff, the doctrine that a surety is exonerated by the holder of a note, giving time upon consideration to a principal, without his consent or knowledge, is applicable to this case. It is not contended, that time was given in its ordinary acceptation to the principal, but that the note having been discharged by the entry upon the record, its effect upon the defendant, who was really at that time, as between him and Brown, a surety only, should be the same. This proposition cannot be sustained either by the facts or the law of the case. The entry on the record is all the evidence relied upon, to show a discharge of the debt. But by the fair import of this entry unconnected with other facts in the case, the payment was made by Brown and the defendant, and whatever was done, was equally known to both. But the debt was never in fact paid and the defendant had full knowledge that it was not. But if it were otherwise, we have found no case, which authorizes the application of this doctrine, when joint contractors, who were both principals, at the time the note first became effectual in the hands of the payee, have changed their relations afterwards, so that one has contracted with the other to pay the whole debt, although this charge may be known to the holder. The holder of a note is not restricted in his rights by any arrangements of the makers among themselves, made after the note has passed from their hands, when he was not a party thereto. *Defendant defaulted.*

Reasons for not concurring by

SHEPLEY, C. J. — It appears to me, that this opinion does not fully meet and decide the most doubtful and delicate point in the case, viz: whether the acknowledgment of one of two joint debtors, that a debt is unpaid, is sufficient to explain a written receipt of payment in full of the debt, made by the creditor, and rebut that *evidence* of payment with respect to the other debtor.

It has, as the opinion states, been decided, that the acknowledgment of one joint debtor, that the debt is due, will rebut

the *presumption of law*, arising from the lapse of time and take the case as to both out of the statute of limitations.

But that seems to me to differ from the case of the introduction by a defendant of *prima facie proof* of actual payment, arising out of a written acknowledgment of the party, that the debt has been paid.

Suppose the defendant, King, had introduced a receipt of the plaintiff, stating that he had received payment in full of the note of King, could such proof be rebutted as to King, by the introduction of a written acknowledgment signed by Brown, that the debt had not been paid? This probably would not be contended, for one person could not destroy or explain the effect of a written discharge given to another.

In this case the written acknowledgment of the creditor states, that he has received payment of "Jacob D. Brown and Samuel H. King, the full and just sum to secure the payment of which the within mortgage was executed." The written acknowledgment is, that payment has been received of both; is it full proof that it has not been received, that one admits that the debt is not paid but due?

I am not aware, that the acknowledgment of one of two joint debtors, has ever been decided to affect the rights of the other, further than to rebut a *presumption of law*. And that effect has been considered as so far undesirable or unjust, that the Revised Statutes have destroyed it.

If the rule be now established, that the acknowledgment of one will rebut *prima facie evidence* of payment arising from a written statement of the creditor, that his debt has been paid not only as it respects himself, but as it respects the other, that rule will continue to be good in a case occurring since the Revised Statutes for they will not operate upon such a case or rule. And the result will be in a case like the present, happening since the Revised Statutes were in force, that payment by one of two joint debtors, will not rebut the *presumption of law*, as to the other, but will rebut *prima facie proof* of payment arising from a receipt in full, not only as respects himself, but as it respects the other. It seems to me, that such

action was commenced at the District Court, in 1842, and that the writ and note had been destroyed afterwards by fire. The plaintiff proved that there was such a note with two indorsements upon it; one in the year 1838, for one dollar, in the handwriting of Brown, and the other in the summer of 1840, a condition of the law, would be somewhat revolting to one's common sense. It appears to me, that this point has not been considered in the opinion, and that it deserves, and must have a sober consideration and decision, and I do not concur because it has not received it.

STATE OF MAINE *versus* GEORGE S. HAY.

The § 3, chap. 24, of the ordinances of the city of Portland, relating to bowling alleys, is legal and valid.

THIS was a complaint against the defendant for a violation of § 3, chap. 24, of the ordinances of the city of Portland. A copy of the article was not incorporated into the report of the case, but it is supposed to be an article requiring keepers of bowling alleys to close them at six o'clock. The defendant being convicted before the Municipal Court, carried the case to the District Court by appeal. On the trial there, the Court instructed the jury, that said ordinance was legal, valid and binding upon all citizens of Portland, and the defendant was convicted. To this instruction of the Court he filed exceptions.

L. DeM. Sweat, for defendant.

1. The ordinance upon which this complaint was founded is not legal and binding upon the citizens of Portland. *People* v. *Sargent*, 8 Cowen, 139.

2. The form of action by complaint is not authorized by law. 1 Smith's Laws of Maine, 486, c. 76, § 2, specially repealed, R. S. p. 780, chap. 76; R. S. chap. 98, § 5; Laws of Maine, chap. 350, in 1846, also in 1848, chap. 58; Dane's Abridgment, page 244.

Swasey, for the State.

The opinion of the Court was given orally by

SHEPLEY, C. J. —The only question in this case is, whether the city ordinance, upon which this complaint is founded, is legal and binding upon the citizens of Portland. By the special laws of 1846, chap. 350, the right to decide whether bowling alleys shall be allowed within the city, and if so, under what restrictions, is vested in the mayor, aldermen and common council of the city of Portland. The ordinance, which is found by the jury to have been violated, is within the power conferred by this act. There is no constitutional provision prohibiting the Legislature from regulating bowling alleys. The Legislature may direct the time when they may be opened, and the place where they may be erected. The city ordinance does not transcend the authority under which it was made. *Exceptions overruled, and the case remanded to the Dis. Court.*

ELIPHALET PACKARD *versus* GEORGE C. SWALLOW, *Ex'r.*

Where a suit is commenced against an executor, within four years of his appointment, and by mistake of the attorney as to the sitting of the Court, the action is not entered, this mistake will not avail the party to maintain a new suit after the four years have expired.

THE plaintiff commenced this suit against the defendant, as executor, more than four years after his appointment, under these circumstances. Before the four years had elapsed, the plaintiff's attorney brought an action upon the same demand, to the District Court, but after the writ was served and returned to his office, the attorney supposing the Court sat later than it did, omitted to enter the action, and this suit was commenced in consequence of that omission.

Barrows, for the defendant.

The action against the executor, is barred by the statute of limitations. R. S. chap. 120, § 23, and chap. 146, § 29.

The case is not within the exceptions specified in R. S. chap. 146, § 12.

G. F. Shepley, for plaintiff, submitted the case without argument.

TENNEY, J. orally. — A question arises here whether the statute of limitations attaches to this suit. The action was commenced more than four years after defendant's appointment and within the six months allowed to parties, in case the suit commenced within the proper time, has failed for any of the reasons allowed, to prevent the attachment of the statute of limitations. As to the former suit, it is proved that the attorney mistook the time of the sitting of the Court and did not enter his action, and the plaintiff now relies upon chap. 146, § 12, to sustain this new suit. In this section, several causes are specified which will enable a party to maintain an action, after the four years have expired, but among them all, is not enumerated the one here relied upon. If the plaintiff had himself made this mistake, it could not enable him to commence a new action, and one by his attorney would not make his case better. The Court cannot add to those therein enumerated. *Nonsuit.*

ISAAC S. CUSHMAN *versus* RICHARD D. DOWNING *& al.*

To a promissory note the defence of usury, by the oath of the defendant, can only be made in a suit brought in the name of the payee.

The plaintiff, who is the indorsee of the note declared on, cannot be called by the defendant to testify, though he was the subscribing witness.

ASSUMPSIT, on a note payable to one Merritt Caldwell, and by him indorsed to the plaintiff. The brief statement filed alleged that the note was given for usurious interest.

At the trial, before GOODENOW, J., the plaintiff, by a counselor of this Court, proved the indorsement of the note at his office, and that the present plaintiff was the subscribing witness to the note. The counsel for the defendant proposed

to inquire of the witness, whether he did not, without being advised with by either Caldwell or plaintiff upon the point, suggest that Caldwell had better indorse the note to Cushman, and have a suit commenced in Cushman's name. To this inquiry the witness stated, that he neither gave any advice or made any suggestion, except in answer to the inquiries of said Caldwell and said Cushman, and declined to answer the question more fully, and the Court ruled, that he need not answer more fully. The witness voluntarily testified, that Cushman requested him to cast the amount due on the note, and that he gave to Caldwell his note for the amount, but before he left the office, he said he had the money in his pocket, and might as well pay it then as at another time, and paid over the money.

The defendant introduced the deposition of Merritt Caldwell, against the objection of the plaintiff, from which it appeared, that the defendants declined paying the note when in witness' hands, alleging that it covered usurious interest, and that when he transferred it to plaintiff, he told him the reason why defendants declined paying it.

The defendants then offered their several statements in writing, subscribed and sworn to before the clerk of the Court, alleging, that the whole amount of the note was usurious, and the Court refused to admit the statements.

The defendants then offered to prove, as preliminary to the admission of said statements, that the note, though in terms made payable to Merritt Caldwell, was in truth given to the plaintiff, but the Court rejected the evidence as insufficient to let in the oath of the defendant.

The defendants contended, that they were entitled to make the same defence in this action, that they would have been entitled to make, if the action had been commenced in the name of the payee of the note, and to offer in support of it the same evidence, and consequently were entitled to their own oaths under the statute of usury; but the Court ruled, that though they were entitled to set up the same defence against the present plaintiff, which they might have done against the

payee, yet they were not entitled to the same evidence, and could not be allowed their own oaths.

The defendants then proposed to call the present plaintiff to testify, he having been the subscribing witness to the note, but the Court refused to admit him.

A verdict was returned for plaintiff, for the full amount of the note and interest, and the defendants filed exceptions.

Codman, for defendants.

1. The witness, Woodman, should have been held to testify, as requested by defendant's counsel. The facts inquired for, were not such as were communicated to him under professional confidence, and the ruling of the Court on this point was erroneous.

2. The evidence offered by defendants, that the note, though nominally payable to Merritt Caldwell, was in truth and in fact payable to the plaintiff, should not have been rejected; it does not contravene the rule of law, that parol evidence is inadmissible to explain, vary or contradict a written contract. The name of the payee forms no part of the contract; it may be a fictitious name, and in such case the holder would be permitted to offer parol evidence to show that he is the legal owner of it.

3. The ruling of the Judge, that the defendants could not be allowed their own oaths, was erroneous. R. S. c. 69, § 3.

4. The ruling that the plaintiff could not be compelled to testify, and the refusal of the Judge to admit him, were erroneous, because being the subscribing witness to the note, and consequently having full knowledge of the facts and circumstances under which and the consideration for which it was given, he could not by voluntarily becoming the indorsee, deprive the defendants of the benefit of his testimony. 1 Greenl. on Ev. (2d ed.) § 167, 418 and cases there cited; *Bent* v. *Baker*, and cases cited in notes, 2 Smith's Leading Cases, 47.

Woodman, for plaintiff.

Wells, J. orally. — It has been decided in *Putnam* v. *Churchill*, 4 Mass. 516, that where the note, alleged to be

usurious, is indorsed to a third party, the oath of the defendant cannot be admitted, and it was re-affirmed in *Binney* v. *Merchant*, 6 Mass. 190. In the latter case, it was alleged, that the suit was brought for the benefit of the payee, but that did not avail to let in the oath of the party. In a later case, *Little* v. *Rogers*, 1 Metc. 108, the Court did not disavow the authority of these decisions, but in that case, which was upon a note payable to defendant's order, they held it was not a note until he put his own name upon it. From these decisions, it appears, that the question asked of the witness, Woodman, was wholly immaterial, and the decision of the Court, rejecting the statements offered by the defendants, was right.

Another question raised, is whether the statement of defendants should not have been admitted because the note, originally payable to Caldwell, was in fact given to the plaintiff. The note was running to Caldwell, and whether or not it was his property is wholly immaterial. He was a party to the note, and when it was negotiated this kind of evidence could no longer be allowable.

It is contended also, that the plaintiff had no right to buy this demand and sue it, and thereby prevent the defendants from using him as a witness. There is a rule of law, that a man cannot make himself interested, and thus prevent his being called as a witness, and there is another, that a note may be negotiated. There may seem to be some hardship in this case, but we think it best to adhere to the general principle that one party cannot be made a witness, rather than the other. *Exceptions overruled.*

MARY GENT *versus* SARAH ANN GRAY, *Administratrix.*

Neither by the common law, nor by the provisions of R. S. chap. 104, § 18 and 36, do actions of tort for the misfeasance of sheriffs or constables survive, as against their legal representatives.

CASE, for the misfeasance and neglect of Ebenezer F. Gray as constable of the city of Portland, in not serving in due

season upon the trustee, a writ of attachment and trustee process sued out by the plaintiff against one George Dyer and trustee.

At the trial, before GOODENOW, J., in the District Court, the defendant moved a nonsuit, on the ground that the action, as set forth, was a tort and did not survive. The motion was allowed, and exceptions taken.

A. W. & J. M. True, for plaintiff, contended that the common law, by the operation of which this action would abate with the death of the wrongdoer, had been changed by the express provisions of the statutes. R. S. chap. 104, § 36 and 18.

The cause of action survives, and this action is rightly conceived, and commenced in the right manner and form. R. S. chap. 104, § 13, 14, 18 and 36.

Shepley and *Dana*, for defendant, contended that this action does not survive against the administratrix of a constable. R. S. chap. 104, § 18.

The opinion of the Court, (HOWARD, J. taking no part in the decision, having been of counsel in the case,) was given orally by

TENNEY, J. — The only question in this case is, whether an action of tort survives against the administrator. And the plaintiff relies upon the statutes of this State, to show that the cause of action survives, citing chap. 104, § 18 and 36 of R. S.

Are these two sections sufficiently broad to include this case? The last section does not extend to the present case in words, and merely gives a remedy upon the bond, but makes no such provision, that the original cause of action survives as against a sheriff. *Nonsuit confirmed.*

Warren *versus* Gibbs *and trustee.*

A trustee, who does not disclose at the first term, is not entitled to costs arising at any subsequent stage of the case.

This action was entered at the March Term of the District Court, 1847. The trustee lived in the county. At the first term, Poor & Adams entered their names under the action, as attorneys for the trustee, but he did not then appear and submit himself to examination. At the next term he disclosed, and was charged. To that judgment he excepted, and in the Court above the exceptions were sustained, and he was discharged.

The trustee claimed costs after the exceptions were filed.

Poor & Adams, for trustee.

The trustee is entitled to costs *on the exceptions*, as the prevailing party. R. S. chap. 115, § 56.

Chap. 119, § 16, of R. S., making a trustee's costs depend on his appearing at the return term, applies only to such costs as arise prior to judgment on the disclosure.

Barnes, for plaintiff.

1. The statute strictly defines the conditions under which a trustee may have costs. To come in at the first term, and submit himself to an examination on oath, is an indispensable previous condition, unless waived by an agreement, or in cases expressly excepted by statute. R. S. chap. 119, sections 16, 22, 25, 26, 42, 90.

2. The duty of the trustee is a personal duty, and his costs are of a personal nature, belonging to himself, and not to attorney; unlike the case of a defendant, who is not obliged to appear personally in Court.

To enter an appearance by attorney for trustee, in the ordinary cases, serves only in practice, to prevent a default of the trustee. This practice, where the trustee does not come in personally at the first term, is irregular, and not to be countenanced and affords no foundation for costs.

The opinion of the Court was given orally by

Howard, J. — The trustee appeared at the second term, and

made his disclosure without any agreement at the return term of the process, that he might come in at the second as of the first term. The trustee proceeding, is wholly regulated by the statute, and the provision is plain and positive, that the trustee shall not have costs, unless he comes in at the first term.

Costs not allowed.

HENRY WILLIAMS *versus* N. E. M. F. INSURANCE CO. *& trustee.*
SAME *versus* COLUMBIAN MUTUAL F. INSURANCE CO. *& trustee.*
JAMES ROBINSON *versus* SAME *and trustee.*

An action may be maintained in the courts of this State, against a corporation established by the Legislature of another State. R. S. chap. 76, § 31.

In such an action, jurisdiction is conferred upon the Courts of this State, in behalf of a citizen of this State, by an attachment of defendant's property under our trustee process.

But no action can be sustained in this State, against such corporation, if, *by its charter*, the jurisdiction of such action is expressly limited to the Courts of its own State. — Per SHEPLEY, C. J.

By the charter of an insurance company, established in another State, claimants were to bring their suits *in that State*, in cases in which, after notice of loss, "the company and the directors, upon view of the same, or in such other manner as they deem proper, shall estimate the loss," &c. — *Held*, that provision does not preclude the Courts of this State from holding jurisdiction of actions brought to recover for losses, in cases where no such estimation was made by the company or its directors.

ASSUMPSIT, on policies of insurance against fire. These three actions, were all brought to the District Court, and were of a similar character. The plaintiffs resided in this county, and the defendants were corporations under the Legislature of New Hampshire. Within the policies were incorporated the acts of incorporation, and the seventh sections enacted "that when any person shall sustain any loss by fire, of buildings or other property insured by said company, he shall within thirty days after such loss, give notice thereof in writing, at the office of said company, and the directors upon view of the same, or in such manner as they may deem proper, shall ascertain and

determine the amount of said loss or damage, and if the insured shall not acquiesce in the determination, his claim may be submitted to referees mutually chosen, whose award shall be final, or he may within ninety days after notice of said determination and not afterwards, bring an action at law against said company for such loss, before any court in the county of Merrimack, proper to try the same, and if the plaintiff shall, in such action, recover more than the damages determined on by the directors, he shall have judgment in said action, with interest thereon from the time said loss happened, with costs of suit; but if he shall recover no more than the amount aforesaid, the company shall recover their costs."

The defendants at the return term, filed pleas in abatement to the jurisdiction of the Court, setting forth that, if any cause of action accrued to the plaintiffs, their actions should have been brought before some Court proper to try the same in the county of Merrimack, and State of New Hampshire.

The replication alleged, that defendants had entrusted property, with the trustee summoned in these actions, who was an inhabitant of this county; to which there was a demurrer.

Fessenden & Deblois, for defendants.

We submit that this Court has no jurisdiction of these suits, inasmuch as the acts of incorporation, of which the plaintiffs were members, provide, that in all disputes arising out of any policies made by said corporations, the suits for recovery thereon, shall alone be instituted in the county of Merrimack, and State of New Hampshire, and in no other place. Acts of Incorporation, § 7.

Munger, for plaintiffs.

We contend in the first place, that the seventh sections of the acts of incorporation do not require the plaintiffs to bring their actions in Merrimack county in New Hampshire. Those sections provide for a special case, and not for the cases at bar. 4 Metc. 212.

2. The plaintiffs are residents in this county, and have at-

tached the credits of the defendants in the hands of the trustee, as resident of this county. R. S. chap. 114, § 27.

3. Inasmuch as the defendants have established an agency to transact business in this State, it makes them amenable to the jurisdiction of our courts.

SHEPLEY, C. J. orally. — In these cases the defendants are corporations existing under the laws of New Hampshire, and the only question arising upon the pleadings, is, whether the plaintiffs can bring an action upon their policies, elsewhere than in the county of Merrimack in the State of New Hampshire. On examination of the seventh sections of the acts of incorporation, which are made a part of the policies, it appears, that these sections attach only in a special case therein provided, and not in all cases which may arise. The plaintiffs do not appear to be in that condition, where they must pursue the special remedy given them by these sections. If the defendants had estimated the loss of the plaintiffs, and performed the duties enjoined, upon notice of the losses, then the plaintiffs would have been obliged to pursue the special remedy allowed them by their policies. But we cannot distinguish these cases from that in 4 Metc. 212, and are satisfied with the reasonings of that case. *Respondent ouster.*

WILLIAM HUSE *versus* INHABITANTS OF THE COUNTY OF CUMBERLAND.

The fees for committing persons to the house of correction in Portland, should be allowed by the county commissioners, and paid out of the county treasury.

But, before an action can be maintained to collect them, they must be audited by the county commissioners, and found to be due.

THIS was an action to recover the plaintiff's fees for committing sundry persons to the house of correction in Portland. The plaintiff was a constable of the city of Portland, and the mittimusses which he executed, issued from the Municipal Court of said city. The county commissioners, being of opinion that

the fees of the officers who served said warrants, should be paid by the city, and not by the county, were unwilling to order the payment of the fees, and this suit was commenced to settle the question. By agreement, a nonsuit or default was to be entered, as the rights of the parties should require.

G. F. Shepley, for plaintiff.

The plaintiff performed the services on warrants in criminal proceedings in the name of the State, which he was bound to execute, and he is entitled to his fees to be paid by the county. R. S. chap. 152, § 12; chap. 168, § 2; chap. 178, § 9 & 29.

Swasey, for the county.

The proper remedy is probably *certiorari*, but any objection to the form of process is waived.

In order for the county commissioners legally to audit and allow the fees, and order them paid out of the county treasury, *there should be some statute provision authorizing them so to do.* The attention of the Court is called to the provisions of R. S. chap. 178. It is not contemplated or provided by this statute, that the costs or expenses attending the commitments (excepting in certain specified cases) shall be paid by the State or the county, but otherwise. By section 11, they are to be paid by the persons committed, or by the *towns* where they belong, to the master of the house, and by the 22d and 20th sections, the master may have *his action* against the persons committed, or against the city or town where they belong, or against their parents, masters or guardians or against their kindred.

The master of the house is thus insured the reception of all costs and expenses. The fees of the plaintiff are therefore in the hands of the master of the house of correction, and it is the duty of the plaintiff to obtain his fees from the master.

The State is not to be made chargeable with such fees, and if not, then the county commissioners cannot order them to be paid out of the county treasury, to be reimbursed by the State.

The commissioners may, by virtue of the 4th section of the statute, make such regulations as may render it highly proper

for the master to account to the officers for their fees, which he receives, or with the overseers of the city who would then be accountable to the officers. There is no provision by which the master is to account to the treasurer of the county. And it is on the whole contended that the State or county should not be made liable as contended for by the plaintiff.

The opinion of the Court was delivered orally by

SHEPLEY, C. J. — The question here raised is, how is the officer to obtain his fees for committing persons to the house of correction. Chap. 152, § 12, of R. S. provides in what cases the county commissioners are required to audit and order them to be paid out of the county treasury. One case specified is, when the party shall be acquitted, or being convicted, shall not be sentenced to pay costs; another, when the party is sentenced to pay the costs, but does not pay them to the justice; in these cases the commissioners are expressly authorized to allow the fees to be paid out of the county treasury.

But it is said chap. 178, § 11, contemplates these costs to be paid by the persons committed, or by the towns where they have their residence, and not by the county. This section does not in any way militate with the one before cited. That the costs are not paid to the justice, gives the commissioners jurisdiction, and makes it their duty to audit and allow them. But in this case the action cannot be maintained, as the commissioners have not found that the fees charged were due.

Plaintiff nonsuit.

JONATHAN M. COOLBROTH *versus* IRA PURINTON.

A paper given by defendant to plaintiff, promising to pay him one hundred and twenty-three and 6-100, on demand and interest, is a note payable in money, and for a sum certain.

ASSUMPSIT, on a paper signed by the defendant alleged to be a note of hand of the following tenor: —

"$123,06. Lisbon, 19 Sept. 1836.

"Value received I promise to pay Jona. M. Coolbroth or order one hundred and twenty-three $\frac{6}{100}$ on demand and interest. "Ira Purinton.

"Attest, Seward Jones."

The body of this paper was not written by the defendant.

Upon this statement of facts, it was agreed, that the Court might draw such inferences as a jury might draw, and render judgment either by nonsuit or default, as the facts would warrant.

J. Goodenow, for defendant.

1. The instrument described in the agreed statement of facts, is not a *promissory note*, within the meaning of the statute of limitations, as it relates to attested notes. — Because there is not mentioned "any sum of money" in such note. Stat. 1821, c. 62, § 10; R. S. c. 146, § 7; *Gilman* v. *Wells*, 7 Greenl. p. 25; *Com. Ins. Co.* v. *Whitney*, 1 Metc.

2. A promissory note to be valid as such, must be for the payment *of money only*. Story on Promissory Notes p. 19.

"It must mention the sum to be paid, a fundamental principle," the amount must be fixed and certain, same p. 21, § 19, 20. In fine, it is contended, that a promissory note, as used in the 7th section of statute of limitations, should possess all the attributes of commercial paper; it should be a plain and unambiguous engagement in writing to pay a certain sum of money *therein stated*, at the time. The instrument set forth in the statement of facts is not such. The action is therefore barred by the statute of limitations.

3. The note is void from uncertainty; and the Court will not make an agreement for the parties. Chitty on Con. 5th Am. Ed. p. 72.

There being no *evidence* of the subject matter of the contract, or of the situation and intent of the parties, the Court cannot ascertain to a moral and reasonable certainty what the contract means. Chitty on Con. p. 79.

Promissory notes are common, which are for the payment of specific articles. If the Court can supply the word "dol-

lars," they may, it is apprehended, supply other words with the same propriety, and moral and reasonable degree of certainty, as, "dollars in corn," "dollars in goods."

If there is a clerical error, it may be in the omission of more words than *one.*

A note expressed thus: — "For value received, I promise to pay A. B. sixteen in May next with interest, will not support an action. The ambiguity is patent and not to be explained by parol." *Brown* v. *Beebe,* 1 Chip. p. 227; cited in the U. S. Digest, vol. 2, p. 305, § 1217.

In all the cases where the words "dollars" or "pounds" have been supplied when omitted, it will be found, that there was evidence, in the instrument itself, or *aliunde,* showing that money *only,* and what amount, was thereby intended to be secured and paid.

It would be against public policy to hold this paper good and valid as a promissory note.

Woodman, for plaintiff.

The opinion of the Court was given orally by

Howard, J. — The Court are satisfied, that the paper declared on, is the promissory note of the defendant, payable in money and for a sum certain, and being witnessed the statute of limitations does not apply. *Defendant defaulted.*

Timothy Pratt *versus* Edward Knight.

The plaintiff is under no necessity of filing a counter brief statement, unless ordered by the Court.

Assumpsit upon a note given in 1829. The defendant pleaded the general issue, and filed a brief statement that he never promised within six years before the commencement of the action.

At the trial, before Goodenow, J., in the District Court, the defendant objected to the reading of the note, because there was no replication or counter brief statement that the note was

a witnessed note, which objection was overruled, and the note was read. By consent, the Judge reported that, with two other questions for the decision of the Court.

Barnes and *Freeman*, for plaintiff.

Augustine Haines, for defendant.

The only question defendant's counsel would present to the Court is, "whether the plaintiff could offer evidence of the making and attestation of the note, not having pleaded a replication, or filed a counter brief statement that the note was a witnessed note. Rev. Stat. chap. 115, § 18 and cases referred to in margin.

WELLS, J. orally. — The general issue is pleaded, and a brief statement of the statute of limitations. There is no rule of Court on this matter, and the plaintiff is not bound to file a counter brief statement, unless ordered so to do. But in this case there need to be no question about the pleadings, as it comes up on a statement of facts.

Defendant defaulted.

ROBERT P. BRIGGS *versus* INHABITANTS OF LEWISTON.

Where a person has been compelled to pay a town tax, wrongfully assessed upon him, he may recover it back in an action against the town for money had and received.

But the charges for officer's fees and charges for commitment, arising from the non-payment of such tax, cannot be recovered of the town.

ASSUMPSIT, to recover $4,30 paid by plaintiff as a tax assessed upon his poll and estate by the assessors of Lewiston, and the sum of $17,75 as the fees and charges for the arrest and commitment of the plaintiff on the collector's warrant for the non-payment of the tax aforesaid. Both of said sums were paid to the keeper of the prison at Wiscasset in the county of Lincoln, to obtain a discharge from said prison.

The plaintiff resisted the payment of said tax, on the ground that he was not an inhabitant of Lewiston, nor liable to taxation therein.

At the trial before WELLS, J. the defendants objected to the introduction of any testimony in relation to the costs and charges of commitment to jail; whereupon it was agreed by the parties that the cause should go on to trial, and if the verdict should be for the plaintiff, the verdict should be for the tax, and the costs and charges of commitment, subject to a revision by the whole Court, and reduced to the amount of the tax, in case the Court should be of opinion, that the costs and charges could not be recovered in this action.

A verdict was returned for the plaintiff.

Foster, for defendants.

Fessenden, Deblois & Fessenden, for plaintiff.

The plaintiff has a right to retain the verdict for the whole amount rendered; the sum of $17,75 being paid for expenses of commitment is recoverable in an action of assumpsit of the town, having been paid by the plaintiff to obtain his release from jail. R. S. chap. 14, sect. 66; *Preston* v. *Boston*, 12 Pick. 14; *Amesbury W. and C. Man. Co.* v. *Amesbury*, 17 Mass. 463; *Sumner* v. *1st Parish in Dorchester*, 4 Pick. 261.

TENNEY, J. orally. — The plaintiff, according to the finding of the jury, being an inhabitant of Auburn, and with no property in the town of Lewiston, was assessed by the defendants in the sum of $4,30, and refusing to pay it was committed to prison. To obtain his discharge he was obliged to pay $17,75 for costs and charges, in addition to said tax. The question is, whether he can recover both of these sums in this form of action.

The money paid for the tax to the jailer was only another mode of paying it to the collector, and was in effect paying it to him. It was then in the hands of the town, and being really the money of the plaintiff, the town had no right to retain it, and the action was rightly brought to recover it back. As for the expenses and charges paid by the plaintiff to the jailer, and remaining in his hands, he cannot in this way recover it of the town. Had it been paid to the collector, it would still have

been the money of the officer and not money in the hands of the town. The town could not recover it out of his hands. And they are not liable to the plaintiff.

Verdict amended so as to stand for the amount of the tax.

MEM.— This case was argued at a former term of the Court, but was mislaid.

JAMES H. MAYALL, *Petitioner, appellant from a decree of the Judge of Probate.*

Where a testator provided in his will that any of his children, after they should come of age, should have the privilege of continuing at home in pursuit of the common business of the family, and to receive as a compensation for their labor, at the rate of $130 a year, for the boys, and 75 cents per week for the girls; *it seems*, that the services rendered were conditions upon which they should receive said sums, and that they were legacies, which might be recovered in an action at law against the executor.

And that such legacies might accumulate until the division of the estate fixed by another clause in the will.

But where the judge of probate refuses to grant a petition to sell real estate, to pay the *debts* of the testator and charges of administration, and dismisses the petition, and an appeal is taken to this Court; and there is no exhibition in the decree, nor in the reasons for the appeal, of the evidence presented to the judge of probate, nor does it appear, that there was satisfactory proof that the services had been performed, for which the claim was made; nor that the personal property was inadequate to meet what was required, the decree of the judge of probate must be affirmed.

AN appeal from a decree of the judge of probate for Cumberland county, refusing to grant a license to sell the real estate of the testator, to the amount of $7500. The facts appear in the opinion of the Court.

WELLS, J.— This case comes before us by an appeal from the judge of probate, upon his refusal to grant the prayer of the petition.

But the grounds upon which the decree was made, are not

stated. The decree states, that "on a hearing of this petition and the evidence adduced, the prayer of said petition is not granted, and the petition dismissed."

There is no exhibition in the decree, nor in the reasons for the appeal from it, of the evidence, presented to the judge of probate.

It does not appear, that there was satisfactory proof, that the services had been rendered, as required by the bill, nor the amount of them, nor that the personal property was inadequate to meet what was required, and an absolute necessity for a sale of the real estate. We cannot therefore say, that the decree is erroneous, and it must be affirmed.

But presuming the question, between the parties, to have arisen from the construction of the will, we have concluded to examine it, and to express our opinion in relation to it.

Such a course may facilitate an amicable arrangement, and supersede the necessity of renewed action, in the probate court.

The will of Samuel Mayall was approved in January, 1832. The executors under the will having ceased to act, the petitioner was appointed in February, 1846, administrator *de bonis non, cum testamento annexo.* He asks for license to sell real estate, for the purpose of discharging obligations created by the will. The first clause in the will, gives to the widow and minor children "the use, control and benefit" of both the real and personal property, until the youngest son, if he lives to the time, shall become twenty-one years of age, "which will be on the twenty-sixth day of March, 1845."

The second clause is as follows: — "Secondly, I will that on the twenty-sixth day of March, 1845, my wife Anna shall, if she so chooses, take, to her own exclusive use and control, her dower in said property, and that the remainder of said property shall be then distributed, in equal parts among my children, as follows," &c.

The third clause provides for a deduction, from the share of any minor child, who shall neglect to aid and assist in "the prosecution of the business at home" by absence and withdrawal

of their services, at the rate of one hundred dollars for each year, "when the dividend shall be made."

The fourth clause provides, that any of the children, after they shall have become of age, shall have the privilege of continuing at home, in pursuit of the common business of the family, and to receive as a compensation for their labor, at the rate of one hundred and thirty dollars per year, for the boys, and seventy-five cents per week, for the girls, subject to be discharged from such labor, when a majority of the family shall so determine.

The petition alleges, there is due to the heirs, arising from their services, under the fourth clause of the will, $7500. And the reason, for the appeal, is confined to the refusal, to grant a license for a sale of real estate, to pay for such services.

Judges of probate have power to license the sale of real estate for the payment of just debts and legacies and incidental expenses of sale, when such sale is necessary. Chap. 112, § 1 and 2, R. S.

The services of the adult children can not be denominated a debt. The testator could not contract a debt after his decease. But he has the right to make such disposition of his property, not forbidden by law, as he might think proper. He can attach conditions to his bequests, more or less onerous, and prescribe the terms, upon which any one shall enjoy his bounty. He has the most perfect right to give an annuity of $130, to any of his children, and if personal services are required, as a condition of such gift, it is thereby only rendered the less valuable. The title to the gift is perfected by the performance of the condition.

In the case of *Farwell* v. *Jacobs*, 4 Mass. 634, it appears, that the testator directed the executor to support in sickness and in health, the testator's father. The Court decided that an action was maintainable by the testator's father to recover damages, and that the direction, in the will, must be considered, as to the remedy, as a legacy.

The performance of labor, required in the present case,

makes the claim, to the benefit of the direction, more meritorious.

It results from the authority of the case cited, that those children, who have performed labor, as required, in the will, could maintain an action against the executor or the administrator *de bonis non*, to recover the sum directed to be paid to them. And upon a failure of assets, derived from personal property, a resort must be had to the real estate, to supply the deficiency.

The ordinary limitation of suits against executors does not bar the recovery of a legacy. R. S. c. 120, § 31.

But what length of time did the testator intend to embrace, in the fourth clause? He must have contemplated some period when it should terminate, although his intention in this respect, is not clearly expressed. From the whole will, we can gather a disposition, on the part of the testator, to make an equal distribution of his property. And as his children, who were of age, had probably labored with him, during their minority, he was desirous that the minor children should also labor in like manner, until they should become of age. In the meantime, those, who were of age, were entitled to compensation for their services. Thus each one was to receive a share of the estate, equal to the service rendered.

The use of the property, mentioned in the first clause, was to cease, when his son Ebry arrived at the age of twenty-one years, and the testator says in his will, that he will be of that age, March 26, 1845. It does not appear but that Ebry is still living, except it is said, on the back of the petition, that all the heirs concur with the petitioner, in his request, and the name of Ebry is not among them. The widow's name is signed in concurrence with the heirs.

The second clause is imperative in its terms, that on the twenty-sixth day of March, 1845, his wife shall, if she chooses, take to her own exclusive use and control, her dower, and the remainder of the property shall be then distributed among the children. No mention is made in this clause of Ebry, nor of any earlier division in case of his death. The first clause re-

lates to the use of the estate by the wife and children, the second to the period of division. But if Ebry had died before he was of age, the time of division being absolutely and positively fixed, in the second clause, must be understood to be the time, intended by the testator.

The wife, if she pleased, could have relinquished her dower to her children, or she could take it to her own use; in either event, the estate could be divided. The testator could not have intended, that his children should labor on the homestead, under the provisions of the will, during their lives. And they could do so no longer, after a division of the estate.

No more suitable time, ascertained from the will, can be discovered for the termination of the services of the children, for which they were to receive the testator's bounty, than that fixed for the division of the estate, by the testator, in the second clause of the will.

The conclusion, to which we arrive, is, that the petitioner is under legal obligation to pay the sums directed to be paid, by the will, to the children, who have performed the required service, but that nothing is to be allowed after the twenty-sixth day of March, 1845.

If the widow and heirs have agreed upon the several sums, to be paid to the children, as they are the owners of the whole estate, they can make such division of it, as they may deem equitable, and can sell the same, without a license.

The decree of the judge of probate is affirmed.

WHITMAN, C. J. — The application to the judge was for liberty to sell for the payment of debts; not for the payment of legacies. The opinion concludes that the claim set up by the heirs, was not a debt. It does not appear why the judge decreed against the prayer of the petitioner. It may have been for that cause. But if the application were for the payment of legacies, has the amount of such legacies been ascertained? If not, how could the judge be expected to grant license to sell, understandingly? Is not the provision in the will, as to those of age, who might remain in the family, too

vague to be carried into execution? When the testator has fixed no time when such continuance in the family shall cease, excepting a vote of its members, what right have we to determine on any particular time for the purpose? Again, the opinion does not seem to me to be correct in saying, that the provision is absolute for a division of the estate in 1845. It was optional with the widow to take her thirds, and it is the residue only, after she shall have done so, that is divisible at that time. If she took no thirds, there would be no residue to divide. Again, in 1845 all the children must have become of age; and all but Ebry must have become entitled to years of earnings before that time. Yet the will is positive, that if the widow took her share in 1845, each heir should have one share of the estate. How is this consistent with a legacy to each of the heirs for services to that time, amounting to different sums, and in the whole equal, it may be, and probably would be, to the whole estate. In short, the will is so vague and inconsistent in its provisions as, to my apprehension, to render them nugatory, and I do not see how a probate court could act understandingly in granting liberty to sell any part of the estate for the payment of either debts or legacies.

T. A. Deblois, for petitioner.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF LINCOLN.

ARGUED AT MAY TERM, 1849.

GEORGE H. HATCH *versus* SIMEON LAWRENCE *& als.*

Where a poor debtor, under bond given to liberate himself from arrest, duly cites his creditor, discloses personal property not exempted from attachment, and takes the oath prescribed; but within thirty days afterwards refuses to deliver the said property, to an officer, having a renewed execution to take it upon, his bond is thereby forfeited.

Although one of the conditions in the bond differ from the phraseology of the statute, so as to read that the debtor will "*deliver himself and go into close confinement,*" instead of reading that he will "*deliver himself into the custody of the keeper of the jail,* into which he is liable to be committed under said execution," the bond is nevertheless a *statute* bond.

DEBT, upon a poor debtor's bond. The case came up by appeal by the defendant upon a statement of facts from the District Court, REDINGTON, J.

The bond was dated June 24, 1843, and the principal in the bond cited the creditor, and disclosed before two justices of the peace and quorum, December 8, 1843, and the oath was properly administered to him.

The principal disclosed four tons of hay and a bunch of shingles, and stated that he was willing to turn out to the creditor, the shingles and so much of the hay as was not

exempted from attachment. The execution was renewed, and within thirty days for the disclosure, the officer demanded said hay and shingles upon said execution, which the debtor refused to deliver. The officer made a return accordingly upon the execution.

One of the conditions of the bond was, that the "debtor might deliver himself, and go into close confinement."

Whitmore, for defendants.

The defendants have not lost the benefit of the oath, by the debtor's neglect or refusal to turn out the hay and shingles disclosed, to the officer having the execution. The language of the statute is he, (the debtor,) shall derive no benefit from the certificate. R. S. chap. 148, § 29, 30, 31, 32 and 34.

The shingles were of no value for the purpose of satisfying the execution. They would not sell for enough to pay the expense of advertising. And the hay was exempt from attachment. R. S. chap. 114, § 28.

But if the Court shall be of opinion that the property should have been turned out by the debtor to the officer having the execution, the question presents itself, what has the debtor, (it will be seen that the forfeiture affects the debtor only, and not the sureties,) lost by the forfeiture referred to in sec. 34. He loses the benefit of the certificate. If imprisoned, he shall not be liberated, &c. Sec. 32, chap. 148.

We claim none of the benefits of the certificate in this suit. We do not need it, even as evidence that we have fulfilled the condition of the bond. The case finds the fact.

We say the provisions of sec. 34, have nothing to do with a suit on this bond. Neither the principal nor the sureties have agreed that the debtor or any third person shall not secrete the attachable property disclosed. This section of the statute clearly defines the penalty which shall attach to the debtor, if he secretes the property, and that penalty is sufficient to protect the rights of the creditor.

Again, if the Court should by any possibility come to the question of damages, we contend this bond is not a statute

bond. It contains a condition more onerous than the statute bond, viz. "*and go into close confinement.*" Sec. 20, chap. 148, R. S. See act of Feb. 9th, 1822.

See the act of 1848, entitled "an act additional for the relief of poor debtors, sec. 2d. It gives the defendants the right to have the damages, if any, assessed by the Court or jury, and the defendants choose to have the damages, if any, assessed by the jury.

If this bond is not a statute bond, why should the defendants suffer because the debtor has not complied with the provisions of the statute?

The certificate described in sec. 31, chap. 148, is only necessary when the debtor is imprisoned. *Kimball* v. *Irish*, 26 Maine, 447.

J. S. Abbott, for plaintiff.

The case shows that the debtor disclosed personal property not exempt from attachment, and that within thirty days it was properly demanded of him on a renewed execution; and he refused to deliver it. Hence he can derive no benefit from having been admitted to the oath. R. S. chap. 148, § 34.

The plaintiff is entitled to judgment on the bond against the principal and surety. This has been decided at least twice, once in Somerset county in 1846, and again in 1848, in *Bates & al.* v. *Williams & als.* So that argument is unnecessary.

TENNEY, J. — One of the conditions required by the statute in a bond given upon the arrest of a debtor on execution is, that he "will within six months thereafter, cite the creditor before two justices of the peace and of the quorum, and submit himself to examination, and take the oath prescribed," &c. R. S. chap. 148, § 20.

By the terms alone of this condition in the bond the forfeiture would be saved by its performance.

But if the statute by virtue of which the bond is given, requires in certain cases, that the debtor shall do something further, after he has taken the oath, to make the performance

available as a part of his duty under the bond, and he shall fail therein, there would still be a forfeiture.

One object of the statute in providing for the disclosure of a debtor arrested on execution is, that the creditor may know his pecuniary means, and if property subject to attachment is disclosed, what it is, and where it may be found, that it may be taken and disposed of, in partial or full satisfaction of the debt.

If the debtor should take the oath and receive the certificate, both in the forms prescribed in the Revised Statutes, chap. 148, sections 27 and 32, after having disclosed attachable property within his own control, (although the creditor may have a lien upon it,) and should fraudulently dispose of it, or omit to surrender it on a legal demand, so as to deprive the creditor of the benefit contemplated, the purposes of the disclosure would be lost to him, provided the oath notwithstanding should prevent a forfeiture. It is true, that by the latter part of the thirty-fourth section of the same chapter, another remedy is provided in such an event, but which may prove inadequate, where the debtor may again and again elude the vigilance of the creditor and protect the property, which it may appear by his oath, he may own and possess, and which is subject to be raised on execution, if it can be reached. But the former part of the same section provides that the debtor shall receive no benefit from the certificate, if he shall transfer, conceal, or otherwise dispose of the personal property, which he shall have disclosed, and which is subject to attachment, within the term of thirty days after the disclosure, and the time, when the certificate shall be given, or suffer the same to be done, or shall refuse to surrender the same on demand of any proper officer, having an execution on the same judgment within the same time. The question presented is, whether such fraudulent acts or omission, shall cause a forfeiture of the bond.

The certificate is merely the evidence of the proceedings recited therein; it is the latter alone which really confers the benefit upon the debtor, and if they can be legally shown by other evidence, they will have the same validity as when shown

in this mode. And the statute has not made the certificate indispensable, as proof that the oath has been taken. R. S. chap. 148, § 32. *Kimball* v. *Irish*, 26 Maine, 444. But it is a species of proof, which is sufficient, unless in some measure controlled, to show that the oath has been taken, and if done before a forfeiture of the bond has been incurred, to prevent it afterwards. The facts certified are the warrant for the discharge of the debtor from imprisonment, on the execution referred to, if he is in prison at the time of the taking of the oath, and it secures him from arrest from any execution, which shall be issued upon or grow out of the same judgment. But if the certificate should become nugatory under the statute, the proceedings, of which it is the evidence, cannot be effectual. It was not intended that the certificate should only fail to be evidence of what it recited, and allow the debtor to prove the same facts by other evidence; but that the certificate and every thing which it records, should cease to be beneficial to the debtor. If the certificate is affected by his misconduct, so that he can derive no benefit therefrom, it becomes a nullity, and equally so, those facts, which it states, are of no avail. All the benefits, which it may produce to the debtor, while it has effect, will cease when his fraud shall destroy its operation. If made before the breach of the bond, the benefits, which it confers are important; and the statute provides, that he forfeits all benefit therefrom, by the fraudulent conduct mentioned. One of the benefits is to save the forfeiture of the bond, and if the certificate fails to do this, it results that the bond is broken.

This is not a new question. The same point was presented to the whole Court in the case of *Wiggin* v. *Davis & al.* in the county of Somerset in 1846, and after argument it was held, that a breach of the bond had taken place.

It is contended that the bond is not in conformity to the statute, therefore the provisions of the R. S. chap. 148, section 34, do not apply. No copy of the bond has been furnished and it is not the duty of the Court to provide papers, which the parties have omitted to obtain. *Wood* v. *Wyman & al.* 25

Maine, 436. But the variance from the statute requirement, as stated by the defendant's counsel in argument, is not such that we are satisfied the bond fails to be a statute bond; one of the conditions required by the statute is, that the debtor shall within six months, "deliver himself into the custody of the keeper of the jail." The language of the bond is said to be, "deliver himself and go into close confinement." If there is a substantial compliance with the law, it will be sufficient, although the form should vary. It is the duty of the keeper of the jail, to put into close confinement those, who may be in his custody, under executions. And to go into close confinement under a voluntary surrender of himself, is not essentially different from the delivery of himself to the jailer, when the result must be the same.

The cause must stand for the assessment of damages according to the statute of 1848, entitled "an act additional for the relief of poor debtors."

Richard F. Fletcher *& al. versus* James D. Clarke *and trustee.*

The adjudication of the Judge of the District Court *as to the facts* in a trustee process is conclusive.

Exceptions can be sustained, only when it appears from the *exceptions themselves* that he misapprehended or misapplied the law upon the facts as he had adjudged them to be. Unless they show such misapprehension or misapplication by him of the law, they must be overruled, although this Court might come to a result different from his upon the facts as presented by the disclosure and the depositions used in connection therewith.

If a supposed trustee holds goods, effects or credits of the principal defendant, under a conveyance from him which is fraudulent as to creditors, he will be charged, *if the fraud was actual*, whether the plaintiff became a creditor *before* or *after* such conveyance. But if the fraud was merely a *legal* one, he will be discharged unless the plaintiff was a creditor at the time of such conveyance.

Exceptions from the District Court, Rice, J., when the supposed trustee was charged.

The adjudication in the District Court was made upon the

disclosure of the supposed trustee, and depositions taken and filed in the case, and these with the writ formed the case as presented to this Court.

Lowell, for trustee, contended that the disclosure, with the depositions, did not exhibit a case, in which the trustee could be charged. The argument is omitted, because the decision did not turn upon that question.

Kennedy and *M. H. Smith*, for plaintiff.

R. S. chap. 119, sec. 69, provides that a person may be adjudged trustee on account of goods, &c. which he holds under a fraudulent conveyance. Same chap. sec. 34, provides that any question of fact may by consent, be tried and determined by the Court, or submitted to a jury.

In *Page* v. *Smith*, 25 Maine, 256, one of the marginal notes is, "In a case coming under that section of 'the statute,' (that is the 69th section,) the ascertainments of the matters of fact, come within the province of the District Judge, and exceptions do not lie to his decision of such matters of fact."

In the case at bar the parties did not choose to have the question whether the supposed trustee was chargeable, or not, submitted to a jury, but left it to the District Judge and his decision is final under the circumstances of this case.

No point of law is presented to the Court by the exceptions. The bill of exceptions merely states, that the trustee having disclosed, and being charged by the District Judge upon his disclosure, and the depositions taken and filed in the case, files this bill of exceptions, &c.

The bill of exceptions afterwards states that the writ, disclosure and depositions constitute the entire case, and are to be referred to without copying. This does not make them a part of the exceptions, and they cannot properly be taken into consideration by the Court; so decided in *Wyman* v. *Wood*, 25 Maine, 436.

TENNEY, J. — This case is before us upon exceptions to the judgment of the Judge of the District Court, charging the person summoned as trustee. Previous to the enactment of

the Revised Statutes, the adjudication in such cases was ordinarily upon the disclosure alone. If it appeared by the statements therein, that the supposed trustee had no goods, effects or credits of the principal defendant in his hands, he was discharged. But the existing statute upon the subject of foreign attachment has new provisions. By chap. 119, § 33, amended by act of 1842, chap. 31, "The answer and statements, sworn to by any person summoned as trustee, shall be considered as true, in deciding how far he is chargeable, until the contrary is proved; but the plaintiff and trustee may allege and prove other facts not stated or denied by the supposed trustee, which may be material in deciding the question." By the 34th section, "any question of fact arising upon such additional allegations, may, by consent, be tried and determined by the Court, or may be submitted to a jury, in such a manner as the Court shall direct." And by the 69th section of the same chapter, it is provided, "If any person summoned as trustee, shall have in his possession any goods, effects or credits of the principal defendant, which he holds under a conveyance, that is fraudulent and void, as to the creditors of the defendant, he may be adjudged as trustee, on account of such goods, effects or credits, although the principal defendant could not have maintained an action therefor against him."

It could not have been the intention of the Legislature, in the last section quoted, to provide only, for a case, where the supposed trustee should disclose *in totidem verbis*, that he held goods, effects or credits of the principal defendant, in fraud of the rights of creditors; from experience we might infer, that by such a construction the provision would be in fact in most instances nugatory. If the meaning of the provision was designed to be thus limited, the thirty-fourth section of the chapter could have no application to a question arising under the sixty-ninth section; but its object is not restricted.

If the creditor supposes, that he may obtain payment of his debt by a resort to a suit, under the sixty-ninth section, it is competent for him, also, if the supposed trustee makes dis-

closure, to apply the means referred to, in the thirty-third section. After he has alleged and proved other facts by virtue of that provision, in addition to those furnished by the disclosure, the whole is to be submitted to the Court or a jury for examination. All the statements in the disclosure may be compared one with another; and the other evidence adduced is to be viewed in connection therewith, and from the whole the question is to be settled, whether the supposed trustee holds fraudulently against the creditors of the principal defendant, any goods, effects or credits. The result thus found may be very different from that to which the one attempted to be holden as trustee has come in his disclosure, or even from that to which the Court or a jury would arrive from the disclosure alone. But when all the facts, in connection with circumstances are considered, it may be a case of palpable fraud, although the transaction between the principal defendant and the one summoned as trustee may be one which the law will uphold as between themselves, It was manifestly the intention of the authors of the statute, that the question of fraud should be settled by a full examination of the evidence in the same manner, that it would be, if presented to them as a court of equity; or if presented to a jury, it would be determined as an issue of fact is ordinarily settled between one, who represents an attaching creditor, and the purchaser of property, where the latter is alleged to have made the purchase in fraud of the rights of the former. *Page* v. *Smith.* 25 Maine, 256.

Where such fraud as is referred to in this provision is found either by the Court or the jury, nothing remains but the application of the law to the fact so found. If the fraud is one of law merely, and the plaintiff in the suit became a creditor after the transfer by the principal defendant, the supposed trustee may with propriety be discharged. But if the fraud was actual, prior and subsequent creditors may avail themselves of the statute. If the whole evidence was submitted to the judge he would pass upon the disclosure and such other evidence as should be adduced; he would ascertain the facts to his satisfaction, and from his conclusion thereupon, and the

supposed law of the case his judgment would be formed and pronounced.

It is only when a party is aggrieved by any opinion, direction or judgment of the District Court in matter of law, in a case not otherwise appealable, that he can allege exceptions. R. S. chap. 97, sect. 18. The facts cannot be revised on exceptions.

The judgment of the District Court is to be considered as correct, till the excepting party shows it to be otherwise, under the exceptions themselves. It does not devolve upon the other party to sustain the opinion, direction or judgment of the Court, until legal error is shown. And if the exceptions do not afford satisfaction, that the District Court misunderstood and misapplied the law, they must be overruled. It cannot be assumed, that the facts found by the Court, to which it applied the law, when evidence was to be considered and weighed, was otherwise than as it treated it, however erroneous its conclusions may be believed to have been. Before the exceptions can be sustained, it must appear therefrom, that upon the facts as they were found, the *law* did not authorize the opinion, decision, or judgment complained of.

In the case at bar, the excepting party was charged upon the disclosure and the depositions filed in the case. No exceptions are taken to the mode in which the evidence of the plaintiff was introduced ; the evidence was proper for the consideration of the Court. It does not appear from the exceptions in what manner any question of fact presented was decided. If the question was, whether there was fraud as against creditors, in the supposed sale of the personal property referred to in the disclosure, by the principal defendant to the supposed trustee, and it was found that there was no fraud, the law would seem to require a judgment of discharge ; but if otherwise, the judgment which was given, might be fully authorized. The case does not present any question of law, which was submitted to the Court, nor does it disclose any facts found, upon which a question of law must have arisen ; there is therefore nothing

which can lead us to the conclusion, that the Judge erred in any matter which we have now power to examine.

Exceptions overruled.

The case of *E. L. Pottle & al.* v. *James D. Clark and Nelson Calderwood, trustee,* was submitted by the agreement of parties to the Court upon the same disclosure of the trustee, and depositions that were taken for the case of *Richard Fletcher & al.* v. *James D. Clark and Nelson Calderwood, trustee.* In that case also *Exceptions overruled.*

ISAAC JACKSON *& al. in equity, versus* LOT MYRICK,
JOSIAH MYRICK,
CUSHING BRYANT,
AUGUSTUS F. LASH,
EBEN'R D. ROBINSON,
BARTLETT SHELDON
AND WIFE,
JOSEPH STETSON,
DANIEL FLY,
NATHANIEL BRYANT.

In a bill to redeem mortgaged real estate, the plaintiffs, to establish their right to redeem, proved the following state of facts. Soon after the giving of the mortgage, one B claimed some interest in the land, and conveyed to certain purchasers a few small pieces of it. Some of his execution creditors, (whose rights the plaintiffs have,) levied his supposed life estate in the premises, and then brought an action against him for possession and mesne profits, in which they prevailed.

While that suit was pending, the mortgager conveyed to said purchasers the small pieces above named; and also conveyed to B the whole premises, taking back from B a mortgage.

The bill was against the original mortgagees, and against B, and also against the mortgager and the persons who claimed the small lots under B. *Held,* the defendants were not estopped to deny that B had any interest in the land, when the first suit was commenced, and that the plaintiffs' right to redeem was not established.

An action in a plea of land, was brought against B, founded on the levy of an execution against him, in which he pleaded that he was not tenant of the freehold, and in which judgment was rendered against him.

Pending that suit, N conveyed to him the land in controversy, and took back a mortgage of it. In a suit by the same plaintiffs, neither B, nor N, nor persons claiming under them, are estopped to deny that B had any interest in the land at the commencement of the first suit.

THIS is a bill in equity to redeem real estate mortgaged.

The estate at one time belonged to Nathan W. Sheldon. He mortgaged it Oct. 12, 1837, to Lot Myrick, Cushing Bryant, Josiah Myrick and Augustus F. Lash, to secure the payment of three notes, one of $333,34, and two of $333,33 each, to Lot Myrick and Josiah Myrick.

It is against that mortgage that the bill seeks to redeem.

Whether the plaintiffs have established in *themselves* a right to redeem, is the exact and decisive inquiry, upon which the case turned. It will not be necessary, therefore, to exhibit any more of the case than relates to that inquiry.

The plaintiffs claim the right under Bartlett Sheldon, through a levy, which was made on the 17th Feb. 1842, upon his supposed life estate in the premises. The levying creditors, immediately after said levy, sued their writ of entry against said Bartlett, and recovered judgment for possession and mesne profits, May, 1846. Said Sheldon pleaded *non tenure*, in that suit.

All the rights of the said levying creditors came by due course of conveyance to the plaintiffs, who seasonably requested the mortgagees to render an account of rents, &c., that they might redeem. But no such account was rendered.

The bill charged that N. W. Sheldon, on the 10th October, 1841, conveyed the land to Bartlett, to hold for the term of his natural life.

The defendants in their joint and several answers, deny that N. W. Sheldon delivered such a life estate conveyance, to Bartlett; but assert that, if ever such a conveyance was drawn up, it was deposited with E. D. Robinson, as an *escrow*, to be delivered to said Bartlett on certain conditions, which were never performed; and that it never was delivered, but was afterwards canceled in the presence and by the consent of all parties. And they assert that they have no knowledge or

belief that said Bartlett ever had such a life estate in the premises.

The plaintiffs then amended the bill, "by inserting an amended description of the conveyance from Nathan W. Sheldon to Bartlett Sheldon, as follows," viz: "And thereafterwards said Nathan W. by his deed indented, duly executed, dated Oct., 1841, conveyed the same mortgaged premises to said E. D. Robinson, to his heirs and assigns forever, in trust for the use of said Bartlett and his wife, Lucy H. and their heirs forever, and said Robinson accepted said trust, and executed said deed, on his part, covenanting to fulfil said trust."

The plaintiffs further charge, that *before* the last named deed was given, and soon after the giving of said mortgage deed, said Nathan W. for a sufficient consideration, conveyed the same premises to Bartlett Sheldon, his heirs and assigns forever; that said Bartlett having entered into the premises, continued to occupy and improve the same as his own rightful property; that said Bartlett conveyed parcels of said land to different persons, viz: one parcel to Joseph Stetson on Nov. 26, 1837, in consideration of $360; one parcel in Jan. 1838; one parcel to L. S. Hubbard, Sept. 30, 1841, in consideration of $800; and that afterwards, in order to defraud the plaintiffs and also the creditors of said Bartlett, and to defeat the titles to the parcels said Bartlett had conveyed as aforesaid, the last named deed from Nathan to Bartlett, was delivered up to said Nathan and canceled, without having been recorded; and the deed of trust was made in lieu thereof. And that afterwards, for the purpose of defeating the said levy which was made as aforesaid, upon said Bartlett's life estate, the said deed of trust was fraudulently given up and canceled.

Josiah Myrick died since the bringing of this suit.

A bill of revivor has been brought against E. W. Farley, administrator to said Josiah and also against four children and heirs of said Josiah.

To this bill of revivor the respondents therein have pleaded that the mortgage was given to secure notes made payable to

Lot and Josiah Myrick, and that on the death of Josiah the notes became the property of Lot, by survivorship.

Augustus F. Lash also died after the bringing of this suit, and a bill of revivor has been brought against his representatives to which they have pleaded the same plea in substance as that offered by the representatives of Josiah Myrick.

It appeared at the trial that N. W. Sheldon, while the suit against Bartlett was pending for the mesne profits, by deed dated October 20, 1843, conveyed to Bartlett the mortgaged premises, and that Bartlett, by deed dated October 19, 1843, mortgaged back sixty acres, "being part of the same farm this day conveyed by said Nathan to me;" that judgment in said suit for mesne profits was recovered against said Bartlett in 1846, the suit having been commenced in May, 1842.

Nathan W. Sheldon, in 1842, conveyed to Stetson and Hubbard, respectively, the lots which Bartlett had conveyed them.

Bartlett Sheldon and N. W. Sheldon are made defendants in this suit, as well as the original mortgagees, as also is Stetson and also Bryant, who claims under Hubbard, and Flye, who claims under Stetson.

The facts, deemed by the Court essential in the decision of the case, are stated in their opinion.

Ruggles, for plaintiffs.

1. The deed of trust, N. W. Sheldon to E. D. Robinson, as trustee for Bartlett Sheldon and his wife, and the levy of execution, *Jackson & al.* v. *Bartlett Sheldon*, gave them a life estate in the mortgaged premises, subject to the mortgage. *Waite* v. *Belding*, 24 Pick. 129, 133; *Cook* v. *Holmes*, 11 Mass. 526, 531; *Hawley* v. *Northampton*, 8 Mass. 3.

2. The judgment recovered by *Jackson & al.* against *Bartlett Sheldon*, in a writ of entry, commenced May, 1842, estops said Bartlett from denying the execution and delivery of the said deed of trust, and binds his assignees becoming such *pendente lite*, and all claiming from or through him subsequently. Story's Eq. Jur. § 405 and 416; Daniel's Chan. 1267; *Atlas*

Bank v. *Nahant Bank*, 23 Pick. 489, 490; *Eldridge* v. *Acocks*, 2 Pick. 319; Jackson on Real Actions, 145, note u; *Bishop of Winchester* v. *Paine*, 11 Ves. 194; Fonbl. Eq. b. 2, chap. 6, § 3, note n.

3. Nathan W. Sheldon has no title and claims none, but by virtue of a mortgage from Bartlett Sheldon, dated 1843, of about sixty acres, part of said premises; and being an assignee *pendente lite*, he is bound by the judgment against said Bartlett, and the deed would give him but a reversionary interest in the bond. And if it were otherwise, he could not deny plaintiffs' right to redeem, in respect to the residue.

4. Stetson, Fly and N. Bryant, (parties defendants,) owners each of but an acre or two of the premises, deriving their title from N. W. Sheldon before the matter of estoppel, and also from Bartlett Sheldon by former deeds, may not be affected by the judgment against Bartlett, and might either of them redeem. But they cannot question the plaintiff's right to redeem also, in respect to the residue, and are liable to contribution. *Taylor* v. *Porter*, 7 Mass. 355.

5. *Lot Myrick* and *Cushing Bryant*, claiming no interest but by virtue of the mortgage, are, on this question of redemption, estopped to deny the plaintiffs' right to redeem, by whatever estops those who claim the right in equity to redeem adversely to plaintiffs.

So with the representatives of *Augustus F. Lash*, and the representatives of *Josiah Myrick*, the deceased mortgagees. As to the operation of the deed of quitclaim from Bartlett Sheldon to Lot and Josiah Myrick, of January, 1846, the former never having taken delivery of it and repudiating it, took no interest by it, and the latter was, and his representatives are, estopped to claim any thing by it, except a reversionary interest, expectant on the death of Bartlett Sheldon.

There being no others claiming any interest adverse to plaintiffs, their right to redeem is clear and unquestionable.

6. The foregoing positions present the case independently of any question as to the actual execution and delivery of the deed of trust of 1841, and steers wide of the palpable trick, fraud

and contrivance, by which, as plaintiffs say, Bartlett Sheldon and his brother Nathan W. Sheldon have sought to elude and defraud the creditors of the former, and for that purpose to avoid the effect of the trust deed.

That attempted fraud has once undergone the fullest investigation, when N. W. Sheldon had the benefit of his own testimony before a jury, to the whole transaction, and the verdict in that case is conclusive upon Bartlett Sheldon and upon all claiming by, through or under him. The defendants, Stetson, Fly and N. Bryant, are the only persons now who have any right to make an issue on that point, and they may not have any occasion to do so.

7. The plaintiffs, having a right to redeem by virtue of their life estate in the mortgaged premises, may pay the balance due on the mortgage, and hold the land during the life of Bartlett Sheldon and until others interested in the estate, shall contribute according to the established rules and principles of equity.

For the settling of those outstanding equities, and future contingencies, this bill may be retained, on the question, should any ever arise, among these or other parties, who may become interested in the estate.

8. One tenant in common has a right to redeem and may claim to know what is due for that purpose. In preferring his bill it was necessary to make all others interested, parties, plaintiffs or defendants. He made Stetson, Fly, &c. parties defendants, they declining to be co-plaintiffs. *Gibson* v. *Crehore*, 5 Pick.

9. The mortgagers in this case were tenants in common and on the death of Myrick and Lash, two of the mortgagers, their heirs should be made parties by revivor in respect to the realty, and their administrators in respect to the account to be taken of the moneys received on the mortgage, and of the rents and profits and repairs.

10. The representatives of Josiah Myrick should be made parties by revivor on account also of the deed of Bartlett Sheldon to Lot and Josiah Myrick, of January, 1846.

S. E. Smith, for N. W. Sheldon.

M. H. Smith, for other defendants.

SHEPLEY, C. J. — The plaintiffs claim the right to redeem the estate conveyed in mortgage, by Nathan W. Sheldon to Lot Myrick, Josiah Myrick, Cushing Bryant and Augustus F. Lash, on October 21, 1837.

Since the answer of the mortgagees was filed, two of them have deceased, and the plaintiffs have filed a bill of revivor. To that, the parties summoned have appeared and pleaded.

The answers of the mortgagees admit the existence of the mortgage and deny that the plaintiffs have acquired any such interest in the estate as will authorize them to redeem it.

In proof of their title the plaintiffs exhibit a judgment recovered by Jackson and Tilton against Bartlett Sheldon, and the levy of an execution issued thereon made on February 17, 1842, on the life estate of Bartlett Sheldon in the premises, and deeds, by which the estate acquired by the levy has been conveyed to them. The principal question presented in the case is, whether Bartlett Sheldon had acquired any estate in the premises before the levy was made. The plaintiffs allege, that he had in two different modes. First by a deed of release from Nathan W. Sheldon to him; and secondly, by a deed from Nathan W. Sheldon to Ebenezer D. Robinson, conveying the estate to him in trust, to permit Bartlett Sheldon and Lucy his wife, and their heirs, to enjoy the use and occupation thereof forever.

There is proof, that such a deed of release was exhibited by Bartlett Sheldon. Its existence is denied by the answers of Nathan W. and Bartlett Sheldon. It is at least doubtful, whether a power of attorney from Nathan W. to Bartlett Sheldon was not the document, which was seen instead of a deed of release. However this may be, there is no proof of the legal execution of such a release deed by Nathan W. Sheldon, and without it the title of Bartlett Sheldon would not be established. The plaintiffs failed to prove that Bartlett Sheldon acquired any title to the premises by such a deed.

It does appear, that Nathan W. Sheldon in October or November, 1841, signed and acknowledged a deed, purporting to convey the premises to Ebenezer D. Robinson in trust, and that it was placed in the hands of Bartlett Sheldon, to be by him handed to Robinson; that Robinson received and detained it until February 15, 1842, when he signed and acknowledged it and left it in the hands of Ebenezer Webb, where it remained until the month of June, 1842, when it was handed by Webb to Nathan W. Sheldon in the presence of Robinson and Bartlett Sheldon; and that Nathan W. Sheldon there cut his name from the deed, and carried the deed away.

The defendants contend, that this deed was never delivered as a deed; that it was deposited with Webb as an *escrow* to be delivered by consent of parties upon the performance of certain conditions, which were never performed.

The plaintiffs deny, that there were any such conditions, and allege in substance, that if any attempt was made to prevent its becoming legally operative to convey the estate, it was made in fraud of the creditors of Bartlett Sheldon.

The plaintiffs have recovered a judgment at law against Bartlett Sheldon for mesne profits of the premises, declaring on their title acquired by the levy, and he is thereby precluded from again contesting their title. Bartlett Sheldon appears to have executed and delivered to Josiah Myrick a deed of release of his interest in the premises, to Josiah and Lot Myrick, bearing date on January 5, 1846. But Lot Myrick in his answer denies any knowledge of the existence of such a deed, until recently, and that he ever accepted of such a release. There is no proof that connects him with that deed. It is therefore inoperative as it respects him, and the other mortgagees not named in it. The mortgagees not being either parties or privies to the judgment before named, cannot be estopped by it.

Nathan W. Sheldon conveyed the premises to Bartlett Sheldon by deed of release on October 20, 1843, and received from him a mortgage of the same to secure the payment of a sum of money named in the deed.

The plaintiffs therefore contend, that the Sheldons are both estopped by the judgment before named, and that whatever estops them will also estop the original mortgagees to deny, that the plaintiffs have acquired a right to redeem. This position cannot be sustained. The title of the mortgagees derived from Nathan W. Sheldon in the year 1837, is not connected with or affected by any of the transactions, which have taken place since the plaintiffs made their levy. There is nothing presented in the case, which can operate to prevent them from insisting, that the plaintiffs shall establish their right to redeem. They must therefore prove, that the deed from Nathan W. Sheldon to Robinson, became an operative conveyance.

Nathan W. Sheldon in his answer says, "said deed was not to be delivered till said Bartlett paid or secured the payment of this defendant's said notes to said Myricks, and also certain other sums due from said Bartlett to this defendant or for which this defendant had become liable to pay." Bartlett Sheldon in his answer, and in a deposition taken by the plaintiffs, makes similar statements. Ebenezer D. Robinson in his answer, and in a deposition also taken by the plaintiffs, states in substance, that when he received the deed he was informed, that it was, when signed by him, to go into the hands of Ebenezer Webb, there to remain without being delivered, until Nathan W. Sheldon came to Newcastle, and then, if Bartlett Sheldon performed certain conditions, the deed was to be delivered; if not it was to be given up, and that the conditions were not made known to him. Ebenezer Webb, in his deposition states, that the deed was placed in his hands by Bartlett Sheldon and Robinson with a request to keep it safely and not to make its existence known, and that it was not to be delivered up unless all three that signed it were present. That he has no recollection of any conditions to be performed by Bartlett Sheldon. This testimony of Webb, if considered alone, proves no more, than that it was, after having been signed and acknowledged, left in his hands, not for the use of the grantee, but subject to the future disposition of all, who were interested in it. The whole testimony on this point fails to prove, that

the deed was ever delivered to any person as an executed deed of conveyance.

If the proof were regarded as sufficient to show, that the estate was held by Nathan W. Sheldon in fraud of the creditors of Bartlett Sheldon, that would not authorize the plaintiffs to redeem it, without proof that they had acquired some title to it. Bartlett Sheldon never had any title to the estate, upon which a levy could be made, unless he acquired it from Nathan W. Sheldon, and there is no satisfactory proof, that he had before the levy, acquired any legal title in the premises.

As the plaintiffs fail to show any right to redeem, it will be unnecessary to consider the other questions presented in argument. *Bill dismissed with costs.*

ENOCH TRASK *versus* WILLIAM PATTERSON.

Brief statements cannot prevent the offering of testimony, pertinent under the general issue.

The omission, in a counter brief statement, to deny any allegation of the brief statement, cannot destroy or control the effect of testimony properly received under such counter brief statement.

Where A and the wife of B, are co-tenants of land, division deeds made by A and B, do not destroy the co-tenancy.

Declarations concerning a right of way, made by the parties prior to the passing of the division deeds, cannot affect the titles.

A husband may lawfully convey the freehold, which he takes by his marriage, in the lands of his wife.

A grantee obtains no right of way by necessity, except when his land is surrounded by, or is inaccessible except through the lands of his grantor.

TRESPASS for passing with teams across the land of the plaintiff.

The land had formerly been in co-tenancy between the plaintiff and the wife of the defendant. A division had been made by deeds between the plaintiff and defendant. The plaintiff had forbidden the defendant to pass upon his land, though he and others had passed there several years.

The defendant filed a brief statement that a right of way, over the portion of the land assigned to the plaintiff, was necessary to that assigned by the plaintiff's deed to him, and that, prior to and at the time of making that division, the plaintiff agreed there should be such right of way.

The plaintiff filed a counter brief statement, denying that such right of way was necessary for the defendant, or that the plaintiff had ever consented there should be such right of way.

Upon this point the evidence was, that certain persons were appointed to recommend how the division should be made, that their report was agreed to, and the division was made accordingly; except that they recommended a right of way, over the plaintiff's, part to the land which fell to the defendant's wife, but in the conveyances, no mention of such right of way was made.

It also appeared, that the land assigned to the defendant was bounded on two sides, by the land of Chase and of other persons. Testimony was received that the making of a road across Chase's land, would be expensive and cost as much as defendant's land was worth. Other witnesses differed greatly from that estimate. The Judge ruled that a right of way could not be implied from the foregoing facts.

Defendant filed a further brief statement, alleging his wife's interest in the land, and justifying as her agent.

Defendant filed a further brief statement, alleging a license from the plaintiff.

The Judge ruled that such license was not inferable from the evidence, but if relied upon, must be proved; and that if there had been such a license, it could be revoked, unless it formed the condition or some part of it upon which the division was made, and left it to the jury whether an express license had been proved; and if proved, whether it had been revoked.

The trial was before HOWARD, J.

Verdict was for plaintiff, and defendant excepted.

Lowell, for defendant. The interest of the wife in the whole land and the co-tenancy, still continued. The husband's deed could not convey it. He might then lawfully do the acts

complained of. 1 Kent's Com. 370; *Both* v. *Adams*, 11 Verm. 156; *Melvin* v. *Locks & Canals*, 16 Pick. 137; *Lithgow* v. *Kavenagh*, 9 Mass. 161; 1 Hilliard's Abridg. page 53; *Ib.* p. 447; *Ib.* 170 & 172; 2 *Ib.* p. 311; 4 Cruise's Digest, 70 & 71; Statutes, chap. 117, page 104, March 22d 1844; chap. 27, page 22, August 2d, 1847, and Aug. 10th, 1848.

SHEPLEY, C. J. — The plaintiff and the wife of the defendant were owners as tenants in common of a tract of meadow land containing about twelve acres. The plaintiff owned three-fourths and the wife of the defendant, one-fourth. Two persons were selected, who made an examination and proposals for a division of it; and the plaintiff and defendant executed deeds releasing each to the other the parts thus assigned. Those appointed to assign the portions, stated to the plaintiff and defendant, that "whoever had the southwesterly quarter would be entitled to a road in the usual place of hauling off hay."

This declaration appears to have been made without calling out any remark from either, in reply to it. No provision was made in the deeds of release for any passage or right of way. The southwesterly quarter was conveyed to the defendant. He subsequently passed over the land conveyed to the plaintiff, for the purpose of hauling the hay from his own land.

The plaintiff has commenced an action of trespass *quare clausum*, to recover damages.

1. The general issue was pleaded and joined. The defendant filed a brief statement alleging among other matters, that the plaintiff and the wife of the defendant, were tenants in common of the premises described in the declaration. The plaintiff filed a counter brief statement alleging, that the plaintiff and defendant never were tenants in common of the premises so described, but not denying, that he and the wife of the defendant, were tenants in common.

It is now insisted, that the tenancy in common was thereby admitted, and that the plaintiff cannot be permitted to disprove it by the deeds of release.

The rules applicable to special pleading can rarely be applied to brief statements and counter brief statements. One of the important purposes designed to be accomplished by allowing them to be used instead of pleas and replications, was to relieve the parties from that exactness of allegation and denial, by which parties were sometimes so entangled as to prevent a trial upon the merits.

The terms "brief statement," convey the idea of a short notice without formal or full statements of the matters relied upon. Such brief statements cannot prevent either party from offering testimony appropriate under the general issue. Nor can the omission of a denial in a counter brief statement of some matter alleged in the brief statement, control or destroy the effect of testimony properly received under it. Such brief statements appear to have been considered as amounting to little more than notices of special matter to be given in evidence under it. *Potter* v. *Titcomb*, 13 Maine, 26; S. C. 16 Maine, 423; *Brickett* v. *Davis*, 21 Pick. 404.

2. The deed of release executed by the husband cannot have the effect, it is said, to sever the tenancy in common, or to destroy the rights of the wife as a tenant in common.

The husband by his marriage became entitled to a freehold estate in the lands then owned by the wife, that estate he could lawfully convey. *Payne* v. *Parker*, 1 Fairf. 178. *Miller* v. *Shackelford*, 3 Dana, 289. By the release deed of the defendant, the plaintiff became entitled to the sole use and occupancy of the land therein described, during the life of the husband at least.

The statutes passed since that time, designed to preserve to married women their former rights of property, can have no effect upon the rights of these parties.

3. The defendant claims to be protected by a license. The declarations of those appointed to make partition cannot affect the title to the estate. Nor could the declarations of the owners, made before their conveyances and at variance with them. The remark of the presiding Judge, that an actual license could not be inferred but must be proved, appears to have been made

in answer to a position insisted upon by the counsel "that the defendant had a positive or express license to cross the plaintiff's meadow, and that such license might be inferred from the situation of the parties and the circumstances of the case, as proved at the trial." There does not appear to have been proof of any circumstances occurring since the division authorizing the inference, that the defendant entered by license.

4. It is further insisted, that the defendant had a right of way from necessity over the meadow of the plaintiff, for the purpose of hauling his hay.

Where one conveys to another a tract of land wholly surrounded by his own land, or inaccessible except through his own land, he has been considered as granting by implication a right of way to and from it. *Nichols* v. *Luce*, 24 Pick. 102. Where the land can be occupied without it, no implication can be made. *Allen* v. *Kincaid*, 2 Fairf. 155. That part of the meadow released to the defendant, was bounded on two sides by lands owned by others.

No implication of a grant of a right of way can arise from proof, that the land granted could not be conveniently occupied without it. Its foundation rests in a necessity for it, not in convenience.

5. A way is claimed by the dedication of the plaintiff. He appears to have separated his meadow from that owned by the defendant, by making a fence and ditch in the year 1842, and to have forbid the defendant's crossing his land in that year, and in the years 1845 and 1846. The defendant notwithstanding, appears to have removed some portion of the fence, and to have passed over the land of the plaintiff every year to haul his hay.

To infer from such testimony, that the plaintiff had made a dedication of a way for that purpose, would be to make use of acts designed to prevent such an appropriation of his land to authorize it. *Judgment on the verdict.*

CALVIN STARRETT, *Appellant from decree of Judge of Probate, versus* ALMOND JAMESON.

If the guardian, in the settlement of his account, omit an entire item which he ought to have credited to the ward, that settlement will not protect him from liability, in his next settlement, to account for such item.

A guardian is accountable for interest moneys due on notes to his ward, whether he collect them, or whether they be lost by his neglect.

A guardian is not entitled to any compensation for services, if he neglect to settle a guardianship account once in every three years, unless prevented by sickness or unavoidable accident, although he was never cited to make such a settlement.

APPEAL, from a decree of the judge of probate, allowing the account of the defendant against his ward.

The defendant was appointed guardian of Daniel O. Daggett, in 1837; and the inventory, consisting of notes on interest, was duly filed in the probate court, and sworn to by the defendant, November 8, 1837. At a probate court held May 10, 1842, the defendant settled his first account, and charged himself with the amount of the personal estate as per inventory, at $353,65, being the exact value on November 8, 1837.

The plaintiff being afterwards appointed guardian of the said Daniel O. Daggett, the defendant settled his second and final account in the probate court, on the ninth day of May, 1848, in which he charged himself with the balance on settlement, May 10, 1842, $260,09, and $40, for interest collected on notes which were delivered to the plaintiff. There was no claim in his account for any loss on any of the notes, or for not receiving the whole amount of all the notes not delivered over to plaintiff as his successor. The defendant in his account also claimed $19, for his services, which was allowed. From the decree allowing this last account the plaintiff appealed.

Bulfinch, for appellant.

The plaintiff complains that the allowance for the services of the defendant was not authorized by law. R. S. chap. 110, § 28.

The defendant should be charged with the interest accruing upon the demands in his hands, and if he collected them it was

his duty to invest the money, and if he did not, the law makes him accountable for interest. A much larger sum than was charged for interest was received. That it was not brought into the first account, cannot defeat the rights of the ward.

M. H. Smith and *Kennedy*, for defendant.

Jameson's first account was settled in 1842, and was not appealed from, and Starrett cannot have that examined on an appeal from tho judge's decree, on settlement of second account, which was settled in 1848.

Starrett objects to the allowance of the $19 for personal services, because, as he states, Jameson neglected to settle his account within three years.

To this Jameson says, that this forfeiture did not attach to him, because he has never been cited to render his account. See *Bailey* v. *Rogers*, 1 Greenl. 187, being same case which is cited in margin of R. S. chap. 110, § 28.

TENNEY, J. — This is an appeal from a decree of the judge of probate, taken, as the documents in the case show, by Calvin Starrett, as guardian of Daniel O. Daggett, a minor under the age of twenty-one years, against the former guardian of the same ward.

An appeal from any order, sentence, decree or denial of a judge of probate may be taken by any person aggrieved thereby. R. S. chap. 105, sect. 25. The ward was aggrieved by the decree in this case, if it was more unfavorable to him, than the law would justify. The ward being a minor at the time of the decree is presumed incapable of taking the appeal; if taken in his behalf, it must be done by the agency of his guardian, who was qualified at the time; and the matter may be regarded as properly before this Court.

The respondent was appointed guardian of Daniel O. Daggett, in the year 1837, and it appears from the inventory duly filed by him on Nov. 8, 1837, that the ward's property consisted of notes of hand bearing interest. On a settlement made with the judge of probate, on May 10, 1842, he charged himself with the amount of the personal estate, as by

the inventory, at the sum of $353,65, being precisely the amount or value of the notes on Nov. 8, 1837, without any account of interest thereon. He made no other settlement till May 9, 1848, when he charged himself with the balance found against him at the former settlement, and the sum of $40,00, for interest collected on notes, which were delivered to the appellant as the new guardian. There were no claims made in the last settlement on account of any losses on the notes, and there was nothing showing, that the respondent had not collected the whole amount of the notes, received by him on his appointment, and which notes were not delivered to the appellant, when he succeeded to the trust. The respondent was allowed by the judge of probate, in his last settlement a sum as compensation for his services as guardian to the time when he ceased to be such.

The reasons for the appeal are substantially, that the judge allowed the former guardian to settle his account, without charging himself with a sufficient amount of interest on the notes belonging to his ward's estate, from the time of his appointment, till the time that he ceased to be guardian, and the last settlement; and because he was allowed for his services as guardian, when he was not entitled to any compensation therefor.

Trustees are bound in the execution of their fiduciary duties, to exercise the same care over the property of the *cestuis que trust*, that prudent and discreet men ordinarily exercise over their own property. They cannot appropriate to themselves any benefits which may arise from the trust property. If the estate of the wards are not already safely and properly invested, it becomes the duty of guardians, to make such changes as their ability and common prudence would dictate. If the estate consists at all in securities upon interest, it is their duty to see that the interest is promptly collected, or so invested as to be the most beneficial to the owner. If he is careless in the investment, or negligent in securing the profits, he must bear the loss and not throw it upon the ward. "If he neglects to put the ward's money at interest, but negligently

suffers it to lie idle,or mingles it with his own, the Court will charge him with simple interest, and in cases of gross negligence, with compound interest." 2 Kent's Com. 188.

It is contended by the respondent, that it was not competent for the judge of probate to open the first account on the settlement of the second, and go into a consideration of the question of interest, which accrued anterior to the first settlement and decree. So far as the matter was before the judge of probate in the first account, and passed upon, no appeal having been claimed, it cannot now be re-examined. But if the guardian omitted to charge himself with what was actually in his hands, or what he was required by law to account for, the decree upon that settlement was not a judgment which could cancel such claims of the ward, and the omissions be *res adjudicata;* they would be still a subject for examination and a decree, nothwithstanding they were matters, which should have been brought into the former settlement. This was the view taken by the Court in *Saxton* v. *Chamberlain*, 6 Pick. 423, and in *Boynton* v. *Dyer*, 18 Pick. 1; and the reasoning of those cases upon this point is satisfactory.

We have a right to presume, (from the facts, that the respondent had notes of hand, drawing interest, from the legal duties arising from the trust, and that there is nothing in his accounts showing any loss, or that such an item in the accounts was presented,) either that he had in his hands a sum received as interest, with which he had not charged himself, or that he had neglected essentially his duty. In either event he would be liable.

By the Revised Statutes, c. 110, § 27, a guardian is required to render and settle his account with the judge of probate, at least once in three years, and as much oftener as the judge may cite him for that purpose. By the 28th section of the same chapter, a neglect of this duty shall cause a forfeiture of all allowance for his personal service, unless it appears to the judge that the omission arose from sickness or unavoidable accident. This is a provision, which was first made in the statutes of 1830, c. 470, § 10. The decision

therefore in the case of *Bailey, Judge*, v. *Rogers & al*, invoked for the respondent, is inapplicable, being a construction of a statute previously enacted.

The decree of the judge of probate is reversed so far as it regards the interest on the notes belonging to the ward, and the allowance for the personal services of the former guardian. The parties having agreed, that the computation, if any should be necessary under the decision upon the law of the case, shall be made by an auditor, the action will stand for further proceedings.

RHODES KINGSBURY *versus* ELISHA J. TAYLOR.

A vendor of personal property is not liable for defects of any kind, in the thing sold, unless there be fraud or an express warranty on his part.

Where the defendant sold *winter* rye for seed *spring* rye, and the plaintiff thereby lost his crop, an action of deceit will not lie, unless the defendant knew it to be *winter* rye.

EXCEPTIONS, from the District Court, RICE, J. The plaintiff in his declaration alleged that he bargained with the defendant to buy of him two bushels of summer rye, sound and fit for seed rye, to be sown for the production of a crop, during the season then about to commence, for a valuable consideration; and that the said defendant sold to the plaintiff two bushels of rye, as and for summer rye, sound and fit for seed, to be sown as aforesaid, for a valuable consideration paid to said defendant; which said rye was at the time of said sale not summer rye, but winter rye, and totally unfit to be sown for the production of a crop as aforesaid, which the said defendant then and there well knew, and so the plaintiff lost his said crop of rye, and was thereby greatly injured, &c.

The plaintiff proved that he called at the defendant's store, and asked him if he had any good seed spring rye, and he said he had, and sold him two bushels for $1,50 per bushel, as seed spring rye, the plaintiff examining the rye at the time of the purchase.

The rye purchased, was winter rye, and was valueless to the plaintiff. But there was no evidence that the defendant knew that the rye sold, was an article differing in kind from that for which it was sold.

The plaintiff's counsel contended, that as the defendant had undertaken to sell the rye for a specific purpose, and for a particular kind, and had undertaken to know and represent its kind, it was unnecessary to prove the *scienter*, though alleged; and that, if there was a special warranty, the plaintiff ought to recover without proof of *scienter*; and that the sale with the description and representation, that the rye was spring rye, made at the time of sale, with the other circumstances, constituted a warranty and was evidence of a warranty; and that if there was a latent defect in the kind of the seed, which could not be discovered by inspection, the examination by the plaintiff did not affect his right to recover, and requested the Judge so to instruct the jury.

The Judge declined to give the instructions requested, but told the jury, that if they were satisfied from the evidence, the defendant did in fact sell the rye, and at the time of the sale expressly warranted it to be summer rye, when in truth it was not such, the plaintiff was entitled to recover; that they must determine from the evidence in the case, if there was a warranty that the rye sold, was summer rye; and that representations honestly made as to the quality of the rye, when the plaintiff had an opportunity to examine the rye, and did so examine it before he purchased, would not be a warranty against latent defects, nor against deceit practised by previous dealers, through whose hands the rye had previously passed before it came to the hands of the defendant. Or that if they should find that the defendant knew the article sold was different in kind or species from what it was sold for, then the plaintiff was entitled to recover though there was no warranty.

The jury returned a verdict for the defendant.

Gilbert, for plaintiff.

1. The defendant sold the rye for a specific purpose, and since he had undertaken to know and represent the character

of the article sold, he was bound to make it good to the plaintiff, whether he knew what the kind of rye was or not; and, therefore, it was not necessary to prove the *scienter*. Opinion of ABBOTT, C. J., Chitty on Contracts, p. 133, second American edition. *Jones* v. *Bright & al.* 5 Bingham, 533, cited somewhat at length in note, in Chitty on Contracts, p. 134; Stephens's Nisi Prius, p. 281, last paragraph; *Ingersoll* v. *Barker*, 21 Maine, 474.

The description of the thing sold, given at the time of the sale, is an express warranty. *Hastings* v. *Lovering*, 2 Pick. 214; *Williamson* v. *Allison*, 2 East, 446. *Scienter* need not be proved. Stephens's Nisi Prius, p. 1281, 1286, 1289; *Bradford* v. *Manley*, 13 Mass. 139, sale of cloves by sample, warranty. Also, PARKER, C. J. on sale of cocoa, upon advertisement, same case. *Conner* v. *Henderson*, 15 Mass. 319; casks of stone and sand sold for lime.

In all these cases the warranty was a mere verbal, or informal representation, at or before the time of sale.

In *all*, the sale was without fraud or warranty, and I think, in some of them, there is nothing said about the *scienter*.

The action is rightly brought. The plaintiff had a choice of several forms. Stephens's Nisi Prius, pp. 1006, 1007, 1008.

In a late case, ABBOTT, C. J. observed, "that on the trial, it occurred to him, that if a person sold a commodity for a particular purpose, he must be *understood* to warrant it *reasonably fit and proper for such purpose;* and that he was still strongly inclined to adhere to that opinion, but some of his learned brothers thought differently." Chitty on Contracts, pp. 133, 134.

Hubbard, for defendant.

The action is not on contract, but on deceit or wilful misrepresentation. The *scienter* must therefore be proved. *Dawding* v. *Mortimer*, 2 East, 450; Dane's Abr. vol. 2, chap. 62, art. 2, §§ 14, 16; Oliver's American Precedents, 336.

If plaintiff rely on express warranty, he must declare specially on it. Phil. Ev. vol. 2, pp. 78, 79; 2 Dane's Abr. chap. 62, art. 2, § 12; same, art. 4, § 1.

The action can not be sustained on plaintiff's evidence. *Stone* v. *Denny*, 4 Metc. 151; *Emmerson* v. *Bingham*, 10 Mass. 197.

The declaration does not allege that plaintiff was deceived. 2 East, 92; *Peake's Cases*, 226.

TENNEY, J. — It has long been regarded as settled in England and in this country, that the vender of personal chattels is not liable for defects of any kind, in the thing sold, unless there is express warranty or fraud in the seller. The case of *Chandler* v. *Lopus*, Croke James II, was where a goldsmith had sold to the plaintiff a stone, which he affirmed to be a Bezoar stone, for £200, and the stone was not of that kind; judgment was rendered for the defendant, because it was not alleged in the declaration, that the defendant knew it was not a Bezoar stone, or that he had warranted it as such. This case has not been approved by the Court in Massachusetts in its full extent. *Bradford* v. *Manley*, 13 Mass. 143. But upon the point involved in the case now under consideration, its authority is not questioned.

In *Dawding* v. *Mortimer*, in a note, 2 East, 450, which was an action founded in misrepresentation, or deceit, (not on warranty, assumpsit or contract,) it was declared, that the defendant sold to the plaintiff an article represented sound and perfect, which he knew to be unsound and imperfect, it was held, that the *scienter* must be proved. "Where there is no warranty, the *scienter*, or fraud, is the *gist* of the action." 2 Selw. 582, 583; *Stuart* v. *Wilkins*, Douglass, 20; *Oldfield* v. *Round*, 5 Vesey, 508.

The same doctrine is established in New York. *Seixas* v. *Woods*, 2 Caines, 48; *Snell & al.* v. *Moses & al.* 1 Johns. 96; *Perry* v. *Aaron*, *ibid*, 129; *Defreeze* v. *Trumper*, *ibid*, 274; *Holden* v. *Dakin*, 4 Johns. 421; *Davis* v. *Meeker*, 5 Johns. 354.

The decisions in Massachusetts have recognized also to the fullest extent a similar principle. In *Emerson & al.* v. *Brigham & al.*, 10 Mass. 197, SEWALL, J. says, "the rule has

always been, I believe, that an action of deceit, or an action of the case for a deceit in a bargain or trade, is maintainable only when the deception complained of, has been intentional on the part of the seller. The doctrine is affirmed in *Salem India Rubber Co.* v. *Adams & al.* 23 Pick. 256. Also in *Stone* v. *Denny*, 4 Metc. 151, where authorities are reviewed, and in other cases.

The manner of declaring, where the action is founded in deceit, has always been uniform ; the *gravamen* has been the *deceit*, and the *gist* of the action the *scienter*. But when there has been a warranty, and a breach of it has been the *gravamen*, the mode of declaring has varied. Mr. Dane, in his Abridgement, vol. 2, page 555, says, "Before the year 1770, or thereabouts, the practice was to declare in *tort*, that is, to state the *warranty*, and the breach of it as the *deceit* or *tort ;* and sometimes to join a cause of action in *trover*, considering the *wrong in violating the warranty*, as the *gist* of the action. The *warranty* was stated as the *inducement*, and the *breach of it*, a *deceit*, or wrong, and as the ground of the action. But as trover went out of fashion, and the money counts came more into use, it was found more convenient to declare in *assumpsit* on the *warranty* as a promise, and to consider the breach of it, as the breach of any other promise, and to join in the same declaration the money counts; no doubt justified where there is a *real warranty*, or a real engagement or undertaking by the seller, the thing he sells is sound, his own, &c. But he expresses a doubt, whether this election to declare in *deceit* or *assumpsit*, in the same transaction, can be extended beyond an implied warranty; because if there be no warranty at all, but a mere deceit or fraud practised, it is clear that the action must be in *tort ;* and on the other hand, if an express warranty is given on the sale, and in that manner the seller secures the buyer, and upon his contract to answer in damages, it is a question, whether the buyer is not confined to his contract and bound to declare and take his remedy upon it, as upon any other express contract which he holds. In *Thompson* v. *Ashton*, 14 Johns. 316, it was holden, that to entitle one to re-

cover for a breach of a warranty, the action must be expressly founded upon the warranty. It is intimated in the case of *Salem India Rubber Co.* v. *Adams & al.*, before cited, that if the plaintiffs had declared upon an express covenant of warranty embodied in the contract, according to the old forms, relying upon such express warranty, and its falsity, that it would bar an action of assumpsit upon the same warranty, because the same evidence would support both actions, and the damages recovered in one, would be a satisfaction of those claimed in the other.

From the case relied upon by the plaintiff's counsel of *Jones* v. *Bright*, 5 Bing. 533, the Court did not, it would seem, regard the old form of pleading erroneous. That was an action sounding in *tort*, in the nature of deceit, to recover damages sustained by the plaintiff in the purchase of a quantity of sheathing copper, for a particular purpose, which was declared at the time of the purchase, manufactured by the defendants themselves, who were the sellers. The article was by no means such as was represented by the defendants. All imputation of fraud in the defendants, was disclaimed by the plaintiff, who was allowed to recover on the ground of an express warranty. Much reliance was placed on the ground, that the defendants were the manufacturers of the article sold. PARK, J. in his remarks said, "I entertain no opinion adverse to the character of the defendants, because the mischief may have happened by the oversight of those whom they employ; but on the case itself, I have no doubt, distinguishing as I do between the manufacturer of the article and the mere seller."

In the case at bar, under the instructions given to the jury, they must have found, that the express warranty was not proved. The declaration in the writ does not allege that there was an express warranty or any representation equivalent thereto. And as the plaintiff did not prove or contend that the defendant at the time of the sale of the rye, knew that it was not such as he sold it for, an essential ingredient in an action

sounding in *tort*, in the nature of deceit, is wanting. Such being the form of the action in this case, it can not be maintained upon the proof adduced. *Exceptions overruled.*

CHARLES F. BARNES *versus* JAMES TAYLOR.

When property has been seized and libeled by a collector of the customs for a breach of the revenue laws of the United States, it is to be considered in the custody of the law, until the claimant *obtains* the possession by order of the Court.

Therefore a demand made upon the collector by the marshal, holding an order of restoration, and a refusal by the collector to deliver the property would not prove a conversion by the collector.

In such a case a portion of the property was abstracted, *while thus in the custody of the law*, and the claimant obtained an order for the restoration of the whole, and actually received possession of the part which remained. *Held*, he could not maintain trover against the collector for the abstracted part.

It seems, his remedy should be sought in the same Court of the United States which ordered the restoration.

TROVER, for the conversion of the schooner Palo Alto and her cargo.

The vessel was enrolled in the district of Wiscasset, June 27, 1847, as measuring $20\frac{12}{95}$ tons, of which plaintiff appeared to be owner and master, and was under a fishing license. The plaintiff proceeded in her to Portland, purchased a quantity of goods of Mitchell & Son, to the amount of $873,36, of which $387,64 was for spirituous liquors, there being more than 500 gallons.

These were put on board the schooner and taken to Wiscasset, where she arrived on the 15th of July, when both the schooner and goods were seized by the defendant as collector of that port, for a breach of the revenue laws.

The schooner and cargo were libeled July 19, and on the 21st, the plaintiff filed his claim and a petition for a remission of the forfeiture. A remittitur was granted by the Secretary of the Treasury, September 18, and on its being filed in the District Court of the U. S. at Portland, an order of restoration

was issued by the Court, to the marshal or his deputy, September 30th.

On September 29, and again on October 4, the Secretary of the Treasury wrote the district attorney to return the certificate of remittitur, to be revoked, as on further consideration of the matter, he was satisfied the claimant was not entitled to relief.

On the 1st and 7th of October, the district attorney wrote to the collector communicating these directions from the Secretary, and suggesting a suspension of the action of the deputy marshal, and of the collector on the order of restoration.

On the 8th of October the deputy marshal made a return upon his order, that he had made a demand upon the collector, and that the collector had refused to deliver the property. There was evidence that on that day, when called upon by the deputy, the collector showed him the letters of the district attorney, and expressed some hesitation as to the propriety of restoring the property under such circumstances, until the further action of the Secretary; and that the deputy marshal concurred in the suggestions made in the letters, but wished to do his duty about it, and proposed a formal demand, that he might make a proper return, and let the property rest where it was, until further proceedings in Court.

On the 20th November, the Secretary of the Treasury issued an order, revoking the remittitur, which was filed in the District Court, November 30th.

On the 7th December, plaintiff petitioned the Judge of the District Court for a redelivery of the property on appraisal, and giving a bond, which was granted, and on the 16th December, the appraisers made return under oath, and on the same day, the plaintiff filed his bond, and on the 18th December, the Judge issued a warrant of restoration, under which the deputy marshal returned, under date 22d of Dec. that he had delivered possession of said vessel and cargo to the claimant.

On the 23d Dec. the plaintiff's counsel filed a motion in the District Court to dismiss the libel, to which motion the district

attorney filed objections, claiming a forfeiture of said vessel and goods. The Judge decreed a dismissal of the libel, from which the district attorney appealed to the Circuit Court of the United States, which was allowed, and entered at the next term thereof. The appeal was pending at the time of the commencement of this suit, which was December 27, 1847.

The defendant offered in evidence a mortgage of said vessel by plaintiff to said Mitchell & Son, to secure payment of $892,60, in four months from July 10, which mortgage was dated July 24, 1847, recorded July 26, and filed in the office of the collector on Oct. 18. Also a copy of another bill of sale of said goods of same date, by same to same, to secure payment of the same debt. Also a copy of a mortgage of the same from the plaintiff to Hiram Rayner, dated Sept. 27, 1847, recorded same day, to secure the payment of $428,51, by Sept. 12, 1849.

The vessel was taken into possession by Mitchell, under his mortgage, at the time, (Dec. 22,) when it was given up by the deputy marshal to the plaintiff, and the cargo, when delivered by the marshal, was attached by the sheriff on writs against the plaintiff, and had since remained in the hands of the sheriff by virtue of said attachments.

There was also evidence tending to show that prior to the appraisement aforesaid, and after the seizure, some portion of the liquors, being part of said merchandise, had been abstracted from the casks, and that all the property seized was not therefore delivered up on the 22d of December.

The trial was had before Howard, J. and a verdict was returned for the plaintiff, for $20,24.

The defendant's counsel requested these instructions: —

1st. That the bills of sale on condition from plaintiff to Mitchell & Son, transferred the legal title in the property to them, and gave them the right to immediate possession of it, except as against the defendant while having it in lawful custody as collector, and that the plaintiff, having neither the right of property nor of possession, nor the actual possession

at the time of the supposed conversion, cannot maintain this action.

2. That this action cannot be maintained, being commenced after the appeal of the 23d Dec., and pending the action on libel for forfeiture, and before the final decision of the appellate Court on the question of the power of the Secretary of the Treasury to revoke the remittitur.

3. That the said property having been delivered up or relinquished by defendant on the 22d Dec. on the order and warrant of restoration of Dec. 18, granted on plaintiff's petition of Dec. 7, and on his giving the bond of Dec. 16, this action of trover, subsequently commenced, cannot be maintained.

4. That the defendant had the right to retain the property as against the demand of the marshal on the 5th and 8th of October, it not appearing that he acted in any other capacity in making the demand than that of marshal, nor especially, that he acted as agent or attorney of the plaintiff.

5. That the return of the marshal, of demand and refusal on the warrant of restoration of Sept. 30, is not conclusive of a conversion by the defendant, and that, if the defendant had no purpose to appropriate the property to his own use, or to the use of any other person unlawfully, but omitted or deferred the delivery of it to the marshal on the 5th and 8th of October, on account of the information he received from the district attorney, communicating the order of the Secretary of the Treasury to return the remittitur to be revoked, the defendant reasonably supposing the property ought to be retained by him, until the final action of the Secretary and the Court thereon, such retention of the property by defendant was not a conversion of it to his own use, such as is necessary to support this action.

6. That if the defendant on the 8th of October, had reasonable ground to apprehend that the property ought to be retained till the further action of the Secretary and of the Court in relation to the remittitur, and did on that ground retain it, that was not such a conversion as would support an action of

trover by plaintiff, although in point of fact the plaintiff might have had a legal right to the possession under the remittitur.

7. If the plaintiff is entitled to recover, he can only recover nominal damages.

If this instruction should be withheld, then: —

8th. That the measure of damages should be the net profit (if any) the plaintiff may have proved that he could have derived from the use of the schooner from Oct. 8, to Dec. 22, deducting expense, insurance and risk.

The presiding Judge declined so to instruct the jury, but did instruct them, for the purposes of the trial, that the action was maintainable, that the mortgages to Mitchell & Son and Rayner, did not affect the rights of the parties involved in this action, that the pendency of the libel in the Circuit Court on appeal, had not the effect to suspend the right of plaintiff to have and receive the property from the defendant by virtue of the remittitur, and that their verdict must be for the plaintiff, and the measure of damages would be the interest on the reasonable fair value of the property, from Oct. 8 to Dec. 22, 1847, and if they found any portion had not been delivered up and accepted by plaintiff, but abstracted or kept back, the value of that with interest, must be added to the interest on that part which was delivered up.

And exceptions were filed by defendant.

Ruggles & Ingalls, for defendant.

1. The first requested instruction ought to have been given. *Paul* v. *Hayford*, 22 Maine, 234; *Welch* v. *Whittemore*, 25 Maine, 85; *Ayer* v. *Bartlett*, 9 Pick. 159; *Forbes* v. *Parker*, 16 *ib.* 462; *Burditt* v. *Hunt*, 25 Maine, 419; *Ingraham* v. *Martin*, 15 Maine, 374; *Abbott* v. *Goodwin*, 20 Maine, 408; *Smith* v. *Putney*, 18 Maine, 18; *Bailey* v. *Spring*, 7 Greenl. 241; *Cutler* v. *Copeland*, 18 Maine, 127; 2 Greenl. Ev. § 636—640; *Packard* v. *Low*, 15 Maine, 48; *Melody* v. *Chandler*, 3 Fairf. 282; *Sheldon* v. *Soper*, 14 Johns. 352; *Pain & al.* v. *Whittaker*, Ryan & Moody, 99; *Vincent* v. *Connell*, 13 Pick. 294; *Putnam* v. *Wyman*, 8 Johns.

337—339; *Van Brunt* v. *Schenck*, 11 Johns. 377; 1 Chitty's Pl. (2d American Ed.) 151; *Gordon* v. *Harper*, 7 T. R. 9; *Harwood* v. *Smith*, 2 T. R. 750.

2. This action cannot be maintained, being commenced after the appeal of the 23d December, and pending the action of libel for forfeiture, and before final decision of the appellate court on the question of the power of the secretary of the Treasury to revoke the remittitur. United States Statutes, Pet. Ed. c. 22, § 71, 69, [act of 1799, March 2, § 69.]

3. The said property having been delivered up or relinquished by defendant on the 22d Dec. on the order and warrant of restoration of Dec. 18, granted on the plaintiff's petition of Dec. 7, and on his giving the bo..d of Dec. 16, this action being subsequently commenced in trover, as for a conversion, cannot be maintained. *Rotch* v. *Howes*, 12 Pick. 136; *Hayward* v. *Seaward*, 28 E. C. L. R. 269.

4. The defendant had a right to retain the property against the demand of the marshal, on the 5th and 8th of October, it not appearing that he acted in any other capacity in making the demand, than that of marshal, nor especially that he acted as agent or attorney for plaintiff. *Gunton* v. *Nurse*, 2 B. & B. 447; 6 Eng. C. L. Rep. 193; *Solomon* v. *Dawes*, 1 Esp. C. 83; Steph. N. P. 2686, 2688; 3 Stark. Ev. 3d ed. 1161; 4 Esp. N. P. C. 156; 2 Stark. Ev. 480, 483; 2 Greenl. Ev. § 644.

5. The fifth and sixth requested instructions, ought to have been given. *Solomon* v. *Dawes*, 1 Esp. chap. 83; *Watts* v. *Potter*, 2 Mason, 77; 2 Stark. Ev. 840, 843; *Jacob & al.* v. *Lowsett*, 6 Searg. & Rawle, 3..0; *Alexander* v. *Southey*, 5 B. & A. 249; 7 Eng. C. L. Rep. 85; 2 Greenl. Ev. § 644; 3 Steph. N. P. 2684, 2685, 2686, 2688; 2 Lowi.d. 47; Bull. N. P. 44; 2 Mod. 244; 1 Moore & Scott, 459; *Hayward* v. *Seaward*, 28 Eng. C. L. Rep. 269; Steph. N. P. 2689, 2709.

6. If the action be maintainable, the plaintiff is entitled to nominal damages only. Steph. N. P. 2712, 2681.

S. Fessenden and *Foote* argued for the plaintiff.

The compiler regrets that the argument is not found among the papers of the case.

Shepley, C. J. — The action is trover to recover for the conversion of the schooner Palo Alto and cargo. The defendant, as collector of the customs for the district of Wiscasset, caused the vessel and cargo to be seized on July 15, 1847, as forfeited to the United States for a breach of the revenue laws. A libel having been filed, the plaintiff, on July 21, appeared and claimed the property; admitted its liability to forfeiture, and filed a petition to the Secretary of the Treasury for a remission of the forfeiture. On the 30th day of September following, a remittitur of the forfeiture by the Secretary was filed in Court, and a warrant was issued by the Court to the marshal for a restoration of the property to the claimant. Soon after, the attorney of the Uuited States received instructions from the Secretary for a return of the remittitur, that it might be revoked. These instructions were communicated to the collector with a suggestion, that the action of the collector and marshal upon the warrant for a restoration of the property should be suspended.

On October 8, 1847, a deputy of the marshal made a return upon that warrant, that he had made a demand for a delivery of the property upon the collector, who refused to deliver it.

This refusal is relied upon as evidence of conversion.

On November 30, 1847, a revocation by the Secretary of his remittitur was filed in Court, and on the 7th of December following, the plaintiff presented to the Court a petition, that the property might be delivered to him upon his giving a bond to the United States for its appraised value. An appraisement was ordered and made, and a bond executed by the plaintiff with surety, was filed, and on December 18th, a warrant was issued by the Court for a delivery of the property to the plaintiff, and it was by virtue of that warrant delivered to him on the 22d day of the same month.

On the 27th day of the same month this action was commenced.

It is not necessary to recite the further proceedings respecting that seizure in the Courts of the United States.

It is provided by the act of Congress, approved on March 2, 1799, c. 128, § 69, that all goods, wares and merchandize, seized by virtue of that act, shall remain in the custody of the collector, until proceedings are had to determine, whether the same have been forfeited. Provision is made by the same act, § 89, that upon prayer of any claimant to the Court, that any vessel, goods, wares or merchandize seized and prosecuted, should be delivered to such claimant, the Court may cause an appraisement thereof to be made and, upon his filing an approved bond, order the property to be delivered to him.

Admitting that the return of the deputy marshal, made upon the first warrant, might be *evidence* of a conversion by the defendant on October 8, 1847, such demand and refusal is not conclusive proof of it. *Hayward* v. *Seaward*, 1 Moore & Scott, 459.

The petition of the plaintiff to the Court, filed on the 7th of the following December, was an admission, that the goods were then in the legal custody of the United States, as goods seized, and therefore legally in the custody of the defendant as collector of the customs. The goods were subsequently received by the plaintiff from the defendant, upon a bond given to the United States, for their appraised value, according to the provisions of the statute and in execution of the process of law. "When goods are brought into the custody of the law by process *in rem* a claimant cannot, it is true, recover the possession of them but by order of the Court." *The Emblem*, Daveis' Reports, 69. When a precept of the Court, which orders a restoration of property, is not executed by restoring it, the property yet remains in the custody of the law and of the proper officer, to whose custody it is entrusted by the law. If that officer refuses to obey the precept directing a restoration, it is for the Court issuing the precept to

adopt the proper measures to cause the property to be restored by compulsory process, if it shall adjudge such to be its duty. The Court issuing the second precept for a restoration must have regarded the property as still in the custody of the law.

Under such circumstances the defendant cannot be considered as having converted the goods to his own use, by refusing to deliver them in obedience to the first precept issued for their restoration. If he were so considered, the plaintiff, instead of presenting a petition to the Court for their restoration, might have immediately commenced a suit against the defendant and have recovered their value. And even admitting that he might have done so, he could not, after admitting them to be in the custody of the law and its designated officer, be permitted to allege, that they had before been by that officer converted to his own use as a tortfeasor.

The bill of exceptions states, that there was evidence tending to prove, that some of the liquor had been abstracted from the casks after the seizure and before the appraisement, and that all the property seized was not restored.

This testimony does not tend to show, that there had been any liquor taken from the casks, before the plaintiff filed his petition to have the property restored, upon giving a bond for its appraised value. And if it was not all restored, being legally in the custody of the defendant, the proper remedy would seem to have been found by an application to the Court having authority to cause it to be restored or compensation to be made. The marshal appears to have made a return, that he had delivered possession of the vessel and cargo to the claimant; and the claimant does not appear to have made any complaint to that Court, that all the property seized was not restored.

The instruction to the jury, that their verdict must be for the plaintiff, was erroneous.

It will not be necessary to consider the other points made in argument.

Exceptions sustained, verdict set aside and new trial granted.

WILLIAM FOSSETT & *als. versus* JOHN BEARCE.

When the right to a penal action depends upon the official character of the plaintiff as a town officer, he must show that he was duly elected at the town meeting, and that the notice for convening the meeting, was posted in a "public and conspicuous" place, unless the town have designated a different mode; and this must appear by the official return upon the warrant.

Where the officer's return upon a warrant for a town meeting did not show that the copies posted up were attested, or that they were posted in conspicuous places, evidence that the copies posted up were attested, and posted in public and conspicuous places in the town, will not cure the defect in the return.

Such evidence is inadmissible, except for the single purpose of showing that the officer ought to be permitted to amend his return, and when it appears that he is willing to amend.

Such an amendment can be made only by the same officer and on his responsibility.

DEBT, brought by plaintiffs as fish committee of the town of Bristol, to recover of defendant the penalty named in the seventh section of a special act passed March 4, 1826, entitled "an act to regulate the alewive fishery in Bristol," for resisting and opposing said committee in the performance of their official duty.

On the trial, before HOWARD, J., the records of the town of Bristol were produced, from which it appeared that a meeting of the town was held on the third of March, 1845, and that, among other things, this vote was passed, viz.: — "Article 18. Chose William Fossett, Alexander Fossett and Robert Boyd, fish committee," and that they were sworn.

From the records also it appeared, that in the warrant of February 21, 1845, calling said meeting of the third of March, the 18th article was "to choose a fish committee." The defendants also read, (against the objection of the plaintiff,) a copy of the officer's return of said warrant, which was as follows: — "Bristol, March 3, 1845. By virtue of the within warrant, I have notified the inhabitants as within directed, by

posting up copies of the same in three public places in said town, seven days before the meeting.

"Elisha Hatch, Constable of Bristol."

The Court ruled, that as it did not appear by the officer's return that the copies were attested copies, nor that they or any of them were posted in a conspicuous place or places, therefore said committee were not legally chosen. Whereupon the plaintiffs offered to prove, under and conformable to the statute of 1848, that the notices aforesaid were attested copies of said warrant, and that they were posted in public and conspicuous places in said town, seven days before said meeting, as contemplated in chap. 5, of the Revised Statutes.

The Court, for the purposes of the trial, decided not to admit such proof, and a nonsuit was ordered. The plaintiffs filed exceptions.

E. & M. H. Smith, for plaintiffs.

1. The plaintiffs say, that the ruling of the Judge in regard to the insufficiency of the service of the notice for town meeting, was wrong. The records of the town meeting fully proved the choice of the plaintiffs, as fish committee. And defendant should not go behind such record for any informality of the officer's return. *Thayer* v. *Stearns*, 1 Pick. 109, and authorities there cited, (in note 2); *Briggs* v. *Murdock*, 13 Pick. 305; *Wells* v. *Battelle & al.* 11 Mass. 481; *Houghton* v. *Davenport*, 23 Pick. 235.

2. As corroborating the above position, a distinction is to be drawn between the case at bar, and the cases, *State* v. *Williams*, 25 Maine, 564, and *Christ's Church* v. *Woodward*, 26 Maine, 178. The former was an *indictment*, in which nothing is presumed against the innocence of the accused, but every thing to be strictly proved. The latter was a case in which title to real estate was in question, and strict execution of the law in all respects is required, to deprive a man of his inheritance; and the meeting, the doings at which were in question, was not an annual meeting, nor called for transacting the ordinary town business, but a special meeting for the

appropriation of the plaintiff's land. In the case at bar, the fish committee are among the officers which by law, are to be elected at the annual meeting. Fish law of Bristol, 1826, sect. 1, special.

The laws regulating fisheries are public laws, and all persons are presumed to know them, and are bound to take notice of them at their peril. *Burnham* v. *Webster*, 5 Mass. 266.

3. The proof offered under and conformable to the statute of 1848, that the constable in warning said town meeting had given notice as contemplated in the 5th chap. of the R. S. which was excluded by the Judge, should have been admitted as a step preliminary to the altering of the return by the officer. Public Laws of 1848, chap. 37, sect. 1; R. S. chap. 5.

Ruggles, for defendant, for the correctness of the ruling of the Judge at the trial, relied upon these cases. *State* v. *Williams*, 25 Maine, 561; *Christ's Church* v. *Woodward*, 26 Maine, 172; *Tuttle* v. *Carey*, 7 Maine, 426; *Thayer* v. *Stearns*, 1 Pick. 109; *Bucksport* v. *Spofford*, 12 Maine, 487.

The opinion of the Court, (WELLS, J. taking no part in the decision, having been of counsel in the case,) was delivered by

HOWARD, J. — The plaintiffs have instituted this suit, as a "fish committee," under section 7, of the act of March 4, 1826, entitled "An act to regulate the alewive fishery in Bristol," to recover a penalty of the defendant, for resisting them in the performance of their official duties.

It is incumbent on them to prove their official character, and establish their right to sue in that capacity, before they can recover a penalty for the alleged resistance.

To show that they were duly chosen as such committee, they introduced the record of the meeting of that town, March 3, 1845, including the record of the warrant, the return thereon, and the proceedings.

The defendant objected to the sufficiency of the evidence, and contended that the meeting was not legally notified, and

that the supposed election of the committee was not legally made.

The return upon the warrant was, "Bristol, March 3, 1845. By virtue of the within warrant, I have notified the inhabitants as within directed, by posting up copies of the same in three public places in said town, seven days before the meeting.

"Elisha Hatch, Constable of Bristol."

It was not pretended that the town had appointed any different mode for calling their meetings from that provided by statute. The objections, principally relied on, were, that the constable did not state "the manner of notice, and the time it was given," in his return on the warrant; — or that the copies were *attested*, — or that they were posted in *conspicuous* places, as required by the Revised Statutes, (c. 5, § 6 and 7.) It is manifest that this return, as made by the constable, does not show that the meeting was legally notified. *State* v. *Williams*, 25 Maine, 561; *Christ's Church* v. *Woodward*, 26 Maine, 172.

The statute of 1848, c. 37, § 1, provides that, "in any action where the proceedings of any town meeting heretofore held are or may be in dispute, when it shall be made to appear by affidavit or otherwise, that the constable, or officer warning such meeting, had given the notice as contemplated in the fifth chapter of the Revised Statutes, but had omitted to make a full return thereof, as contemplated by the provisions of the said chapter, it shall be the duty of the Court to allow him to amend such return accordingly." And the "plaintiffs offered to prove, under and conformable to that statute, that the notices aforesaid were attested copies of said warrant, and that they were posted in public and conspicuous places in said town, seven days before said meeting, as contemplated in c. 5, of the Revised Statutes."

The statute authorizes the Court to allow the officer to amend his return, when it should be made to appear that he had given legal notice, and had omitted to make a full return. *He* only, can amend; the Court cannot order him, nor permit another, to amend the return. The officer must amend upon

his own responsibility, and it must be made to appear to the Court that he can amend the defective return and that he is ready or willing to do it, before an amendment can be allowed or made. The offer, in this case, did not meet the objection. The plaintiffs did not propose an amendment by the constable; nor did it appear, nor was it pretended, that that officer could or would amend his return. The rejection of the offer was not therefore erroneous, for the proof would have been unavailing if it had been received.

Nonsuit confirmed.

SAMUEL D. CROOKER *versus* STEPHEN JEWELL *& al.*

If there be a series of conveyances with warranty running with the land, and the warranty be broken, the remedy belongs to him, during whose ownership or claim of ownership, under the conveyances, the warranty is broken.

One of the grantees in such a series can have no action against his grantor for a breach of the warranty, occurring after having himself conveyed the land.

In an action for the land, by one claiming under a paramount title, if the tenant vouch his immediate warrantors, who take upon themselves the defence, their release of a previous warrantor will not render such previous warrantor a competent witness for the defence.

The act of the tenant, in vouching his *immediate* warrantors, does not impair his remedy against a *previous* warrantor.

WRIT OF ENTRY. At the September term, 1847, the defendants had leave to vouch in John Richardson and the heirs of William Richardson and of Green Richardson, warrantors; who appeared and defended.

At the trial, before HOWARD, J., the demandant introduced his record evidence of title, by deeds from Jonathan Davis *& al.* to Hannah Duncan in 1786; and from said Hannah Duncan to James Curtis in 1789; and from said Curtis to John Lowell in 1807; and from said Lowell to the demandant in 1821. He also introduced several witnesses tending to prove that he had done various acts indicating title, accompanied

with declarations of ownership at different times, from 1821 to within thirteen or fourteen years before the trial, and that he had within fence, portions of it which were formerly upland but now are flats.

The respondents, to prove their title, introduced a deed from Samuel E. Duncan to Nathaniel Coombs, dated May 5, 1804, a deed of mortgage from said Coombs to Nathan Hunt, dated Dec. 20, 1804, a deed from Mary Hunt as administratrix of said Nathan, to John Richardson, Green Richardson and William Richardson, dated Sept. 10, 1811; and a deed from the said Richardsons to respondents, dated Oct. 18, 1836. All of the aforesaid deeds, upon both sides, purported to convey the premises in dispute.

The respondents called as a witness Samuel E. Duncan, their original grantor and warrantor. The counsel of the demandant objected to his testifying. John Richardson thereupon executed a release to him of his covenants. The counsel for the demandant then contended: —

1. That Duncan's warranty run with the land, and could not be released by intermediate grantees.

2. That it was not competent for John alone to release, since the heirs of Green Richardson and the heirs and executors of William Richardson were, as was admitted, then living.

3. That the release was without consideration, which he offered to prove. The Court rejected the proof and admitted the witness to testify.

There was much other testimony, on either side, before the jury, which it is unnecessary to report to understand the case. The jury returned a verdict for the tenants.

The instructions given to the jury, and the requested instructions which were withheld, are all omitted, because they were not alluded to in the decision of the Court. Exceptions were allowed to the rulings upon the trial, and to the instructions given to the jury, which were elaborately argued by the counsel on both sides, but their arguments are here omitted, except as to the only point, which came under examination of the Court.

Gilbert, for demandants.

Duncan was an interested party, being a warrantor of the premises, and should not have been allowed to testify at all. He is the man who had created the estate in the premises, out of "the baseless fabric of a vision," and sold with covenants of general warranty. The bill of exceptions discloses the answer to this objection. John Richardson being in court, executed a deed of release to Duncan, of his covenants. And it is to be inquired, whether this release removed his incompetency. Duncan's covenant enures to the benefit of all the subsequent grantees, taking by deeds of general warranty. And this has always been the law. *Fairbanks* v. *Williamson*, 7 Greenl. 96; *Heath* v. *Whidden*, 24 Maine, 383; *Griffin* v. *Fairbrother*, 10 Maine, 91.

The R. S. chap. 115, § 16 and 17, does not touch this case; the provision being designed for cases of covenants of seizin, and freedom from incumbrances. Duncan's deed contains a covenant for quiet enjoyment, which is not touched by the statute. But this statute, if applicable, is in our favor. Intermediate grantees have no power to release Duncan's covenant of warranty. If it were so, a wide door would be open for collusion and fraud, by making conveyances through insolvent grantees, to innocent, subsequent purchasers.

But if such a release could be made, it is clear that one of several co-tenants could not make an effectual release for all. It is claimed for the Richardsons, that they held as co-tenants. As such, they had each an individual interest, which neither of the others could in any way control, compromise or release. Were it otherwise, one co-tenant might lose his rights, by the fraudulent conveyance of another co-tenant. *Merrill* v. *Berkshire*, 11 Pick. 269; *Allen* v. *Holton*, 20 Pick. 458.

Besides, the release was made without consideration, and therefore void. This proof was offered and rejected. The books are full of cases where deeds of conveyance are impeached for want of consideration, and I hardly need cite the authorities.

H. Tallman & *T. D. Sewall*, for tenants.

It is contended that the covenants in Duncan's deed, were broken when made, and if so, they did not run with the land.

WELLS, J. — By the common law, the covenant of general warranty runs with the land, because it is connected with it, and descends to the heir, and is transferred to the purchaser of the land by the conveyance.

As assignees of grantees or lessees are bound by covenants real, which run with the land, so are they entitled to the benefit of all such covenants as are entered into by the grantors or lessors and may maintain an action on them. Cruise's Dig. tit. Deed, c. 5, § 16, 30, 44; *Sprague* v. *Baker*, 17 Mass. 586.

Where a covenant which runs with the land, is broken, he in whose time it is broken, whether the grantee or any one who claims and holds under him, may maintain an action for the breach. *Griffin* v. *Fairbrother*, 1 Fairf. 91.

The tenants claim, through mesne conveyances, under Samuel E. Duncan, and that the title passed from Nathan Hunt by the deed of Mary Hunt, his administratrix, to the Richardsons. It is contended by the demandant, that she was not lawfully authorized to make the conveyance, but assuming that she was, as is alleged by the tenants, they then deduce their title from Duncan, and if that title fails, they have a remedy against him upon the covenant of warranty.

The covenant, running with the land, passed from the Richardsons to the tenants, and consequently, the Richardsons had no control over it, and could not discharge it. The release of John Richardson made to Duncan, was therefore of no effect. Whether it would have been sufficient to release the covenant, if the title had still been in the Richardsons, it is unnecessary to determine.

The act of the tenants, in vouching in the Richardsons, their immediate grantors, did not operate as a relinquishment of their claim against Duncan, whose liability to them remained, and they would have had an election to call on him for damages, if their title had failed.

The title to the demanded premises was directly in issue between the parties, and Duncan was interested to sustain that of the tenants, and having been introduced by them, and allowed to testify, the exceptions must be sustained.

Exceptions sustained, and a new trial granted.

ROBERT SPEAR, 2d, *& als. versus* JACOB ROBINSON, *App't.*

The act of Massachusetts, passed March 6, 1802, entitled "an act to regulate the shad and alewive fishery in the town of Warren," is still in force, so far as to authorize the choice of a fish committee with power to commence suits for the recovery of forfeitures under the second section thereof.

Under an article in a warrant, at a legal meeting in the town of Warren, "to choose selectmen, assessors and all other officers that the law requires, or may be thought necessary," a fish committee may be legally chosen.

A justice of the peace has no jurisdiction of an action, if he were once married to a sister of the plaintiff, whether at the time of the suit she were living or not; and whether the suit were for his own benefit or for the benefit of others.

Where a statute requires that certain town officers shall be freeholders, the choice of a person, who is not a freeholder, is merely void.

CASE, against the defendants, for taking and catching 200 alewives in St. George's river, within the town of Warren, on Tuesday, the twenty-fifth day of May, A. D. 1847, without permission, &c.

This action was originally brought before a justice of the peace, by the plaintiffs, as a fish committee of the town of Warren, to recover the penalty accruing to the use of said town, for the alleged unlawful taking of alewives.

At the return day of the writ, the defendant put in a plea to the jurisdiction of the magistrate, of this tenor, "because he says, that Edward Starrett, the said justice of the peace, who issued the writ in said action, and before whom the same is made returnable, is related to one of the plaintiffs in said action by affinity within the sixth degree inclusive, according to the rules of the civil law, and within the degree of second cousin, to wit; the said Edward Starrett married the sister of

the said Robert McIntyre, one of the plaintiffs in the said action, and this defendant has never in any way given his consent that the said justice should act upon the questions arising in said action," &c. To which plea there was a demurrer and joinder in demurrer.

The plea was overruled, the case tried and carried to the District Court by appeal, and before RICE, J. the following facts were agreed to.

The third article in the warrant for the meeting of the inhabitants of the town of Warren, March 1, 1847, was as follows: —

"To choose selectmen, assessors, superintending school committee, fish wardens and all other officers that the law requires, or may be thought necessary by the town." There was no article providing for the choice of fish committee, except the above.

The said meeting was duly and legally called and holden, and a portion of the records of it are as follows: —

"Voted to choose a fish committee. Voted to choose three for said committee. Chose Robert Spear, 2d, John G. Hoffses and Waldo Brackett. Voted that two more be added to the fish committee. Larkin Bogs and Joseph Vaughan, were chosen. It being ascertained that John G. Hoffses was not a freeholder, Robert McIntyre was chosen one of the fish committee in his stead. Chose Reuben Hall and Stephen B. Crooker, fish wardens. Voted to excuse Reuben Hall from serving as fish warden, and David Lermond was chosen in his stead."

It also appeared from the records of the town, that the plaintiffs, and the said John G. Hoffses (who was not a co-plaintiff,) severally took their oaths faithfully to discharge the duties of the office of fish committee assigned them by law, and that the said David Lermond and Stephen B. Crooker severally made oath faithfully to discharge the duties assigned by law to the office of fish warden of which oaths separate and formal certificates were made by the clerk.

The plaintiffs, at the time they were chosen, and ever since, have been freeholders, but the said John G. Hoffses was not,

when chosen, and has not since been a freeholder. The facts stated in the plaintiffs' declaration were admitted to be true. The place of taking the fish was upon or opposite to land in occupation of the defendant and situated about a mile below the fish way at the village in Warren.

It was also admitted that the said Lermond and Crooker acted in the capacity of fish wardens for the year 1847, and the plaintiffs, during the same time, as fish committee. That Edmund Starrett, the justice before whom the action was brought, is, and ever has been an inhabitant of Warren, and married the sister of one of the plaintiffs.

It was also agreed, that all rights should be reserved to the defendant in the same manner as though specially pleaded before the justice.

Upon these facts and pleadings, the following questions of law were raised.

1st. Whether the relationship of the justice, before whom this action was brought, to one of the plaintiffs, is sufficient to disqualify him from having jurisdiction in the suit?

2d. Whether the act of Massachusetts, passed March 6, 1802, entitled "an act to regulate the shad and alewive fishery in the town of Warren," &c. is still in force, so far as to authorize the choice of a fish committee and the commencement of this suit by them under it?

3d. Whether the plaintiffs were legally chosen a fish committee?

4th. Whether the plaintiffs under all the facts and pleadings are entitled to recover?

The parties then agreed that the case should be reported for the decision of this Court upon the following stipulations. If this Court shall be of opinion, upon the facts and pleadings in this case, that the plaintiffs are not entitled to recover in this action, they shall direct a nonsuit with costs for the defendant. If they are of opinion that the plaintiffs are entitled to recover, they shall direct a default, judgment to be entered for the plaintiffs for ten dollars and costs.

M. H. Smith, for plaintiffs.

The first question raised in this case is, "whether the relationship of the justice, before whom this action was brought, to one of the plaintiffs, is sufficient to disqualify him from having jurisdiction of the suit." To this the plaintiffs say, 1st. The plea does *not* state, that the justice's wife was living at the time of the filing of the plea, nor at the date of the writ; she may have deceased. The plea does not state that she was his wife at the date of the writ.

2d. The plea in abatement is founded upon Revised Statutes, c. 1, § 3, rule 22, which states, when a person is required to be disinterested, &c. any relationship within the sixth degree shall disqualify, &c. (see the statute.) Plaintiffs contend, that this section refers only to cases in which a person is required *by* the Revised Statutes, to be disinterested, &c. The statute states, the following rules shall be observed in the construction of the following Revised Statutes.

The Revised Statutes no where in terms *require* a justice to be disinterested, and therefore the 22d rule, chap. 1, sect. 3, does not apply to a justice of the peace in any case.

A justice trying a case should by the common law be disinterested, but as the Revised Statutes nowhere in terms require a justice to be disinterested, the 22d rule, R. S. no more disqualifies a justice from trying a case when one of the parties is related to him within the sixth degree, than the same rule would disqualify a witness from testifying, or a justice from taking the acknowledgment of a deed, when one of the parties is thus related to him. The plaintiffs therefore contend that a justice of the peace is in *no case*, under the said 22d rule of § 3, chap. 1, R. S. disqualified from trying a case, by reason of a relationship to one of the parties.

But, if the Court should be of a different opinion, then plaintiffs contend: —

3d. That in the case at bar, the justice is by the statutes, expressly authorized to try cases like the present, although interested. This action is brought by the plaintiffs as fish committee of Warren. The penalty to be recovered is to the

use of the town. Neither of the plaintiffs has any interest in it except so far as they are citizens of the town. The case finds that the justice is and always has been an inhabitant of Warren, and as such he had no interest, and the sister of one of the plaintiffs, whom the justice married (even if she was living, and his wife at the date of the writ,) had no interest, except as inhabitants of Warren. The penalty is recovered for the town, and if defendant prevails the town must pay plaintiffs the costs of a suit which they as officers, chosen by the town, were, by their oath of office, obliged to commence. R. S. chap. 116, sect. 1, provides that in prosecutions for penalties, a justice may have jurisdiction, notwithstanding his town may be interested in the penalty, so that, in the case at bar certainly, a justice is not "required to be disinterested or indifferent," and sect. 3, rule 22, chap. 1, R. S. does not apply to this case, even if it does to cases in general. A special statute of Massachusetts, passed March 6, 1802, vol. 2, page 517, of Massachusetts Special Laws, entitled "an act to regulate the shad and alewive fishery in the town of Warren in the county of Lincoln," section 7th, provides, that all penalties shall be recovered by an action of case or debt, before *any* justice of the peace, within and for the county of Lincoln, and all money recovered shall be to the use of said town. The case at bar is brought to recover a penalty incurred by a breach of this act, sect. 2d, and the practice under this act has invariably been, to bring such actions before a justice residing in Warren. The case, *Fuller & als.* (fish committee of Warren) v. *Spear*, 14 Maine, 417, was thus commenced by one of the learned counsel for defendant.

E. & S. E. Smith, for defendant.

The case finds that the justice, Edmund Starrett, married the sister of Robert McIntyre, one of the plaintiffs, and the plea states, what the demurrer admits to be true, that the defendant has never consented that the justice should act upon the questions presented in the case. The case is thus substantially brought within the third section of chap. 1, R. S. rule 22. The definitions of the terms "consanguinity and affinity," are

laid down in Jacob's Law Dic. (title, consanguinity,) as follows: "Consanguinity is a kindred by blood or birth, as affinity is a kindred by marriage." The plaintiff, McIntyre, therefore, and the justice, Starrett, are brothers by affinity, and so of course within the sixth degree according to the statute. Why should not this provision in rule 22 apply? It cannot be doubted or denied that a justice of the peace should be disinterested in a matter upon which he is to determine. It may be said, perhaps, that this is a rule of construction, given to explain the language used in the statute, and that it not being any where said in terms, that a justice should be disinterested, therefore the rule has no application to this case, but only to cases where such language *is* used. It is true, the statute does not mention a want of interest, as a qualification for a judicial magistrate. Neither does it require him to be of sane mind. Either provision incorporated into a statute would be sufficiently ridiculous. But it is not less a part of the law, that it is unwritten. The statute requires the following officers among others, to be discreet "disinterested" persons, viz: — appraisers of real estate set off on execution; appraisers to take inventories of the property of deceased persons; commissioners to assess damages for flowing land; commissioners to make partition of real estate. These are required not only to be free from pecuniary interest, but by the application of this 22d rule, they must also not be within the sixth degree of relationship, or within the degree of second cousin. Is it less important or less within the meaning of the statute, that a judge who is to decide upon the most important rights of individuals, should be equally free from interest, or from a prejudice in favor of kindred, which often biasses the mind and judgment more powerfully than any pecuniary consideration? It may be said, again, that the plaintiff to whom the justice is related, although a party, is not "interested" in the event of the suit, since the penalty, to recover which the action is brought, enures to the benefit of the town, and no part of it to the plaintiffs. We answer, that he is interested in the matter of costs, in the same manner as a guardian,

administrator or executor, who is disqualified by such interest from being a witness in actions to which he is a party. *Seers* v. *Dillingham*, 12 Mass. 360; *Fox & al* v. *Whitney*, 16 Mass. 118.

The plaintiff is directly liable for costs, if defendant prevail, for which he may or may not have a claim to be reimbursed by the town.

The counsel upon both sides, argued at much length, the other legal questions reported from the District Court. But as the case was determined upon the first point, it is not deemed necessary to insert the residue of the arguments.

The opinion of the Court, (WELLS, J. concurring in the result only,) was delivered by

TENNEY, J. — This case comes before us by a report presenting certain legal questions under the statute of 1845, c. 172. One of the questions is, whether the act of Massachusetts passed March 6, 1802, entitled "an act to regulate the shad and alewive fishery in the town of Warren, in the county of Lincoln," is still in force, so far as to authorize the choice of a fish committee, and the commencement of this suit by them under it. To answer this question understandingly, it is important to ascertain, whether the forfeiture claimed in the action, has been incurred by the defendant, under the statute mentioned; and if so, whether a fish committee, as required by the same act, is still to be chosen; and whether, if chosen, they can maintain a civil suit for such forfeiture.

Every part of the statute mentioned, is repealed by that of 1844, c. 126, § 15, so far as it is inconsistent with the latter, and beyond this, it has all its former validity and effect.

By the statute of 1844, c. 126, § 11, all persons are prohibited from taking any of the fish therein described between the fifteenth day of July in one year, and the first day of April in the succeeding year. By the seventh section of the same statute, between the first day of April, and the fifteenth day of July in each year, no person shall take or destroy, in

any of said waters, any of the fish aforesaid, either by means of weirs, nets, or any other implement, apparatus or machinery whatever, except between sunrise on Monday and sunrise on Saturday of any week." By the 11th section, the town of Warren have the right to take fish within that town on Mondays, Tuesdays, Thursdays and Fridays of each week, during the period from the first day of April to the fifteenth day of July. This statute gives the town no right to take fish on Wednesday of each week during the privileged term, and does not exclude others from the right to take on that day and also on Mondays, Tuesdays, Thursdays and Fridays in common with the town; neither does it confer upon others any such right; but herein it is entirely silent. Hence it is not inconsistent with the former statute, which provides in the latter part of the second section, that if any other person whatever [than those previously mentioned in the former part of the same section,] shall presume to take or catch any of said fish in any river or stream, within the boundaries of said town, without permission from the inhabitants thereof in legal town meeting, he or they so offending, shall for each offence, forfeit and pay a sum not exceeding *thirteen dollars*, nor less than *one dollar*, at the discretion of the justice before whom the offence is tried." The defendant not having the permission required, and having taken fish in the river St. Georges in the town of Warren, on Tuesday the 25th day of May, in the year 1847, has incurred the forfeiture, unless he is protected by being a riparian proprietor. The case finds that the place, where he took the fish on that day, was upon or opposite to land in his occupation and situated about a mile below the fish way at the village in Warren. It is understood that this place is upon navigable tide waters. This question was presented to the Court in the case of *Fuller* v. *Spear*, 14 Maine, 417, and decided that the defendant therein, had no such privileges as he claimed as a riparian proprietor. The statute under which that action was brought is not essentially different from those now in force upon that point.

We are next to inquire, whether the act of 1802 is so far in force as to require the choice of a fish committee as therein provided; and whether, if so required, that committee have authority to commence and maintain this suit for the recovery of the forfeiture incurred. The act of 1844 nowhere repeals in terms the provision of the former act touching the choice of this committee, but if it has left no duty for this committee to perform, in effect it operates as a repeal, and they cannot commence or prosecute in their own names any suit, if such committee have in form been chosen.

All forfeitures for the violation of the provisions of the law of 1844, are to be recovered by complaint before a justice of the peace, if they do not exceed the sum of twenty dollars; otherwise by indictment in the Supreme Judicial or the District Court; complaint to be made for offences mentioned in this act, by any fish warden or deputy fish warden, or any other person. c. 126, § 12. The forfeiture for which the present suit is brought, is for a violation of the former act and is not affected by this provision; it can be recovered only in an action of the case or of debt before a justice of the peace. This is not denied by the defendant, but it is insisted that by the act of 1844, § 6, the power is given exclusively to others, and therefore it cannot be exercised by the fish committee. This section provides, that "it shall be the duty of all fish wardens, and deputy fish wardens, by all lawful means, to prevent the taking or destroying any of the fish aforesaid, in any of the waters, in violation of law, and also to institute prosecutions for all such offences, against this act, as shall come to their knowledge, and prosecute the same to final judgment." The duties of fish wardens and deputy fish wardens are herein divided into two classes; one embraces the general duties of these officers, which they are required "by all lawful means" to perform, to prevent the destruction of fish in "violation of law;" and the other is confined to the institution of prosecutions for offences against the act containing the provision, and pursuing them to final judgment. They are not required in terms to commence suits for the

recovery of the penalties under the act of 1802, and no provision is made in the act of 1844 for the mode in which the suits shall be brought.

If the fish committee have no longer a legal existence, or have no authority to bring suits, who are to take the place of that committee, and become plaintiffs in the actions of the case or of debt for the recovery of penalties under the law of 1802? Are all the fish wardens and deputy fish wardens to join in such civil actions; or can they be brought and maintained in the name of one or more, less than the whole? No provision in the new act meets this inquiry. It would seem if these officers had so important duties, as the commencement and prosecution of civil actions entrusted to them, that something more than the general language, that they should use "all lawful means" to prevent the destruction of fish, "in violation of law," should be employed. Wardens and their deputies are clothed with many and various powers and duties by the act, which creates these officers; the territory over which their supervision extends, embraces several towns; the deputies may, if judged necessary by the five wardens required, be appointed to the number of seven. The general duties required of these officers are such, that the sixth section of the act of 1844, has an important signification, aside from the duty to institute prosecutions by civil actions. These general duties, which are required to be performed "by all lawful means," are to *prevent the destruction* of fish unlawfully; and do not extend to the taking of measures to recover forfeitures incurred, excepting as an indirect mode of prevention. And if under the term, "by all lawful means," the commencement and prosecution of civil actions for the recovery of penalties against the old law as well as the new law, was intended, the subsequent requirement, that all wardens and deputy wardens should institute prosecutions for all offences against the latter, would be an unmeaning repetition. The penalties for violations of the act of 1802, are to be for the benefit of the town of Warren. They have valuable rights and privileges secured to them as a corporation by that act, as well as by the one of

1844; and by the eleventh section of the latter, the town of Warren in taking fish, as is provided in that section, shall be subject to all the provisions of the act of 1802, which are not inconsistent with the provision of the act of 1844. The privilege of taking fish four days in each week is secured to this town, by the new act; and of prohibiting all others from taking, is secured to them by the old act, as we have seen. The other towns of Thomaston, St George and Cushing, have no such privileges, although they have a majority of the fish wardens.

It is manifestly important to the town of Warren, that they should have guardians, citizens of the town, to take care of an interest so beneficial, as these privileges. And we cannot doubt that it was the intention of the Legislature, in passing the act of 1844, to leave the former law, so far as regards the election of the fish committee, and their duty to commence suits for recovery of forfeitures, under the second section thereof, unrepealed.

2. Another question presented is, whether the plaintiffs in the suit, were legally chosen a fish committee. The third article in the warrant for the town meeting, at which the plaintiffs were chosen a fish committee was in these words. "To choose selectmen, assessors, superintending school committee, fish wardens, and all other officers that the law requires or may be thought necessary by the town." This meeting was held on the first day of March, and it is understood as being the annual meeting for the year 1847.

The article in the warrant was such as practice has sanctioned, and is supported by authority, as being sufficient to authorize the choice of the committee. *Williams* v. *Lunenburgh*, 21 Pick. 75.

The act of 1802, sect. 4, provides, that the fish committee shall consist of not more than seven nor less than three, who shall be freeholders of said town, and who shall make oath or affirmation to the faithful discharge of the duties required of them. The case shows that the town voted to choose five as their fish committee, and they made choice of five persons, but

it appearing, that one of those elected was not a freeholder, another was chosen in his stead; and that the plaintiffs are those, who were freeholders, and were duly sworn, and have acted as that committee. The choice of the man who was not a freeholder, was a nullity, and the one last elected was chosen in conformity to the provisions of the act.

3. Was the justice of the peace before whom this action was brought, having married a sister of one of the plaintiffs, thereby disqualified, so that he had no jurisdiction of the suit? The defendant in support of the negative of this question, relies upon R. S. chap. 1, sect. 3, and the 22d rule under that section, which is, "whenever any person is required to be disinterested and indifferent, in acting upon any question, in which other parties are interested, any relationship in either of said parties, either by consanguinity or affinity, within the sixth degree inclusive, according to the rules of the civil law, or within the degree of second cousin inclusive, shall be construed to disqualify such person from acting on such question, unless by the express consent of the parties interested therein." The application of this rule is restricted, by the section cited, to the construction of the following Revised Statutes, and all subsequent statutes, unless the construction should be forbidden by the plain meaning of the Legislature. Hence the plaintiffs insist, that neither the Revised Statutes, nor any subsequent statute, having required that a justice of the peace, to have jurisdiction in a civil suit between party and party should be disinterested, the case is not affected by the rule.

The rule is applicable to all constructions which are to be put upon the Revised Statutes, when from its nature it can apply; consequently the section embraces the provision therein, by which a person may be acting upon a question in which other parties are interested. Whenever such a case arises, the statute under which the action is to take place, is to be construed by the aid of this rule in order to ascertain the legal meaning of such statute. It is not necessary that the Revised Statutes, or any subsequent statute should require, that a person called upon to act in a certain case, should be disin-

terested or indifferent, in order to render the rule pertinent. It is sufficient if they provide, that such a person is authorized to act generally in cases of the same kind as the one which may be presented; and if by the principles of the common law he must be disinterested or indifferent, the rule is to determine, whether he is so or not. The rule gives the definition of the term, "disinterested" or "indifferent." And whenever a person is either by the common law, the revised or subsequent statutes, required to be so, in order to do any act under the authority of the latter, his qualification to perform such act is to be tested by the definition contained in that rule.

R. S. chap. 116, sect. 1, confers upon every justice of the peace, excepting those residing in a city or town, where there is established a municipal or police court, and the judge of such court is not interested, jurisdiction in the county where he resides, in all civil actions, when the debt or damage demanded, does not exceed twenty dollars, certain kinds of actions, expressly enumerated, excepted. By the literal meaning of this section, a justice of the peace would have jurisdiction of a case where he was a party. But probably no one would contend for such a construction. All would admit, that in certain cases not mentioned as exceptions, he would not be qualified to act. The fair construction would be, that he would be authorized to act according to the provisions of the statute, excepting in certain cases, in which there would be a specific personal disability, as being a party, or otherwise interested to such an extent, as to be by well settled principles disqualified.

The case before us is one, where a construction is to be put upon the statute, chap. 116, sect. 1. Is the justice before whom this suit was brought, so disqualified, that he could not take jurisdiction of the cause? His authority as a justice is by virtue of the provision referred to. He was called upon as a justice to do acts upon a question, in which others were parties, if he took cognizance of this suit. We apprehend, that there can be no doubt of the necessity of applying the rule in de-

termining whether he had jurisdiction or not. If he was disinterested by that rule, his jurisdiction was ample; if he was not disinterested, he had none, excepting where he had no other interest than that as a citizen of the town of Warren, which by the same section does not amount to a disqualification.

But if the rule can be applied only in those cases, where the statutes themselves require, that the person should be disinterested or indifferent, it is believed that its aid is still to be invoked in the construction to be given to the statute, under which the justice acted. A requirement may be by implication as well as by direct provision. A justice of the peace has jurisdiction in cities and towns, where a municipal or police court is established, if the judge of such court is interested; and also in cases where the town, in which the justice resides is interested in the penalty for the recovery of which the prosecution is instituted, he has jurisdiction, if otherwise entitled to exercise it. A judge of a municipal or police court has no jurisdiction over suits in which he is interested. It must have been intended that the same cause should disqualify a justice. And if it was designed that a justice should have jurisdiction, notwithstanding he should be interested, the provision that he should not be disqualified by the interest of the town, of which he was a citizen, in a penalty, sought to be obtained in a prosecution before him, would be totally unnecessary. The words, "if otherwise entitled," clearly imply, that any other interest than the one expressed, takes from him his jurisdiction.

But it is contended for the plaintiffs, that by the pleadings in the case, it does not appear, that the sister of one of the plaintiffs, whom the justice married, was at the time when the action was commenced and entered, his wife, and hence, it is not shown that at the same time, the disqualifying relationship existed. It is true, that the case presents nothing which proves that the woman, whom the justice married, was then his wife, and upon such an issue as is made by the pleadings upon this point, nothing can be inferred. But did the relationship

produced by the marriage of the justice and the plaintiff's sister cease, if that marriage was dissolved.

Mr. Webster, in his Dictionary of the English language, defines *affinity* to mean "the relation contracted by marriage between a husband and his wife's kindred, and between a wife and her husband's kindred, in contradistinction from *consanguinity*, or relation by blood." By the marriage, one party thereto holds by *affinity* the same relation to the kindred of the other, that the latter holds by *consanguinity*. And no rule is known to us, under which the relation *by affinity* is lost on a dissolution of the marriage, more than that by blood is lost by the death of those, through whom it is derived; the dissolution of a marriage, once lawful, by death or divorce, has no effect upon the issue; and it is apprehended, it can have no greater operation to annul the relation by affinity, which it produced.

It is contended, that the justice had jurisdiction by express provision of Revised Statutes, c. 116, § 1, in the last part of the section. The whole meaning of this part of the statute is, that the justice being a citizen of the town entitled to the penalty, does not disqualify him from taking jurisdiction.

It is again insisted, that the plaintiffs sue in this kind of actions solely for the benefit of the town, and therefore, they have no interest; and consequently on that account the justice is not disqualified. The plaintiffs are liable for costs if the defendant should prevail; and whether the town would be answerable to them, would depend upon facts, which cannot here be introduced or considered. Even if the town should be eventually liable, it is not apprehended, that this would remove the disqualification. The statute is imperative, that such a relation as here exists, shall be sufficient to constitute a want of jurisdiction. *Judgment for the defendant.*

THOMAS HERBERT *versus* SAMUEL FORD.

In an action upon a note, between the original parties, a partial failure of consideration, though the amount of it be unliquidated, may be proved by the defendant in mitigation of damage. And the jury, upon the evidence, may determine the amount of the failure.

The tendency of decisions in this country has been to allow a broader latitude of defence, than was permitted by the rules of the common law, to bills of exchange and promissory notes, where the justice of the case requires it, and a circuity of action may thereby be avoided. — Per WELLS, J.

In a suit upon an unnegotiable note made payable to the plaintiff for the benefit of a third person, who still remains the owner, the same defence may be set up, as if the note had been made payable to such third person.

Nor, in order to make this defence, is it necessary that the party, who sets it up, should restore what he had received under the contract.

EXCEPTIONS from the District Court, RICE, J. The action was assumpsit upon a note given to the plaintiff, and not negotiable, for $175, on which there were several indorsements, the last under date of June, 1841, all in the handwriting of the defendant, leaving due of principal and interest on the day of the trial, $32,71.

There was evidence that the note was given for the medical stand, (or professional practice and good will of his stand,) of Dr. Albert S. Clark, in the town of Bristol. The terms of the trade had been agreed to, before Dr. Clark left Bristol, and after he had left, the note in suit was given in pursuance of the previous agreement, and made payable to Clark's brother-in-law and agent, the plaintiff.

There was evidence that Clark remained absent from Bristol some four or five years and then returned, and is now in practice there. It was proved that the defendant remained in Bristol after said note was given, about three years, and then moved away and established himself at Nobleboro', where he has resided ever since; that one Dr. Palmer moved into Bristol a short time before defendant left there, to aid him in his practice, and remained about two years, and after he left Dr. Clark returned to Bristol.

The defence set up was, the want and failure of consideration, and the Judge was requested by defendant's counsel to instruct the jury, that if they should find upon the evidence in the case, that the only consideration for the note was Dr. Clark's professional stand in Bristol, without any specified limited time proved, and that Dr. Clark did return to Bristol without the defendant's consent, and did resume and continue practice as a physician there; that would constitute a want or failure of consideration and would be a good defence to this action. The Judge was further requested to instruct them, that if they should not be able to ascertain the precise amount of want or failure of consideration, yet if they should be satisfied that the want or failure of consideration, if any, is as much or more than the amount due on the note, the action fails, and the defence is well maintained.

But the Judge ruled otherwise, and said, that if they found that the plaintiff acted as an agent only, and that the note under consideration was the property of Dr. Clark, it might by them be treated as such, and that any defence or failure of consideration that might have been successfully set up, had the note run directly to Dr. Clark, and been prosecuted in his name, was equally available to the defendant here; but inasmuch as the failure of consideration was not total, but only partial, and that part which had failed, if any, was uncertain and not capable of computation, it could not be set up in defence of this action, though it might be ground for an action to recover damages for a breach of contract, and that they might cast the interest and return a verdict for the plaintiff for what they should find due on the note. And a verdict was found for $32,71.

H. C. Lowell, for defendant.

1. This is not a negotiable note.

The jury should, therefore, have been permitted to ascertain whether any portion of its consideration had failed.

2. There was no sufficient consideration to support this promise. It was the intention on the part of the plaintiff to sell to the defendant his professional stand in Bristol, and his

right to practice there ; *this was to be perpetual,* or else it was on the part of the plaintiff designed to mislead the defendant. *The law* will not permit a practising physician to sell out, and deprive himself of the right, and the sick and afflicted, of the benefit of his professional services, even in a *limited* district for an *unlimited* time. The community, — the sick and suffering ones, — have a right, which cannot be impaired or abridged by trade and speculation, to have the skill and services of the physician of their choice and confidence, *at all times.* This very transaction is opposed to the benign and guardian policy of the law.

This differs widely from those cases where the defence is that the agreement was "*in restraint of trade,*" and where the distinction between a limited territory and the whole kingdom, between a term of years or a very long and unreasonable period, often decides the rights and liabilities of the parties.

3. But supposing for a moment that there was a sufficient legal consideration for this contract in its inception, then it is apparent that it had failed, not in *part*, but in *full,* for the nature of the contract was such that a failure in any respect and at any time would operate a total failure. Whether viewed in the light of a total or partial failure the instructions requested should have been granted. Such instructions could have led to no unjust result, while they were well calculated to produce exact and equal justice between the parties. 14 Pick. 2 cases; *Bean* v. *Jones,* 8 N. H. 149; *Savage* v. *Whitaker,* 3 Shep. 24 ; *Stevens* v. *McIntire,* 2 Shep. 14.

4. The views taken by the Judge and advanced to the jury were incorrect, and not adapted to the facts and nature of the case. *Noyes* v. *Day,* 14 Vermont, 384 ; *Gardiner* v. *Morse,* 9 Metc. 278.

Hussey, for plaintiff.

It will readily be admitted that there was not a total failure of consideration for the note. It therefore, cannot be rescinded by one of the parties, where both of them cannot be placed in the identical situation which they occupied,

and cannot stand upon the same terms as those which existed, when the contract was made. *Kimball* v. *Cunningham*, 4 Mass. 502; *Conner* v. *Henderson*, 15 Mass. 319; Chitty on Contracts, 5th American edition, 743.

In an action on a note or bill, the defendant cannot show a partial failure of consideration to reduce the damages, if the quantum to be deducted is of an uncertain and unliquidated amount, and there has been no attempt to repudiate the contract or restore the consideration. As where A had sold an interest in a patent right to B, accompanied with a false representation, and the interest, though of some value, was of less value than it would have been if the representation had been true, but the difference was of an uncertain and unliquidated amount, and B did not repudiate the contract, nor offer to restore the interest sold, it was held, in an action on the note, that B could not avail himself of such partial failure of consideration to reduce the damages below the sum expressed in the note. *Pulsifer* v. *Hatch*, 12 Conn. 234. So also in the case of *Greenlief* v. *Cook*, 2 Wheaton's Rep. 13, a defence was made to a promissory note, on the ground that the title to land, for the consideration of which the note was given, had only partially failed; and it was said, that to make it a good defence, in any case, the failure of title must be total. It is held in the case of *Day* v. *Nix*, 9 Moor, 159, that a partial failure of consideration of a note was no defence, provided the quantum of damages arising upon the failure was not susceptible of definite computation. Where there is a subsequent failure of consideration, it is, in many cases, equally fatal with an original want of consideration; but not in all cases, at least, where it is a matter capable of definite computation and not mere unliquidated damages. See Story on Promissory Notes, p. 204, sec. 187; Chitty on Bills, chap. 3, sec. 1, p. 79—83, (8th edition.) It has been decided, that where the defendant has derived some advantage, by the other party, to some extent having performed the agreement, in such case the agreement should stand, and he should seek a compensation in damages for the plaintiff's

default, in a cross action. And with respect to the immediate parties to a bill or note, the debt between whom, formed the consideration for the instrument, may be inquired into in whole or in part, and the holder shall recover no more than the amount of debt due to him from the defendant. But even between such parties, if the bill or note were given upon a special contract, which has not entirely rescinded, and is not wholly void on account of fraud, the partial failure of consideration will afford no defence whatever, and the full amount of the bill or note shall be recovered, when the plaintiff's partial non-performance of the contract involves a question of unliquidated damages. See Chitty on Contracts, 5th edition, p. 773; Chitty on Bills, 9th ed., p. 78, *Lewis* v. *Crossgrave*, 2 Taunt. 2; *Aulzer* v. *Bomford*, 3 Starkie's Rep. 175.

The cases, in which the Court, to prevent unnecessary litigation, have, in many instances, allowed a defendant, in case of partial failure of consideration, (except where the action is on a bill of exchange or promissory note, and a question of unliquidated damages would be raised by inquiring into the consideration for such bill or note,) instead of bringing a cross action, to reduce the damages, by setting up such partial failure of consideration are generally cases of contract for goods, or work and labor, and materials in which the defendant, when sued for the price, may show the insufficiency of the goods, or incomplete performance of the work, although a specific sum were agreed upon. *Moggridge* v. *Jones*, 14 East, 486; *Havelock* v. *Geddes*, 10 East, 564; *Harrington* v. *Stratton*, 22 Pick. 510, and *Parish* v. *Stone*, 14 Pick. 198.

The opinion of the Court, (Howard, J. concurring in the result only,) was delivered by

Wells, J. — It appears by the facts stated in the bill of exceptions, that the note in suit was given for the good will of the professional practice of Doct. Albert S. Clark, in the town of Bristol, and by the agreement of the parties, it was made payable to the plaintiff, as the agent of Clark. The

plaintiff holds it for Clark, and it is open to any defence, which might be made against the latter. *Petry* v. *Christy*, 19 Johns. 52.

Four or five years after the note was given, Clark returned to Bristol, and resumed his practice. Several payments had been made upon the note, and this suit was brought to recover the balance. The defence set up was a want or failure of consideration, equal at least, to the balance due on the note, which was not negotiable.

The Judge of the District Court instructed the jury, that inasmuch as the failure of consideration was not total, but partial, and the part which had failed, if any, was uncertain and not capable of computation, it would constitute no defence. By the common law, any legal consideration is sufficient to form the basis of a contract, and consequently, it must be entirely wanting of that ingredient, to render it a *nudum pactum.*

Whether a partial failure of consideration may be given in evidence, to defeat a recovery *pro tanto*, has been very much discussed, and has created conflicting decisions.

In New York and other States, a partial as well as a total failure of consideration, may be given in evidence by the maker of a note, to defeat or mitigate, as the case may be, the recovery. 2 Kent's Com. 474; *Earl* v. *Page*, 6 N. H. 477. The note in suit, in *Parish* v. *Stone*, 14 Pick. 198, was given upon two distinct and independent considerations, one alone of which was valid in law, but both were blended together, and neither was definite or liquidated. It was decided, that the plaintiff could recover to the extent of the valid consideration and no further, and that the amount should be settled by the jury, upon the evidence. This case appears to cover the whole ground in controversy, for if a partial want of consideration, which is unliquidated, may be shown, no apparent objection could arise to showing a partial failure, which was also unliquidated.

In *Tye* v. *Gwynne*, 2 Camp. 346, Lord Ellenborough says, the want of consideration may be given in evidence to re-

duce the damages, but a failure cannot, that furnishes a distinct and independent cause of action. No judgment was rendered in that case, which, with a cross action between the parties, was referred to arbitration.

If there be a sale of two chattels, for a gross sum, and a note given for the price, and one of the chattels is not the property of the vendor, and a partial want of consideration may be shown, why should not the same defence be allowed, if both of the chattels were the property of the vendor, and the title passed to the vendee, but the vendor destroyed one of them before delivery? In one case, there is a want of consideration, at the time when the contract is made, to the extent of the value of one of the chattels, in the other a failure of it, to the same extent, caused by the misconduct of the vendor. There does not appear to be any good reason, why the maker of the note might not defend on one ground as well as on the other. Accordingly it has been held, in *Dyer* v. *Homer*, 22 Pick. 53, where there was a sale of chattels, which was considered valid between the parties, but not so as to attaching creditors, and some of the chattels were taken and held by an attaching creditor, that the maker of the note, given for them, might prove the partial failure of the consideration, in an action on the note.

Nor is it necessary in making this defence, that there should be a restoration, by the party who sets it up, of what he has received under the contract.

In the case of *Harrington* v. *Stratton*, 22 Pick. 510, where a note was given upon an exchange of horses, and the payee represented his horse to be sound, when he was not, the defendant was allowed to prove in reduction of damages, the defect in the horse received by him, without returning or tendering it to the plaintiff.

The same principle was adopted in *Goodwin* v. *Morse*, 9 Metc. 278, where the chattel sold, was not such in quality as it was warranted to be. So also in *Stevens* v. *McIntire*, 14 Maine, 14, where a note was given for a bond, for the conveyance of land, and there was a mistake in the amount, for

which the note was given, it having been made for too large a sum, the defendant was allowed to show the same, in reduction of damages, without returning the bond.

It is true, where the purchaser would rescind the contract, and recover back what he has paid, he must restore what he has received.

But in such case he becomes the actor, and brings his action for redress. It is also well settled, that he may recover in an action for the fraud or breach of warranty, retaining what he has purchased.

It does not follow that because these two remedies are open to him, he may not also prove in reduction of damages, when he is sued upon the note, that there were fraudulent representations made to him by the payee, a warranty which has been broken, or any partial failure of consideration.

By the allowance of such defences, in those cases, where the defendant would have a right to maintain a cross action and recover damages, an unnecessary circuity of action is avoided.

In the present case, there cannot be an entire restoration of what was purchased, after the defendant had received a part of the benefit of it, but he would undoubtedly be entitled to recover damages, if he had sustained any, for the breach of the contract. And those damages may as well be investigated in an action upon the note, as in a cross action, if the plaintiff has proper notice of the defence. And the jury can as well determine them, in the one case as in the other.

There are no reasons of public policy, which would shut out this defence, or that would require a party should recover to-day, what it is conceded he must pay back to-morrow.

The case of *Lloyd* v. *Jewell*, 1 Greenl. 352, was doubted by PARKER, C. J. in *Knapp* v. *Lee*, 3 Pick. 452, and was considered by him to be at variance, with the doctrine laid down in *Bliss* v. *Negus*, 8 Mass. 46. It was also questioned by RICHARDSON, C. J. in *Tillotson* v. *Grapes*, 4 N. H. 444. And the ground of the opinion, that the covenants were a

sufficient consideration for the note, was denied to be the law of Massachusetts, in *Rice* v. *Goddard*, 14 Pick. 293. The objection made to the case of *Lloyd* v. *Jewell*, as appears by the cases cited, in Massachusetts and New Hampshire, does not seem to arise from the ground of the decision of that case, that a partial failure of consideration could not be given in evidence, but to the remarks of MELLEN, C. J. that a total failure could not. The decision in that case was made according to the rule of the English law, which remits the party back to his covenants in his deed. But the English courts admit a total failure of consideration to be a good defence, between the original parties to a bill of exchange, while they hold a partial failure is no defence. 2 Kent's Com. 473.

The authority of *Lloyd* v. *Jewell*, in which there was only a partial failure of consideration, is recognized in *Wentworth* v. *Goodwin*, 21 Maine, 150, and in *Jenness* v. *Parker*, 24 Maine, 289.

The present action does not relate to real estate, a conveyance of which with covenants of warranty, was the consideration of the note in *Lloyd* v. *Jewell*. If Clark, by resuming his practice, has prevented the defendant from enjoying the entire benefit of the contract, he ought not, through the plaintiff, to be permitted to recover compensation for that, which he has agreed, the defendant should enjoy, when by his own interference, the defendant has been deprived of it. Clark is responsible in damages, if there has been a breach of his contract, but it does not appear from the current of authorities, that the defendant is to be limited to that remedy alone. The consideration of the contract was the good will of the practice, and so far as that has been taken away by Clark, there is manifestly a failure of it.

The tendency of decisions in this country has been, to allow a broader latitude of defence than was permitted by the rigid rules of the common law, to bills of exchange and promissory notes, where the justice of the case required it, and a circuity of action could be avoided.

Exceptions sustained and a new trial granted.

PEASLEE PLUMMER *versus* JOHN SHERMAN.

The creditor has a right to recover of his debtor the amount he has paid the jailer, for his board while imprisoned on the creditor's execution.

Such recovery may be had by assumpsit on an implied promise.

ASSUMPSIT, on facts agreed, to recover the amount the plaintiff paid for the defendant's board while in jail on his execution.

The facts as agreed by the parties were, that immediately upon the commitment of said defendant, he made complaint to the keeper of the jail, according to the statute in such cases provided, of his inability to support himself in prison, and claimed relief also as a pauper; and thereupon the keeper gave notice according to law, to the creditor and the overseers of the poor of Wiscasset, and the plaintiff, being the creditor in said execution, secured and afterwards paid to said jailer the board of said debtor, for four or five months, and until he made a disclosure of his property affairs, and was discharged by taking the poor debtor's oath.

Lowell and *Carleton*, for the plaintiff.

1st. By our statute the debtor has a right, at his election, to give bond to the execution creditor, conditioned that within six months he will pay the debt and costs, or disclose his property affairs before two justices of the peace and quorum, or to go into close jail within that time. If he elects to go to jail he may do so, and on entering the jail he may represent himself as unable to support himself, and thereupon the creditor becomes liable for his said support. And if the town pays the bill in the first instance, the town may recover the same of the creditor. R. S. chap. 148, sec. 20, page 628; statute of March 17, 1842, chap. 23, page 14; R. S. chap. 148, sec. 56, pages 634, 635; chap. 32, sec. 31, 32, page 242.

2d. It is further provided that no release or discharge of the debtor's *person*, shall impair or discharge the right of the creditor to his debt and costs; all which, together with any

and all sums he shall have paid for the support of his debtor in jail, shall be and remain a legal claim against the goods and estate of the debtor. R. S. chap. 148, sec. 42, page 632; R. S. chap. 32, sec. 33, page 242.

3d. Here the defendant availed himself of these provisions of law for his benefit. He elected not to give bond, but to go to jail, to apply as a pauper, and at last to swear out, disclosing property more than sufficient to pay the debt and costs. The creditor renewed his execution and caused it to be satisfied out of said property, and having been obliged by his debtor to pay for his support while wilfully in jail, he brings this action to recover out of the goods and estate of the defendant the money he has been compelled to pay for his support.

4th. Assumpsit is the appropriate form of remedy. The plaintiff could not maintain debt on his judgment and recover this claim as additional thereto, for his judgment had been paid and satisfied. The law gives the creditor a right and the inquiry is, what is the proper form of remedy to enforce that right? This is not a fine or forfeiture to be recovered in debt, nor is it an escape to be sued for in a special action of the case; but is an equitable claim which the law declares, and as such will enforce.

And from analogy, it would seem that assumpsit is the most, if not the only, appropriate remedy. R. S. c. 32, sec. 50, page 246; chap. 32, § 29, p. 242; chap. 148, § 56, p. 634, 635; *Inhabitants of Paris* v. *Inhabitants of Hiram*, 12 Mass. 267.

Geo. Abbott, for defendant.

The plaintiff paid the defendant's board for *his own benefit* and *not* for the benefit of the defendant. The defendant had *no wish* or *desire* that the plaintiff should pay or assume any obligation to pay his board, and in fact it was quite a damage to the defendant for him, the plaintiff, to assume to pay to the jailer the board. The defendant thereby was obliged to lay in jail until he or some of his friends furnished the means of defraying the expenses of being relieved from prison on taking

the poor debtor's oath. We therefore contend the action at bar cannot be maintained at common law, because —

1st. There is *no express or implied* promise on the part of the defendant to pay. *Whiting* v. *Sullivan*, 7 Mass. 107; *Kimball* v. *Tucker*, 10 Mass. 192; *Richards* v. *Cram*, 7 Pick. 216; *Jewell* v. *Somerset*, 1 Greenl. 125.

2d. I find no statute provisions authorizing the maintainance of this action.

WELLS, J. — By chap. 148, § 56, R. S. the keeper of the prison, in case the debtor should claim relief as a pauper, might require *security* of the creditor, for the payment of the expense of supporting the debtor, while in prison.

By the act of March 17, 1842, c. 23, before such *security* can be required, the debtor must make complaint in writing, and verified by his oath, of his inability to support himself in prison, and of furnishing *security* for such support.

It could not have been the intention of the Legislature, to require the creditor to support his debtor in prison, without any claim of reimbursement from the debtor.

The debtor may have property, but so situated, as not to be available for his support, or to enable him to furnish the required security. His condition may in reality be much more favorable, than he represents it to be, in his complaint. Must the creditor either allow the debtor to be discharged without examination, or support him without any legal claim to recover again what he has paid?

By the terms of the statutes, the creditor cannot be called upon for the security, until the debtor has made the complaint. He therefore, voluntarily lays the foundation for the call upon the creditor.

Every man is under obligation to support himself, and when that support is furnished by another, it must be regarded as beneficial to him. The creditor has a legal right to cause the debtor to be arrested and imprisoned, if he does not pay the debt, or discharge himself by the poor debtor's oath. The debtor's obligation to maintain himself remains, although he is

in confinement, and his ability to do it may be lessened. The creditor, by the coercion, is not legally in fault. By the reception of support from the creditor, the parties are to be viewed in the same relation, as if no confinement existed. There is no difference in the liability, arising from a support furnished in prison or out of it. The creditor is to furnish *security* or pay money in advance, from time to time, or the keeper of the prison may release the debtor. But the security of the creditor does not preclude the debtor from making payment, it is not the less obligatory upon him to do so. The creditor is to make the keeper secure, that he will receive his pay from the debtor, who is the party creating the expense. The debtor is the principal, and the creditor is to be viewed as a surety.

Supplies furnished by towns to paupers, before they were made liable for them by statute, were not considered as creating any obligation to make payment. *Deer Isle* v. *Eaton*, 12 Mass. 329. The supplies were to be deemed a gratuity. But when furnished to a person not a pauper, it is said by WESTON, J. in *Alna* v. *Plummer*, 4 Greenl. 249, there can be no doubt but the common law affords a sufficient remedy, without the aid of the statute.

But the law does not require of the creditor to support his debtor in prison; it gives him the option of doing so, if he would retain him there. It is a mode afforded to him of compelling the debtor to make payment or disclose. It is a part of the remedy provided for the collection of debts, and could, in no sense, be construed as a gratuity.

It is true, the law will not imply a promise of any person against his own declaration. *Whiting* v. *Sullivan*, 7 Mass. 107. But generally the law implies a promise, where one pays money, or performs a beneficial service for another. 1 Chit. on Plead. 90, 91; 1 H. Black. 90; *Bowes* v. *Tibbets*, 7 Greenl. 457.

There does not appear to be any thing in the present case, to authorize it to be taken out of the general rule. What was paid to support the defendant, must be considered as paid for

his benefit, and the law raises a promise on his part to reimburse the plaintiff. *Judgment for the plaintiff.*

JOSEPH MOORE *versus* JAMES MANN *& als.*

In a petition for partition, where commissioners are appointed upon a default, and make a return, which is resisted by a written motion, this proceeding does not make those who file the motion parties or subject them to costs.

EXCEPTIONS from the District Court, RICE, J.

Petition for partition. In the District Court, judgment, upon default, was entered, *quod partitio fiat*, and commissioners were appointed, who made their report at the October term, 1847.

At the same term the respondents were permitted by the Court to oppose the acceptance of the report, and the action was continued, on their motion, to the then next term.

At the term last mentioned the respondents, John Wyman and Isaac Randall, filed a motion, that the report be rejected for reasons therein alleged. The Court recommitted the report to the same commissioners, with instructions.

At the Oct. term, A. D. 1848, the commissioners again submitted their report, which was also opposed by said respondents, but it was accepted. The petitioner then moved for his costs against those respondents, who had appeared in the case.

The Judge awarded costs for the petitioner against the said Wyman and Randall for the October term, A. D. 1848, only.

Gilbert, for petitioner.

The general provision of law is, that the prevailing party shall recover costs. R. S. c. 115, § 56.

The provisions in c. 121, do not touch this case. R. S. c. 121, § 13 and 14.

The question really involved is not whether the petitioner shall take costs at all, but how much.

The acts of the respondents kept the action in court and multiplied costs, and they finally failed in their objections.

The recommitment of the report was not through the fault of the petitioner.

This recommitment is analogous to the granting of a new trial, where if the party who first obtained a verdict, finally prevails, he shall recover costs for the former trial, although there was error on the part of the Court or the jury in the proceedings, by which he first obtained a verdict.

Ingalls, for respondents, contended that costs only were allowed where an issue is joined and tried. *Symonds* v. *Kimball*, 3 Mass. 299; *Swett* v. *Bussy*, 7 Mass. 503; *Reed* v. *Reed*, 9 Mass. 372; *Paine* v. *Wood*, 4 Pick. 246; U. S. Digest, costs, 50.

SHEPLEY, C. J. orally.

Both parties complain of the judgment of the court below; one that costs are taxed at all, and the other that there is not enough allowed. The question presented is whether this case comes within the provisions of c. 115, § 55, 56. It cannot rightfully be said that this is an *action* and § 56 speaks only of *actions*. There is a provision in c. 121, R. S. calling this proceeding for partition an action, but § 15 provides that in all actions at common law for partition, costs shall be taxed upon like principles as when the proceeding is by petition. This case does not fall within the partition act, because the persons against whom judgment for costs was rendered were not parties. In order for one to be a party he must present himself on the docket of the Court and be subject to costs on trial, if such there should be. Section 30 of same chapter provides for a recommitment of the report, or that it may be set aside, § 31 enacts that all parties to the judgment shall be bound, and § 33 makes provision for those not appearing and answering, and shows what is meant by an appearance, that the party must present himself upon the docket or on the record. Here the parties appeared only by a written motion against the acceptance of the commissioners' return. This proceding did not make them parties to the petition. They

never intended to make themselves parties nor can an act of this character constitute them such.

No costs allowed.

STATE *versus* CHARLES F. BARNES.

A motion to quash an indictment is addressed to the discretion of the presiding Judge.

When a party has pleaded and a verdict has been found against him, a motion to quash the indictment is not regularly before the Court, and the overruling it is not subject to exceptions.

Where the presiding Judge instructs the jury in a manner appropriate to the facts of the case, and correctly as to the law, though not in terms as requested, there is no cause for exceptions.

INDICTMENT, against the defendant for unlawfully keeping and suffering to be kept for the purpose of hire and gain, a certain shop or building for the purpose of gaming, gambling and playing for money and other things, &c.

On the trial, in the District Court, before RICE, J., the county attorney introduced evidence tending to show that such a building was kept by the defendant for the purpose of playing at bowls and cards; those who played at bowls paid fifty cents an hour, or ninepence a game, to one Mitchell or to persons employed by him to set up pins, and that it was common to roll off to see who should pay for the use of the alley, and for liquor drunk; that there was a room connected with the bowling room, in which cigars and candies and liquor were kept, and that the game of cards was played in that room, and on two or three occasions, a small amount of money was played for, some small change on the table being taken up by the winner, and in three or four instances, it was testified, that persons in said "edifice," played to see who should pay for the liquor they drank.

It appeared that respondent erected one bowling alley in the basement room in 1847, and three others in the same building in March, 1848. And that on the 21st of March, 1847, he rented the first alley to one Mitchell for $100,

for one year, and that Mitchell had control of the establishment, but made no special contract as to the three other alleys, as he was expecting to have them at the same rate. Mitchell kept cigars, candies, &c. in the room above, connected with the bowling room, which he had of Barnes, and paid him one half the profits of sale.

It also appeared, that Barnes put up a notice, March 21, 1847, on a post in the bowling room, that no gambling could be allowed in said room or any part of the establishment, which notice remained there; and that said Barnes several times inquired of those who had charge of the alleys, &c., if any person gambled there, requesting to be informed if any one should do so, or break over the rule. It was testified that said Barnes, on one or more occasions, played at cards to see who should pay for the liquor they drank, and that liquor was sold there. It was also proved that sundry persons played at cards and at bowling. The card playing for money, was in the winter of 1847 and 1848. Barnes was frequently in the room connected with the bowling alleys, and often tending the bar and taking pay, and had been heard to say that the whole establishment belonged to him, and was his concern.

It also appeared, that this was a place of frequent and almost constant resort, and that bowling was kept up there a good deal of the time both in the day time and evening, and that those who resorted and played there were mostly young men, citizens of Wiscasset.

The counsel for the respondent requested the Court to instruct the jury, that "rolling off" to see who should pay for the use of the alleys, or the playing for the liquor or cigars used, was not gaming within the true intent and meaning of the statute, and that the evidence of two or three solitary instances of persons playing there for money, in small and inconsiderable sums, without the knowledge of defendant, would not constitute gaming, nor subject defendant to the charge of keeping a house for the purposes of gaming.

The presiding Judge, after reading to the jury the 7th sec. of chap. 35, R. S., said, that in order to sustain the indictment,

the government must satisfy them that the building referred to in the indictment, was kept by the respondent, and was resorted to for the purpose of gaming, with his knowledge and consent; that playing at cards or bowls simply for amusement or exercise was not gaming within the meaning of the statute; to constitute that offence the gaming must be for money or other things, and to make this house a gaming house, it must be kept and resorted to for the purpose of gaming for money or other things; that if the house described in the indictment was kept and controlled by Mitchell or any person other than the respondent, then the respondent would not be liable unless the persons thus keeping and controlling the house, were his agents or servants, and acted under his direction and control; if however the house was managed by others, and those managers were the mere agents or servants of the respondent, he would be liable in the same manner as he would have been, had he controlled and managed the establishment personally.

A verdict of guilty was rendered, and after verdict and before sentence the counsel for the respondent filed a motion in writing to quash the indictment for various reasons therein set forth, which was overruled. Exceptions were taken to the rulings and instructions, and omissions to instruct.

Ruggles, for the respondent.

Hill, County Attorney, for the State.

Howard, J. — Motions to quash, are addressed to the discretion of the presiding Judge. He may quash a defective indictment, or he may require the party to plead or demur, but he is not bound, *ex debitó justitiæ*, to dispose of the prosecution summarily, on such motion.

After a party has pleaded, and after verdict against him, a motion to quash the indictment is not regularly before the Court, and the overruling it is not subject to exceptions. 1 Chitty's C. L. 245—250; Bac. Abr. Indictment, K; 4 Hawk. b. 2, c. 25, § 146; *Rex* v. *King*, Str. 1268; *Rex* v. *Johnson*, 1 Wils. 325; *King* v. *Wynn*, 2 East, 226; *State* v. *Soule*, 20 Maine, 20.

The prisoner's counsel contended that, "rolling off to see who should pay for the use of the alley, or the playing for the liquor or cigars used, was not gaming within the true intent and meaning of the statute, and that the evidence of two or three solitary instances of persons playing there for money in small and inconsiderable sums, without the knowledge of the defendant, would not constitute gaming, nor subject the defendant to the charge of keeping a house for the purpose of gaming, and requested the Court to instruct the jury in accordance with these positions."

The presiding Judge, in the District Court, did not comply with this request, in terms, but instructed the jury, "that, in order to sustain the indictment, the government must satisfy them that the building or house, referred to in the indictment, was kept by the respondent and was resorted to for the purpose of gaming, with his knowledge and consent; that playing at cards or bowls simply for amusement or exercise, was not gaming within the meaning of the statute; that to constitute that offence, the gaming must be for money or other things, and to make this house a gaming house, it must be kept and resorted to for the purpose of gaming for money or other things."

These instructions were appropriate and correct, and were all that were required by the facts and law of the case, which were embraced in the request. Other instructions were given, upon other requests, to which exceptions were not filed.

The exceptions are overruled, and the case is remanded to the District Court for further proceedings.

LIME ROCK BANK *versus* WILLIAM MACOMBER *& als.*

The assent of a bank, that a note may be sued in its name for the benefit of a third person, may be inferred from the acts of its officers, and without a vote of its directors.

ASSUMPSIT upon a note, made payable to the bank, but for the benefit of one Williams, under an agreement between him

and the defendants that the bank should hold the property as trustee for Williams, for whose use this action is brought. The note was never discounted or accepted by the bank. But their president, cashier and general attorney knew of the pendency of the suit, without objecting to it.

The jury were instructed that, *with the consent* of the bank the action might be maintained, and that such consent might be inferred from the acts of their officers.

Verdict for plaintiff. Exceptions by defendants.

Gould, for defendants.

1. The bank could not become a party, except by discounting the note. Stat. of 1831, c. 519, § 2.

2. The Banks' consent to stand as trustees to Williams, and to have the suit in their name, could have been given only by consent of a majority of their directors. Stat. of 1831, c. 519, § 7; Angell on Corp. 171, 191, 249; 16 Pick. 574, is in point, both as to principle and details.

3. It was not competent for a bank thus to become a party without interest. Such power was not given by the Legislature. It would be dangerous to the public. Stat. of 1831, c. 519, § 2; Angell on Corp. 192, 200; Bank Act of 1841; U. S. Dig. p. 602, § 88.

4. Even *with the assent* of the bank, the suit is not maintainable. There never became a contract between these parties. Whatever contract existed, was between the defendants and Williams. Upon that contract, and not upon the note, he should have brought suit. *Allen* v. *Ayer*, 3 Pick. 298; *Bank* v. *Adams*, 16 Pick. 579.

The Court, by Howard, J. orally. — Formerly the assent of the bank, in such a case, was required to be proved by record. More recently the consent of its officers has been held sufficient. The jury were justified in finding such consent. A suit in the name of the United States was recently maintained by direction of the Postmaster General, for the benefit of an individual. *Exceptions overruled.*

JAMES D. WILSON *versus* NICHOLAS NICHOLS.

It *seems*, that in replevin, after issue joined upon the merits, it is too late to move that the action be dismissed, because no replevin bond was returned.

TENNEY, J. orally. — The defendant had attached certain goods, as the property of one Elbridge G. Wilson. The plaintiff then brought this action of replevin, for them. At the last term of this Court, the defendant moved to dismiss the action because the replevying officer returned no replevin bond. The motion was overruled, the suit having been commenced in 1847.

The goods had been shipped from Boston to Bath. Before the freight was paid, the goods were taken from the defendant on the replevin writ. The defendant's counsel requested instruction to the jury that, because the ship's lien for the freight was not discharged, the plaintiff could have no right of possession, and therefore could not maintain replevin. That instruction was not given. The verdict was for the plaintiff and the defendant excepted.

It is the opinion of the Court that the motion to dismiss came too late. Though in the nature of a plea in abatement, it was not made till after issue joined. Pleading to the merits admits the service to be regular. The bond is required only for security of defendant, and he may waive it. But a further examination of the papers has shown that the objection is not well founded in fact, and that a bond was duly taken.

By the *attachment*, the possession of the goods had already been taken from the master of the ship. As between these parties, the right of possession was in the plaintiff, the jury having found him to be the owner. *Exceptions overruled.*

A TABLE

OF THE

PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.

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ACCESSORY.

which the Court will protect, to the balance due at the time of the notice of the assignment, which cannot be diminished by any claim of the other party, accruing or procured subsequently. *Bartlett* v. *Pearson*, 9.

2. And if the assignee bring an action in the name of the assignor for the whole amount of this account against the other party, and the defendant bring a cross action, also, for the full amount of his account, and both actions proceed to judgment; under the provisions of Rev. St. c. 115, the judgment *debt* in the lesser claim may, by leave of court, be set off in payment of so much of the larger; but the *costs of that suit* cannot be set off in further payment of the balance of the larger judgment, without the consent of the assignee. *Ib.*

3. The District Court may exercise a discretionary power by ordering or refusing to order judgments of the Court to be set off, when it can be done without a violation of the legal rights of either party. But when a set-off is not authorized by law, and when it would deprive a party of any of his legal rights, he can have a remedy to protect them, by bill of exceptions. *Ib.*

4. If, pending a suit in which land had been attached, the plaintiff assign the demand for value, the equitable estate, after the levy, is in the assignee, as a resulting trust. *Warren* v. *Ireland*, 62.

5. In the making of such a levy, if the assignment be stated in the appraiser's certificate, such statement is notice of the trust to any attaching creditor of the assignor. *Ib.*

6. Whether such creditor, without notice, actual or implied, could, by levying the land as the property of the assignor, hold it discharged of the trust; *quære.* *Ib.*

7. But with such notice, he could hold only subject to the trust, and could not maintain a writ of entry against the grantees of the *cestui que trust.* *Ib.*

See Bank. Bankruptcy, 1, 2, 3. Partnership.

ASSUMPSIT.

See Guaranty, 5, 6. Poor Debtors, 6. Shipping, 4.

ATTACHMENT.

See Mortgage, 6, 7. Partition, 3, 4. Shipping, 3.

ATTORNEY.

1. Where a power of attorney has been given, authorizing the conveyance of land, verbal directions from the constituent to the attorney can confer no new authority, nor enlarge that contained in the power of attorney. *Spofford* v. *Hobbs*, 148.

2. A ratification, by the proprietor of land, of an unauthorized conveyance by his attorney, in order to be effectual, must be by an instrument under seal. *Ib.*

wards ratify the act, and proceed to judgment in the same manner as if the suit had been originally commenced by his direction. *Ib.*

3. A note made payable to a bankrupt, after petition filed, and before the decree, passed to the assignee by operation of law, as a part of the bankrupt's effects. *Ib.*

4. Though a petitioner in bankruptcy may have had an *equitable* interest in land, which had been sold by the *legal* owner, who had taken a note payable to himself for the purchase money, it would not certainly follow that the petitioner in bankruptcy had any interest in the note; nor would an omission to specify the note in the schedule, be conclusive evidence of fraud on his part, such as to invalidate his certificate of discharge.
Cary v. *Esty*, 154.

See CONTRACT, 2, 3, 4, 5, 6. INSURANCE, 6.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. In a suit upon a promissory note, if the plaintiff be the holder of it, the law presumes the title to be in him, or in some person for whom he acts. *Souther* v. *Wilson*, 56.

2. The drawee of an order of $55 paid 34,75, and indorsed upon it that the payee had received that sum, "it being all that the drawee agrees to pay, unless the drawer intended the order to be exclusive of $20,25 which the drawee had previously paid without order." It was afterwards ascertained that the drawer intended the whole $55 should be paid by the drawee, of which the drawee was notified by a new request from the drawer. *Held*, the drawee was liable for the balance. *Phillips* v. *Frost*, 77.

3. The maker of a note which is sued by those who have a legal interest in it has no right to inquire into the disposition to be made of the proceeds when collected; but if the plaintiffs can lawfully receive payment for the note, the defendant is protected in making it, whatever may become of the proceeds. *Stevens* v. *Hill*, 133.

4. Counsel will not be permitted to argue to the jury, that the note before them was payable, according to the agreement of the maker, at a different place, than is indicated by the note itself. *Pierce* v. *Whitney*, 188.

5. In an action against the indorser, evidence that the maker of a note addressed a letter to the holder, informing him that he should not be able to pay it at maturity, and requesting an extension, is not admissible to excuse a presentment of the note at the maker's place of residence and business, at its maturity. *Ib.*

6. The parties to a note, deposited in a bank in Boston for collection, cannot be affected by an usage in the other banks, which has no existence in the bank where it is lodged. *Ib.*

7. Any illegality in the transfer of a negotiable note, will vitiate the title of one, who was a party to the illegality. *Sproule* v. *Merrill*, 260.

8. If one, without consent of the maker, affix his name, as subscribing witness to a note which had been executed without attestation, it is a material alteration of the note. — Per HOWARD, J. *Thornton* v. *Appleton*, 298.

BOND.

CERTIORARI.

CITY OF PORTLAND.

CONSTABLE.

CONTRACT.

See EQUITY, 12, 13. GUARANTY. INSURANCE. REPLEVIN. SALE.

CONVEYANCE.

See COVENANT. DEED.

CORPORATION.

therefor, it is not entitled to demand toll for *driving* lumber, that sort of business not being within its corporate powers.

Bangor Boom Corporation v. *Whiting*, 123.

2. In a suit by such corporation, upon an account annexed for *driving* and *booming* lumber, it is rightful to allow the plaintiffs to amend by withdrawing the charge for the *driving*. *Ib.*

3. Payments to a person, acting as agent for such a corporation, made partly to pay for *driving* and partly for *booming*, are to be applied to each, according to the intent of the parties when the payments were made. *Ib.*

4. If the doings of such an agent are some of them *within* and some of them *beyond* the corporate powers, the corporation may ratify his doings so far as they were within its powers, but no further. *Ib.*

See INSURANCE, 12, 13, 14, 15.

COSTS.

See ASSIGNMENT, 2. EQUITY, 4 PARTITION, 7. TRUSTEE PROCESS, 3. USURY, 1.

COUNTY COMMISSIONERS.

1. The power, which the county commissioners exercise over roads, under the statute, is a judicial power, and the records of their proceedings and judgments, so long as they act within the sphere of their duty, cannot be incidentally impeached. *Longfellow* v. *Quimby*, 196.

2. Hence, if there are important irregularities in the location of a road, or in the assessment of taxes to build it, they can be taken advantage of only by *certiorari*. *Ib.*

3. Exceptions do not lie to the rulings of the District Court, in cases appealed from a decision of County Commissioners. Errors, if any, are to be corrected on *certiorari*. *Banks & als. Appellants*, 288.

4. There is no right of appeal to the District Court from a *joint* decision of the county commissioners of *two or more* counties. *Ib.*

COVENANT.

1. If there be a series of conveyances with warranty running with the land, and the warranty be broken, the remedy belongs to him, during whose ownership or claim of ownership, under the conveyances, the warranty is broken. *Crooker* v. *Jewell*, 527.

2. One of the grantees in such a series can have no action against his grantor for a breach of the warranty, occurring after having himself conveyed the land. *Ib.*

3. In an action for the land, by one claiming under a paramount title, if the tenant vouch his immediate warrantors, who take upon themselves the defence, their release of a previous warrantor will not render such previous warrantor a competent witness for the defence. *Ib.*

4. The act of the tenant, in vouching his *immediate* warrantors, does not impair his remedy against a *previous* warrantor. *Ib.*

See DEED.

DAMAGES.

See Action, 4, 5. Bills and Notes, 17. Slander, 5, 6. Trespass, 4, 5. Usury, 1. Way.

DEED.

1. A receipt not under seal, cannot be regarded as a release of the covenants in a deed which is not apparently referred to in the receipt; for "covenant by deed must be discharged by deed." *Heath* v. *Whidden*, 108.

2. Where a plan of a tract of land is made, with intent to represent a survey actually made and marked upon the face of the earth, if there be a variance between the survey and the plan, the plan is controlled by the survey. *Williams* v. *Spaulding*, 112.

3. In such a case, conveyances made of lots according to the plan must yield to conveyances of lots according to the survey. *Ib.*

4. Where a deed of a tract of land bounds it "partly on a stream, as the said lot was surveyed by L. L. Esq. reference being had to the plan," and the plan shows a straight line drawn along the stream pursuing its general course, but crossing the stream at a curvature, and taking in a piece of land on the other side within the curvature; and the lines named in the deed do not entirely surround the tract; but by substituting the straight line instead of the stream the tract is surrounded, the straight line must be regarded as the true boundary, and the land on the other side of the stream between the curvature and the straight line is embraced in the deed. *Eaton* v. *Knapp*, 120.

5. The Revised Statutes, c. 91, § 26, have abrogated the law by which *implied* or *constructive notice* of a prior *unregistered* deed, would avoid a subsequent one from the same grantor. Unless the grantor in the subsequent deed had "*actual* notice," of the prior one, his title is valid. *Spofford* v. *Weston*, 140.

6. *It seems*, the conduct of a subsequent purchaser or attaching creditor, who has knowledge or notice of a prior conveyance, and afterwards attempts to acquire a title to himself, is *fraudulent*. *Ib.*

7. The registry of a deed of a piece of land from one stranger to another, does not indicate that the grantor in said deed had a conveyance from the former actual owner, no such conveyance appearing on the record; nor can any information derived by the grantee from those who obtained their knowledge from such registry, have any such effect. *Ib.*

8. Nor is a party, proposing to purchase the same premises, bound to inquire of the grantor in such a deed, with regard to the title. *Ib.*

9. It is for the party relying on an unregistered deed, against a subsequent purchaser or attaching creditor, to prove that the latter had *actual* notice or knowledge of such deed. *Ib.*

10. Where the declarations of the subsequent purchaser, indicate his disbelief that any prior deed had been given by his grantor, although admitting his knowledge of a claim that such deed existed, by those who professed to hold under it, there can arise no presumption that he had *actual* notice of

DEMURRER.

DEPOSITION.

DISTRICT COURT.

DIVORCE.

DOWER.

EQUITY.

ERROR.

ESTOPPEL.

EVIDENCE.

EXCEPTIONS.

EXECUTION.

2. A complaint for flowing land, will lie against the occupant as really as against the owner of a dam. *Ib.*

3. A right to flow lands for the working of a mill, may be acquired by prescription, although the flowing was occasioned by different dams, owned by different persons. *Ib.*

FOREIGN ATTACHMENT.

See TRUSTEE PROCESS.

FRAUD.

See BANKRUPTCY, 4. BILLS AND NOTES, 9. DEED, 6, 10. EQUITY. INSURANCE, 5. MORTGAGE, 3, 4. SALE, 2, 3.

GUARANTY.

1. Where one transfers a note and, at the same time, guarantees its payment, the consideration for the transfer is a sufficient consideration for the guaranty. *Gillighan* v. *Boardman*, 75.

2. It is not necessary that a contract should contain a statement of its consideration. *Ib*

3. A guaranty to pay a note after the guarantee has obtained execution, if it cannot be collected of the maker, is valid, although the execution be obtained in the name of an indorsee of the guarantee. *Ib.*

4. In such a case the guarantor would not be discharged by want of notice, (before suit against him,) that the note could not be collected of the maker or by any other laches of the guarantee, unless such want of notice or such laches, would, in case of his liability, be the occasion to him of some loss or injury. *Ib. See Errata, page* 600.

5. The plaintiff, with others, were guarantors for the purchase of goods by A of B. Afterwards C purchased A's stock, and informed one of the guarantors that he had assumed to pay the debt due B under the guaranty. Subsequently the guarantors were called on for payment, and on informing C, he repeatedly promised one of them it should be paid. C also made the same promises to the attorney who had the demand for collection. The guarantors paid B's claim, and the plaintiff paid his portion thereof and charged the same to C who acknowledged its justice. *Held*, that C's undertaking was not within the statute of frauds, and that there was such privity between the parties, that *indebitatus assumpsit* might be maintained. *Todd* v. *Tobey*, 219.

6. In such action, it is not necessary that all the guarantors should join. *Ib.*

GUARDIAN.

1. If the guardian, in the settlement of his account, omit an entire item which he ought to have credited to the ward, that settlement will not protect him from liability, in his next settlement, to account for such item. *Starret* v. *Jameson*, 504.

2. A guardian is accountable for interest moneys due on notes to his ward, whether he collect them, or whether they be lost by his neglect. *Ib.*

3. A guardian is not entitled to any compensation for services, if he neglect to

2. Where in a policy insuring a stock of dry goods, it is provided that the policy shall be void, if "the risk shall be increased by any means whatsoever within the control of the assured, or if such building or premises shall, with the assent of the assured, be occupied in any way so as to render the risk more hazardous than at the time of insuring;" and among the articles denominated hazardous is cotton in bales; — yet if cotton in bales is merely kept for sale as a part of the stock of dry goods, it does not vitiate the policy, unless the jury should find that the keeping of such cotton increases the risk. *Ib.*

3. Where in a policy upon a store and stock of dry goods, one of the conditions protected the insurers against the appropriating, applying or using the store for *keeping* or *storing* goods of a hazardous character, — *held*, that the keeping of a hazardous article for *sale* among the other goods was not an infraction of that condition. Such a condition is merely a protection against appropriating the store for a depository of such goods, as a sole or principal business. *Ib.*

4. The affidavit of the assured, made in pursuance of the requirement of the policy, and his examination before the company's agent, after being introduced into Court without objection, are proper evidence for the consideration of the jury as to the amount of the loss. *Ib.*

5. The fact that the assured in his affidavit estimated the value of the goods consumed, at $2800, and the jury returned a verdict for $1853 only, is not such evidence of fraud and false swearing, as would justify the Court in granting a new trial. *Ib.*

6. In the charter of an insurance company it was enacted that, if the insured should alienate the property, the policy should be void. *Held*, an alienation had occurred when, upon his own application, he had been decreed a bankrupt and his assignee in bankruptcy had been appointed.
Adams v. *Rockingham M. F. Ins. Co.* 292.

7. *Held*, further, an alienation had occurred, when the insured, by an absolute deed, had conveyed the property, although he received from his grantee an unsealed agreement to reconvey upon the payment of a specified sum. *Ib.*

8. *It seems*, that in cases relative to the impracticability of saving a vessel, which has been wrecked at sea, the probable expense of repairs if she could have been saved, and the course to be pursued in making them, the opinions of experienced masters of vessels are admissible in evidence.
Walker v. *Protection Ins. Co.*, 317.

9. In a contract of insurance upon time, the time is to be reckoned, according to the longitude of the place where the contract was made, and is to be performed. *Ib.*

10. If, by reason of the violence of the winds and waves, a vessel upon the high seas has become a wreck, incapable of being brought into port, she is to be considered an *actual* total loss. *Ib.*

11. If one, having an interest in mortgaged property, procure insurance in his own name, with a stipulation that the loss, if any, shall be paid to the mort-

LARCENY.

See INDICTMENT, 5.

LAW AND FACT.

1. Whether certain words, spoken by the mortgagee to the mortgager of personal property, conveyed authority to sell the property, is a question for the jury and not for the Court; and where the jury were instructed that if the words used were "sell the horse and pay me," the power to sell was given, it was held to be erroneous, it being the province of the jury to find not only the words used, but the meaning of them.

Copeland v. *Hall*, 93.

2. The words used were but evidence. Whether that evidence proved the authorization, was a question, not of law for the Court, but of fact for the jury. *Ib.*

LEASE.

See LANDLORD AND TENANT.

LEGACY.

See WILL.

LEVY ON REAL ESTATE.

See ASSIGNMENT, 4, 5, 6, 7. EQUITY, 15, 16. PARTITION, 4.

LICENSE.

See PEDDLING.

LIEN.

See EQUITY, 9.

LIMITATIONS.

1. An agreement by the defendant, made since Rev. Stat. c. 146, was in force, "to waive any defence he might have had by virtue of the statute of limitations, and take no advantage of the same," will not take the contract, to which it had reference, out of ihe operation of that statute, unless the same be in writing and signed "by the party chargeable thereby."

Hodgdon v. *Chase*, 47.

2. To a note of hand, made in the Province of New Brunswick, to the plaintiff, who has ever resided there, the maker, though living in this State for eleven years, cannot set up as a defence, our statute of limitations.

McMillan v. *Wood*, 217.

3. Where a suit is commenced against an executor, within four years of his appointment, and by mistake of the attorney as to the sitting of the Court, the action is not entered, this mistake will not avail the party to maintain a new suit after the four years have expired. *Packard* v. *Swallow*, 458.

See BANKRUPTCY. BILLS AND NOTES, 14. PRACTICE, 3.

MILLS.

MORTGAGE.

NEW TRIAL.

OFFICER.

ORDER.

See BILLS AND NOTES, 2.

PARTITION.

1. By the provisions of Rev. Stat. c. 121, § 33, 37, the proceedings and judgment on a petition for partition are not conclusive, unless against one who appeared and answered to the petition, upon an elder and better title than that of the person holding by virtue of the partition.

Argyle v. *Dwinel*, 29.

2. When a person is the owner of an undivided portion of lands holden in common, which portion is severed and set out, to be holden in severalty by legal process and proceedings for partition, his title adheres to and follows the estate, and becomes limited by it. *Ib.*

3. When a creditor attaches the estate of his debtor held in common with others, that cannot prevent the other part owners from procuring a legal partition of the estate. Nor will such partition vacate or destroy the attachment which will remain a lien on that part of it set off to the debtor. *Ib.*

4. And if the attachment be followed by a judgment, execution and levy, that levy cannot, if made after the partition, be legally made upon the debtor's interest, as a common and undivided estate. To be effectual to convey the title, it must be made upon the estate assigned to the debtor to be held in severalty. *Ib.*

5. A judgment upon a verdict, rendered in favor of petitioners for partition against persons unknown, is conclusive, so far as concerns the rights of those who did not appear and become parties to the proceedings, although the finding of the jury did not conform to the issue and by inadvertence was not written out in form, before it was affirmed.

Foxcroft v. *Barnes*, 128.

6. A judgment establishing the partition of lands bars the legal possessory title of all who did become or might have become respondents. *Ib.*

7. In a petition for partition, where commissioners are appointed upon a default, and make a return, which is resisted by a written motion, this proceeding does not make those who file the motion parties or subject them to costs. *Moore* v. *Mann*, 559.

PARTNERSHIP.

1. Where the general partner, (in a special partnership subsisting and conducted in his name,) makes a general assignment of *his* property for the benefit of creditors, without using any words to show that the partnership property was intended to be assigned, the partnership property is not thereby transferred. *Merrill* v. *Wilson*, 58.

2. In such case, one, who takes the partnership property by purchase from the assignee, cannot hold it as against the creditors of the copartners. *Ib.*

3. Where one of two partners has assigned his interest in the partnership effects to his co-partner to secure the latter for debts due him from the former, but remains liable for the debts of the firm, and entitled to his share of

hear a poor debtor's disclosure of his property affairs, the proceedings of the justice will be invalid, unless it be shown, that, in making the appointment, such person acted in his capacity of constable.

Gilligan v. *Spiller*, 107.

2. Where a debtor under the R. S. chap. 148, discloses notes, accounts and executions, and the oath is administered to him without any measures taken on his part, to have an appraisal of the property, the condition of the bond is not thereby fulfilled. *Fessenden* v. *Chesley*, 368.

3. Where a poor debtor, under bond given to liberate himself from arrest, duly cites his creditor, discloses personal property not exempted from attachment, and takes the oath prescribed; but within thirty days afterwards refuses to deliver the said property, to an officer, having a renewed execution to take it upon, his bond is thereby forfeited. *Hatch* v. *Lawrence*, 480.

4. Although one of the conditions in the bond differ from the phraseology of the statute, so as to read that the debtor will "*deliver himself and go into close confinement*," instead of reading that he will "*deliver himself into the custody of the keeper of the jail*, into which he is liable to be committed under said execution," the bond is nevertheless a *statute* bond. *Ib.*

5. The creditor has a right to recover of his debtor the amount he has paid the jailer, for his board while imprisoned on the creditor's execution.

Plummer v. *Sherman*, 555.

6. Such recovery may be had by assumpsit on an implied promise. *Ib.*

PRACTICE.

1. In local actions, if the venue be in the wrong county, and the objection appear on the record, it should be taken advantage of on demurrer. After pleading to the merits, and after verdict, it is too late to raise the objection.

Heath v. *Whidden*, 108.

2. By a default, the declaration is to be taken as true, and regarded the same as it would have been if a verdict had been taken. *Ib.*

3. When an amendment has been properly made, and is for the same cause of action originally embraced in the writ, the amended writ is treated as it would have been if so made when the suit was commenced, notwithstanding the amendment was not filed till the action would have been barred by the statute of limitations. *Ib.*

4. An amendment of a writ, by striking out of the account annexed, a part of the charges and credits, is within the discretion of the Court, and is not a subject for revision on exceptions. *Wight* v. *Stiles*, 164.

5. An omission of the presiding Judge to charge the jury in relation to certain principles, not then brought to his consideration, and no request being made for such instruction, forms no ground of exception.

Harpswell v. *Phipsburg*, 313.

6. When exceptions shall have been filed and allowed in the District Court to any of its preliminary, collateral or interlocutory judgments, directions or opinions, the exceptions must remain among the proceedings of that Court without being entered in this Court, until the action shall have been prepared by nonsuit, default or verdict for its final disposition between the plaintiff and defendants in that Court. *Daggett* v. *Chase*, 356.

PROBATE.

PUBLIC LOTS.

RAILROAD.

REFERENCE.

See ARBITRATION.

REGISTRY.

See DEED, 5, 6, 7, 8, 9, 10.

RELEASE.

See DEED, 1.

REPLEVIN.

1. S. delivered to W. a quantity of hides, and received his note at their agreed value, payable in eight months. At the same time W. gave to S. a written agreement, if his note should not be paid at maturity, to return the leather made from the hides to S. to be sold by him, and the proceeds to be applied to the payment of the note, and the surplus, if any, paid to W. *Held* that the property in the hides passed to W. and that S. could not maintain replevin for them. *Southwick* v. *Smith*, 228.

2. *It seems*, that in replevin, after issue joined upon the merits, it is too late to move that the action be dismissed because no replevin bond was returned. *Wilson* v. *Nichols*, 566.

See OFFICER, 1.

RESERVED LANDS.

See PUBLIC LOTS.

REVENUE LAWS.

1. When property has been seized and libeled by a collector of the customs for a breach of the revenue laws of the United States, it is to be considered in the custody of the law, until the claimant *obtains* the possession by order of the Court. *Barnes* v. *Taylor*, 514.

2. Therefore a demand made upon the collector by the marshal, holding an order of restoration, and a refusal by the collector to deliver the property would not prove a conversion by the collector. *Ib.*

3. In such a case a portion of the property was abstracted, *while thus in the custody of the law*, and the claimant obtained an order for the restoration of the whole, and actually received possession of the part which remained. *Held*, he could not maintain trover against the collector for the abstracted part. *Ib.*

4. *It seems*, his remedy should be sought in the same Court of the United States which ordered the restoration. *Ib.*

SALE.

1. In an action for goods sold and delivered, if the plaintiffs furnish credible testimony, that the goods were purchased by defendant of the plaintiffs, as a partnership known by their style and name; that a bill of goods was

made out and delivered to the defendant, who fully examined the same, and made no objection thereto; and that the goods were delivered on board a vessel by him designated; it is sufficient to authorize a verdict for the plaintiffs. *Wight* v. *Stiles*, 164.

2. Where one, though without fraud, sells property with a warranty of its quality, the vendee may rescind the contract, if the property be not of the warranted quality. *Marston* v. *Knight*, 341.

3. A vendor of personal property is not liable for defects of any kind, in the thing sold, unless there be fraud or an express warranty on his part. *Kingsbury* v. *Taylor*, 508.

4. Where the defendant sold *winter* rye for seed *spring* rye, and the plaintiff thereby lost his crop, an action of deceit will not lie, unless the defendant knew it to be *winter* rye. *Ib.*

See BILLS AND NOTES, 10, 11, 12. SHIPPING, 9, 10. TAX, 1.

SEIZIN AND DISSEIZIN.

1. Disseizin, in order to defeat the operation of the proprietor's deed, must be by occupancy of a part under a deed of conveyance recorded, or such an open and visible occupancy, that the proprietor may at once be presumed to know the extent of the disseizor's claim and occupation. *Foxcroft* v. *Barnes*, 128.

2. An occupation according to the provisions of stat. 1821, c. 62, § 6, or R. S. c. 147, § 11, does not constitute such a disseizin as would prevent the owner from conveying his land, although, if continued 20 years, it might bar a writ of entry, brought by the owner for possession. *Ib.*

See EXECUTION, 1, 2.

SET-OFF.

See ASSIGNMENT, 2, 3. EQUITY, 11, 14.

SHERIFF.

See OFFICER.

SHIPPING.

1. A part owner of a vessel is not relieved from his joint liability for the wages of a seaman, who was employed on the credit of the owners by the master, although the master was appointed by the other part owner, and althoughhe had forbade both the master and said other part owner to employ the vessel at all, unless such prohibition was known to the seaman. *Hardy* v. *Sproule*, 258.

2. Confession, made by the owner of a vessel, upon record in the Courts of the United States, that the vessel has been forfeited for a breach of the navigation laws, is not conclusive against him of that fact. It may have been made under a mistake of the facts or of the law. *Mitchell* v. *Cunningham*, 376.

3. After a seizure of the vessel and cargo for such a supposed breach of the law, and after such confession by the owner, and while the property is in

SLANDER.

STATUTES CITED, EXPOUNDED, &c.

Statute of the United States.

Statute of Massachusetts.

Statutes of Maine prior to Revised Statutes.

Revised Statutes.

SUBSEQUENT STATUTES.

SPECIAL LAW.

SURVEY OF LAND.

See DEED.

TAX.

1. In a sale of lands by a county treasurer for unpaid taxes, where there is no stipulation before the sale, that a credit is to be given, and after the sale the treasurer receives a note for part of the purchase money, this does not invalidate the sale. *Longfellow* v. *Quimby*, 196.

2. Where a person has been compelled to pay a town tax, wrongfully assessed upon him, he may recover it back in an action against the town for money had and received. *Briggs* v. *Lewiston*, 472.

3. But the charges for officer's fees and charges for commitment, arising from the non-payment of such tax, cannot be recovered of the town. *Ib.*

TENANCY IN COMMON.

See DEED, 20, 21, 22, 23. TRESPASS, 1.

TOWN.

1. When the right to a penal action depends upon the official character of the plaintiff as a town officer, he must show that he was duly elected at the town meeting, and that the notice for convening the meeting, was posted in a "public and conspicuous" place, unless the town have designated a different mode; and this must appear by the official return upon the warrant. *Fossett* v. *Bearce*, 523.

2. Where the officer's return upon a warrant for a town meeting did not show that the copies posted up were attested, or that they were posted in conspicuous places, evidence that the copies posted up were attested, and posted in public and conspicuous places in the town, will not cure the defect in the return. *Ib.*

3. Such evidence is inadmissible, except for the single purpose of showing that the officer ought to be permitted to amend his return, and when it appears that he is willing to amend. *Ib.*

4. Such an amendment can be made only by the same officer and on his responsibility. *Ib.*

TRESPASS.

See FENCE.

TROVER.

See REVENUE LAWS.

TRUST.

See ASSIGNMENT, 4, 5, 6, 7. EQUITY, 7, 8, 9.

TRUSTEE PROCESS.

6. If a supposed trustee holds goods, effects or credits of the principal defendant, under a conveyance from him which is fraudulent as to creditors, he will be charged, *if the fraud was actual*, whether the plaintiff became a creditor *before* or *after* such conveyance. But if the fraud was merely a *legal* one, he will be discharged unless the plaintiff was a creditor at the time of such conveyance. *Ib.*

See INSURANCE, 13.

USAGE.

See BILLS AND NOTES, 6.

USURY.

1. Under Revised Statutes, c. 69, § 7, where the damages in an action on a note alleged to be usurious, are not reduced by the oath of the defendant, but by the voluntary act of the plaintiff, in indorsing the amount received as usurious interest on his note, after the commencement of the suit, the defendant is not entitled to costs. *Cummings* v. *Blake*, 105.

2. To a promissory note the defence of usury, by the oath of the defendant can only be made in a suit brought in the name of the payee.
Cushman v. *Downing*, 459.

WAY.

The plaintiff traveling with a hired horse met an accident through a defect in the highway, by which the horse was entirely ruined. He paid its value to the owner. In his damages recovered of the town *it was held*, that the value of the horse was rightfully included.
Littlefield v. *Biddeford*, 310.

See COUNTY COMMISSIONERS. DEED, 21, 23.

WILL.

1. Where a testator provided in his will that any of his children, after they should come of age, should have the privilege of continuing at home in pursuit of the common business of the family, and to receive as a compensation for their labor, at the rate of $130 a year, for the boys, and 75 cents per week for the girls; *it seems*, that the services rendered were conditions upon which they should receive said sums, and that they were legacies, which might be recovered in an action at law against the executor. *Mayall, Appellant*, 474.

2. And that such legacies might accumulate until the division of the estate fixed by another clause in the will. *Ib.*

3. But where the judge of probate refuses to grant a petition to sell real estate to pay the *debts* of the testator and charges of administration, and dismisses the petition, and an appeal is taken to this Court; and there is no exhibition in the decree, nor in the reasons for the appeal, of the evidence

presented to the judge of probate, nor does it appear, that there was satisfactory proof that the services had been performed, for which the claim was made; nor that the personal property was inadequate to meet what was required, the decree of the judge of probate must be affirmed. *Ib.*

WRIT OF ENTRY.

See ASSIGNMENT, 7.

ERRATA.

PAGE 79, in the abstract, erase the last part of the last paragraph, and insert the following: — "In such a case, the guarantor would not be discharged by want of notice, (before suit against him,) that the note could not be collected of the maker, or by any other laches of the guarantee, unless such want of notice or such laches would, in case of his liability, be the occasion to him of some loss or injury."

109, insert at the bottom of the page, the following line: —
"J. and M. L. Appleton, for plaintiffs."

183, in the third line of the abstract, instead of "*or*," read "*and*."

283, in last line of abstract, instead of "*from* the District Court *to*," read, "*to* the District Court *from*."

469, in the abstract, after the word "interest," insert "with the figures in the margin, $123,06."