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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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. HENRY TALLMAN, ATTORNEY GENERAL.

HON. JOHN SHEPLEY, REPORTER.

A TABLE OF CASES

REPORTED IN THIS VOLUME.

MEM. — On page 11, the reader will please to alter the second paragraph, so as to read, "It was proved that the money, which the defendant had received, was paid by Harrington, his debtor, without any intimation that it was not his own money."

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF LINCOLN,

1849.

MME. — Several cases of 1849, in this county, were published in the last volume.

SIMON HANDLY *versus* MOSES CALL.

Where the plaintiff was allowed to read to the jury, an attested copy of a registered deed, "provided he should in the course of the trial, file an affidavit of the loss of the original," and the case proceeded and was submitted to the jury, without any objection that the condition had not been performed, it may well be considered that the affidavit, if not filed, was waived.

If, in such a case, there was an omission to file the affidavit, and the omission does not appear to have occasioned any injury to the defendant, it cannot be considered a sufficient cause for disturbing the verdict.

The declarations of a party, made in conversation with a third person, and not appearing to be a part of any business transaction, cannot be introduced by him as testimony in his own favor.

If one procure an attachment upon real estate to be ante-dated, so that it falsely appears of record that it was prior to a conveyance made by the owner to a third person, and such third person not knowing that the attachment was ante-dated, and for the purpose of dislodging it, pays the creditor the amount which the attachment purported to secure, he may recover back the same in an action at law, although the money was paid to the defendant by the hand of his debtor, without any disclosure that he was paying it as the agent of the plaintiff.

In such an action, it is no defence that the defendant, in receiving the money from his debtor, intended no fraud upon the plaintiff or any other person; or, that he was ignorant that the *plaintiff* had furnished the money; or, that the money was paid before there was any certainty that the plaintiff would be injured by the attachment; or that the land never had been seized upon execution, and the plaintiff had never been disturbed.

Where a former verdict was set aside because the principal witness, in the opinion of the Court, was entitled to little or no credit; and on another trial a similar verdict was returned, and there is no proof of any improper prejudice, bias, or passion with the jury, the Court cannot interfere to enforce its own opinion respecting the testimony and the facts, and the verdict cannot be set aside as against the weight of evidence.

It is incorrect for a person, drawn as a juror, and who was also summoned as a witness for the party prevailing, to receive his fees as a witness, for any part of the time he was sitting as a juror to try the cause. Yet, if it do not appear that either the party prevailing or the juror *knew* it to be incorrect, and if there be no evidence of corrupt intention, it is not sufficient cause for setting aside the verdict.

A new trial, to permit newly discovered testimony to be introduced, should only be granted, where such testimony is not cumulative, and where there is reason to believe that, if it had been before the jury, the verdict would have been different.

This case is upon exceptions and upon two motions for a new trial. The facts on which the plaintiff relied, were stated by his counsel to be in substance as follows, viz.: — That the plaintiff purchased several lots of land, in payment of debts, of one Harrington, who was in failing circumstances, and caused the deeds, to be immediately recorded; that Harrington, at the same time, was largely indebted to the defendant; that two days after said conveyances, the defendant made a writ upon his demand against Harrington, and dated the same back to the day prior to said conveyances, and procured one Joel How, Jr. a deputy sheriff, to indorse upon the writ a return, under the same date with the date of the writ, that he had attached said land thereon; and also to make return of said attachment within five days from said date, to the registry office; that the defendant entered the action in Court, and the same was continued; that pending said continuance, the plaintiff, not knowing the writ and the return thereon to have been ante-dated, and in order to relieve the land from said attachment, paid to the defendant the amount of the debt due

to him from Harrington; and that the suit was brought to recover back the money so paid.

To prove that the writ and its return were ante-dated, the plaintiff relied upon the evidence of How, who testified to those facts, and that he ante-dated his return at the request of the defendant. The cross-examination tended heavily to impair the credibility of How. His own previous statements, made on oath and otherwise, with several important circumstances proved in the case, tended strongly to the same result. And many witnesses offered testimony to impeach his character for veracity.

It was proved that the money, which the officer received, was paid by Harrington, his debtor, without any intimation that it was his own money.

The action had been tried once before, and the verdict, which was for the plaintiff, had been set aside on the ground more especially that the evidence of How, a *particeps fraudis*, testifying that he had violated his official oath as a deputy sheriff, was entitled to little credit.

All the other material facts are shown in the opinion of the Court.

The counsel for the defendant requested the Court, TENNEY, J. presiding, to instruct the jury: —

1. That if Call received payment of his honest debt from Harrington, his debtor, without any intention to defraud the plaintiff or any other person, this action cannot be maintained.

2. That if Call received payment of his honest debt from Harrington, his debtor, in ignorance of Handly's having assisted Harrington in raising the funds with which to do it, Handly cannot maintain this action.

3. That if Harrington procured Glidden and Handly, or Handly alone, to assist him in raising the means to pay Call, Harrington became thereby responsible to them or him. And that, without satisfactory evidence that he has not in some way secured or paid them or either of them, or that he is unable to pay them, this action cannot be sustained.

The Judge instructed the jury, that to entitle the plaintiff to recover, he must satisfy them that the defendant fraudulently procured the return to be ante-dated, so that the attachment should purport to be so early as to precede the time when the deeds from Harrington to the plaintiff should take effect as against the defendant; and that the money or means were obtained by the plaintiff and on his credit, and paid to the defendant, in order to free the land from the attachment. If Harrington paid the money to the defendant by means which he had obtained, in his own behalf, or on his own credit, the plaintiff could not recover; if he obtained the money on note or notes independent of the plaintiff and without his agency, the plaintiff could not recover; or if Harrington obtained the plaintiff's name upon paper, from which the money was procured, upon his own credit, Harrington being liable to the plaintiff, if the latter should take up the paper, and he did take it up after its maturity, the plaintiff could not recover. But if Harrington acted as the agent of the plaintiff in obtaining the paper and the money thereon, and as such paid the money to the defendant, the plaintiff could recover the amount of the money so paid to the defendant, with a further sum for the detention, which the jury would be authorized to consider the interest, if otherwise entitled; and the ignorance of the defendant of the manner in which the money was obtained, and the absence of any fraudulent or wrong intention on his part *at the time* of his receiving the money, would not prevent the plaintiff's recovery.

The jury found a verdict for plaintiff for the sum of $1139. The defendant excepted to said rulings and instructions.

Ruggles, for the defendant.

M. H. Smith, for the plaintiff.

Shepley, C. J. — The first question presented by the exceptions is, whether copies of the record of two deeds from William P. Harrington to the plaintiff, were improperly admitted as evidence. After testimony had been introduced to

prove the loss of the deeds, the copies were admitted "provided plaintiff should file an affidavit of their loss, which was not done."

The deeds had been in the office of Messrs. Hussey & Coffin, whose partnership was dissolved in the month of April, 1843. Mr. Hussey states in his testimony, that he does not know, whether Mr. Coffin took them or not; that he had no knowledge, that any person took them from the office, which, with all the papers in it, was burned on May 1, 1845. Mr. Coffin states, that they remained in Hussey & Coffin's office until their partnership was dissolved; that he thinks he did not take them; that, if he took them, they must have been burned when his office was burned, at the same time that Mr. Hussey's was. This testimony would afford conclusive proof of their loss, unless they were obtained by the plaintiff from one of those offices. The fact, that they were executed on the evening of the day of their date, does not appear to have been seriously contested. There was full proof, that they were. Knowing that the condition upon which the copies were admitted, had not been performed, the counsel for the defendant appear to have proceeded to present the case to the jury without calling the attention of the Court to that omission. The Court might justly infer, that the affidavit had been made and exhibited to the counsel, that it was not considered to be of any importance. The Court did not err in admitting the copies subject to that condition. There was therefore, strictly speaking, no erroneous ruling. It was the duty of the plaintiff to have made his proof perfect. The omission to do so not appearing to have been the occasion of any injury to the defendant, cannot be considered as sufficient cause for disturbing the verdict.

Complaint is made, that the declarations of the defendant, made to Harrington on the morning after his failure, were improperly excluded.

The conversation between them does not appear to have been a part of any business transaction, and it could not be admitted as a part of any *res gestae.* The declarations of a

party, made in the course of conversation with others, cannot be introduced by him as testimony in his own favor.

Complaint is also made of the refusal to instruct as requested, and of the instructions given.

The position insisted upon in the first request, is in substance, that if the defendant, when he received payment from Harrington, of a debt justly due, did not commit any fraud upon the plaintiff in receiving such payment, the action cannot be maintained.

The alleged cause of action was not, that the defendant defrauded the plaintiff by receiving payment of a debt justly due to him from Harrington, but that having such a debt he caused a return of an attachment of land, conveyed by Harrington to the plaintiff, to be entered on a writ founded on such debt before those conveyances were made, when in fact the attachment was made subsequent to the conveyances.

The wrong and injury consisted in causing the land to become subject to, and to be incumbered by that attachment, by which the plaintiff was injured. If the instructions first requested had been given, the plaintiff might have proved the whole facts alleged, as the cause of action, without being entitled to a verdict in his favor. This requested instruction was properly refused.

The second request for instruction rests upon the position, that if the defendant received payment, "in ignorance of Handly's having assisted Harrington in raising the funds with which to do it," the action cannot be maintained.

That the ignorance of the defendant of the fact, the plaintiff procured the funds or assisted Harrington to procure them to pay the debt, can alone constitute no defence, will be apparent, when it is considered, that consistently with such ignorance, it might have been true, that the defendant wrongfully caused the land to become subject to the attachment, and that the plaintiff was obliged to pay the debt to relieve it from that incumbrance, and that he procured the money and caused it to be paid by Harrington acting as his agent.

The matter contained in the third request for instructions,

so far as it was suited to present the rights of the parties correctly, was embraced in the instructions which were given. Those instructions required the jury to find "that the money or means were obtained by the plaintiff or on his credit, and paid to the defendant in order to free the land from the attachment," and that they were not obtained by Harrington or upon his credit. "But if Harrington acted as the agent of the plaintiff in obtaining the paper and money thereon, and as such paid the money to the defendant, the plaintiff could recover the amount of the money so paid to the defendant with a further sum for the detention."

The alleged wrongful act being first proved, the plaintiff was entitled to recover for the amount of damages which he had suffered by it. And if he was by law entitled to pay the debt for the purpose of relieving his land from that attachment, without waiting to ascertain whether the defendant ever would obtain judgment against Harrington, and whether, if he did, he would cause a levy to be made upon the land conveyed, the defendant can have no just cause to complain of the instructions given.

The debt was admitted to have been justly due from Harrington to the defendant. Harrington at the time when it was paid, was insolvent. If the plaintiff would have been entitled to maintain an action on the covenants contained in his deed from Harrington, to recover from him the amount paid to discharge that attachment, and could not obtain satisfaction from him on account of his insolvency, he would suffer the loss of that amount when paid, by reason of the false date of the attachment. But the counsel for the defendant insists, that the plaintiff was not entitled to interpose and to pay the debt to discharge the attachment before there was any certainty, that he would ever be injured by it. He says, "there was no seizure; Handley was not disturbed; many contingencies intervened between him and harm. Injury to him was remote, contingent, uncertain."

The existence of an inchoate right to dower is a breach of a covenant against incumbrances contained in a conveyance of

the land, and yet it is quite uncertain whether the grantee will ever be injured by it. *Porter* v. *Noyes*, 2 Greenl. 27; *Jones* v. *Gardner*, 10 Johns. 266; *Shearer* v. *Ranger*, 22 Pick. 447.

A judgment creating a lien upon land conveyed is an incumbrance, and the grantee may satisfy it before the lien has been enforced, and recover the amount of his grantor by virtue of the covenant against incumbrances. *Hall* v. *Dean*, 13 Johns. 105.

In the case of *Shearer* v. *Ranger*, the opinion says, "it has been argued, that an attachment is not an incumbrance within the meaning of the covenant against incumbrances; and the case of *Barnard* v. *Fisher*, 7 Mass. 71, is relied on as establishing this principle." That case is then explained as not authorizing such a conclusion; and it is said, that the proper course for a second attaching creditor is to continue his action until the suit, on which the prior attachment was made, is concluded. "And that would be the proper course to pursue, if an action were brought for the breach of a covenant against an incumbrance by an attachment of the estate before conveyance."

If any doubt was thereby occasioned, that the grantee might pay the debt to discharge the incumbrance created by an attachment, and maintain an action founded on that covenant, to recover the amount of his grantor, it was dispelled and the question put at rest by the case of *Norton* v. *Babcock*, 2 Metc. 510.

The defendant does not therefore appear to have been aggrieved by the rulings, instructions, or refusals to instruct.

It is further insisted, that the verdict should be set aside, because it was found against the weight of evidence.

A verdict obtained by the plaintiff at a former trial was set aside on the ground more especially, that the principal witness for the plaintiff, he being the officer and a *particeps fraudis*, and testifying that he had violated his official oath, was entitled to little credit. The case has been presented to another jury. The doubt entertained by the Court respecting the credibility of that testimony was well known. Increased efforts

have been made, and additional testimony has been introduced by each party. Another jury has come to the same conclusion. The opinion of the Court cannot be substituted for that of the jury. It is its duty to set aside verdicts and to grant new trials when necessary, that parties may have a decision upon the facts by a jury, which does not act under any improper prejudice, bias, or influence. Without proof arising out of the evidence or otherwise presented, that a jury has thus acted, the Court cannot interfere to cause its own opinion respecting the facts and testimony to be enforced. From the testimony now presented, the Court does not find itself authorized to conclude that the jury must have acted under the influence of passion, bias, or prejudice, and it cannot therefore set aside their verdict as found against the weight of evidence.

A motion has been made to have the verdict set aside on account of alleged misconduct of the plaintiff and of one of the jurors.

The plaintiff cannot be prejudiced by what Joel Howe, Jr., or any other person said respecting that juror without authority from him. The facts presented by legal testimony appear in substance to have been, that the juror was regularly summoned as a witness for the plaintiff after he had been drawn as a juror. It does not appear, that the plaintiff then knew, that he had been drawn as a juror, although he did know it on his first attendance at court. When the jurors were empannelled, this juror was not placed upon either jury, but he remained in attendance as a juror. When this cause was about to be taken up for trial he was called on to the jury. A statement was then openly made, that he had been summoned as a witness for the plaintiff to testify respecting the character for truth of a witness for the defendant. The juror asked to be excused, and stated that he knew nothing about the case. He had before had a conversation with the plaintiff, and asked him to excuse him from attending as a witness, but the plaintiff would not consent. The juror claimed and received his fees as a witness, so long as to include some portion of the time

while he was sitting as a juror, to try the cause. This was incorrect, but it does not appear, that the plaintiff or the juror knew it to be so. This testimony does not present a case of gratuity within the statute, chap. 115, § 76. There is no testimony authorizing the inference, that there was any corrupt intention. It was decided in *Fellows' case*, 5 Greenl. 333, that a juror, who had been summoned as a witness against the defendant on a former trial, was not thereby rendered incompetent to sit as a juror for his trial. It is stated in that case, that "a juror may always be a witness for either party, and still retain his seat as a juror; and a witness may be a legal juror." While this is true, it is much better to avoid all suspicion of partiality by allowing a person so situated to retire from the jury before the commencement of the trial. The facts proved in this case do not authorize the Court to set aside the verdict on account of any misconduct of the plaintiff or of the juror.

There is also a motion to have the verdict set aside to enable the defendant to introduce newly discovered testimony.

Of this, the first item is the book, in which the witness, Joel Howe, Jr., made entries of the precepts served by him.

Some of the entries found in that book would be inconsistent with the truth of certain parts of his testimony. There was at the time of the trial abundant testimony introduced to prove that he had made statements, and had testified on other occasions, in a manner inconsistent with the truth of some part of his testimony. Of this the jury must have been well satisfied. This book could only afford cumulative evidence of the like kind. If it had been before the jury, it does not appear to be of sufficient importance to lead to the conclusion, that their verdict would have been different.

Another item is the docket kept by Bartlett Sheldon, containing a list of actions entered before him as a justice of the peace.

This could only have the effect to impair the confidence reposed in the truth of his testimony. There was proof, that he had testified differently on a former occasion, and testimony

was introduced to prove, that his character for truth was bad, and that it was good. The docket would not necessarily prove, that his testimony could not have been true.

The other item is, that now presented by the testimony of George W. Philbrook; that he sold certain horses and carriages to Simon Cotter, which came to the possession of the plaintiff and Joel Howe, Jr.; that a part of the property was taken back, and that the plaintiff paid the balance due on Cotter's note. This testimony is quite inconclusive to prove, when taken in connexion with the other testimony, that the plaintiff bribed or corrupted Howe, Jr., to induce him to testify falsely.

A new trial to permit newly discovered testimony to be introduced, should only be granted, when such testimony is not cumulative and when there is reason to believe, that the verdict would have been different if it had been before the jury. The newly discovered testimony is not of that character.

Exceptions and motions overruled.

INHABITANTS OF LEWISTON, *petitioners for certiorari, versus* COUNTY COMMISSIONERS OF LINCOLN.

On an appeal to the county commissioners to locate and cause a town way to be recorded, if their adjudication does not contain a description of the road, its courses, distances and admeasurements, so that it may be ascertained from the record, a writ of *certiorari* will be granted.

A town cannot be adjudged to have delayed or refused to approve and allow a supposed way, where there had been no proper return or report of the laying of such way by the selectmen.

PETITION FOR CERTIORARI, against the county commissioners of Lincoln. It sets forth, that "on the first Monday of September, 1848, a decision was made and judgment rendered by said commissioners, approving and allowing a certain town way in said Lewiston, said to have been previously laid out by the selectmen of said Lewiston, and unreasonably refused and delayed to be allowed by said inhabitants; said commissioners directing said town way to be recorded by the town clerk

of said Lewiston, which decision and judgment of said commissioners was rendered on the petition of Oliver Herrick and sixty others."

The petition of said Herrick and others was directed to the commissioners at their May term, 1848, and represented as follows: — "That a town way from a stone in the ground, at the corner of Hiram Adams' house lot in the town of Lewiston, thence in a southeasterly direction, partly over land given by the Lewiston Power Company for a road, and over land of the widow Joanna Frye and Daniel Tracy, to the county road leading from Lewiston bridge to Greene corner, in said town of Lewiston, would be of great public convenience; that the selectmen of said town, after notice and hearing of the parties, have laid out such a way and reported the same to the town, at a public meeting of the inhabitants duly notified and warned, yet the town has unreasonably refused and delayed to allow and approve said town way, laid out by the selectmen as aforesaid, and to put the same on record. Wherefore, your petitioners, considering themselves aggrieved by such delay and refusal, pray that your honors would, agreeably to law in such cases made and provided, accept and approve said town way, and direct the same to be recorded in the books of said town."

The petition of said inhabitants of Lewiston, sets forth that the decision and judgment of said commissioners was wholly predicated upon the petition of said Herrick and others, and was inoperative, illegal and void, and that the court of county commissioners had of right and law no appellate jurisdiction of the subject matter in which they exercised such jurisdiction; and that the decision and judgment aforesaid ought to be quashed, for which said inhabitants assigned fifteen reasons.

But the examination of the case renders it unnecessary to report only the thirteenth reason, which was in these words: —

"And the said inhabitants do further represent, that in the doings and records of said commissioners, there is error in this, that neither in the petition of Oliver Herrick and sixty others,

nor yet in the decision of the county commissioners, is there any description of any road or way, that the town clerk can record, as ordered by said commissioners."

The record of the county commissioners, after reciting the petition of Herrick and sixty others, its entry and notices ordered, was as follows: — "Pursuant to the foregoing order of notice on the petition of Oliver Herrick and sixty others, for a town road in the town of Lewiston, being an appeal from said town to the court of county commissioners, we, the county commissioners of Lincoln county, met the parties at the time and place designated in said order, for that purpose, and it was then and there proved to our satisfaction, that all the notices required by said order had been duly and fully served, and that all the requirements of said order had been fully complied with, we then proceeded with the parties and viewed the route prayed for in said petition, and heard the parties and their witnesses at a convenient place in the vicinity thereof, and after a full hearing and consideration of all the testimony and arguments by all parties presented for consideration, we do adjudge and determine that the public convenience and necessity require that the said town of Lewiston open and build said road, and that the clerk of the court of county commissioners is hereby directed to notify the clerk of the town of Lewiston to make a record of the return of the selectmen of the said town of Lewiston, of the laying out of said road, the same as though said road had been accepted by said town.

"And it is further ordered, that the town of Lewiston pay into the county treasury, within three months from the time this report is accepted, the cost arising and made on the county by reason of the above petition, taxed at $75,75."

The action of the town, so far as it appeared from their records, in relation to this supposed town way, was after this manner. The second article in the warrant calling a meeting on the 13th of Sept. 1847, was "to see if the town will accept the following street or road laid out by order of the selectmen, August 28, 1847, beginning at a stone fixed in the

ground at the northerly corner of Hiram Adams' house lot, thence on the westerly side of Middle street, so called, south 14° E. twenty-two rods and 22 links to a stake and stones on the northerly side line of the widow Frye's house lot, said road to be 50 feet wide on the easterly side of said line, — thence 22½° east nine and one half rods across said Frye's land, the road leading from Lewiston falls to Greene; also beginning at a stake at the termination of said Middle street on Daniel Tracy's line, thence south 22½° E. eight and one half rods to the said county road, said street being 50 feet wide, taking about five rods of widow Frye's land, and twenty-one rods of Daniel Tracy's land, for which they claim damage." At the meeting, under article second, was recorded "on road across Daniel Tracy's and widow Frye's land the selectmen estimate the damage to Daniel Tracy two hundred and fifty dollars, and to widow Frye thirty dollars. Voted not to accept the road."

At a regular meeting of the town on the 4th October, 1847, under a similar article respecting said road, it was "voted to defer the subject of the road across Frye and Tracy's land to the next annual town meeting."

At another meeting on the 13th March, 1848, under an article to "see what action the town will take upon the road across land of William R. Frye and Daniel Tracy, and referring to the warrant of the previous October meeting, it was voted "to indefinitely postpone the article."

It further appeared, that a paper made by Col. Garcelon, a surveyor, containing a description of the road as set forth in the second article of the warrant before alluded to, was filed in the office of the town clerk of Lewiston, upon which were the following indorsements. "Minutes of road across widow Frye's and Daniel Tracy's land, August 28, 1847." "Duly filed in the clerk's office." "Recorded." "E. C. Tobie, town clerk."

The only record evidence of any action in reference to damages occasioned by the supposed laying out of said road, appears from the proceedings of the town under the second article of the warrant, of the meeting of September 13, 1847.

Of the application for the laying out of the road, there was no record. The chairman of the selectmen posted up two notices of the intentions of the selectmen to lay out the road, which he wrote, and signed the names of the board thereto, under a general authority from his colleagues to use their names in their official capacity, when he deemed it necessary so to do. He posted up the notices seven days prior to the time of acting upon the application, at two places within a quarter of a mile of said road. The substance of the notices were not recollected. He employed William Garcelon, a surveyor, to survey said road and to give him the minutes thereof, and the chairman was the only one of the selectmen present, to locate said road. No personal notice was given to Daniel Tracy, nor to the other owners of land, across which the said road was to be laid, and none of them were present at the time of the location. The damages were estimated by the selectmen, at the time the meeting was holden, to see whether the town would accept the road. One of the selectmen had no knowledge of the location or intention to locate said road.

The supposed street was included in a surveyor's district under the order of the selectmen in 1847, and worked upon that year.

It did not appear from the records of the town, that the selectmen filed or caused to be filed the location of the road, or any minutes thereof, other than what appeared in a warrant calling a meeting to see if they would accept of several roads, in October, 1846, among which was the road now in dispute, and which was then rejected. And it was agreed that there were no reports of the location of said way, other than has herein been referred to.

It was admitted that said Tracy's house was built several years before the supposed location of said road in 1847, and that the road was laid so as to run through the L part of his house.

Jacob Hill, for the inhabitants of Lewiston.

May, for County Commissioners.

HOWARD, J. — Applications for a writ of *certiorari* being addressed to their discretion, this Court has uniformly examined the records and proceedings, in which the errors are alleged, before granting the process. If the alleged errors are found to be such as affect the forms of the proceedings only, and not the substantial merits of the case, the writ will be refused.

The object of the petitioners, in this case, is to procure the proceedings of the county commissioners, relative to a *town road* in Lewiston, to be quashed. To their record, and the proceedings upon which it is founded, numerous errors are alleged, affecting form and substance, but all do not require special consideration at this time.

The *thirteenth* error assigned, is, "that neither in the petition of Oliver Herrick and sixty others, nor yet in the decision of the county commissioners, is there any description of any road or way that the town clerk can record, as ordered by said commissioners."

Upon inspection of their record, we find, that it embraces the petition of Herrick and others, as the basis of their proceedings. This petition states, "that a town way, from a stone in the ground, at the corner of Hiram Adams' house lot, in the town of Lewiston, thence in a south-easterly direction, partly over land given by the Lewiston Water Power Company for a road, and over land of widow Joanna Frye and Daniel Tracy, to the county road leading from Lewiston bridge to Greene corner, in said town of Lewiston, would be of great public convenience; that the selectmen of said town, after notice and hearing of the parties, have laid out such way, and reported the same to the town at a public meeting of the inhabitants duly notified and warned, yet the town has unreasonably refused and delayed to allow and approve said town way laid out by the selectmen aforesaid, and to put the same on record; wherefore your petitioners, considering themselves aggrieved by such delay and refusal, pray that your honors would, agreeably to law in such case made and provided, accept and approve said town way, and direct the same

to be recorded in the books of said town." This application was intended as an appeal to the commissioners, under the provisions of the Revised Statutes, c. 25, § 34.

Upon this petition the county commissioners gave notice, met and viewed the route, and heard the parties, and "adjudged and determined, that the public convenience and necessity require that the said town of Lewiston open and build said road, and that the clerk of the court of county commissioners is hereby directed to notify the clerk of the town of Lewiston to make a record of the return of the selectmen of the said town, of the laying out of the said road, the same as though said road had been accepted by said town." Then follows an order for the payment of costs into the county treasury by the town.

This is all, which the record contains descriptive of the road, and if the town clerk of Lewiston should record the whole record of the county commissioners, upon the books of the town, it would furnish no proper description of the way, its courses, distances, or admeasurements, whereby the town or its officers or agents, could open or construct the road.

But it is contended that the record and adjudication of the county commissioners become sufficiently definite, by embracing the petition of Herrick & als., and by referring to the return of the laying out of the road by the selectmen as the matter to be recorded. If it were admissible to define and sustain a defective record of the county commissioners, in that manner, the facts agreed upon and used in the argument of this case, conclusively show, that this record cannot be aided by such reference, or by proof *aliunde*. For the selectmen did not make a report or return to the town, of the laying out of such supposed way, with the boundaries and admeasurements, as required by the Revised Statutes, chap. 25, § 29, unless the second articles in the warrants, calling the town meetings of September 13, and October 1st, 1847, can be considered as such report.

The warrants were in the usual form, and signed by the selectmen. The second articles were, "to see if the town

will accept the following street or road, laid out by order of the selectmen, August 28, 1847, beginning at the northerly corner of Hiram Adams' house lot." Then follow the courses, distances and admeasurements, to the other terminus, and the conclusion, "taking about five rods of widow Frye's and twenty-one rods of Daniel Tracy's land, for which they claim damages."

These articles were the same in each warrant, but they do not purport to be a return or report by the selectmen, of the laying out the street or road; and do not determine whether it is a town or private way; or whether, or by whom damages are to be paid. They were evidently drawn in reference to a report, but not as such. They do not give the requisite information to the town, or the citizens, or the persons interested, as provided in chap. 25, § 29 and 31, of the Revised Statutes. Consequently, there was no report upon which the town could act; and there could not have been either delay or refusal, on the part of the town, to approve and allow the supposed way.

The appeal, and the proceedings of the county commissioners were predicated upon the alleged unreasonable refusal and delay of the town to approve a town way, laid out by the selectmen, yet the record shows that the county commissioners did not so adjudicate; nor did they adjudge that the allegations in the petition of Herrick & als. were proved. Indeed such allegations could not have been established, for they were contrary to the facts proved and admitted by parties.

Other reasons for quashing the proceedings of the county commissioners, are given, and supported by evidence. They have been fully discussed by counsel, but do not seem to require further consideration in this stage of the case.

We cannot refuse the writ of *certiorari*, and it must be granted.

SAWYER SEWALL, *plaintiff in error, versus* EZEKIEL TARBOX.

Where the plaintiff becomes nonsuit, no judgment can be rendered against him upon an account in set-off.

ERROR, to reverse a judgment of the District Court.

The present plaintiff had brought a suit against the defendant upon an account annexed to the writ. The defendant filed an account in set-off.

The plaintiff afterwards became nonsuit, and judgment was rendered by said Court for the balance which appeared to be due to the defendant upon his account filed in set-off, and for his costs.

Gilbert, for plaintiff.

The law of set-off is a statute provision, and no judgment can be had under it, unless provided for by the statute. The statute provides that judgment shall be rendered for the defendant, only when a balance is found due. No balance was found for there was no trial. R. S. chap. 115, § 46.

After the filing of the demand in set-off, the plaintiff shall not be allowed to discontinue, unless by consent of the defendant. § 48.

This is to save the defendant's rights, as he cannot have judgment for a balance after a discontinuance.

Further, the statute distinctly recognizes the possibility of the defendant's losing "the benefit of the set-off by nonsuit or other act of the plaintiff." § 26. See 8 Mass. 418; 18 Pick. 521.

Ingalls, for defendant.

1. There was no error in this case. R. S. chap. 115, § 46.

2. Error cannot be assigned in this Court, for any thing which was not objected to in the Court below. *Porter* v. *Sherburne*, 8 Shepl. 258; U. S. Dig. Sup. Error, 132, 133, 134, 135.

If there was error in the Court below, in rendering judgment for the balance of debt due the defendant, the Court will reverse the judgment only as to such balance, and affirm it as to the costs. *Nelson* v. *Andrews*, 2 Mass. 164; *Waite* v.

Garland, 7 *ib.* 453; *Cummings* v. *Pruden*, 11 *ib.* 206; *Symonds* v. *Kimball*, 3 *ib.* 299.

WELLS, J. orally. — Where the plaintiff becomes nonsuit, a balance of an account in set-off cannot be allowed. The whole of the statute provisions must be taken into consideration, and they do not authorize such a judgment. As to the allowance of the set-off, the

Judgment is reversed, but not as to costs.

WILLIAM PATTERSON *versus* ENOCH TRASK.

A farm was a little wider at that end which was bounded on the river, than at the other end. The north half was conveyed to the plaintiff, separated from the other part by a line beginning at the river, and running back the length of the farm, "holding its width equally alike," the whole length of the farm: —

Held, the plaintiff was entitled to a strip of equal width throughout, and that its width at the river must be so much less than one-half the width at that end as to give to the parties each an equal number of acres.

TRESPASS QUARE CLAUSUM. The question was one of boundary, and related to the location of a line across the David Trask farm, so called.

That farm was bounded on one end by the river. And it was a little wider at the river than at the back end. A conveyance to the plaintiff gave him the north half of the farm, separated from the other half, by a line beginning at the river and running to the back end of the lot, "holding its width equally alike from said river" to said back end of the lot, "said one-half to be taken on the northern part of said farm."

The plaintiff contended that a sound construction of the deed, gave him a strip beginning at the river and there being half the width of that end of the farm, and extending of that exact width to the back end, although it would include a little more than half the number of acres.

F. Allen and *Foote*, for plaintiff.

This is a deed in which the particular controls the general description. The grantor owned the whole farm. He fixed

the width of plaintiff's part at the river, but not in the rear. The width at the river being thus fixed, his part extended of that width throughout, between parallel lines, regardless whether the other part grew narrower or wider.

Ingalls, for defendant.

The Court decided that the plaintiff's part must be of equal width throughout; and that the end of his part at the river, must be so much less than one-half the width of the farm at that end as to give an equal number of acres to each party. Upon this construction, no acts of trespass appear to have been committed on the plaintiff's half.

Judgment for defendant.

STATE *versus* DANA JACKSON.

Where an indictment for larceny contains any particulars descriptive of the property stolen, though not necessary to be inserted, they must be proved on the trial.

INDICTMENT, for feloneously taking and carrying away a black gelding horse.

On the trial in the District Court, before RICE, J., the government introduced no evidence, that the horse, testified to as having been stolen, was a gelding. One of the witnesses testified, that the horse taken by the accused was black, and two others, that he was not black, excepting his extremities, that the body was a dark brown; another witness testified that the horse was one he should call black, although the color of the body then had become somewhat brown by exposure in the pastures.

On this evidence the defendant's counsel requested the Court to instruct the jury, that the horse, for taking which defendant was indicted, being described as a black gelding horse, such description became material, and that it was incumbent on the government, in order to sustain the indictment, to prove affirmatively, that the horse testified to, as being taken by the accused, was a gelding horse, and that as there was no such proof, the indictment was not sustained.

The Court declined so to instruct, but said to the jury that, if they were satisfied, from all the evidence in the case, that the horse described by the witness, as being stolen by the accused, was the same horse alleged in the indictment to have been stolen, it was sufficient to sustain the indictment. Thereupon the jury rendered a verdict of guilty, and exceptions were filed to the instructions.

Gould, for the prisoner.

Matter descriptive of the thing stolen, in an indictment for larceny, though it be an unnecessary allegation, must be *strictly proved.* 3 Stark. Ev. 1530, 1542; 1 *ib.* 387; Greenl. Ev. 73, 74, 76; 2 Campbell, 134, 140; 7 Greenl. 132; 12 Maine, 368, 369; 3 Chitty's Crim. Law, 974; 4 Black. Com. 240.

It is not sufficient that the "jury were satisfied from all the evidence in the case, that the horse was the same, as was alleged to have been taken," in the absence of proof that the horse was a *gelding*. The allegation cannot be deemed surplusage. 15 Maine, 446.

Tallman, Attorney General, for the State.

WELLS, J. orally. — The rule in criminal trials is, that all material allegations in the indictment must be proved. The color and kind of animal alleged to be stolen, are made material by being set out in the indictment. Whether it was necessary to make such allegations, is not the question before us, but there is no doubt that, if found in the indictment, they must be proved. The principle in this State has been already settled in *State* v. *Noble*, 15 Maine, 446.

Exceptions sustained and new trial granted.

RICE ROWELL *versus* JONATHAN SMALL.

If, in a writ of entry, the declaration omit to allege that the demandant had been seized and that the defendant had disseized, an amendment may be allowed to supply the defect.

If a Judge rule that, *as matter of law*, a specified amendment cannot be allowed, exceptions may be taken to such ruling.

Exceptions from the District Court.

Entry. The defendant was summoned to answer to Rice Rowell in "a plea of land, wherein the said Rowell demands against the said Jonathan possession of one undivided third part of the following parcel or tract of land, [described in the declaration,] whereof the said Small unjustly. . . . . To the damage of said Rowell," &c.

The plaintiff moved to amend the declaration by adding the usual averments, requisite to a declaration in a writ of entry. The Judge ruled that, *as matter of law*, the amendment could not be made.

Ruggles and *Gould*, for plaintiff.

G. Abbott, for defendant.

Wells, J. orally. — The declaration, though defective, indicates the cause of action. The demandant cannot recover unless he prove a seizin, and the defendant cannot be charged unless upon proof of disseizin by him. The declaration shows what is demanded, though imperfectly. The requisite averments would have to be supplied, before the demandant could have judgment. Had the Judge ruled against the amendment, as *matter of discretion*, it would have been conclusive. But he ruled, *as matter of law*, and such ruling is open to exceptions. The amendment is allowed, [no terms imposed.] *Exceptions sustained.*

James Whitney *versus* John Cottle.

A witness testified to a conversation of the defendant; and parts of it were relevant and parts were irrelevant to the present suit; — *Held*, that, though the evidence of the irrelevant declarations was seasonably objected to, exceptions to the admission of it could not be sustained.

Ingalls, for defendant.

Gould, for plaintiff.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF KENNEBEC,

1849.

FREEMAN STOWE & *al. versus* SAMUEL S. COLBURN.

Promissory notes, made payable at a time and place certain, are not affected by the statute of 1846, chap. 218.

That enactment applies only to notes payable at a place certain, on *demand* at or after the expiration of a time specified.

ASSUMPSIT on a promissory note, dated July 27, 1847, payable "*at Boston six months after date.*"

By due course of mail the defendant received from the plaintiffs, a letter dated and mailed at Boston, Jan. 18, 1848, from which the following is an extract: — "If you can possibly send us the amount of your note or a part of it, on the receipt of this, it will greatly oblige us."

By due course of mail the plaintiffs received from the defendant a letter dated and mailed Pittston, January 24th, 1848, of which the following is an extract: — "Yours of the 18th was duly received. I cannot pay the whole of that note until spring, but I will send you part of it next week."

Afterwards, by due course of mail, the plaintiffs received a second letter from the defendant, dated and mailed at Pittston, February 3, 1848, of which the following is an extract: — "I hope you will wait patiently a short time longer. I think I can

send you a part of it very soon, but I cannot say certain." The mail goes from Pittston to Boston in a little short of twenty-four hours. The note was received by the plaintiffs' attorney in Gardiner, by mail, on the morning of the 9th February, 1848, and was sued the same day.

The parties agreed to submit the case to the decision of the Court, on the foregoing statement.

Danforth and *Woods*, for the plaintiff.

The defendants should be defaulted. The note is not within the statute of 1846, chap. 218, not being a note payable on *demand* at a place certain, or on *demand* at a place certain after or at the expiration of a specified time, but payable *absolutely* at the expiration of a specified time. The distinction may be a nice one, but the Legislature must have intended it, or they would have said at once, "all notes payable at a place certain."

Again, this note is not payable at a *place certain* as contemplated by the statute. The statute contemplates a note payable at some particular place of business, where a demand could be made effectually. This is payable in Boston generally, the same in effect as though payable in Massachusetts or the United States.

A demand made in Boston would certainly be indefinite and useless to the defendant, for whose benefit the statute was undoubtedly passed.

Again, if a demand was necessary, it was waived by the letters of the defendant, as decided, in principle, in the following cases, *viz.*:—*Taunton Bank* v. *Richardson*, 5 Pick. 436; *Boyd* v. *Cleaveland*, 4 Pick. 525; *Lane* v. *Steward*, 20 Maine, 98.

Chadwick, for defendant.

The note is within the statute of 1846, chapter 28, being a note payable on demand at a place certain, after or at the expiration of a specified time. It is not necessary that the word "demand," should be written in the body of the note. It is

sufficient that the legal effect, of the time of payment passing is, that the note becomes payable whenever demanded. The Legislature intended that makers of promissory notes might be enabled to protect themselves from unnecessary costs. That the parties, at the time of the making of the note, understood Boston to be a place certain, is shown by the rehearsal of the maker's residence in the body of the note. There was no waiver, made in the defendant's letters. Story on Promissory Notes, § 229, page 268, and § 231, page 277.

TENNEY, J. — Prior to the statute of 1846, chap. 218, in an action on a promissory note, made payable at a time and place certain, no averment or proof of a demand was necessary on the part of the holder; but if the maker was ready to make payment at the time and place specified, such would be matter of defence. *Bacon* v. *Dyer*, 3 Fairf. 19; *Remick* v. *O'Kyle & al.*, *ibid.* 340. And when a note was payable on demand at a particular place, no averment or proof of a demand was necessary to entitle the holder to maintain an action upon such note; but a readiness of the maker to pay at the place, when a suit was brought upon such note would be a defence. *McKenney* v. *Whipple*, 21 Maine, 98.

By the statute referred to, it is provided, that in an action on a promissory note payable on demand at a place certain; or on demand at a place certain, after or at the expiration of a specified time, the plaintiff shall not be entitled to recover, unless he shall prove a demand to have been made at the place of payment, before the commencement of the suit.

On a fair construction of a note payable at a place certain and at a fixed *future* time, without the words "on demand," those words are not implied, and the note since the statute, is an essentially different contract from one in which those words are inserted. In a note of the latter description, a demand is a condition precedent, to the right to commence and maintain an action thereon. The import of those words is, that the maker shall have an opportunity to fulfil his promise upon notice, at the time and place. But in one of the former char-

acter he reserves to himself no such privilege; the promise is absolute and unconditional, that he shall make the payment at the time and place mentioned. According to the agreement of the parties *Defendant defaulted.*

AUSTIN SUMNER *& al. versus* JAMES R. BACHELDER.

A mortgage of personal property, given to sureties to protect them against their suretyship, is not in force after the creditor has discharged the sureties.

Where a debtor gave to his sureties such a mortgage to secure them against their suretyship upon a note, and they assigned the mortgage to the creditor for his security, taking from him a discharge, under seal, of *their* liability on the note; the mortgage is no longer in force.

The design of such a mortgage being merely to protect the sureties against the note, and that protection having been given by the creditor's discharge, the condition of the mortgage is fulfilled.

TROVER against the sheriff, for selling by his deputy, goods claimed by the plaintiffs.

The goods formerly belonged to William G. Hall, and he mortgaged them to Hall & Turner. The deputy seized and sold the goods, as the property of William G. Hall. The question relates to the title derived by the mortgage. The mortgage was conditioned for the payment of two notes, given to Hall & Turner, of amounts similar to those for which the plaintiffs hold the notes of said W. G. Hall, signed also by Hall & Turner, and which are the notes now in suit. This mortgage they had assigned to the plaintiffs. No notes given to Hall & Turner were produced. Charles O. Turner, of the firm of Hall & Turner, was called by the plaintiffs. He testified on cross-examination, that Hall & Turner had paid nothing on the said notes, given to the plaintiffs; that the mortgage was given for their security against their suretyship on the notes; that they had no other security; that they had failed and become insolvent, before assigning the mortgage to the plaintiffs. This witness, before testifying in chief, was examined on the *voir dire*, and produced two releases under

the hands and seals of the plaintiffs to himself and his partner Hall, against "any and all liabilities, they or either of them are or may be under, to" [the plaintiffs] "by reason of their having assumed as surety or otherwise, any responsibility for or on account of William G. Hall, also on account of their having conveyed to us a certain quantity of goods, which were in said William G. Hall's store, being the same that were mortgagedby said William G. Hall to said Hall & Turner."

Joseph Baker, Esq. testified for plaintiffs, that acting as attorney for them, he notified the deputy of the assignment of the mortgage, and demanded the goods before the sale.

Plaintiffs offered parol testimony to show that the notes produced were the notes, intended to be secured by the mortgage; but it was excluded.

A nonsuit was ordered by SHEPLEY, C. J. If the plaintiffs upon the evidence can maintain the suit, the nonsuit is to be taken off.

Lancaster, for plaintiffs.

1. The mortgage having been executed and delivered, together with the goods specified in the mortgage, and the grant therein being complete and sufficient to convey the goods, and the consideration being a valuable one; if the condition of the grant was imperfect or incomplete by reason of any misdescription of the notes secured by the mortgage, then the deed would stand as a deed without conditions, and the conveyance would be good. *Bank* v. *Vose*, 23 Maine, 98; *Davis* v. *Mills*, 18 Pick. 394.

2. Parol evidence is admissible to show what notes were given at the same time the mortgage was, and were intended to be secured by it. *Johns* v. *Chandler*, 12 Pick. 557; *Johnson* v. *Bourne*, 7 Cowen, 13; *Hall* v. *Tufts*, 18 Pick. 455; *Jackson* v. *Stanley*, 10 Johns. 139; *Davis* v. *Mills*, 18 Pick. 394.

3. A deed, if legally possible, is to be so construed as to give effect to the intentions of the parties. 1 N. H. 64; 10 Mass. 183; 7 Verm. 100; 15 Pick. 23.

4. Exceptions in a deed are always to be construed most favorably for the grantee. 3 Johns. 375; 8 Johns. 394. And so with conditions, as plaintiffs contend.

H. W. Paine, for defendant.

The defendant contends that the nonsuit should stand, because —

1st. As the notes offered by plaintiffs are not the notes described in the mortgage, they are not to be permitted to show that these were the notes intended to be secured. R. S. chap. 125, sec. 32.

2d. The releases of Hall & Turner, executed by the plaintiffs, are a discharge of the mortgage. *Parks* v. *Hall*, 2 Pick. 206, 211.

SHEPLEY, C. J. — The plaintiffs are creditors of Hall & Turner. The defendant is the sheriff of this county. The action is trover brought to recover the value of certain goods attached and sold by a deputy of the defendant as the property of William G. Hall. It is admitted that he was formerly the owner of the goods. The plaintiffs claim to have derived their title to them from him. It was stated in argument, that the defendant had exhibited no title. It was not necessary that he should make an exhibit of the writs, upon which the attachment had been made, until the plaintiffs had established their title. "It was admitted, that the defendant was sheriff of this county, and that Norris, who attached the goods, was his deputy." The plaintiffs had also introduced a witness, who testified, that on February 12, 1848, he notified Norris, the deputy sheriff, who attached the goods, of the assignment of the mortgage and demanded the goods, and that Norris declined to deliver them, because he held them on the attachments. The defendant will be entitled to hold them, unless the plaintiffs can show a superior title.

They exhibit a conveyance of the goods in mortgage made on December 29, 1847, and recorded in the town records on the following day, by William G. Hall to Hall & Turner, upon condition to be void upon payment by William G. Hall of

the sum of $1343,00, being the amount of two notes described, given by William G. Hall to Hall & Turner; and an assignment of that mortgage to themselves, made on February 7, 1848, and recorded in the town records the same day. The notes described in the condition were not produced. To prove, that the mortgage was made for a valuable consideration, the plaintiffs introduced Charles O. Turner, of the firm of Turner & Hall, who testified in substance, that the mortgage was made to secure Hall & Turner for signing two promissory notes produced, as sureties for William G. Hall; that Hall & Turner had no other notes against William G. Hall, that he recollected; that the schedule annexed to the mortgage was made the day before the goods were attached; that Hall & Turner had no other security than the mortgage for signing those two notes for William G. Hall.

The notes produced were signed by William G. Hall and by Hall & Turner. One of them bearing date on November 12, 1847, was made payable to Sumner, Brewer & Co., in four months, with interest after, for the sum of $916,41. The other, bearing date on December 28, 1847, was made payable to Little, Spear & Co. in two months from date, for $426,11.

The report states, that parol testimony was offered and excluded, to prove "that the notes produced were intended to be secured by the mortgage."

On a motion for a new trial, a note is now produced as newly discovered evidence, bearing date on December 28, 1847, for the sum of $1343, made by William G. Hall and payable to Hall & Turner on demand. It is not however contended, that there was any other consideration for this note than their liability as sureties on the other two notes before named.

Admitting that the parol testimony excluded should have been received, the whole proof as now presented under the motion shows, that the mortgage was made, or that it was intended to have been made, to indemnify Hall & Turner for becoming sureties for William G. Hall on the two notes first named. The quesion is therefore still presented, whether at

the time of the trial, the plaintiffs had such a title to the goods, that they could maintain their action.

They had before that time, on October 7, 1848, by an instrument under their hands and seals, released Hall & Turner "from any and all liability," "by reason of their having assumed as surety or otherwise, any responsibility to our said firm for or on account of William G. Hall."

It is therefore obvious, that they could maintain no action against Hall & Turner founded upon those two notes. The liability of Hall & Turner to pay those notes had been by their release extinguished. Nothing had been paid upon them. Hall & Turner acquired by the mortgage from William G. Hall a conditional title to the goods, liable to be defeated by the termination or extinguishment of their liability to pay those notes. That title and no other could they convey to the plaintiffs. They did not attempt to convey any other. They only assigned the mortgage and the title to the goods, which they had acquired by it.

No absolute title to the goods was at any time conveyed or attempted to be conveyed by William G. Hall to Hall & Turner; or by them to the plaintiffs.

There may be a difference of opinion, whether the title to real estate conveyed in mortgage, upon payment or discharge of the debt or liability secured by the mortgage after condition broken, would revest in the mortgager without a reconveyance or release or cancelation of the mortgage. But although the title to personal property conveyed in mortgage, becomes absolute in the mortgagee upon failure to perform the condition within the time limited and extended, by the statute of this State, c. 125, § 30; yet if the mortgagee or his assignee, afterward accept payment of the debt, or discharge the liability secured by the mortgage, the title revests in the mortgager, without a redelivery or resale and without a cancelation of the mortgage. *Butler* v. *Tufts*, 13 Maine, 302; *Flanders* v. *Barstow*, 18 Maine, 357; *Paul* v. *Hayford*, 22 Maine, 234; *Greene* v. *Dingley*, 24 Maine, 131; *Leighton* v. *Shapley*, 8 New Hampshire, 359; *Parks* v. *Hall*, 2 Pick.

206; *Barry* v. *Bennett*, 7 Metc. 354; *Patchin* v. *Pierce*, 12 Wend. 61; *Harrison* v. *Hicks*, 1 Port. 423.

It is true, that the introduction of a mortgage made to indemnify a surety, after proof of its execution, has been held to be *prima facie* evidence of title. The same case also decides, that such title will be avoided by proof introduced in defence, that the debt has been paid, or the liability of the surety discharged. *Davis* v. *Mills*, 18 Pick. 394.

In this case, the proof, that the sureties had been discharged from their liability, was introduced by the plaintiffs, and their title to the goods was thereby avoided. A new trial could not avail them. *Nonsuit confirmed.*

JOHN S. ABBOTT *versus* ALBERT STURTEVANT.

After the attachment of an equity of redeeming mortgaged land, no conveyance made by the debtor can lessen the creditor's rights.

By an officer's sale of such an equity, the purchaser takes a right to the immediate possession of the land, (except as against the mortgagee,) and may maintain trespass *quære clausum* against one exercising ownership under any conveyance made by the debtor after the attachment.

Persons claiming under such a conveyance do not hold by a seizin adverse to that of the debtor.

It is not indispensable that the officer's deed should be made on the day of the sale. If made so soon afterward, that it may be regarded as a part of the sale-transaction, the deed and the purchaser's right under it will have relation back and take effect from the time of the sale.

GEORGE C. HALL owned the equity of redeeming certain mortgaged real estate. It was attached on a writ in favor of Bunker. After that George C. Hall conveyed away his said right. Bunker, having obtained judgment in his suit, caused the equity to be seized on his execution within thirty days from the judgment, and the same was sold by the officer to the plaintiff. At the time of the sale, the defendant was occupying the land, as a tenant under Elijah Hall and Ephraim Hall, who had acquired the rights which George C. Hall, after the attachment had sold as above named. This suit is brought

to recover for pasturing cattle and cutting hay upon the ground between the time of the purchase and the bringing of the suit. Said sale to the plaintiff was made on the 20th of May, 1844. The officer's deed was made, acknowledged, delivered and recorded, August 6, 1844. The suit was brought on the 21st of August, 1844.

The case was submitted for the decision of the Court.

May, for defendant.

Under the statute of 1821, such a deed gave seizin, if the debtor had it, and also constructive possession in addition to the title.

But under R. S. nothing passes by such a sale except the naked "title." chap. 94, § 39. The intent undoubtedly was that debtor should hold possession, until evicted by law. Hence, the creditor may recover in his suit for the rents and profits. chap. 145, § 14. In the sale of an equity, there is no delivery of seizin, except a momentary one, when a third person is seized. chap. 94, § 18. And the tenant is not to be expelled. The creditor took but a *right* of entry and of possession. *Langdon* v. *Potter*, 3 Mass. 215; *Gore* v. *Brazier*, 3 Mass. 537.

Else, why was the statute of 1821 repealed? This view is confirmed by that provision, relating to the setting off an equity, which prohibits the tenant to be ousted, and only assigns the debtor's right. chap. 94, § 17.

George C. Hall, the debtor, was disseized by the deed which he gave of the equity. The purchaser, therefore, took but a right of entry, and this suit cannot be maintained.

Abbott, pro se.

TENNEY, J. — The statute of Massachusetts, passed March 17, 1784, chap. 57, § 2, provided, that where land should be set off on execution to a creditor, and seizin and possession be given to him by the officer who should make the levy, and the execution and the doings thereon be returned to the clerk's office, and be recorded within three months in the registry of deeds, in the county where the land should lie, such proceed-

ings should make as good a title to the creditor, his heirs and assigns, as the debtor had therein. The statute, passed in 1821, of this State, chap 60, § 27, was similar. The only mode provided by the statutes of Massachusetts before our separation, or by the statutes of this State, previous to the passage of the Revised Statutes, for the levy of an execution upon the right in equity of redeeming real estate under mortgage, as such, was by a sale at auction, in the mode prescribed in the act of Massachusetts of 1798, chap. 77, § 4, and in the act of this State, of 1821, chap. 60, §§ 17 and 18. And by these statutes all deeds, made and executed according to their provisions, were declared to be effectual to all intents and purposes to convey the debtor's right in equity to the purchaser, his heirs and assigns, as if the same had been made and executed by such debtor. But a levy, being made by an extent upon land, as the estate of the debtor who held it only as a mortgager, would have the effect to pass the right to the creditor, against the debtor or those claiming under him, if no deduction was made in the appraisal on account of the incumbrance. *Warren* v. *Childs*, 11 Mass. 222; *White* v. *Bond*, 16 Mass. 400; *Litchfield* v. *Cudworth*, 15 Pick. 23.

In decisions under these statutes, it has been held, that when the creditor has extended his execution upon the real estate of the debtor, and received from the officer seizin and possession, he not only acquired all the title which the debtor had in the premises, but if the debtor was disseized and had not lost his right of entry, the disseizin was so far purged, that the creditor could maintain a writ of entry, or an action of trespass at his election. *Gore* v. *Brazier*, 3 Mass. 523; *Nickerson* v. *Whittier*, 20 Maine, 223; *Woodman* v. *Bodfish*, 25 Maine, 317.

When the levy was made by a sale of the mortgager's right of redeeming, the purchaser acquired the title and the seizin of the debtor, inasmuch as the debtor's deed would convey both if they were in him, and might recover in a writ of entry against the debtor or a stranger, unless the latter had in fact disseized the mortgager, before the sale of the equity. *Wellington* v. *Gale*, 7 Mass. 138; *Porter* v. *Millett*, 9 Mass. 101;

Fox v. *Harding*, 21 Maine, 104. But if the debtor was disseized at the time of the purchase of his right, the purchaser acquired the debtor's title, but not the seizin as the creditor did in the case of the levy by an extent upon the land. *Poignard* v. *Smith*, 6 Pick. 172. In this last case cited, the Court say, "If the mortgager was seized at the time of the seizure on the execution, then the sheriff's deed would have conveyed his seizin to the purchaser, for the statute gives the same effect to the sheriff's deed, as the mortgager's would have, had he himself conveyed the right of redemption, or the land subject to the mortgage; but if the mortgager was not seized at the time of the sale, then the sheriff's deed could not convey a seizin, but only a right of entry, which must be executed before a writ of entry could be maintained, in which the demandant should declare on his own seizin."

In the Revised Statutes, essential changes have been introduced touching the levy of executions, both by an extent upon the land and by the sale of the mortgager's right of redemption. In the former case, all the debtor's interest in the premises shall pass by the levy, unless it be larger than the estate mentioned in the appraiser's description. R. S. chap. 94, § 10. And the officer shall deliver seizin and possession so far as the nature of the estate taken and the title of the debtor will admit. Sect. 17. When an execution is levied upon land, into which the debtor has, or is supposed to have the right of entry, and of which any other person is then seized, the officer shall deliver to the creditor a momentary seizin and possession of the land, so far as to enable the creditor to maintain an action therefor in his own name, and on his own seizin; but he shall not actually expel and keep out the tenant then in possession, against his will. Sect. 18. The right of redeeming mortgaged estate, may be taken and set off on execution for the mortgager's debts, in like manner as though they were not mortgaged, excepting that the appraisers shall deduct the amount of the mortgage debt. Sect. 31. Or the right of the mortgager may be taken and sold, in the same manner as under former statutes, and the deed to be given by

the officer to the purchaser, being recorded in the registry of deeds, in the county where the land is situated, within three months of the sale, shall convey to the purchaser all the title, which the debtor had in the premises. Sect. 39.

It is obvious from these modifications, that it was not designed that the creditor's or the purchaser's rights should be enlarged, but in some respects restricted. Where the debtor is not seized of the land, upon which an extent is made, the creditor is not to be put into the actual possession of the land as he would be by virtue of a writ of possession, so that he could maintain trespass against the one in its occupation, but is to have a momentary seizin, so as to be able to sustain an action upon his own seizin to obtain possession, if he has the title. The Legislature has provided, that the creditor should be placed in the same situation after the levy, that the debtor was before, and has afforded him the opportunity to try the title with the tenant, upon the seizin obtained from the officer, but has restrained him from substituting himself without judgment of law, in the place of one having peaceable possession.

When the levy was made by a sale of the debtor's right, as a mortgager, and the debtor was disseized, the condition of the purchaser under the statute of 1821 was not materially different from that in which he is placed by the Revised Statutes. By the former statute, he obtained the same rights, which he would have done by the debtor's deed; this was the title of the debtor, but not seizin, because it was not in the debtor or any one claiming under him. By the present provisions, the officer's deed gives him the debtor's interest in the land, but if the debtor is disseized, he does not acquire the possession.

If the debtor has the possession at the time of the officer's sale of the equity of redemption, the purchaser succeeds to that possession as he did under the statute of 1821.

It is contended by the counsel for the defendant, that if the mortgager conveys the land after its attachment on the writ, and before the seizure and sale on the execution, the possession of the grantee under the deed is a disseizin of the mortgager; and that the purchaser of the equity does not obtain thereby

such a seizin as will enable him to maintain an action of trespass, notwithstanding he may acquire the title of the mortgager. To constitute a disseizin of the true owner, it is well settled, that the possession must begin and continue to be adverse to his title. The possession under a deed from him, is in submission to his rights, as they actually existed before the conveyance; the grantee acquires nothing beyond that which was held by the grantor before the deed; he is in all respects placed in the situation of the one from whom he derives all his interest, and is equally affected by any existing lien or incumbrance. It is not in the power of the grantor by giving a deed, or the grantee by receiving it, to change in any manner the relations, which others hold to the estate.

The levy of an execution by an extent upon land attached upon the writ, made within thirty days after judgment, by the statute, passes the title which the debtor had at the time of the attachment, by relation to that time as effectually as it would pass by the conveyance of the debtor. *Brown* v. *Maine Bank*, 11 Mass. 153; *Nason* v. *Grant*, 21 Maine, 160. The sale of an equity of redemption will have a similar effect upon the mortgager's rights previously attached, and will defeat all titles subsequent to the attachment. *Bigelow* v. *Wilson*, 1 Pick. 485. The purchaser of an equity of redemption attached before the conveyance by the mortgager acquires all the interest, which the latter had at the time of the attachment; the grantee holds the title and the possession of the grantor as it was, when attached; and when the sale is perfected, the rights of the grantee are as perfectly extinguished as the rights of the grantor would have been, if no conveyance had been made.

The disseizin of the debtor, which will operate to prevent the creditor from obtaining actual possession of real estate by virtue of a levy made in pursuance of R. S. chap. 94, sect. 18 and 31, or by a sale under sect. 39, is that, when the debtor was disseized by a possession adverse to his title, and not by a conveyance made by him.

George C. Hall was the owner of the equity of redemption,

when the attachment was made on a writ in favor of W. J. Bunker, against him and others. Judgment was obtained, and upon an execution, which issued thereon, Hall's right was seized and sold according to law, to the plaintiff, before the attachment expired. At the time of the officer's sale, which was on May 20, 1844, the defendant was in possession of the land as the tenant of Elijah Hall and Ephraim Hall who had obtained the title of George C. Hall, after the attachment. The plaintiff acquired by his purchase all the interest which George C. Hall had at the time of the attachment on the original writ, which interest was his title and possession. The defendant having occupied the premises after the purchase by the plaintiff and the delivery of the deed by the officer to him, without his authority, became a trespasser upon his rights, unless he held possession under a title paramount to that of the plaintiff. It was insisted, at the trial, that he did hold under such title, and evidence thereof was offered and rejected by the Court, on the objection of the plaintiff. This evidence was, that the defendant occupied under authority of the assignee of the mortgage of Hall. The assignee never having taken possession under his mortgage, could not confer the right contended for, and the evidence was properly rejected.

Another question involved in the case is in reference to the damages. Is the plaintiff entitled to recover on account of the occupation of the land by the defendant, after the officer's sale and before the delivery of the deed to him? The debtor's right to redeem, being seized on execution, advertised and sold in pursuance of the provisions of the statute, and a good and sufficient deed thereof executed and delivered by the officer to the purchaser, duly recorded, conveys all the title of the debtor in the premises. R. S. c. 94, § 39. To become effectual, these different steps of the proceedings, must be parts of the same transaction and have relation to each other. The deed required, though not delivered, or actually made on the day of the sale, does not necessarily fail to be operative on that account. The officer may be prevented by causes over

which he has no control, from making the return upon the execution, and preparing, executing, acknowledging and delivering the deed, at the time, when the purchase is made. But if it is delivered so soon afterwards, that the whole proceedings will vest a title in the purchaser, every thing is considered as having relation to the day of the sale, and the interest of the debtor passes at that time to the one who made the purchase, and he is entitled to all the benefits thereof, notwithstanding the deed may not have been actually received till afterwards. According to the agreement of the parties,

Judgment for the plaintiff.

TRUXTON WOOD *versus* HORATIO G. KELLEY & SAMUEL NOYES.

In a conveyance of land, bounded on a fresh water pond, which had been permanently enlarged by means of a dam at its mouth, the title extends to the low water mark of the pond, in its enlarged state.

To establish a right by user, to flow water upon a complainant's land, in a case where the defendant's proof showed that the only interruption to the flowing was during the rebuilding or repairing of the dam, it must be proved that damage was done thereby to the landowner; that the damage must have been such as would enable him to maintain a process to prevent such flowing or to recover for it; that the damage should be of yearly occurrence; that he knew or had the means of knowing of such flowing; and that it must have been continued for twenty years, and that for that period it was flowed as high or higher than during the three years next before filing the complaint; with the qualification, however, that the omission to flow during the time while the dam was being rebuilt or repaired, should not prevent the acquiring of such right.

In a complaint for flowing, one of the respondents, after being defaulted, cannot be used as a witness for his co-defendant.

"THIS was a complaint for flowing plaintiff's land by a dam erected by defendant, on a stream at the outlet of South pond. The land flowed was on said pond about two miles north of the dam.

"The complaint was filed August term, 1843. Noyes was defaulted in the District Court. The action was brought by Kelley into this Court by appeal. The general issue was

pleaded; it was also pleaded that the plaintiff was not seized; also that James Bowdoin and Henry Dearborn had a grant in 1783, from one William Vassal, the owner of the land, of the right of flowing it for the purpose of carrying a mill then about to be erected by said Bowdoin and Dearborn, from whom their right was transmitted to defendant, which grant was lost by time and accident, and that the defendant, or those under whom he claims, erected said dam and built said mills in the year 1784, and continued the same to the filing of this complaint; also it was pleaded, that the defendant had a right to flow said land, by prescription, he and those under whom he claimed having continued to flow the same from the year 1784 to 1843.

"Plaintiff, to prove that he was seized of the land flowed, read in evidence the following deeds, viz: — A grant from the Proprietors of the Kennebec Purchase to William Vassal, dated Oct. 9th, 1771, a deed from Vassal to L. V. Borland, dated Jan'y 2d, 1787, and from Borland to D. Greene, dated Jan'y 18th, 1796, and from Greene to John Lowell, dated Nov. 2d, 1802. These deeds, among other lands, conveyed the north half of great lot No. 22. Plaintiff then read in evidence a deed from John Lowell to John Chandler, conveying all of said north half of No. 22, lying west of South pond, dated June 10th, 1803, and a deed from John Chandler to Elijah Wood of all that part of No. 22, which lieth west of said South pond, with the exception of a number of lots sold to others, dated March 29th, 1804, and a deed from said Elijah Wood to said complainant, dated May 2d, 1839, of 60 acres, part of said lot No. 22, bounded easterly on said South pond.

Defendant called several witnesses, whose testimony tended to prove that at the several times when said three last deeds were executed, said pond, upon which they were bounded on the east, was, by means of said dam, and for many years previous had been, raised to such a height as to cover the land, as flowed at the time of filing the complaint; and contended, that the boundary expressed in said deeds, being *by the pond*,

it was the margin of the pond, *in its artificial state*, that formed the boundary in said deeds, which would exclude the land flowed ; and the defendant's counsel requested the Judge to instruct the jury : —

1st. " That the deed of John Lowell to John Chandler, and of John Chandler to Elijah Wood, and of said Elijah to the complainant, being bounded easterly by the pond, would be limited to the margin of the pond, as it was raised by the dam, at the several times when those deeds were executed.

2d. " That if the jury are satisfied that all the land, proved to have been flowed by said dam within the time alleged in said complaint, was situated to the eastward of said margin, in such case said complainant is not seizable thereof, and this complaint cannot be maintained.

" Under the 3d and 4th grounds of defence, defendant called many witnesses, whose testimony tended to prove, that said Bowdoin and said Dearborn erected said dam and mills in the year 1784 ; that said Bowdoin was the grantee of said mill lot and privilege from the Proprietors of the Kennebec Purchase, in the year 1770, and that his title to the land and mills, and privilege, had been regularly transmitted through sundry mesne conveyances to R. H. Gardiner, who leased the same to defendants. The testimony of said witnesses also tended to prove, that said dam had been kept up by successive owners and occupants from 1784 or 5 till 1820, and said mill had been in operation during the whole of said period, except when under repair or rebuilding ; and that the water was raised to as great a height on said land alleged to be flowed, during the whole of said period as it was during the time complained of in said complaint, doing damage to the owner of said land flowed, and the counsel for the defendant thereupon requested the Judge to instruct the jury, —

" That if the respondent and those, from whom he derived title to said mill and dam, exercised the right and privilege of flowing said land, proved to have been flowed by him, full twenty years uninterruptedly, from the time of its erection, doing thereby some damage to the owner of the land flowed,

however small, and without claim or disturbance, it furnished a legal presumption of a grant of a right so to flow.

"And said counsel further requested the Judge to instruct the jury, —

4th. "That, independent of such supposed grant, the fact of flowing such of plaintiff's land as is proved to have been flowed for any period of twenty years, doing damage to said owners and with their knowledge and without a claim for damages or disturbance by them, would confer upon said respondent, and those under whom he claims, a right to flow without payment of damages.

"The Judge declined to instruct the jury as requested, but did so instruct them, with the following qualifications; the first and second requested instructions were given accompanied with the remark, that the margin of the pond should be found for such purpose at low water mark; the third and fourth requested instructions were given with the remark, that the flowing during the twenty years should be proved to have been as high or higher than during the three years prior to the time of filing of the complaint; the third was further varied by stating that the flowing should have been so made as to exhibit a knowledge or means of knowledge of it to the then owner of the land; and that the damage, "however small," should be such damage as would have enabled the owner of the land to maintain a process to prevent such flowing, or to recover for the damage occasioned by it. And the jury were instructed that they must be satisfied that such damage was occasioned during each year of the whole period of twenty years. But that the omission to flow during the time while the dam was being rebuilt or repaired, should not be considered as preventing the owners from acquiring such a right, those seasons being regarded as they would have been, had the flowing been continued.

"In the course of the trial, the counsel for said Kelley moved that said Noyes might be examined as a witness for him. This was objected to by counsel for complainant, and the motion was overruled by the Judge, and the said Noyes was rejected.

"A verdict was returned for the complainant and the defendant excepted."

F. Allen and *A. Belcher*, for defendant.

The dam was erected in 1784. It then raised the water as high as at any subsequent period. The six last successive conveyances, under which the plaintiff claims, were made while the water was thus flowed. When he took his deed the water had been kept thus raised for fifty-five years. A new margin to the pond had then existed all that time, and the land, concerning which the plaintiff complains, had been covered to the depth of four and a half feet.

The requested instruction was, that the margin of the pond, so enlarged, was the eastern boundary of the plaintiff's land under his deed. This point has never been precisely settled. The qualification annexed to the instruction was erroneous. It made a difference between high and low water marks. The rule is generally different from that. It has long been a part of the law, that lands, bounded by fresh water streams, extend to the centre. But in tide waters, the limit is at high water, both by the common law and by the civil law. 3 Kent's Com. 427, Lect. 52. Except under the Provincial ordinance, high water is the prevailing limit. But that ordinance only affected cases on tide waters. It does not reach this case. *Storer* v. *Freeman*, 6 Mass. 438. In this case there is an error in the report. The word "low" is there by mistake. It should read "high," otherwise the case is but contradiction and confusion. With that change the case would harmonize with Kent's views.

What was, by the common law, the boundary on tide waters, is now the boundary on fresh water ponds and lakes; that is, the margin formed by high water. Ld. Hale's Tr. de Maris, ch. 4, p. 5; Douglass, 446.

By the deeds under which the plaintiff claims, his land lies "west of the pond; which means, west of the pond, in its then artificial state. The deeds were made in the spring, when the water was high, and the land covered. This would destroy the seizin, so that nothing could pass below high water

mark, even if title extended to low water. *Hathorn* v. *Stinson*, 10 Maine, 224.

The case of *Rice* v. *Bradley*, 13 Maine, 198, which was of a natural pond raised by artificial means, settles that the boundary is at the margin of the pond in its enlarged state. In *Waterman* v. *Johnson*, 13 Pick. 261, it is obvious that (except for the parol testimony,) the boundary would have been fixed at high water mark of the pond, as it existed when the deed was made. The effect of the deed cannot be enlarged by construction. In tide waters there are two water lines. Not so in ponds and lakes. And when raised by a dam, the marginal line is still more permanent. In a pond there is no fixed low water mark. The ordinary state of the water to carry the mill is the true line.

If asked, who owns the land below the then high water mark? We answer, the man last seized.

If the Court had the power to enlarge the deed by construction, it could not be sound policy to do it. It would destroy the manufacturing interest to avoid a trifling inconvenience to the agriculturist. *Nelson* v. *Butterfield*, 21 Maine, 220; *Williams* v. *Nelson*, 23 Pick. 141; *French* v. *Braintree M. Co.*, 23 Pick. 216.

As to the points in the case, No. 3 and 4, we submit that the instructions were directly in opposition to *Nelson* v. *Butterfield*, before cited. What would have been the result, if the dam had been down a year or two? See *Dana* v. *Valentine*, 5 Metc. 8. It was there decided that the right of twenty years user was not defeated by two years of interruption.

If the flowing occasion a damage, *at any time* within twenty years, to the knowledge of the land owner, the right by the prescription is established.

Noyes ought to have been received as a witness. This is a suit in *tort*. He had been defaulted. He cannot protect himself. He was therefore competent to testify for Kelley.

Evans and *May*, for plaintiff.

Shepley, C. J. — The case presented by the bill of excep-

tions arises on a complaint, authorized by statute, to recover damages for an injury occasioned by flowing the waters of South pond, upon land alleged to be owned by the complainant. His land is bounded "easterly on said South pond." If that boundary extends to low water line, it is not denied, that some part of his land has been flowed by reason of a mill-dam occupied by the respondents.

The defence rested upon two grounds. — First, that the complainant by his conveyance acquired no title below the water line of the pond at the time, when the conveyance was made.

Secondly, that the owners of the mill-dam had enjoyed the right to flow the lands to the same height for twenty years, and had thereby acquired the right to continue to do so; and that a grant of that right was to be presumed.

South pond appeared to be a natural body of fresh water, the height and extent of which had been increased for more than twenty years, before the complainant purchased his land bounded upon it.

The jury were instructed, that the complainant acquired a title to the land bounded upon the pond, to the margin of the pond at low water mark, considering the pond to be permanently enlarged by reason of the mill-dam.

It is in argument insisted, that in analogy to the rule of law, which limits a conveyance of land, bounded upon the sea, or upon waters in which the tide flows and ebbs, to high water mark, the conveyance in this case should be so limited.

That rule appears to have arisen from the considerations, that the right of navigation upon such waters was a common right. That all the subjects or citizens of the country were entitled to navigate such waters, and that the use of the shore was essential to its full enjoyment. That the sovereign power could not have intended by a grant of land bounded upon navigable waters to infringe upon that common right. That the grantee could not have expected thereby to acquire a title, which would be in conflict with the most beneficial use of

that common right. These considerations not being applicable to waters not navigable, conveyances bounded on streams of fresh water above the ebb and flow of tides were regarded as conveying the land *ad filum medium aquæ*. The sovereign power can have no occasion to retain the title to soil around ponds between the lines of high and low water for any purpose of navigation. The use of the waters of such ponds at all seasons is of great importance to the owners of the adjoining lands. When the water is low, its use becomes more desirable and valuable. As the title of the sovereign to a strip of land between the two water lines could be of no use to the public, no presumption can arise of an intention not to grant it. Such waters are most valuable to the owners of land adjoining them for purposes, for which tide waters cannot be used. Unless rebutted by some proof, the presumption is, that it was the intention of the parties to a conveyance of land bounded by a pond, that the land should be bounded upon it at all seasons of the year, and not while the pond remained only at the level existing at the time of the conveyance.

It is said that the Court has no power to extend the conveyance by construction.

It does not propose to do so; but to decide, whether it was the intention of the parties to a conveyance of land, bounded upon a pond, that it should be bounded by it at all times, or only when the water was neither so high or so low as to be above or below a certain water line. If the doctrine insisted upon were to be adopted, a person who received a conveyance of land adjoining a pond, when the water was quite low, might convey it to another at a more elevated and yet not high state of the water with a like boundary, and retain a small strip of land between those two water lines; and there might, under the application of the doctrine, be several strips of land thus owned by different persons, when conveyances were made at several different states of the water.

No grantor or grantee can be supposed to have had an intention to produce such results.

The instructions are supposed to be in conflict with the decision of this Court in the case of *Bradley* v. *Riee*, 13 Maine, 198. That case decided, that a conveyance of land bounded upon a pond formed, as the one referred to in this case is, partly of the waters of a natural pond and partly by waters accumulated by a dam erected at its outlet, was limited to the margin of the pond as then enlarged. It did not decide, whether such margin was to be found as it then existed or when the waters were high or low.

The opinion in the case of *Waterman* v. *Johnson*, 13 Pick. 261, states, that "a large natural pond may have a definite low water line, and then it would seem to be the most natural construction, and one which would be most likely to carry into effect the intent of the parties, to hold that land bounded upon such a pond would extend to low water line, it being presumed, that it was intended to give to the grantee the benefit of the water, whatever it might be, which he could not have upon any other construction."

It is not perceived, why the same presumption respecting the intention does not arise, when the land is bounded upon a natural pond after it has been for a long time enlarged by artificial means, and thereby determine, that the line of boundary is to be found at low water mark.

In the case of *Handly's Lessee* v. *Anthony*, 5 Wheat. 374, it was decided that the State of Virginia, when she ceded the territory north-west of the Ohio river to the United States, retained the whole bed of that river, and yet that the land on the north-west side of it was bounded by low water mark. MARSHALL, C. J. says, "wherever the river is a boundary between two States, it is the main, the permanent river, which constitutes the boundary; and the mind will find itself embarrassed by insurmountable difficulty in attempting to draw any other line than low water mark." There will be found a similar difficulty, when a pond is the boundary. No other line can well be established by proof, when any considerable time has elapsed since the conveyance was made.

Vattel, when speaking of lakes, observes, "If some of the

lands bordering on the lake are only overflowed at high water, this transient accident cannot produce any change in their dependence. The reason why the soil, which the lake invades by little and little, belongs to the master of the lake and perishes with respect to the ancient proprietor, is, because the proprietor has no other limits besides the lake, nor any other marks besides its bank, to ascertain how far his possession extends." Vattel, B. & C. 22, § 273. This doctrine is alike applicable to large ponds, and if a line as permanently existing could be established at the margin of the waters at the time of the conveyance, its application to them would be excluded. Such line could not be varied by a permanent encroachment of the pond.

To establish a right to flow the lands of the complainant, the jury were by the instructions required to find, that the owners or occupants of the mill-dam had continued without interruption to flow the land for twenty years, doing thereby some damage each year. To establish an easement according to the common law, it would not be necessary to prove, that the owner of the land suffered damage. The reason for requiring it in a case like the present, was stated in the case of *Nelson* v. *Butterfield*, 21 Maine, 220.

The argument is, that such instructions must be erroneous, as they would prevent the owners of the mill-dam from obtaining a right to flow, if they had been prevented for one year only of the twenty, from flowing by a prostration of the dam by an extraordinary rise of water, or by a necessity to make repairs upon it, or to rebuild it.

Such a result was noticed, and the objection obviated, so far as the facts required that it should be, by instructions that the omission to flow during the time, while the dam was being rebuilt or repaired, should not be considered as preventing the owners from acquiring such a right, those seasons being regarded as they would have been, had the flowing been continued.

The case of *Dana* v. *Valentine*, 5 Metc. 8, cited and relied upon by the counsel appears to favor the doctrine, that twenty

entire years' adverse use, would not be required to establish the right, and that there might be a voluntary omission to exercise the right for about two of those twenty years.

A voluntary omission to exercise a right cannot afford evidence of a continued adverse claim or exercise of the right. There are to be found in the books some other cases, which would authorize the presumption of a grant of an easement or servitude upon the land of another by proof of an adverse use of it for a period short of twenty years. Such cases are at variance with the general current of authority and cannot, as Mathews observes, be supported. Mathews on Pres. 363.

The case of *Moore* v. *Rawson*, 3 B. & C. 332, cited in the last case, recognizes the doctrine, that there must be proof of twenty years' adverse enjoyment of the flow of light and air to authorize the presumption of a grant. It admits, that the right thus acquired, would be determined by a voluntary omission to exercise it without manifesting any intention to resume it.

Where land is not flowed, because the dam occasioning it must be repaired or rebuilt, that it may be useful, the very act of rebuilding or repairing, is the exhibition of an intention to maintain and to resume the exercise of the former use of it.

To acquire an easement or servitude upon the land of another, there must be proof of an uninterrupted and adverse use of it for twenty years, or, if such use be omitted for a time, evidence that such omission was not voluntary but unavoidable accompanied by the exhibition of an intention to resume the use as soon as practicable. And when the right asserted, be that of flowing land in this state, it cannot be acquired without proof, that the land was thereby injured during each of those twenty years. The reasons for this were sufficiently assigned in the case of *Nelson* v. *Butterfield*.

One of the respondents had been defaulted, and he was offered as a witness for the other and excluded.

If either branch of the defence had been established, it would have been effectual to prevent a maintenance of the

process, which the witness was directly interested to defeat. He was therefore properly excluded.

Exceptions overruled.

NOTE. — WELLS, J. having been of counsel took no part in this decision.

JONATHAN S. EASTMAN *versus* BENJAMIN F. HOWARD.

From the mere occupation of the plaintiff's land, (no permission by him being shown, nor any recognition of his title,) the law implies no promise to pay him for the use of it.

In directing a nonsuit, the Court may consider the testimony drawn out in the cross-examination of the plaintiff's witnesses, as well as that presented in chief.

ASSUMPSIT for use and occupation of a house and its lot.

The plaintiff had levied the property, as belonging to the defendant, on an execution against defendant and one Lane.

John D. Millett, called by plaintiff, testified that Howard's family used and occupied the land and house about two years after the levy of plaintiff's execution. On cross-examination, he stated that Howard was not at home when the levy was made, but was at home all the next winter; that since Howard moved off he told the witness he had a good warranty deed, and had never denied that he had a title.

Giddings Lane, called by plaintiff, testified as follows: — I was co-defendant with Howard in the original suit, brought by the plaintiff. Howard continued to occupy the premises about two years after the levy.

On cross-examination; Howard was in Massachusetts when the levy was made, he came home the next winter or summer; he told me, plaintiff could not prove he, Howard, had any title, and therefore plaintiff could not hold by his levy, or something like that; plaintiff resides in Baltimore, Maryland; was never in Leeds to my knowledge. I saw him in April, 1847, in Baltimore; he then told me he had never brought any action against Howard for rents and profits, and did not know any thing about such an action; did not know there was any

claim against Howard for rent; and had never seen Mr. Evans after the levy.

George Evans, Esq., called by plaintiff, testified as follows: — I was attorney in the original suit for the plaintiff; demand was sent me by plaintiff; I directed a young man in my office to bring a suit.

After levy I had verbal instructions from plaintiff to act as I did; I agreed to sell the land to Ensign Otis, made the deed exhibited to me, the signature is that of plaintiff. Plaintiff was anxious to have the matter adjusted, and gave me broad authority. This was in March or April, 1845. When I delivered the deed to Otis, I made and delivered to him the following assignment: —

"Having sold certain property in Leeds levied upon by me, as the property of Benjamin F. Howard, to Ensign Otis of said Leeds, I hereby assign all the rents and profits of said premises, accruing since said levy, to said Otis; and authorize him to sue for and recover the same, in my name, for his use; he saving me from all cost in the same.

"Oct. 13, 1845. Jonathan S. Eastman."

"By his attorney, Geo. Evans."

On cross-examination; I told Eastman the land was his and had been for two or three years. He authorized me to settle and do the best I could for him, without any restrictions whatever. I did not know which of the debtors occupied the land.

A nonsuit was ordered, and exceptions filed by the plaintiff.

H. W. Paine, for plaintiff.

A Judge may not order a nonsuit, unless, assuming the evidence of the plaintiff to be true, he has failed to support his action. *Sanford* v. *Emery*, 2 Greenl. 5; *Perley* v. *Little*, 3 Greenl. 97; *Wilkinson* v. *Scott*, 17 Mass. 249.

Here were three questions for the jury, viz.: — the occupation, the permission and the value. The cross-examination made by the defendant, is not to be taken into consideration. The questions are upon the evidence called out by the plaintiff. The Court is not to decide, that the statements in the cross examination were true. The plaintiff had adduced evidence

which would have authorized a verdict in his favor. Stark. on Evidence, vol. 3, pages 1513 and 1516.

It is only necessary to prove that defendant occupied by permission of the plaintiff. The permission may be inferred. It was therefore for the jury.

Though trespass for mesne profits might have been maintained, the plaintiff may maintain assumpsit. The trespass may be waived. *Curtis* v. *Treat*, 21 Maine, 525; Stark. on Evidence, vol. 3, page 1516 and 1517; *Hambly* v. *Trott*, Cowper, 372; *Cummings & ux.* v. *Noyes*, 10 Mass. 433; *Pickett* v. *Breckenridge*, 22 Pick. 297.

In the case of *Wyman* v. *Hook*, the reasoning was one way, and the decision the other. It can therefore have no weight.

An execution debtor, whose land has been set off, cannot contest the creditor's title, although a third person might do it.

May, for defendant.

1. Where the debtor remains in possession after the levy, assumpsit for use and occupation will not lie, except upon some contract between the plaintiff and defendant, either express or implied. None can be implied from the mere holding of the defendant. There must be proof that the defendant held under the plaintiff. *Wyman* v. *Hook*, 2 Greenl. 337; *Fox & al.* v. *Harding*, 21 Maine, 104; *Curtis* v. *Treat*, 21 Maine, 525.

2. An assignment of a right of action for a *tort* is not valid; and the declarations of the assignee, he being the plaintiff of record, made *after* such assignment, may be given in evidence. *Vose* v. *Grant*, 15 Mass. R. 517.

3. The Court will not try the question of title in an action for use and occupation. If the relation of landlord and tenant exist, the defendant is estopped to deny the plaintiff's title; and if it does not exist, the action cannot be maintained. *City of Boston* v. *Binney*, 11 Pick. 10.

Wells, J. orally. — To maintain assumpsit, a promise, express or implied, must be proved. All that the plaintiff proves in this case is, a mere occupation by the defendant. No per-

mission and no recognition of plaintiff's title are shown. From such occupation alone, the law raises no promise.

The testimony all came from the plaintiff's witnesses. All the parts of their statements are to be considered as his testimony, as well that which is called out on the cross-examination, as that drawn out in chief.

The nonsuit was properly ordered.

MOSES WELLS *versus* JAMES S. BRACKETT.

Of a petition, *filed* after the repeal of the bankrupt act for the benefit of said act, the District Court of the United States had no jurisdiction, although *it was made, signed* and *sworn to*, prior to said repeal, for the purpose of being filed.

A discharge of the petitioner, granted afterwards, upon such petition, is not a bar to a suit against him on a contract debt, due before the signing of such petition.

ASSUMPSIT on a debt due prior to the year 1843. General issue, with brief statement that the defendant on the 26th *day of September*, 1843, filed in the office of the clerk of the District Court of the United States, his petition for the benefit of the bankrupt act, and was afterwards duly discharged upon said petition. To that brief statement, the plaintiff demurs specially, setting forth that the bankrupt act was repealed on the 3d day of March, 1843, several months before the defendant filed his petition in bankruptcy. There was a joinder in the demurrer.

Afterwards the defendant moved for leave to amend his brief statement by inserting in it that the said petition was *made, signed and verified by oath* on the 25th *January*, 1843, for the purpose of being filed.

S. Titcomb, for plaintiff.

J. S. Abbott, for defendant.

WELLS, J. — The defendant has pleaded the general issue, which is joined, and also filed a brief statement of his de-

fence, to which the plaintiff has demurred specially, and the defendant has joined issue on the demurrer.

By our statute, c. 115, § 18, the defendant may give any special matter in defence under the general issue, provided he shall file a brief statement of it, to which the plaintiff, within such time as the Court may direct, may file any counter brief statement of matter in avoidance of what is stated by the defendant in his brief statement. No provision is made for any further extension of the pleadings in such manner. The defendant is not confined to this mode of pleading, but may, at his election, with the general issue, plead any special matter in bar.

By our practice, brief statements are intended to embrace a general exhibition of what the party making them expects to prove, without a precise and formal statement of all the particular facts, necessary to be proved, to establish his positions. They are not, therefore, to be governed by the technical rules, applicable to special pleading.

The parties did not probably intend any further action under the general issue. We are therefore to determine whether the defendant has set forth in his brief statement enough in substance, to constitute a defence.

He states, among other allegations, that on the twenty-sixth day of September, 1843, he filed his petition in the clerk's office of the District Court, for the benefit of the bankrupt act of the United States, and that on the seventh of December, 1847, he received his certificate of discharge.

He moves to amend his brief statement, by inserting an allegation, that his petition was made, signed and verified by oath, for the purpose of being filed, on the twenty-fifth of January, 1843.

The bankrupt act was repealed on the third day of March, 1843, and the repealing act contains this proviso, "that this act shall not affect any case or proceeding in bankruptcy *commenced* before the passage of this act, &c. but every such proceeding may be continued to its final consummation in like manner as if this act had not been passed."

Was the defendant's petition a case or proceeding in bankruptcy, *commenced* before the passage of the repealing act? It was made before the act was repealed, but not filed in the clerk's office until afterwards.

By the first section of the bankrupt act of 1841, any person, by petition, may apply to the proper court, for the benefit of the act.

The petition was not entered in the District Court until several months after the law was repealed. How many terms of that Court intervened, between the time of making the petition and the entering of it, does not appear.

An action is commenced when the writ is sued out in vacation, but it must be returned at the next ensuing term, and in the mean time, a notice of its pendency must generally be served on the adverse party. Such proceedings are regulated by statute. But the notice of the petition of a person praying to be declared a bankrupt, is made known to those interested by the order of the Court, to which it is presented, and there is no necessity of its previous existence, for any specified time. As it may be filed the moment it is completed, that point of time would be regarded as the commencement of proceedings.

How long can one keep a petition after the law has been repealed, though made before, and then file it? If he can retain it six months, he might do it for any indefinite time. Such could not have been the intention of Congress; if it had, one would suppose, more definite language would have been used, to confer such power, and that the proviso would have referred expressly to the petition.

By the phrase "any case or proceeding in bankruptcy" must be understood some action or proceeding in court, and not any preliminary matter.

The object of the petition is to allow the party to proceed in bankruptcy, that is, in the court having authority to declare one to be a bankrupt.

In the matter of *Joseph Richardson & al.* 2 Story's R. 571, the petition was filed about noon of the day when the act was

repealed. But the repeal in fact, did not take place until the evening of that day. It was determined that the petition was filed before the act was repealed. There is no suggestion, that the case would have been relieved from the difficulty under which it labored, by the mere fact of the existence of the petition at a prior time.

In the matter of *David Howes*, 6 Law Reporter, 297, it is said by PRENTISS, J. that the presenting and filing the petition is deemed to be the commencement of a proceeding in bankruptcy, and as the petition was not filed until the day the repealing act was passed, the proceeding was not commenced in time. In the matter of *Deluis Wellman*, 7 Law Reporter, 25, no modification of the opinion, given, in the matter of *David Howes*, by the same Judge, was made, but a confirmation of it in relation to the doctrine, that a petition could not be filed, on the day when the law was repealed.

But it is contended, that the judgment of the District Court, declaring one to be a bankrupt, is conclusive, and cannot be controverted.

The judgment of a Court having jurisdiction of the subject matter and of the person, is conclusive. But State Courts can be under no obligation to respect the judgments of the Courts of the United States, in those cases, where the latter have no jurisdiction. If there had been no law of Congress, authorizing the District Court to declare a person to be a bankrupt, a judgment to that effect could have no validity, and the same result would take place, if a like judgment should be rendered, after the bankrupt law had been repealed. And where one tribunal is called upon to examine the jurisdiction of another, it must have power to decide upon the fact of jurisdiction, or the inquiry would be useless. Every court rendering a judgment assumes jurisdiction, and although it is expressly made a point of discussion and decision, that circumstance does not preclude other courts from investigating it.

In the case of *Sackett* v. *Andross*, 5 Hill, 327, where the defendant pleaded specially a discharge in bankruptcy, the Court held, that the facts, on which jurisdiction depends, must

be specially alleged, and that the plea failed to show, that the defendant presented the necessary papers to put the Court in motion.

If then, to sustain the jurisdiction, it must appear that those acts were performed, which the law of Congress requires, the repeal of the law itself must put an end to any further proceedings under it.

The petition of the defendant not having been entered in the District Court until the bankrupt law was repealed, the amendment of the brief statement, as requested by the defendant, would be unavailing, if allowed.

Judgment for the plaintiff.

THE STATE *versus* DUDLEY L. HAINES *& al.*

In a criminal prosecution, the Judge is not bound to quash the indictment on motion. The defendant should take the advantage by demurrer or in arrest of judgment.

Upon a motion in arrest, a common law indictment is good, which alleges that defendant "with force and arms, near the dwelling houses of divers citizens and near divers streets and common highways, did unlawfully erect, continue and use a certain building as a place for bowling, with a bowling alley therein, to which divers persons have been, and now are, accustomed to resort for the purpose of bowling, and, being so there, to play at bowls in the day time and also in the night time, thereby occasioning great noises, damage and other annoyances, and becoming injurious and dangerous to the comfort of divers individuals and the public, and to the common nuisance," &c.

It seems, also, that upon such a motion, an indictment would be good, which charges that the defendant did unlawfully keep and maintain, for his own lucre, a common and disorderly room, called a bowling alley, and did unlawfully procure and permit divers persons to frequent and come together at said alley for the purpose of bowling, and being so together, there to play at bowls in the day time and in the night time, to the great annoyance, damage and common nuisance of all the citizens of the State.

Upon conviction of a nuisance, the Court may punish by a fine only. Or they may also cause the nuisance to be abated. But such abatement will not be required when strangers to the proceedings might be improperly affected.

INDICTMENT tried in the District Court, RICE, J.

The first count charged that the defendant and another person unlawfully and injuriously did keep and maintain a certain common and disorderly room called a bowling alley, for their own lucre and gain, and did unlawfully and injuriously cause and procure, and suffer and permit divers persons, to the jurors unknown, to frequent and come together at said alley for the purpose of bowling, and being so come together, there to play at bowls in the day time and also in the night time, to the great annoyance, damage and common nuisance of all the citizens of said State of Maine and against the peace and dignity thereof.

The second count charged, that the defendant and another person at Winthrop, near the dwellinghouses of divers citizens of said State, and near divers streets and common highways in said town, did unlawfully and injuriously erect, continue and use a certain building, as a place for bowling, with a bowling alley therein, to which divers persons, to the jurors unknown, have been since said first day of January, and now are accustomed to resort for the purpose of bowling, and being so there, to play at bowls in the day time and also in the night time, thereby occasioning great noises, damage, and other annoyances, and becoming and being injurious and dangerous to the comfort of divers individuals and the public, and to the common nuisance of all the citizens of said State inhabiting and residing near to said bowling alley, as well as all the said citizens going and returning, passing and repassing in and through the streets and common highways aforesaid, against the peace of said State of Maine.

The defendant contended that the indictment was bad and insufficient in law, because "it does not set forth specifically any crime at common law, and does not state particularly the facts which constitute the act charged therein a crime." But the Court ruled that the indictment was sufficient."

There was no proof that there had been rolling, playing, or gaming upon the alley for money or other things, but it was proved that boys and young men were accustomed to assemble there, and to roll upon the alley for amusement; that the

noises complained of were from the rolling of the balls and the falling of the pins; that a price was paid for the use of the alley; and that those using it, were accustomed to roll, to see who should pay for the alley; and that the price was generally paid by the party, who upon rolling, got the fewest pins, but sometimes it was paid for in equal parts, between them."

The Court instructed the jury, that "they were to judge from the evidence whether it was or not such a source of annoyance and disturbance to the neighborhood and to the public generally as to constitute it a common and public nuisance; that, if they should find the alley to have been kept for gaming, that would of itself constitute it a common and public nuisance; but that the rolling to see who should pay for the alley would not show it to be a common gaming room.

Defendant introduced one Darius Robbins who testified that, on Nov. 23, 1847, he took a deed of the premises on which the alley is, and now holds the same; that he paid $300 at the time of taking the deed, and gave his note for $300 for the balance of the purchase, and gave a mortgage upon the premises to secure the payment of the note in one year from that date; that there was a stable on the premises and that his grantor reserved the use of about one-half of the stable until the first of May next, in which to stable his horses and stow some baggage, and had so used it to the present time; that the alley is a new building, built upon and in addition to the stable since the deed to Robbins; that when Robbins bargained for the premises, Haines was present; that it was the agreement between Haines and Robbins, that Haines was to be jointly interested in the purchase; but when the deed was made, Haines was not prepared to pay for one-half the purchase, or for any part, and accordingly the deed was made to Robbins, he paying as above stated; that it was understood and agreed verbally between Haines and Robbins, that Haines was to have one-half the purchase, if he pays one-half the purchase money at the end of the year; that in pursuance of that arrangement, said Haines and Robbins went into possession of that part of the stable, not occupied by the grantor, about the

first December last, and from that time have occupied the same as a livery stable in company ; that afterwards they concluded to build the alley together, each paying half the expenses ; that they made their contracts for the lumber and for putting up the building for that purpose ; but that sometime in December, and before the alley was fit for use, they were called upon for payment for their lumber and for the building ; that Haines was unprepared to pay his part and said it had cost much more than he expected ; that he could not pay and must give it up, and that therefore it was agreed between them to continue their business together in the stable, but that Robbins was to finish the alley and own it, and Haines was to have nothing to do with it ; and that accordingly Robbins finished the alley and owned it ; that he had paid the bills for building, except some small bills in one or two instances when Haines had paid, where the bill had been made to them both and was for work done for them in the stable, and in which was included some for labor or materials upon the alley ; that Haines had been in the alley often and had assisted him, and when he had been gone away, had taken the money for the alley and had kept a separate account of it ; that he, Robbins, had seen it and looked it over, but had not settled with Haines ; and that he, Robbins, also kept a separate account of moneys, received on account of said alley, by himself.

The government introduced evidence, tending to show that Haines had an interest in the alley ; that he had often been there taking direction of it and taking money for its use, and had been known to have control of it many times in the absence of Robbins ; and when Robbins had been present and when both the alleys were in operation, Haines had taken care of one, and had paid some small bills against Haines and Robbins, in which were items furnished for the alley ; that he jointly contracted with Robbins for the building for the alley, for the lumber and other articles, and that defendant, after the alley had been in operation a month, had stated "we have cleared $100, the first month from the alley."

The defendant contended, that he had not such ownership

and interest and control and management in the alley as would render him chargeable in this indictment.

The Court instructed the jury that if, from the evidence, they should be satisfied that the alleys were a common nuisance as alleged in the indictment, and that the defendant was the sole or joint owner of them, or that he was in possession and had the care and control of the alleys, either by himself or jointly with others, in either event, he would be liable in this prosecution.

The verdict was against the defendant, and he excepted.

Morrell, for defendant.

The indictment does not set out any offence indictable as a common and a public nuisance, nor does it specify acts which of themselves constitute the offence.

1. The whole charge, stripped of its formal parts, is this: — "did keep and maintain a common and disorderly room, &c., called a bowling alley, for their own gain."

2. It is not every "common and disorderly room," that is a *public nuisance*, but it depends upon whether dissolute and disorderly persons assembled there, and whether unlawful games and practices are pursued there.

The "disorder" may be the result of legitimate business or trade, and it may be of a private instead of a public character.

Play houses are not in themselves nuisances, though by neglect and mismanagement they may be rendered so. 4 Bl. Com. 169; 1 Hawk. P. C. c. 32, § 7.

3. When the allegation is general, as here, the acts complained of, must of themselves, show an offence, as for keeping a house of ill fame, gaming houses, *actual obstructions* in the public highways, rivers, &c. 2 Hawk. P. C. c. 25, § 57; 1 Chitty's Cr. Law, 188; *People* v. *Sands*, 1 Johns. 78; 3 Stark's Ev. Am. ed. 1830, p. 350.

The description of the room, "called a bowling alley" adds no force to the charge, but rather modifies it.

A general charge for a nuisance in keeping a bowling alley for gaming, would not be sufficient. It falls within the princi-

ples stated, to wit: the facts, and circumstances which constitute it such, must be stated.

It should state that disorderly and idle persons resorted there. The mere keeping a bowling alley without entertaining disorderly persons, for unlawful games, is not an indictable offence.

4. There are no facts or circumstances charged which show it a public or common nuisance.

The charge is, "did procure and suffer *divers persons*, to the jurors unknown, to frequent and come together there, to play at bowls," "in the day time and also in the night."

If the keeping "the room," as we contend, does not constitute the offence alone, does it depend upon the character of the persons who come together there? Who and what descriptions of persons? The charge is, "divers persons."

In its most extended sense, "divers," different, its common acceptation is, more than one, *not many*. Web. Dictionary.

It relates to the number, and not to the character or description of persons. The mere coming together of more than one, not many persons, indefinite persons, persons neutral as to evil designs, will not make that place a nuisance which otherwise is not.

The indictment not only does not allege the *character* of the persons who came together there, and that they were disorderly persons, but it does not allege that "divers persons" were there for unlawful purposes or practices, but simply to "play at bowls, day and night."

For orderly persons to play at bowls, without disorder, for amusement, not for unlawful purposes, not for money, not gaming, is not unlawful in any sense. And for ought that is alleged in the indictment, the "divers persons," were among the most orderly citizens of the county, who were playing at bowls, simply for amusement and healthful recreation.

5. The indictment should show that he not only kept a "disorderly room," but that *disorderly persons*, persons of bad reputation, *ill-name*, resorted there, and remained there mis-

behaving themselves, practicing unlawful pastime. 1 Russell on Crimes, 300; 4 Black. Com. 127.

6. The mere charging the acts to be "to the common nuisance," &c. is not sufficient. In *People* v. *Sands*, the Court say, "the Court must examine whether the facts charged imply a nuisance."

The acts necessary to constitute the offence, must appear of record, so that the ground, on which the jury proceed may not be matter of conjecture, but be tested by the acts laid in the indictment.

There are no acts charged in the indictment, into the existence of which, and the character of which, the jury were to inquire, and which if found, would constitute the offence. But the jury were left to their own conjectures, without being confined to what was charged in the indictment, as to what acts would constitute the offence of public nuisance.

7. They were told by the Judge, "that they were to judge, from the evidence, (and not from what was alleged and proved,) whether or not, it was such a source of annoyance and disturbance to the neighborhood, as to constitute a public nuisance.

These instructions virtually say to the jury, if in your judgment, "the neighborhood or public" are annoyed or disturbed by the room, then it is a public nuisance, and you need not stop to inquire whether it be proved or alleged, that the room is unlawfully, disorderly kept, or that disorderly persons resort there.

They were told to determine the character of a public act, not offences described, by its degree of annoyance to the neighborhood, without inquiry into the character of the acts which produced the annoyance.

8. There was no proof, "that there had been playing for money or other thing," and there is no charge in the indictment of gaming, or purposes of gaming, and yet the Judge charged the jury, "that if they should find it was a place kept for gaming, that would of itself constitute it a common and public nuisance."

The case finds that the acts complained of, were the assembling of the boys and young men, to roll upon the alley for amusement, and the noises complained of were from the falling of the pins and the rolling of the balls.

The Court should have instructed the jury that this would not constitute it a common and public nuisance, and not have left it to them to determine, "whether it was or not, such a source of annoyance," &c.

These facts were not sufficient to constitute it even a private nuisance, giving a personal remedy.

The "annoyances" complained of, must not be merely imaginary, fancied, and depending upon the notions of the persons complaining, but must be real, operating to some damage; as by infecting the air, rendering it injurious to health; as by exciting constant apprehension of danger.

There is nothing alleged from which the Court can intend the existence of real danger to the citizens and the public.

But another question is, whether defendant had such interest or property in the alley, as would make him chargeable.

The general rule is, that if the indictment be against one for a nuisance, he must be shown to be the owner of the land on which the nuisance exists, and that he erected it or continued it, or in some way sanctioned its erection or continuance.

If his tenant erects or continues it, with his sanction, he, the owner, is liable, on the ground that tenant's acts are the acts of the owner, and is the agent for him. 3 Stark. Ev. Nuisance.

So also the tenant may be indicted, as he, for the time being exercises the rights of the owner, and his acts bind the owner. *People* v. *Townsend*, 3 Hill, 479.

Either or both are liable, upon the principle that they represent a *blended interest*, and the acts of one are conclusive upon either or both.

For the public prosecution proceeds upon the ground that the *ulterior* purpose is the abatement of the nuisance, and hence the proceedure must be against *such as have* the right and interest in the thing complained of. Now the indictment

was against Haines and Erastus Robbins, who are said to keep and maintain, &c.

The government did not pretend to show that defendant was joint owner with Erastus Robbins, or that he in fact owned jointly with any one or separately. They merely introduced evidence tending to show an interest and occupation.

The defendant proved that he did not, in fact, own it or have interest in it, but that Darius Robbins had a deed of it, subject to mortgage to Stevens.

Now it is not alleged or pretended, that defendant kept and maintained this alley with the sanction of Stevens or Robbins, or that they had any reason to suppose that he was so conducting.

The only capacity in which it was possible for defendant to have been there, from the proof, was that of amusement, without interest in it, or ability to control it, or suppress it.

The instructions of the Court, that if satisfied " that he was in possession and had the use and control of the alleys, either by himself or jointly with others, in either event he would be liable," was erroneous in this; that it did not instruct them they must be satisfied he had the possession, use and control, with the sanction of the owner, and also that it must be a joint possession with the owner, and with others, with the sanction of the owner.

The instructions were calculated to mislead the jury, and it is only upon the supposition that they were misled by them, that you can account for their verdict, upon the proof found in the case, that Darius Robbins owned and controlled the alley, with one Stevens.

No judgment for discontinuance or abatement of the nuisance could be ordered by the Court, for the reason, that the owner of the land upon which the nuisance exists, is not connected with the prosecution, either by himself or his tenant having any interest in it, and no man can be bound or prejudiced by a judicial decision, to which he is not privy.

Tallman, Attorney General, for the State.

SHEPLEY, C. J. — The defendant was indicted with another person for keeping a bowling alley for gain and common use.

The first question presented by the bill of exceptions is, whether the offence is sufficiently set forth in the indictment. A motion was made apparently with a design to have the indictment quashed. This was overruled, and the indictment was declared to be sufficient. The presiding Judge was under no obligation to decide such a question before the accused had been found guilty. Then it could be properly presented by a motion in arrest. As such a motion can yet be made, the question may as well be considered and decided.

The indictment contains two counts. Divested of their formal and expletive language the averments in the first count are, that the accused kept a bowling alley for gain, and procured or induced persons to frequent the same to play at bowls in the day and night time, to the great annoyance, damage and common nuisance of the citizens.

An averment, that the acts alleged are to the common nuisance without averments, which, being proved, will show, that the accused had been guilty of causing a nuisance, will not be sufficient. The allegation, that the alley was kept "to the great annoyance and damage" of the citizens, without stating any particular acts that would occasion such annoyance or damage, is so general, that the accused could not be prepared to rebut the charge by proof.

The question therefore on this count is presented, whether the keeping of a bowling alley for gain and common use, as an inducement for persons to play on it in the day and night time, is a common nuisance.

A nuisance has been defined to be "any thing, that worketh hurt, inconvenience, or damage." 3 Bl. Com. 216. Erections made and occupied for certain purposes are by the law regarded as nuisances, without proof of any particular injury. The injury is considered to be inherent. Other erections wholly innoxious in their nature and usual occupation, may become nuisances by being used in such a place or in such a manner,

as to render the enjoyment of life and property in their neighborhood uncomfortable. Among those, which are held to be nuisances *per se* are stages for rope-dancing, for mountebanks, gaming houses and bawdy-houses. The law requires no particular allegations or proofs, that they are injurious to the community. The simple allegation, that such places or houses are kept *ad commune nocumentum*, is sufficient. Among those not regarded as common nuisances, without proof of their improper location or use, may be reckoned the trades of the soap-boiler, tallow-chandler, brewer and tanner. If a bowling alley kept for gain and common use is to be regarded as a common nuisance *per se*, the first count in the indictment is sufficient, otherwise it is not.

Hawkins states, that stages for rope-dancers, and gaming houses are common nuisances "not only because they are great temptations to idleness, but because they are apt to draw together great numbers of disorderly persons, which cannot but be very inconvenient to the neighborhood." Hawk. P. C. B. 1, c. 75, § 6, 7.

Bowling alleys appear to have been early regarded as analogous in character to stages for rope-dancing, probably because they produced similar results. *Jacob Hall's case*, 1 Mod. 76. HALE, C. J. is reported to have said in that case, "that in the eighth year of Charles the first Noy came into Court and prayed a writ to prohibit a bowling alley erected near St. Dunstan's church, and had it." It appears, that a writ was issued in the case referred to by Lord Hale to abate the bowling alley as a nuisance. 1 Vent. 169.

The "hurt" or injury to the community, which has occasioned bowling alleys kept for gain and common use to be regarded as common nuisances, arises from their tendency to withdraw the young and inconsiderate from any useful employment of their time, and to subject them to various temptations. From their affording to the idle and dissolute encouragement to continue in their destructive courses. Clerks, apprentices and others are induced, not only to appropriate to them hours, which should be employed to increase their

knowledge and reform their hearts, but too often to violate higher moral duties to obtain means to pay for the indulgence. Other bad habits are in such places often introduced or confirmed. The moral sense, the correct principles, the temperate, regular and industrious habits, which are the basis of a prosperous and happy community, are frequently impaired or destroyed. Bowling alleys without doubt may be resorted to by many persons without such injurious results. The inquiry is not what may be done at such places without injury to persons of fixed habits and principles, but what has been in the experience of man, their general tendency and result. The law notices the usual effect, the ordinary result of a pursuit or course of conduct, and by that decides upon its character. It need not be the necessary and inevitable result of a bowling alley kept for gain and common use, that it is thus injurious to the community, to make it a common nuisance. Mr. Justice LITTLEDALE, in the case of *Rex* v. *Moore*, 3 B. & Ad. 184, correctly said, "if it be the probable consequence of his act, he is answerable as if it were his actual object. If the experience of mankind must lead any one to expect the result, he will be answerable for it." But the question was so fully examined and discussed by Mr. Justice COWEN, in the case of *Tanner* v. *The Trustees of Albion*, 5 Hill, 121, that it may be more useful to quote and adopt certain portions of that opinion, than to enter upon a more enlarged discussion of the question.

He says, " so far as I have been able to discover, erections of every kind adapted to sports or amusements having no useful end, and notoriously fitted up and continued with the view to make a profit to the owner, are considered in the books as nuisances.

" The tendency of the alley being well known, it was adjudged to be a nuisance of itself; and a writ accordingly issued to remove it without a trial.

" The nuisance consists in the common and gainful establishment for the purpose of sports having the aptitude and tendency of which Hawkins speaks.

"In general the law is not scrupulous about actual results. It sees, that a building has been erected for at least an idle purpose, the probable consequence of which will be pernicious. It does not stop therefore and call witnesses to prove, that it is so in fact.

"The only argument I have heard urged in excuse for bowling alleys is, that the exercise of the players is conducive to health. In this respect such alleys have been compared with bath houses. The answer is, that there are various other kinds of exercise entirely equivalent, and if not, the means of playing with bowls are easily accessible without those public establishments carried on for hire, which the law has denounced as of evil tendency."

If these views are correct, the first count in the indictment is sufficient.

But if that count should be regarded as defective, the second would seem to be sufficient to show, that the alley was a nuisance, because it was used in such a manner as to render the enjoyment of life and property, uncomfortable to those residing in its neighborhood.

It alleges, that the accused erected, continued and used a building for bowling with a bowling alley therein, near the dwellinghouses of divers citizens, to which persons are accustomed to resort to play at bowls in the day and night time, thereby occasioning great noises, damage, annoyances, and becoming and being injurious and dangerous to the comfort of divers individuals and the public. The only essential and distinguishing allegation in this count is, that great noises were made. The mere fact of occasioning such noises in the night time, to the disturbance of the neighborhood, has been decided to be a nuisance. *Rex* v. *Smith*, Stra. 704.

The next cause of complaint is, that the jury were instructed "that they were to judge from the evidence whether it was or not such a source of annoyance and disturbance to the neighborhood, and to the public generally, as to constitute it a common and public nuisance." The objection is, that the jury were not informed, what facts were necessary to be proved to occasion it to be a common nuisance.

If the law had not been stated in the hearing of the jury during the trial, the counsel for the accused might have requested and obtained definite instructions respecting that matter. There is nothing in the instructions which were given, suited to lead the jury to an erroneous conclusion.

The remaining cause of complaint is, that the jury were instructed, if they should be satisfied "that the defendant was the sole or joint owner of them, or that he was in the possession and had the care and control of the alleys by himself, or jointly with others, in either event he would be liable."

Instructions must be considered with reference to the testimony. An owner of a bowling alley, who had not used it or authorized its use for gain and common use, or in such a manner as to occasion noise or disorder, might not be liable for such unauthorized use of it, by another. No such question was presented in this case. The particular error alleged is, that the instructions did not require that the possession and control of the alley should appear to have been with the sanction of the owner."

Surely one, who should obtain possession of property by trespass or disseizin, and use it in such a manner as to occasion it to be a common nuisance, could not interpose the unlawful acts, by which he obtained and held possession, as an excuse or justification of his subsequent unlawful conduct.

It is further insisted, that some greater interest than that arising out of possession and control of the property should have been required to enable the Court on conviction, to abate the alley as a nuisance according to the provisions of the statute. chap. 164, § 7.

The case cited by the counsel shows, that a tenant may be liable to indictment and conviction for such a use of property.

The Court is authorized by the statute to punish by fine only; and may cause the nuisance to be abated. It is not required to do so, when the interests of strangers to the proceedings might be improperly affected.

Exceptions overruled and case remanded.

ALLEN FISK *versus* MOSES B. CHANDLER.

A conveyance of land upon a condition that, unless the grantee should make certain payments, the deed shall be "void, so far as to make good any non-fulfilment of said conditions," will, after a breach of the condition, entitle the grantor to recover possession, and to hold the property as a pledge or mortgage, till the condition be performed.

THIS was a writ of entry, demanding one undivided half of premises described.

Demandant read a deed from himself to the tenant, dated January 20, 1847, conveying to the tenant the demanded premises on condition.

The condition, in substance, was that unless Chandler should perform certain specified acts, "the deed was to be *null and void, so far as to make good any non-fulfilment of said conditions.*"

The things which, by said condition, were to be performed by Chandler, were that he should pay five certain notes, which Fisk had given to one Wing, made payable at successive periods, and secured by a mortgage, so that neither the said Fisk or his heirs, executors, administrators or assigns should have any cost or trouble, on account of said notes or mortgage, and also pay two other specified small notes made by Chandler to Fisk.

James R. Bachelder, testified, that he purchased the mortgage and four of the notes named in the deed; and agreed with the defendant to extend the payday if the plaintiff had no objections to it.

Afterwards, and after the first of said four notes became payable, the plaintiff paid it. Witness told him of the conditional agreement made with the defendant.

The defendant afterwards paid the balance due on the mortgage, and it was discharged.

Defendant read a deed from Fisk to Lewis Chase, of same date as mortgage, conveying all his interest in the premises.

It was admitted that Chase gave back at the same time a bond to Fisk to reconvey on certain terms, and that Chase

released his interest to Chandler on the back of the deed, Fisk to Chandler.

Christopher C. Spear, testified, that in the fall of 1847, he went with plaintiff to defendant, — plaintiff took out two notes and told defendant, Bachelder had called on him and he had taken up the notes; — defendant asked how much he paid; plaintiff said $121; defendant said, "I suppose I can have them by paying it;" plaintiff said "I will negotiate about it," and they parted. Afterward went with plaintiff, and when on the land named in deed, he said he entered on the estate for condition broken, — and plaintiff notified defendant that he had taken possession of the shops. This was the 20th of Nov. In defence, was read deed of mortgage named in condition of first deed, dated May 16, 1845, securing five notes of $100 each, payable each yearly in succession.

James Young testified, that he heard a conversation in Oct. or Nov. 1847, between the plaintiff and defendant; plaintiff said he had obtained money and taken up two notes, — had done it for the purpose of obtaining a division of the shops and a settlement.

Bradbury Sylvester testified, that plaintiff last fall, or first of winter, said he was in hopes he should get defendant off the premises before long.

The cause was submitted for the decision of the Court.

May, for plaintiff.

Morrell, for defendant.

On plaintiff's own showing, he had parted with the entire estate, both legal and equitable.

The conditions are conditions subsequent, and are to have the force and effect of such. 4 Kent's Com. 125, 5th ed; 5 Pick. 528; *Simonds* v. *Simonds*, 3 Metc. 528; 5 Wend. 338; Bac. Abr. b. 1, title Condition, 629.

The provisions, "to redeem the premises by paying the note and mortgage," invested the defendant with equities, and imposed upon him liabilities such as were vested in .and imposed upon the mortgager, to redeem the estate.

The provision does not require the defendant to pay the notes or the mortgage, at maturity.

The fair interpretation of the language of the condition is, that defendant would so comply with its terms, in such proper manner and at such seasonable time, that the plaintiff should not, unavoidably, suffer damage, "on account of said mortgage and notes."

The case does not disclose such facts as show a *neglect or failure*, to perform the conditions. *Hodgboom* v. *Hall*, 24 Wend. 146.

The case does not find that Fisk was forced into "costs or trouble," but on the contrary, he voluntarily paid the note to Bachelder.

The condition in the deed is not absolute, and does not render the deed void absolutely.

A condition which determines the estate in part only, leaving it valid for the residue, is void. 4 Black. Com. 122, in note; Bac. Abr. Condition, letter o.

SHEPLEY, C. J. — The demandant, on May 16, 1845, conveyed certain premises in mortgage to Benjamin C. Wing, to secure the payment of five promissory notes of $100 each, one of them payable yearly. At the same time he conveyed all his remaining interest therein to Lewis Chase, who gave him a bond obliging himself to reconvey upon certain conditions.

On January 20, 1847, the demandant by deed of that date, conveyed one half of the same premises, with certain reservations, to the tenant upon certain conditions to be hereafter noticed, and Lewis Chase, by a release made upon the back of the same deed, relinquished all his title and interest in the premises conveyed to the tenant. That deed contained a clause providing, that the tenant should redeem the premises mortgaged to Wing by paying the notes mentioned in the mortgage, which remained unpaid, "so that neither the said Allen Fisk or his heirs, executors, administrators or assigns shall have any cost or trouble on account of said notes or

mortgage." The conditional clause also required the payment of certain other notes. The conclusion was in the following words, "then the foregoing deed is to be and remain good and valid, otherwise it is to be null and void so far as to make good any non-fulfilment of the above conditions."

Four of the notes, and the mortgage made to Wing, were by him assigned to James R. Bachelder, the note first payable had been mostly paid. The one, which next became payable, was not paid at maturity, and Bachelder called upon the demandant and tenant to pay it and agreed with them to wait a fortnight longer. When that time expired he agreed with the tenant to wait until February then next, if the demandant had no objection to it. After this the demandant inquired of Bachelder, if the tenant had taken up the note and was informed that he had not; and was informed of the agreement to wait till February, to which he made answer, that if the tenant had not paid it, he should. He afterward in the latter part of September paid the note, and subsequently informed the tenant that he had taken up the note and shew it to him. The tenant said, I suppose I can have it by paying it, to which the demandant replied, I will negotiate about it. They then separated. After this time, on November 20, the demandant entered upon the premises in presence of a witness stating, that he entered on the estate for condition broken, and then notified the tenant that he had taken possession. There was a small balance due on the note previously payable, which constituted a part of the same arrangement and payment.

The release made by Chase to the tenant operated merely to extinguish his title; and if the title of the tenant or his right of possession be forfeited by his omission to perform the condition, and by the entry of the demandant for condition broken, the title or right of possession will revest in the demandant.

The conveyance to the tenant was made upon a condition subsequent. If he did not perform it, his title or right of possession, so far as the condition required, would be avoided by the entry made for that purpose. The intention of the

parties in making that condition was to secure the payment of the notes named in the mortgage, without cost or trouble to the maker. It might be important to him, that the tenant should not receive the income of the estate and permit the notes to remain unpaid and the accruing interest on them to accumulate.

If that part of the condition be regarded as a mere contract of indemnity, to save the demandant harmless from those notes, he would be entitled to pay what had become due and been demanded of him. One, who has a contract of indemnity against a claim upon him, may after payment maintain an action upon it.

If there were no limitation to the annulment of the title by an omission to perform the condition, the case would be determined by the application of well settled principles. That limitation was evidently not intended to destroy the effect of the condition or to prevent the demandant from obtaining possession of the premises, as security for indemnification. The intention appears to have been to empower him in such case to hold the premises as a pledge or mortgage. That intention may be carried into effect by the application of the rules of law and equity, which this Court can administer.

Judgment for demandant.

WILLIAM V. MOSHER *versus* DANIEL BERRY.

If the lands lying between known monuments or boundaries, be conveyed at the same time by distances, whether in equal or unequal proportions, to different grantees in severalty, there being no intermediate monuments or other means of ascertaining the location, and the distances do not correspond with those named in the deeds, they will hold in proportion to the widths respectively granted by the deeds, whether there be an excess or deficiency in the distance.

In such cases, it is competent to prove that the location was in conformity to an established custom of giving a particular measure, whether large or small, in locating the territory.

THIS is a writ of entry, to recover the possession of a strip

of land about five rods in width, being the northerly part of the following parcel of land, and extending the whole width thereof, viz.: part of check lot No. five, in the fifteen mile lot A 1, and bounded as follows: easterly and westerly by the side lines of said check lot, southerly by a line parallel with the north line of said fifteen mile lot and distant therefrom southerly one hundred and twenty-eight rods, and northerly by a line parallel with said north line of A 1, and distant therefrom southerly sixty-two rods, containing forty-one acres and one quarter, more or less.

The demandant read a deed from B. Goodwin and others, dated the ninth of Dec. 1818, to Washington Mosher, describing the said premises in the language of said writ. Also other deeds conveying the premises by several mesne conveyances to the demandant in 1841.

Samuel Goodridge, testified, that he run the north line of said fifteen mile lot, A 1, beginning at a monument in the line two miles west of the premises; he measured southerly from this line sixty-two rods, named in the deed, and it did not reach the fence now maintained between the parties, by between three and four rods; was present when Mr. Chandler went on to make his survey and shew him the monument on the line from which he started.

B. F. Chandler, surveyor appointed by the Court, testified, that he started from the monument, shown by Goodridge, and run the course of the *wall*, south 65° 50′ east, he measured sixty-two rods south from this line, and found that distance to end north of the present fence about ten rods. This course is not the true course of fifteen mile lot, the ancient course, being 67½°. The present course to run that line is 65° 15′. The parties then agreed upon a monument, from which he should run the line. He run accordingly, and measured down the sixty-two rods, and found it four rods north of the present fence.

Moses Chute testified, that he knew where the north line of fifteen mile lot was, and that Chandler began at a correct monument in running his east line.

The respondent read a deed from Benjamin Goodwin and others, dated the ninth day of December, 1818, to the said respondent, of a certain parcel of land in said Rome, part of check lot No. five, in the fifteen mile lot A 1, bounded as follows: easterly and westerly by the side lines of said check lot, and southerly by a line parallel with the north line of said fifteen mile lot, and distant therefrom southerly, sixty-two rods, and northerly by a line parallel with said north line of A 1, and distant therefrom southerly thirty-two rods, containing eighteen acres and three-quarters more or less.

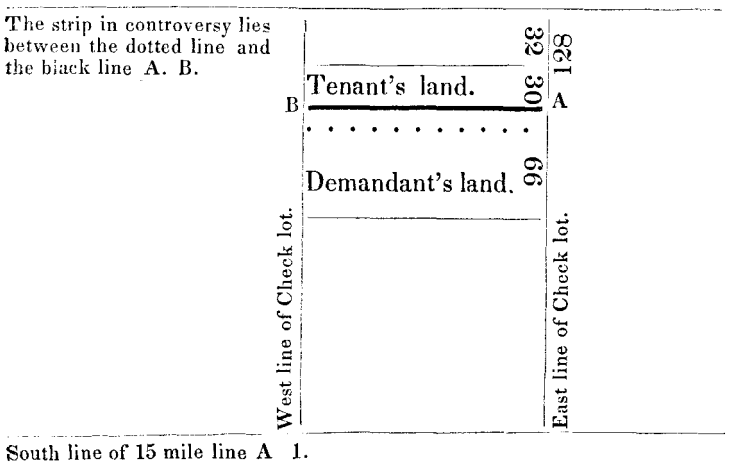
Respondent introduced proof tending to show that he had had the demanded premises in his possession for more than twenty years.

Elihu Stevens, for respondent, testified, that there are two lots between the demandant's lot and the north line of the fifteen mile lot; that he measured across respondent's lot and found it to be thirty-one rods wide, and that the lot lying north of respondent's lot and between it and line of fifteen mile lot, is about three rods wider than the limits named in the deed of the same, and that demandant's lot is about four rods wider than the number of rods mentioned in his deed.

The jury were instructed that they might ascertain from the testimony, where the true north line of great lot A 1 was established; and that the northerly line of the demandant's land, in the absence of any monuments establishing it, would be found parallel and distant sixty-two rods from it, in a southerly direction, if this were not prevented by other considerations. That they would notice the time when the admeasurements were made, and from that and the other testimony, would consider whether large measure was made. That if they were satisfied that the southerly line of the demandant's land was established, and that there was in fact a greater number of rods between that line and the north line of great lot A 1, than were named in the conveyances, the overplus should be divided between the three lots lying between them in proportion to the width of those lots respectively.

To these rulings the plaintiff excepted.

Sketch, showing the demandant's claim.



Morrell, for demandant.

The rule given to the jury by the presiding Judge, by which they should find the demandant's north line, is deemed to be correct; but the qualifications which accompany it, and by which it is modified and limited, are considered erroneous.

The demandant is entitled to have his north line established at a point precisely 62 rods south of the north line of great lot A 1.

The demandant's deed establishes his north line at that distance.

The respondent's deed fixes his south line at same point.

The respondent maintains his fence and has the possession about four rods south of that point. Did the proof authorize the instructions by which the jury were permitted to vary that point?

The Judge instructed the jury, "that they would consider whether large measure was made."

But there was no proof of any admeasurement at the time when Goodwin's deeds were made.

It did not appear that demandant's south line is established.

The demandant, if his south line encroaches upon his neighbor at the south, may be compelled to remove north within his proper limits.

The Court further say, "If there were in fact a greater number of rods between demandant's south line and the north line of great lot, than were named in the conveyances, the overplus should be divided between the three lots lying between, in proportion to their width."

This it will be seen, leaves all the surplus on the south of demandant's south line, and belongs not to the tenants or original grantees, or either of them, for the terms of the conveyance exclude it, but belonged to the proprietor, leaving to him all that should not be found to fall *within their limits;* and if there is a surplus, it cannot be a question between the original grantees of these lots, but between the demandant and the proprietor of the original lot, if he has got possession of more than was conveyed, by having extended his south line.

The Judge adverted to other testimony as to the measurement. But there was no such "other testimony."

This was clearly erroneous, as it was plainly calculated to impress the jury that there was *evidence* of an original admeasurement, and the time when made, and that there was "other testimony" all tending to show large measurement.

The Judge told the jury, "that if they were satisfied the southerly line of demandant's land was established," &c.

It is contended the *north line* of demandant's land must be established, independent of the south line, as it may now appear, for its present condition, (south line) may not be in conformity to the original grant, but may have been acquired by demandant, by purchase, possession or otherwise, as might perhaps have been shown, if it had been subject of controversy.

Paine, for the tenant.

The Judge instructed the jury, that if they were satisfied where the north line of great lot A 1 was, and where the south line of demandant's lot was, and that between the two there was a greater number of rods than that named in the conveyances, the overplus should be divided among the owners of the three lots, according to their width.

Can any other rule be adopted?

If the south line of plaintiff's lot be ascertained and estab-

lished, there is as much propriety in measuring from this line northerly to find his north line, as there would be in measuring from the north line of great lot A 1, southerly.

Each one of the lines is as much a starting point as the other. The demandant's north and south lines are sixty two rods apart *by his deed.*

This mode of measuring would leave the strip of land in dispute, north of the demandant's true north line. If it belongs to the original proprietors, the action must fail. But the original grantors intended to convey all the land they owned between the south line of demandant's lot and the north line of great lot A 1.

Under very similar circumstances the same rule has been applied and the application sustained. *Brown* v. *Gay*, 3 Greenl. 126.

If the south line of demandant's lot had been established, the principle applied by the Judge was quite as favorable to him as he had any right to expect.

The demandant complains that there was no proof touching the actual location of the demandant's south line. A bill of exceptions is not required to state *all* the evidence.

Further, the testimony of Stevens, as recited in the bill, did tend to establish the demandant's south line. He says, he measured the demandant's lot. He could not have measured the lot if he had not known the boundaries. If it were the possession which he measured, the demandant's possession is to say the least, some evidence, and might, in the absence of proof to the contrary, be satisfactory to the jury.

It is suggested that there was no proof of large measure having been made. These deeds were made in 1818. Is it not a historical fact, that it was customary to make large measure at that period? And might not the Judge well call the attention of the jury to such fact, in the absence of express proof?

Morrell, in reply. — The boundary lines of lots, are not of such a nature, as to render "historical facts" admissible. Historical notoriety of a *fact*, is not sufficient to found a judg-

ment upon. The notoriety of the *law* is otherwise. 1 Stark's Ev. 62; 2 Bouv. Law Dictionary, 230.

HOWARD, J. — To test the correctness of the instructions, it is important to consider the respective claims of the parties, as stated in the exceptions. They owned adjoining tracts of land, and their titles originated from the same source, and at the same time, (Dec. 18, 1818.) The case arose, and was contested, upon the position of the dividing line between these lands. This would be the north line of the demandant's, and the south line of the tenant's land. In the deed from Goodwin & als. to those under whom the demandant claims, his south and north lines are described as parallel with the north line of the fifteen mile lot, A 1. The former as being one hundred and twenty-eight rods, and the latter sixty-two rods distant from it. In the deed from Goodwin & als. to the tenant, of the same date, his south and north lines are described as parallel with the same north line of the fifteen mile lot A 1, and distant from it sixty-two rods, and thirty-two rods, respectively.

The jury were instructed, "that they might ascertain from the testimony, where the true north line of the great lot, A 1, was established; and that the northerly line of the demandant's land, in the absence of any monuments establishing it, would be found parallel, and distant sixty-two rods from it, in a southerly direction, if this were not prevented by other considerations. That they would notice the time when the admeasurements were made, and from that, and the other testimony, would consider whether large measure was made. That if they were satisfied, that the southerly line of the demandant's land was established, and that there was in fact a greater number of rods between that line and the north line of great lot, A 1, than were named in the conveyances, the overplus should be divided between the three lots lying between them, in proportion to the width of those lots respectively."

It is a general rule, in the absence of monuments, that the

distances, named in a conveyance, will govern in ascertaining the location of the land. But this rule is subject to qualifications, and is not always inflexible. Where the lines were actually run at the time of the conveyance, though boundaries were neither named nor fixed, and the parties soon afterwards established monuments, intending to conform to the location; or where they immediately take possession and occupy with such intention, openly, uninterruptedly and exclusively for more than twenty years in succession, such monuments, or occupancy, would govern the extent of the location, although not coinciding with the distances named in the deed. Under such circumstances it would be competent to prove that, in the location, large measure was in fact actually made; or that the location was made in conformity with an established custom and usage, existing at the time, of giving a particular measure, in locating the territory under consideration.

So if conveyances of land, between certain boundaries, are made to grantees in severalty, by distances, and in different proportions, but covering the whole extent, without intermediate monuments, and without other means of ascertaining the location, and the distances do not correspond with those named in the deeds, they will hold in proportion to their respective grants, whether there be an excess or deficiency in the distance. *Davis* v. *Rainsford*, 17 Mass. 210; *Bancroft* v. *Makepeace*, 12 Mass. 469; *Wyatt* v. *Savage*, 11 Maine, 429; *Loring* v. *Norton*, 8 Maine, 61; *Emerson* v. *Tarbox*, 9 Maine, 42; *Moody* v. *Nichols*, 16 Maine, 25; *Rust* v. *Boston Mill Corporation*, 6 Pick. 158; *Proprietors of Kennebec Purchase* v. *Tiffany*, 1 Maine, 219; *Brown* v. *Gay*, 3 Maine, 126; *Clark* v. *Wethy*, 19 Wend. 320.

These doctrines were embraced in the instructions, and the presiding Judge correctly stated principles, leaving the application of the testimony to the jury. The exceptions do not purport to state all the evidence introduced at the trial, and we cannot say that, in stating such principles, the jury were misled, on the ground that the evidence did not require

or admit of their application. But as the case has been exhibited to us, the verdict appears to have been in accordance with the proof, and with the merits.

Exceptions overruled.

JAMES W. PATTERSON *versus* THE AUGUSTA WATER POWER COMPANY.

A corporate company had sustained great loss by a freshet, and owed a large amount of debts. Their whole property had been under a mortgage, which was fully foreclosed. But the mortgagee promised to convey the same, if by the first day of January, 1845, arrangements should be made for purchasing it at a stipulated price. The plaintiff made a contract in writing to surrender his claim, "in case the property is redeemed of the mortgagee, the refusal of which is given till the first of January." The property was redeemed, but not until after said day. *Held*, the plaintiff's contract was upon a condition, that the property should be redeemed *by said day*, and that it is not a bar to his demand.

DEBT upon a judgment, recovered before a justice of the peace.

The defence rested upon the following memorandum, made and signed by the plaintiff, viz.: — "I hereby agree to give up an execution I hold against the Kennebec Locks and Canals Company, in case the property is redeemed of Reuel Williams, the refusal of which is given till the first of January next. November 2, 1844."

It was proved that Reuel Williams had held a mortgage on the estate of the company, which had been given for $27,000; that by means of an excessive freshet, their mills and other works had been greatly injured; that said mortgage had been fully foreclosed; that very large debts were outstanding against the company; and that the shares in the corporate stock, were deemed to be of no value.

It further appeared that one Alfred Redington interested himself to put the company affairs into a better shape; that he obtained from said Williams a stipulation that, if Redington would, by the first day of January, 1845, make arrangements

by which to take the property at $75,000, he, Williams, would give a bond to convey the same; that Redington procured the dam to be repaired, and purchased up, for very trifling compensation, much of the outstanding debts, and at one time passed into the hands of the Secretary and canceled forty thousand dollars of the same; that all or nearly all of the old stockholders had relinquished their shares; that he then obtained an entirely new list of stockholders, and procured the name of the company to be altered to that of the Augusta Water Power Company; that on the 23d January, 1845, he procured from Williams the bond to convey the property; and that on the 25th May, 1848, Williams, having received by instalments the amount agreed upon, conveyed the property to the said company.

The case was opened in the District Court, RICE, J. By agreement of parties he reported the legal questions, founded upon said facts, for the decision of said Court, which questions were: —

1. Whether there is a legal and sufficient consideration for the agreement in writing, signed by the plaintiff.

2. Whether the condition contained in the writing signed by the plaintiff, has been complied with by the defendants.

If in the opinion of the Court the questions above presented are decided in the affirmative, the Court is to enter a nonsuit. If either of them in the negative, defendants are to be defaulted, and judgment entered for the original judgment, and interest.

Vose, for plaintiff.

WELLS, J. — The plaintiff recovered a judgment against the Kennebec Locks and Canal Company, Nov. 9, 1839. The corporate name has been since changed to that of the Augusta Water Power Company. The plaintiff, Nov. 2, 1844, executed the following agreement: —

"I hereby agree to give up an execution I hold against the Ken. Locks & Canal Co., in case the property is redeemed of Reuel Williams, the refusal of which is given till the first of January next."

It appears in evidence, that the property of the company had been mortgaged, and at the time of making the agreement, the mortgage had been foreclosed, and that an absolute title had vested in Mr. Williams, who conveyed the same to the company by a deed, bearing date May 25, 1848.

The plaintiff contends, that according to his agreement, the redemption should have taken place by the first of January, 1845. The agreement, by which the plaintiff intended to relinquish his debt, must be construed according to its just import. It contemplates a redemption of the property, and the mind would ordinarily advert to some period of its accomplishment. It does not state in clear and positive language, when the redemption shall take place, but says, "the refusal of which is given till the first of January next." This language must be understood to indicate, that the owner of the property had limited the time, when he would permit it to be redeemed.

The plaintiff did not appear to contemplate any action beyond that period, and there could be no necessity, as shown by the agreement, for making provision for it.

The fair construction of the agreement appears to be, that the plaintiff would give up his execution, in case the property should be redeemed within the time, which the owner had fixed for its redemption, and which is specified in the agreement.

Any new arrangement, made between the company and the owner of the property, by which the time of redemption was extended, not being referred to in the agreement nor contemplated by it, could have no effect upon it.

From the view taken of the case, it becomes unnecessary to consider the other question, which was presented to us, and the result is, that the defendants are to be defaulted.

Howard, J. did not concur.

EPHRAIM BALLARD *versus* FRANCIS G. BUTLER, *& als.*

An easement may be extinguished.

An easement, created by reservation in a deed, and consisting in a right to take water from a well, imposes upon the owners of the servient estate, the obligation to keep the well in repair or in a condition to be used. Such a reservation does not assure the right in the well as a permanency, but only so long as it existed, in a suitable state for use.

Such an easement is destroyed by erecting buildings of a permanent character over and upon the well.

For the wilful destruction of the easement by the erection of such buildings by the owner of the servient estate, damages may be recovered.

One who purchases the *dominant* estate, *after the extinguishment of the easement*, can have no remedy against one who also purchased the *servient* estate, *after* such extinguishment.

ACTION on the case, to recover damages for obstructing an easement appurtenant to the plaintiff's dwellinghouse, viz.: — a well and the right of passing to and from the same.

The *defendants'* claim to the land, upon which the well stood, was derived, (through intervening conveyances,) from Ephraim Dutton. And Dutton's title was derived in 1828, by deed from Nathan Weston, which deed reserved "to said Weston, his heirs and assigns, who may occupy the dwellinghouse in which said Weston and John Hovey now live, the right to take water freely from the well, now on the premises, or from any other well which may be sunk there." And all the said intermediate conveyances contain substantially the same reservation.

In this tracing of the title, it appears that Dutton conveyed to Oliver Barrett in 1830, and at the same time, took back a mortgage to secure the purchase money, and that, in 1836, he assigned the mortgage, which in 1843, came by assignment to Francis Butler, the father of the defendant, and under whom their title is derived by inheritance.

The lot, claimed by the *plaintiff*, is near to that claimed by the *defendants*. It was derived to the plaintiff, by intermediate conveyances, under the title of Nathan Weston, whose deed being the first in the series, was made in 1829, to Ebenezer

Caldwell, containing the following clause, "together with the privilege of getting water from the well on the land I sold to Ephraim Dutton, as reserved in my deed to him." Substantially the same clause is contained in all the said deeds.

The title was held by Caldwell until 1841, and came in 1845, to the plaintiff, who immediately entered into, and still continues the occupation of the house.

In 1831, the lot, sold as aforesaid to Dutton, "was covered all over with brick and wooden buildings of a permanent character; the well was entirely covered up, and this state of things has so continued ever since." The case was submitted for the decision of the Court.

J. Baker, for plaintiff. Besides the amount of damage, the plaintiff is bound to establish two points: —

1. His title. This is shown clearly by the deeds used in the case.

2. The disturbance by the defendant. The case shows that the well was covered up by permanent erections, in 1831, by persons under whom the defendant claims. And for the continuance of the disturbance, the defendants are liable from the time their title commenced. These two positions establish the plaintiff's right to recover.

H. W. Paine, for defendants.

The obstruction complained of was erected long before the ancestor of the defendants became the owner of the servient estate. It is therefore *only* for the *continuance* of the obstruction, that the plaintiff has any pretence of complaint.

Admitting that the erections complained of were an invasion of the plaintiff's easement, he has shown no right of action, because he does not show that, before instituting the suit, he requested the defendants to remove the erections.

Butler might reasonably have supposed that the easement had been relinquished or abandoned. "When the party against whom the action is brought, was not the original creator of the disturbance, a request must be made, to remove the nuisance, before any action is brought." *Penruddock's*

Case, 5 Co. p. 101; *Bent* v. *Haddon*, Cro. Jac. p. 555; Gale & Whatley on Easements, 295.

If this principle is to be applied for the protection of a purchaser or a lessor, *a fortiori*, it will to those who have the inheritance cast upon them by the act of the law.

Again, the well was covered long before the plaintiff became the owner of the dominant estate, and long before the servient estate was purchased by the defendant's ancestor.

In 1831, the well ceased to exist as a well, and the easement was extinguished. *Hancock* v. *Wentworth*, 5 Metc. 446.

The owner of the dominant estate at the time, might have maintained his action and recovered damages commensurate with his loss. But his right of action was not assigned to his grantee, nor did it pass with the land. The plaintiff purchased "the right to take water from the well." There was *then* no well, and none has since that time been sunk.

Baker, in reply.

1st. A demand on the defendants was not necessary. The law does not require *useless acts*. The well was covered with buildings of a permanent character of great value, and no man believes that these defendants, on request by plaintiff, would have removed them. No such request is necessary in analogous cases, such as flowing lands, diverting water courses or raising dams so as to injure mills above.

2. An easement of this nature is a *real right*, 5 Mass. 129, 7 *ib.* 387, and cannot be acquired without a grant, express or implied. 3 Kent's Com. part 6, § 52, pages 434 and 441; *Cook* v. *Stearns*, 11 Mass. 536—7; *Thompson* v. *Gregory*, 4 Johns. 83; *Ricker* v. *Kelly*, 1 Maine, 118; *Arnold* v. *Stevens*, 24 Pick. 106. Why then should it be lost or extinguished with any less formality?

The easement was not extinguished. The case cited for defendants, 5 Metc. 446, lays down the modes of extinguishing such rights. By the act of God, operation of law, and the act of the party. The same rule is found in 2 Hilliard's Abr. p. 54, § 12. This would seem to be the settled law. Now the plaintiff has not lost his right in either of these

modes. *White* v. *Crawford*, 10 Mass. 183; Gale & Whatley on Easements, part 3d, Extinguishment, p. 347, 353, and seq. cases; 10 Pick. 316; *Dyer* v. *Sanford*, 9 Metc. 395. The case does not find that the easement was destroyed in 1831; it only finds the well was *covered* up with buildings. The permanent obstruction, or even destruction of the *beneficial use* of the easement, is a very different thing from the *extinction of the right* in the plaintiff's grantors. It is the *right* which is at issue here.

SHEPLEY, C. J. — The conveyance from Nathan Weston to Ephraim Dutton must receive such a construction, as will carry into effect the intention of the parties.

Was it their intention to secure to Weston a perpetual easement in the land conveyed or only a right to take water from the well so long as it existed and from any other well, that might be sunk upon that lot? The right was to take water from "the well now on the premises." There was no obligation imposed upon the grantee to keep the well in repair and in a suitable condition to afford wholesome water, or even to continue to preserve its existence. It could not be expected, that it would continue always in a condition to be useful, or indeed in any condition as a well, without some attention and expense for its preservation. The clause providing, that the grantor might take water from any other well, which should be sunk upon the premises shows, that the parties contemplated the possibility, that the well might cease to exist from some unexplained cause or from the act of the owner of the estate; and that another might be sunk as a substitute for it.

If the well had become choked by the falling of its walls, or had been wantonly filled up by an unknown person, Weston could have maintained no action against Dutton for a disturbance of his easement. For the mere reservation of the right of use, cannot be extended to embrace a covenant to repair, much less to embrace a covenant for the perpetual preservation of the thing subjected to the use. It being well known that all earthly structures are subject to decay and finally to destruc-

tion, it would be most unreasonable to raise by implication, a covenant for perpetual preservation.

In the case of *Doane* v. *Badger*, 12 Mass. 65, it appeared, that lands were set off to Christopher Marshall, "reserving the privilege of a well and pump to the children and heirs hereafter mentioned." To the after mentioned heirs of Thomas Marshall, land was set off, "with a right and privilege in the well and pump, they paying at all times hereafter, their proportional part of the charge in the maintenance of said well."

The plaintiff was the owner of the dominant, and the defendant the owner of the servient estate. The Court considered, that he would not be liable to keep the well in repair, without an express covenant for that purpose, although the owner of the dominant estate was required to contribute his proportion.

In the case of *Blake* v. *Clark*, 6 Greenl. 436, it was held, that the use of a mill yard set out in the division of an estate, "for the use and accommodation of the mills" was "an easement to continue only so long as the mill should be occupied as such."

In the case of *Brondage* v. *Warner*, 2 Hill, 145, it appeared, that William Leslie granted to Joseph Benjamin the privilege of building to the height of three stories, the east wall of his house on the top of the west wall of Leslie's tenement, already erected. The tenement formerly owned by Leslie had been burnt down leaving the west wall standing; and it was held that the owner of that lot could not recover of the owner of the estate formerly owned by Benjamin, the land on which that wall stood, and that his right to the enjoyment of that easement, would continue, "so long as the wall stands and answers the purpose."

The reservation in the conveyance made by Weston, cannot therefore, upon a correct construction, be considered as assuring to the owner of the dominant estate a right to the easement after the well, without the fault of the owner of the servient estate, had ceased to exist in a condition to be used as a well.

When the person, to whom a servitude is due, does an act

incompatible with the nature and exercise of it, the servitude is thereby extinguished. *Moore* v. *Rawson*, 3 B. & C. 332; *Taylor* v. *Hampton*, 4 McCord, 96; *Corning* v. *Gould*, 16 Wend. 531. In the latter case the opinion declares, that a party to whom a servitude is due may effect its extinguishment by suffering erections of a permanent kind, which would prevent its use, such as edifices or walls; and that it would also be extinguished by his own act, by the erection of such permanent edifices.

Much of the doctrine respecting servitudes is derived from the civil law. Chancellor Kent cites that law with approbation, when it is not opposed to the common law, as authority in such cases. He says, "the doctrine of the civil law was, that a servitude was presumed to have been released or renounced, when the owner of the estate, to which it was due, permitted the owner of the estate charged with it to erect such works on it, as a wall for instance, which naturally and necessarily hindered the exercise of the right and operated to annihilate it." He states, that the mere sufferance of such works to be erected would not raise the presumption of a release, unless the sufferance continued for a time requisite to establish such a presumption, "or the works were of a permanent and solid kind, such as edifices and walls." 3 Kent's Com. 448—9. An easement may be extinguished or destroyed. *Hancock* v. *Wentworth*, 5 Metc. 446.

Was the well destroyed in the year 1831, by being entirely covered over by brick and wooden buildings of a permanent character? It is obvious, that it became impossible to use it as a well, while it was thus covered. All access to it was thereby excluded. If an action on the case had been then commenced by the owner of the dominant estate against the owner of the servient estate, to recover damages for a wilful destruction of the well and of his easement, he could have maintained it upon the proof now presented and have recovered damages for its total loss, unless the reservation had been construed to secure it to him only for so long a time, as it should be the pleasure of the owner of the servient estate to

continue its existence. If the owner of the servient estate, after thus destroying the easement, had conveyed it to another person, the owner of the dominant estate could not recover damages of that person for its destruction, with which he was not chargeable; nor for neglect to repair or to restore the well, unless by virtue of an implied covenant running with the land, which is inadmissible. What is the present action but an attempt to compel such other person to repair or to restore a well, which had been destroyed before he became the owner of the estate, without any covenant attached to it, by which he can be required to do so? The argument is, that the action is brought to recover damages for a continuance of the disturbance. But how can there be a continued disturbance of that, which long since ceased to have an existence.

It appears from the exhibits of title, that Ebenezer Caldwell was the owner of the estate, to which the easement was appurtenant, from August 13, 1829, to September 29, 1841; that the owner of the estate, from which the servitude was due, erected permanent buildings entirely destructive of the use of the easement, in the year 1831; and that Caldwell continued to be the owner of the estate, to which the servitude was due, for about ten years afterward, without making any complaint, so far as appears, and without taking any measures to protect or preserve his easement. The grantees of Caldwell conduct in like manner, until the ancestor of the defendants purchased the servient estate, on December 23, 1843. Twenty years of non-user of the easement had not elapsed, when this action was commenced; but such length of time is not required to extinguish the easement, when works of a permanent kind, which necessarily hindered the exercise of the right "and operated to annihilate it," had been erected.

If it be considered, that the easement was wrongfully destroyed, by the owner of the estate subjected to it, in the year 1831, and that the owner of the estate, to which it was appurtenant, might have recovered of him damages to the extent of its value, still the easement having been destroyed could no longer continue appurtenant to that estate or be conveyed by

a conveyance of it. If it be considered as destroyed by the erection of permanent buildings by one party, and by the non-user and neglect of the other party to enforce his rights, so that it had no existence, when the plaintiff purchased on December 12, 1845, the result would be the same, he would acquire no title to it.

The conclusion, that it was annihilated and destroyed by the erection of permanent buildings, absolutely preventing its further use, is authorized by the authorities already noticed.

Plaintiff nonsuit.

ELIZABETH WORTHEN *versus* ANDREW H. HANSON *& al.*

Upon a poor debtor's disclosure, to obtain his release from arrest upon an execution in a personal action, wherein the damages recovered are less than $100, if the creditor neglect to appoint one of the justices, an appointment may be made for him by a constable of the town in which the disclosure is to be made, and in which the debtor is present, although it be a town in which neither of the parties reside, and although the execution be not directed to any constable.

THE facts are presented in the opinion of the Court.

Bradbury & Morrell, for plaintiff.

The constable of Augusta had no authority to select one of the justices. The execution was not directed to *him* or to *any* constable. Neither of the parties had ever resided in Augusta.

D. Williams, for defendant.

SHEPLEY, C. J. — The case is presented upon an agreed statement in which it is said, that the action is upon a bond, given to release one of the defendants from arrest on an execution recovered against him in an action of dower. The execution upon which the arrest was made, is also made a part of the case, and upon inspection it does not appear to have been issued upon a judgment rendered in an action of dower. So much of the agreed statement as declares it to have been

issued on such a judgment, must be considered as erroneous, being disproved by the document referred to.

The debtor appears to have taken the oath prescribed by the statute after due notice given, before two justices of the peace and of the quorum, on December 18, 1845. One of the justices was selected by a constable of the town of Augusta, where the justices resided and where the oath was administered. The execution was not directed to a constable, and the creditor and debtor were both named in it as residents of the town of China.

The authority of a constable of Augusta to select one of the justices is denied. The statute approved on February 23, 1844, chap. 88, amending the Revised Statute, chap. 148, § 46, provides, that a constable, "who might legally serve the precept, on which he was arrested," may select one of the justices, when one has not been selected by the creditor. A constable is authorized by statute, chap. 104, § 34, to serve upon any person in the town, to which he belongs, any writ or precept in any personal action, where the damage sued for and demanded, does not exceed one hundred dollars.

The words, "who might legally serve the precept," were used to designate the class of precepts, on which the arrest had been made, and the cases, in which a constable or other officer might select a justice; and not to require, that the particular precept, on which the debtor had been arrested, should have been directed to such constable or other officer.

The execution, on which the debtor was arrested, appears to have been issued on a judgment recovered in a personal action. The amount of the debt or damage demanded by it was $90,87. The debtor appears to have been in the town of Augusta, when the selection of a justice was made by the constable. If the execution had been directed to a constable of the town of Augusta, service of it might have been there made by such a constable, who was, therefore, authorized to select a justice.

The proceedings in other respects, appear to have been regular. *Plaintiff nonsuit.*

INHABITANTS OF WATERVILLE *versus* REUEL HOWARD, JR.

In a justice's court, an appeal can be taken only from such judgments as make a final disposition of the case in that court. It cannot be taken from any interlocutory order or judgment. It cannot be taken from a judgment of *respondeat ouster*, upon a demurrer to a plea in abatement.

THIS action was commenced before a justice of the peace, to recover the penalty for unlawfully selling intoxicating drinks, &c. Before the justice, there was a plea in abatement to his jurisdiction, to which plea the plaintiffs demurred. The justice rendered judgment that the defendant should answer over, and the defendant appealed. In the District Court, RICE, J., the appeal was dismissed, and the plaintiffs excepted.

H. A. Smith, for plaintiffs.

The R. S. chap. 116, § 9, gives the right of appeal to *any* person aggrieved by the judgment of the justice. The right is not restricted to certain kinds of judgments. The language is general and embraces all judgments.

Stat. 1821, chap. 76, § 10, allowed appeals when both parties had "appeared and plead," which would in terms embrace a case like this. The Legislature intended to enlarge the right and not to abridge it, by extending it to judgments on default, or when the parties had not "appeared and plead." Defendant might appeal even from default. *Holman* v. *Sigourney*, 11 Metc. 436.

Defendant could not have availed himself of his matter in abatement in the District Court in any other way than by appeal. By pleading to the merits he waives his matter in abatement.

Section 9 does not refer to such judgments only, as are named in sect. 7; because sect. 7 refers only to judgments against the defendant, and sect. 9 gives appeal to plaintiffs as well as defendants.

A judgment against plaintiffs in this case would abate their writ. Must they stop there, or could they appeal? But the law gives the right of appeal equally to both parties.

It was the *defendant* who carried the case into the District Court and claimed the right to have it tried there.

He cannot be allowed now to object to his own act.

Stackpole, for defendant.

WELLS, J. — The question presented in the present case is, whether the defendant could be allowed to appeal from the decision of the justice of the peace, upon a judgment of *respondeat ouster*. Chap. 116, § 9, R. S., allows to any party aggrieved by the judgment of the justice, an appeal to the District Court, "and the case shall be entered, tried and determined in the District Court, in like manner as if it had been commenced there."

If an appeal should be allowed from the judgment of *respondeat ouster*, it would be in the power of the defendant, in all cases to withdraw from the justice a trial of the merits of the action. For upon the decision, that the plea is insufficient, such judgment must always be rendered, and then upon an appeal and a like judgment in the District Court, the case would be open upon the merits in that court.

We do not think the Legislature intended to allow such a course of proceeding.

And by requiring the defendant to answer further before the justice, he is not deprived of any of his rights. After a final decision is had of the cause before the justice, the appeal will remove the whole case to the District Court, and the same questions may there be raised, as had been before him, and according to the statute, the case may be tried in the same manner as if it had been commenced in that court.

An appeal can be taken in all cases where the judgment of the justice is a final decision of the action, and not merely interlocutory. In the present case, if the judgment had been that the action should abate, no doubt the plaintiff might have appealed, because that would have been a final determination of the action.

The objection, to the trial of the cause in the District Court, is interposed by the defendant, who is the appealing party,

but a proceeding not in conformity to law, cannot be allowed, although occasioned by the party objecting to it. Courts are bound to rectify irregularities of practice, whenever they come to their knowledge.

Parties may waive objections, which they are at liberty to make, and cannot afterwards recall the waiver.

But the granting of an appeal is an act of the court, and if unauthorized by law, is altogether invalid. The error is not cured, because it was committed through the advice or solicitation of the defendant. *Exceptions overruled.*

EARL SHAW *& al. versus* JOHN REED.

A promise, made in consideration that the promisee would procure the discontinuance of an indictment, in which he was prosecutor, is invalid.

A was in prison in Massachusetts upon an indictment for having fraudulently obtained goods from the prosecutor by false pretences. It was then agreed by the prosecutor, that he would procure a *nol. pros.* and stop the prosecution, if B, a friend of A, would pay the costs, and give his notes for a specified sum, to be allowed on the debt due from A, for the goods. The prosecutor procured the *nol. pros.* to be entered, and A to be thereby discharged. B refused to give the notes as he had promised. *Held*, that the consideration for the promise was illegal, and that no action by the prosecutor could be maintained upon it.

May, for plaintiff.

Walton, for defendant.

SHEPLEY, C. J. — This case having been submitted to the decision of the Court upon a report of the testimony, it becomes necessary in the first place to determine, what the contract between the parties, is proved to have been.

The testimony shows, that an indictment was pending in the municipal court of the city of Boston, against Abraham Reed, a brother of the defendant, for obtaining goods from the plaintiffs by false pretences; and that he had been arrested and imprisoned to await his trial. After a conversation between one of the plaintiffs and the defendant, in the preceding month of

May, the defendant, on July 13, 1846, addressed a letter to the plaintiffs, in which he says; "I will make you one proposition; and that is, I will pay you one hundred dollars down, out of which you must pay the cost of prosecution, and two good and satisfactory notes of one hundred dollars each, payable in one and two years. No discharge is asked, so far as my brother and his partner is concerned, only credit to his account. The money and notes to be deposited in the hands of a third person, to be drawn by you, provided my brother is discharged and suffered to leave the State of Massachusetts."

One of the plaintiffs, on July 16, addressed a letter to the defendant in answer, and without accepting his offer, he says, "After receiving yours yesterday, I called on Mr. Parker, the county attorney. He agreed to *nol. pros.* whenever the cost was paid, and I would say I was satisfied." "Give me cash $125, to remunerate for the money paid out, and a note for $200 payable in one year with interest, at either bank in Boston, with satisfactory indorsers, such as G. W. Stanley, Esq. or Gen. Greenleaf White will say they consider good, and I will stay the action and get him discharged."

In a letter bearing date on the day following, the defendant says: —"I do not object to the one year instead of the two, and interest on the notes, in your offer, which makes an addition of some twelve dollars, besides one year instead of two equal annual payments." He then refers to the sum of $125 proposed to be paid in cash, and says: —"But it is utterly out of my power to go further than I propose," which was to pay in cash, $100.

In a letter addressed to the defendant on the day following, one of the plaintiffs says: —"I shall receive cash $100, and a note for $200, payable as proposed in my last letter."

Thus the contract as proposed by the plaintiffs to the defendant, modified by reducing the amount to be paid in cash, from $125 to $100, was assented to by both parties.

The action is brought by the plaintiffs to recover damages for a breach of that contract in omitting to give the note for $200.

To prove performance on their part, the plaintiffs introduce the testimony of Samuel D. Parker, which states, that he made the following indorsement upon the indictment.

"And now on the 13th day of August, 1846, the said Abraham Reed having been several months confined in jail and having satisfied the prosecutors, and the costs being paid, I will no further prosecute him on this indictment, at the written request of the prosecutors."

The proof shows, that the indictment was found on the promotion of the plaintiffs, who were regarded as the prosecutors. That a *nolle prosequi* was entered upon it by their written request. The inference is unavoidable, that the request was made, and that the indictment was no further prosecuted in consequence of the agreement made between the plaintiffs and the defendant. This shows a performance on the part of the plaintiffs of an agreement made by them with the defendant, to "stay the action and get him discharged." Or, in other words, no further to prosecute for a crime punishable by imprisonment, in the State prison, and to permit the accused to be discharged, which was the substance of the proposal made to them by the defendant.

The question is then presented, whether such an agreement can be enforced in a court of justice.

In the case of *Collins* v. *Blantern*, 1 Wil. 341, Chief Justice WILMOT in his opinion says, "it is the duty of every man to prosecute, appear against, and bring offenders to justice." He considered the consideration of a contract "to stifle a prosecution for perjury," to be "wicked and unlawful."

In the case of *Edgecombe* v. *Rodd*, 5 East, 294, a person prosecuted for having disturbed public worship, made an agreement with the prosecutor, that with the consent of the magistrates, he would no further prosecute him for the alleged offence but would consent to his discharge. Lord ELLENBOROUGH said, "such an agreement has a tendency to produce impunity for the commission of the offence." "In *Collins* v. *Blantern*, an agreement to put an end to a prosecution for a misdemeanor, was considered to be illegal as impeding the

course of public justice. And this produced the same mischief." GROSE, Justice, said, "the agreement stipulating for the plaintiff's discharge for want of prosecution was illegal and void." LAWRENCE, Justice, observed, "the justice of the country has been defeated."

These cases exhibit the established doctrine of the common law. The cases cited by the counsel for the plaintiff are not opposed to it.

In the case of *Beely* v. *Wingfield*, 11 East, 46, the defendant had been indicted and *convicted*, for ill treating his parish apprentice. The chairman of the Court, suggested to him, that if he would agree to pay forty guineas towards the expenses of the prosecution, he would be imprisoned six instead of twelve months. He gave his note for that amount, and the contract was decided to be a lawful one. Lord ELLENBOROUGH says, "the overseers got no pecuniary benefit to themselves, or to the parish beyond a fair amount of the expenses incurred by them in bringing the defendant to justice. It did not stifle a public prosecution, or elude the public interest in bringing such an offender to justice by way of example to others."

In the case of *Brett* v. *Close*, 16 East, 293, one Dent had been appointed in chancery receiver of an estate, and had received a certain amount of income, which he had been ordered to pay over. For his neglect to do this he had been arrested on a chancery warrant and released upon giving two promissory notes for the amount, with the defendant as his surety. It was contended in a suit upon the notes, that the transaction was illegal, but the Court decided otherwise on the ground, that the process, though criminal in form, was only ancillary to a civil remedy to enable the creditor to collect his debt, and that he had the control of it.

In the case of *Pilkington* v. *Green*, 2 B. & P. 151, one of the defendants had been *convicted* and ordered to pay penalties to the amount of one hundred and fifty pounds, for a violation of the excise laws. He was arrested on a warrant and released by the officer upon giving notes with surety for

the amount. The conduct of the officer had been approved by the commissioners of excise. Judgment was rendered against the defendants in a suit upon one of the notes. In that case no agreement had been made to forbear to prosecute or to be instrumental to prevent a conviction of the offender.

The case of *Harding* v. *Cooper*, 1 Stark's R. 467, was not regarded by Lord Ellenborough as intrenching on the doctrine before asserted by him. On the contrary, he said, "a stipulation to drop the prosecution would without doubt be illegal, but if the party authorized his agent to compound his civil rights only, and after coming to a settlement the creditors chose to forego the prosecution, the transaction was not illegal."

If it be the duty of every man it, is more especially the duty of persons injured, who have caused criminal prosecutions to be commenced, to appear against offenders, and not to make bargains to allow them to escape conviction, if they or their friends will pay a sum of money to repair the injury. To decide that such bargains might be lawfully made, would be to lend a helping hand to make public justice venal. To procure a compensation to be made to the person injured, is a subordinate object to the State, in causing crimes to be punished. It causes crimes to be punished, that they may not be committed with impunity, and therefore, become more frequent; that the rights of property and the inviolability of the person may not become less secure; that persons may depend upon the execution of the laws, rather than resort to physical force for the preservation and protection of their rights.

It is contended, in this case, that the plaintiffs did no more than to secure, as far as they might, the payment of their just debt; and that the county attorney did no more than he had a legal right to do. But the plaintiffs, as a consideration for the promise of the defendant, were not only to credit the amount of the notes in account with their debtor, but were to cause him to be discharged from that prosecution. The agreement was designed by both the parties to it to have the effect to stifle the prosecution and to discharge the accused.

As this was the consideration for the promise of the defendant, no action founded upon it, can be sustained in a court of justice. *Plaintiffs nonsuit.*

Chester Rhodes *versus* School District No. 14 in Gardiner.

To constitute an effective delivery of a deed, it must have come into the possession of the grantee, with the consent of the grantor that it should operate as a deed.

If a deed of land be placed in the grantee's possession, with some other purpose on the part of the grantor, than that it should take effect as a conveyance, it is no delivery of it as a deed.

A committee consisting of three inhabitants, was appointed by a school district to procure a deed of land. The deed was made and deposited with one of said committee, with directions to deliver it upon payment of the purchase money, and not otherwise. The district received the deed from the depositary, and voted to accept and record it, but made no payment. *Held*, the deed was never delivered, and the district obtained no title by it.

Writ of entry. The trial was before Shepley, C. J. The defendants submitted to a default, which is to be taken off if, in the opinion of the Court, the demandant is not entitled to recover.

Danforth and *Woods*, for plaintiff.

Bachelder, for defendants.

Shepley, C. J. — The land demanded, is a lot formerly, if not now, owned by the demandant, upon which a district school house has stood for about fourteen years. During that time there has been a contention between the parties. The district claims to have acquired a title to the lot by a deed of conveyance from the demandant, bearing date on March 13, 1847.

The question presented for decision is, whether the testimony proves, that the deed has been so delivered, as to be effectual to convey the lot of land.

At a meeting of the district, on November 28, 1846, a vote

was passed "to raise a sum of money sufficient to pay Mr. Rhodes' bill." Also "to raise a committee to tender Mr. Rhodes the money." At an adjournment of that meeting, holden on December 5, 1846, "Voted to raise a committee of three to request Mr. Rhodes to give the district a deed of the lot, which the school-house stands on, and to receive the same." "Voted that John Libby, Eliakim Norton and John Knox, be that committee." "Voted to authorize the committee to hire money to pay Mr. Rhodes, not exceeding $10,67."

John Libby testifies, that he with another member of the committee, Eliakim Norton, called upon the demandant to give a deed of the lot to the district, and that he said he would give one, and agreed to go to Norton's and give it.

Norton testifies, that he has no recollection, that the demandant then agreed to give a deed. Thinks he did not. That the demandant came to his house, and desired him to make out the deed and he did so; that demandant signed and acknowledged it, and left it in his hands, that the district might have it on payment of a sum of money, and that they could not have it without; that he carried it into a district meeting and read it, and informed the meeting of the conditions, on which he had it; that the district voted to accept the deed; that he left it on the table, he believed; that it never went into the possession of the district by the consent of the demandant.

At a meeting holden on April 5, 1847, the district voted to receive the deed, but it does not appear to have taken any measures to pay the demandant; nor does it appear that any thing has been paid to him since the deed was made.

Several witnesses testify, that the demandant admitted, that he had received payment for the land long before any of these proceedings took place, but that he insisted, that the district was indebted to him on other accounts.

There can be no doubt, that the demandant did not intend, that the deed should be operative to convey the land without the payment of a sum of money. The district having obtained possession of the deed insists, that it has obtained the title without showing, that it has made any such payment.

Proof that he had at some former time received payment for the land, connected with the proof, that he considered that the district was otherwise indebted to him, can have no effect upon the title, if he made the payment of the sum claimed by him a condition to be performed prior to a conveyance. The question is not, whether he made a just claim upon the district, but whether he made the payment of that claim a condition precedent to a conveyance. Nor can the testimony, that he promised to make a conveyance, prevent his making such a condition or destroy its effect when made.

In defence it is insisted, that the delivery of the deed to Norton, he being an agent of the district to receive it, was a delivery to the district. That to make it an escrow, the delivery must have been made to a third person. That a delivery to the grantee is effectual, though a condition be annexed and not performed.

The argument assumes, that the deed was delivered to Norton, as the deed of the demandant. The testimony is, that it was only left in his possession with authority to let the district have it on payment of a sum of money. This shows, that he did not consider, that he was delivering it to their agent for their use.

It does not appear to have been left with him in his capacity of a committee-man of the district, but rather as a scrivener of the demandant.

To constitute a delivery, the deed should appear to have come into the possession of the grantee as a conveyance by the consent of the grantor. If a deed be placed in the hands of the grantee, not for the purpose of having it take effect as a deed, but for some other purpose, that is no delivery of it as a deed, and no title will be conveyed by it. *Fairbanks* v. *Metcalf*, 8 Mass. 230; *Chadwick* v. *Webber*, 3 Greenl. 141; *Woodman* v. *Coolbroth*, 7 Greenl. 184; *Jackson* v. *Sheldon*, 22 Maine, 569; *Carr* v. *Hoxie*, 5 Mason, 60; *Stiles* v. *Brown*, 16 Verm. 563; *Elsey* v. *Metcalf*, 1 Denio, 323.

Delivery depends upon an act done, and the intent, with which it is done. *O'Kelley* v. *O'Kelley*, 8 Metc. 437.

It is apparent, that the demandant, when he left the deed with Norton, did not intend to deliver it as his deed. If the grantor after signing and acknowledging a deed, should hand it to the grantee saying, "you keep it till we make the notes and prepare a mortgage," and the grantee should retain it and refuse to make the notes and mortgage, the deed could not be considered as so delivered as to convey the title.

If Norton were to be considered as the agent of the district in receiving the deed, there would be little more reason to contend, that the deed was left in his possession as one delivered, than in the case supposed. *Judgment on the default.*

WILLIAM B. PIERCE *versus* JEFFERSON PIERCE.

If a submission before a justice be made of all demands arising between the parties after a specified day, a specification of the claims must be annexed to the submission.

Such specification is dispensed with only when *all* demands are submitted.

EXCEPTIONS from the District Court, RICE, J.

A submission was made before a justice of the peace of all demands arising between the parties since the 1st of January, 1845.

No specification of claim, and no demand of any kind was annexed to the submission. The award was rejected.

Vose, for W. B. Pierce.

The submission of all demands since January 1, 1845, is equivalent to a submission of *all demands*, so far as the requisition of the statute in relation to the annexation of demands is concerned. The reason for omitting the annexation would be the same in both cases.

Fuller, for J. Pierce.

TENNEY, J. — Controversies, which may be the subject of a personal action, may be submitted to one or more referees by an agreement, executed and acknowledged by the parties or their attorneys.

If all demands between the parties are submitted, no specific demand is required to be annexed to the agreement. But if a specific demand only is submitted, the same shall be annexed to the agreement, and signed by the party making it; and such demands, shall be stated in a manner to be readily understood, and be as certain in substance, as the case will admit. R. S. c. 138, § 1, 2, 3 and 4.

It is contended for the plaintiff, when all the demands, which arose after a certain time mentioned in the agreement, are submitted, the reason, which dispenses with the annexation to the agreement of specific demands, when all are referred, will fully apply; and consequently, that it is equally unnecessary, that the claims should be so specified. The statute in this respect refers to two classes of demands; those which comprise all the mutual claims between the parties; and those which do not purport to be so; and having provided for the submission of those of both classes, and having dispensed with the specification of those of the first class only, we must infer, that the Legislature intended, that the other class should be subject to the provision which requires them to be annexed. If the submission of all demands, which accrued after a certain time are to be treated in this respect as the submission of all demands, mutually existing between the parties without limitation; claims, which originated between two certain periods however near each other, and those, which arose on a certain day, must fall within the same rule. This would be giving to the statute the construction, that the specification required, is the time only, when the claim had its origin. Such a construction is not in accordance with the provision, that the claim shall be stated so as to be understood, and be as certain in substance, as the case will admit, and signed by the party making it, and cannot be adopted. In the case before us, there was no demand annexed to the submission.

Other questions are presented in the case; but they are not material to its decision.

Exceptions overruled.

STATE *versus* HENRY L. CROWELL.

The act of 1846, c. 205, was designed to restrict the sale of wine, brandy, rum or other spirituous liquors, or liquors a part of which is spirituous, whether manufactured in *this* or in any *other* country.

With *two* exceptions, it *prohibits* absolutely the sale of *any* and *all* of such liquors, for *any* and *every purpose*, and in *any* and *every quantity*, great or small.

One of the exceptions authorizes sales by certain persons, appointed therefor, and placed under bonds and penalties for their faithfulness.

The other exception authorizes sales of liquors, imported from any foreign port or place, but *only* by quantities, as large or larger than the quantities which revenue laws allow to be imported.

This exception, therefore, does not authorize any sale of *domestic* liquor, in *any quantity whatever*. And it authorizes the sale of *foreign* liquor only in *prescribed quantities*.

If, therefore, a complaint allege a sale to have been made in a *less* quantity, it need not specify whether the liquor *was* or *was not* imported. For such sale of either would be an offence; and the penalty for each is the same.

EXCEPTIONS from the District Court, RICE, J.

This is a complaint charging, that defendant, without license, sold spirituous liquor to J. R. in less quantity than the revenue laws of the United States prescribe for importation, viz: — one glass of New England rum.

The defendant, before trial, moved the Court to quash the complaint, —

1st. Because it does not appear, in and by said complaint, that the liquor alleged to have been sold was not imported into this country from any foreign port or place.

2d. Because it does not appear, in or by said complaint, that said liquor, alleged to have been sold by the defendant, was imported into this country from any foreign port or place.

3d. Because it does not appear, in or by said complaint, with sufficient certainty, that the sale, if any, was in less quantity than the revenue laws of the United States prescribe for the importation of New England rum into this country.

4th. Because the offence, if any, is not set forth in said complaint with sufficient certainty.

5th. Because it is not set forth, in or by said complaint,

whether said liquor was imported into this country from any foreign port or place.

But the Court overruled the objection, and the motion. The defendant then plead not guilty to said complaint. The jury found the defendant was guilty, and answered the following interrogatory, propounded to them in writing, in the manner following: —

"Was the spirituous liquor, sold by the defendant, imported into this country from any foreign port or place?"

"Ans. The jury are unable to determine."

The defendant's counsel moved in arrest of judgment. The *Court refused the motion, and the defendant excepted.*

Whitmore, for defendant.

The statute defines two distinct offences and attaches the same penalty to each.

The first section prohibits the sale of any quantity of spirituous liquor, however large, without a license.

The second section qualifies and limits the first section, and permits the sale of spirituous liquor, which has been imported into this country, in quantities not less than the minimum quantity permitted to be imported.

Each of these offences should be charged in a distinct and appropriate count. 1 Chit. Crim. Law, page 249; *Rex* v. *Clendon*, 2 Str. 270; *State* v. *Howe*, 1 Richardson's R. 260.

A count which might be sufficient to charge the defendant with selling spirituous liquor not imported, would be evidently defective, as a count charging the defendant with selling imported liquor.

The count in this complaint, (if it shall be considered as a count, charging the defendant with selling liquor not imported,) is defective, because it is not alleged therein, that it was not imported from any foreign port or place.

It is defective, as a count charging the defendant with selling liquor imported: —

1st. Because it does not allege that it was *imported* liquor.

2d. Because it does not set forth the minimum quantity of

New England rum allowed to be imported, and negatives in specific terms, the fact that one glass was a part of this minimum quantity.

The jury erred in finding a verdict of guilty, when they were unable to find whether the liquor was imported or not.

Tallman, Attorney general, for the State.

WELLS, J. — The defendant, before the trial, moved the Court to quash the complaint, because it did not appear by it, that the spirituous liquor alleged to have been sold, was not imported into this country from any foreign port or place, that it did not appear that it was imported, nor that the sale was in less quantities than the revenue laws of the United States prescribe, and that the complaint did not set forth the offence with sufficient certainty.

The jury found the defendant guilty, and in answer to an interrogatory propounded to them, in writing, stated, that they were unable to determine whether the spirituous liquors sold by the defendant, were imported or not.

The defendant, after verdict and before judgment, moved the Court to arrest the judgment.

The act of 1846, c. 205, § 1 and 2, prohibits the sale of spirituous liquors, but does not extend to such as have been imported, when not sold in less quantities than the revenue laws prescribe, for the importation into this country.

The intention of the statute is to forbid the sale, without a license, of domestic spirituous liquors, in any quantity, and of foreign spirituous liquors in any less quantity, than is allowed to be imported by the laws of the United States.

If then, a person should sell spirituous liquors of any kind, whether foreign or domestic, in less quantity than is allowed to be imported, he falls within the prohibition of the act. And it is unnecessary to allege in the complaint, whether they are foreign or domestic; for the person selling violates the law in either case, if the quantity sold is less than what is allowed to be imported.

The complaint charges the defendant with having sold spirituous liquor in less quantity than the revenue laws of the United

States prescribe, for the importation thereof into this country, to wit, one glass of New England rum. The selling of such quantity is prohibited by the statute, and the complaint contains allegations by which a breach of it is clearly declared.

It is not alleged in the complaint what quantity is the least that may be imported, but it follows the language of the act, and such mode of stating the offence is sufficient.

The defendant having been found guilty, it is to be presumed that all the facts requisite to establish his guilt were proved, and that correct instructions were given to the jury, in relation to the least quantity of spirituous liquors, which might be imported, as no exceptions have been taken to the instructions.

The act of Congress of 1799, chap. 128, § 103, prohibits the importation of distilled spirits, arrack and sweet cordials excepted, into the United States, except in casks or vessels of the capacity of ninety gallons, wine measure, and upwards.

It being immaterial whether the liquor sold was foreign or domestic, as it was less than the quantity allowed to be imported, the answer of the jury to the written interrogatory can have no legal effect upon the case.

The exceptions are overruled, and the case is remanded to the District Court.

GEORGE W. STANLEY *versus* WILLIAM KEMPTON.

A note given in *payment* of usurious paper, held by the promisee against a third person, cannot be avoided for want of consideration.

If the maker of a usurious note procure a third person, having no connection with it, to give his note for the amount, *in payment* of such usurious note, such third person cannot avoid his note, on account of the usury between the former parties.

But, *it seems*, he might avoid it, if it had been given, not *in payment*, but in renewal or substitution, of the original usurious note.

The statute of limitations does not bar a witnessed note, sued in the name of an indorsee, though the indorsement were made more than six years after the payday of the note.

REPORT of legal questions from the District Court, RICE, J.

The action was *assumpsit,* commenced in 1848, upon a witnessed promissory note for $91,38, dated July 12, 1839, payable to Francis Butler or order, in one year with interest, and indorsed to the plaintiff more than six years after its payday. Brief statement of usury and of the statute of limitations.

In defence, it was proved that Butler, on said 12th of July, 1839, held three notes against one Bangs, upon which was due $91,38; that the whole amount of said notes was for excess of interest over six per cent. upon some larger notes which Butler held against Bangs, and which, with the lawful interest upon them, have been paid to Butler; that, on that day, Bangs being called on by Butler to pay said $91,38, due on the three notes, procured the defendant to give his note of the same amount, (the one now in suit,) in payment for and discharge of said three notes, and that said three notes were thus paid and discharged, and thereupon given up to said Bangs.

On the foregoing facts, the following points of law are presented for the adjudication of the Supreme Judicial Court, to wit: —

1st. Whether the note in suit is barred by the statute of limitations?

2d. Whether said note is void for want of consideration?

3d. Whether said note is void by reason of usury, either in this note or the three small notes for which it was given.

4th. Whether this action was improperly brought in the name of the indorsee?

In case either of the above questions are answered in the affirmative a nonsuit is to be entered, otherwise a default and judgment for the amount of the note and costs.

Morrell, for plaintiff.

Sherburne, for defendant, cited R. S. c. 69, § 2; *Bridge* v. *Hubbard,* 15 Mass. 92; *Warren* v. *Crabtree,* 1 Greenl. 167; *Lowell* v. *Johnson,* 14 Maine, 240.

Shepley, C. J. — When a security for the payment of money is usurious, and the debtor procures a third person,

having no connexion with it, to give his note, which is free from usury, in payment, such third person cannot avoid payment of his own debt on account of the usury between the other parties. *Bearce* v. *Barstow*, 9 Mass. 45; *Lowell* v. *Johnson*, 14 Maine, 240; *Little* v. *White*, 8 N. H. 276; *Reading* v. *Weston*, 7 Conn. 409; *Green* v. *Morse*, 4 Barb. 332.

When the note of the third person is given not in payment but for renewal or as a substitute for the original security, the note may be under our law in part or in whole avoided by proof of usury in the first contract. *Bridge* v. *Hubbard*, 15 Mass. 96; *Warren* v. *Crabtree*, 1 Greenl. 167; *Lowell* v. *Johnson*, 14 Maine, 240.

The importance and justice of this distinction will be perceived, when one considers, that the maker of the usurious contract has upon payment of it a right to recover back the usurious interest, which he has paid; and if the maker of the second contract used to pay it were allowed to avoid the payment of his contract, the creditor might be compelled to account to two different persons for the same excessive interest. When the second contract is not received in payment, but as a substitute or for renewal of the first, no such result can occur, for the first debtor can have no claim upon his creditor on account of the usurious contract, and the last may take advantage of the usury secured by his own contract.

The testimony presented in this case proves a payment of the three usurious contracts first named, and not a substitution of this note for them. It was a negotiable note, and by our law, such a note is *prima facie* evidence of payment of the debt for which it was given. The testimony, instead of rebutting the legal presumption, confirms it. The case states, "Bangs being called upon by Butler for payment of these first named notes, procured the defendant to give his said note in payment for and discharge of the same, and said three notes were thus paid and discharged and thereupon given up to said Bangs."

The statute of limitations is no bar to an action brought in

the name of an indorsee upon a negotiable promissory note, which was signed in the presence of an attesting witness. Act of March 23, 1838; R. S. c. 146, § 7; *Quimby* v. *Buzzell*, 16 Maine, 470.

The consideration of this note is sufficient, it having been given to pay three other notes, which Bangs might lawfully pay, if he pleased to do so, and to procure his discharge from all trouble respecting them. *Defendant defaulted.*

JOSEPH BAKER, *in Equity, versus* DANIEL VINING *& al.*

The purchaser of a bankrupt's right in a tract of land, if he was never a creditor of the bankrupt, nor represents any creditor, takes only the rights in law and equity, which the bankrupt had at the time of his bankruptcy.

It is a settled rule, that if one purchases an estate with his own money, and the deed be taken in the name of another, a trust results, by presumption of law, in favor of the one, who pays the money.

By force of authorities, the Court has been constrained, though reluctantly, to adopt the rule, that such payment may be proved by parol, but they will require the proof to be full, clear and convincing.

It has been said that, if the money were paid by two or more persons, and it clearly appeared how much each one paid, a trust in the estate would arise to them, respectively, *pro tanto*. But no case has been found to uphold a trust, where the proportions paid were uncertain. In such a case no trust can be established.

The presumption of a resulting trust may be rebutted by parol testimony.

THE Bill charges that Jonathan Vining, in 1815, purchased fifty acres of land, and paid cash therefor; but being indebted, and with a view to keep the property from the reach of his creditors, he procured the conveyance to be made to William Bowler; that afterwards, to raise money thereon for said Jonathan Vining, and at his request, the title passed from Bowler, until, through several mesne conveyances, it came to Joshua Lord, who gave back a writing, stipulating to reconvey on the repayment of the money he had advanced; that Jonathan Vining, afterwards, of his own money, repaid said Lord, and

procured him to make a conveyance of the land to Daniel Vining, the son of said Jonathan, for the fraudulent purpose of defeating the just creditors of said Jonathan; that this plaintiff believes Daniel knew of his father's insolvency and intent; that said Jonathan, on his own application, made 21st February, 1843, obtained a discharge in bankruptcy, October 7, 1845; that J. T. McCobb was appointed assignee, and by authority from bankrupt court, on 14th December, 1846, sold at public auction, at plaintiff's office, all said Jonathan's right, in law and equity to said land, to the plaintiff; that the deed was dated 15th, acknowledged 16th, and recorded 24th of said month; that the defendant, Estabrooks, was present at the sale, and bid, and had a newspaper in his hand, containing notice of sale; that on 17th December, Daniel quitclaimed to Estabrooks, his brother-in-law, said premises, for the nominal sum of $1000 he giving two notes of $500 each, on 6 and 12 months, without any mortgage or other security, for the fraudulent purpose, as plaintiff believes, of defeating his rights under the sale.

And plaintiff prays that defendants may be required to disclose fully all the facts in the case, and that the Court will decree that they convey to plaintiff their right, and for other relief.

Daniel Vining's answer: — He says he is ignorant of the circumstances connected with the premises and conveyances thereof until they passed into the hands of Lord, but has been informed that they were as stated in the bill; that, in the fall of 1829, he went to Calais; that after he resided there about twenty months, he was written to by his sister Clarissa, informing him of his father's extreme poverty, and that he and the family were about to be turned off the farm in controversy; that he returned and went to said Lord to get deed of said farm, if possible; that Jonathan was then notoriously insolvent, had taken poor debtor's oath two or three times, had quitclaimed all his right to said farm to satisfy creditors; that in August 1831, said Daniel called on Lord, and made a contract for the purchase of said farm, (Jonathan having no inter-

est in the same,) at about $600; paid $100 down and took a bond for a deed, and a lease for one year, for $40; that in the spring of 1832 he paid $115 more, by draft on John Barnard, of Boston; that in January, 1833, he paid $100 more and gave notes for balance; that in the spring of 1833 he paid $100 more, and in August, 1833, paid balance and took deed; that all said payments were his own hard earned money; that the purchase was made in good faith and not fraudulently, as alleged by plaintiff; that at that time Jonathan was largely in debt, and from said Daniel's earliest recollections, notoriously insolvent; that he has permitted his father and mother ever since to live on the place; and that his father neither directly or indirectly paid any thing to said Lord on the purchase aforesaid; nor has he promised to make any such payment or had the ability to do so.

He believes Eastabrooks was present at the sale, does not know his motives, that nothing was done on his part singly, or in connection with said Eastabrooks, for the purpose of deceiving or defrauding Jonathan's creditors, or because he had any right in said premises. He did convey to said Eastabrooks, for good and valuable consideration, (part of which has been paid,) said premises in good faith, and not fraudulently, as plaintiff alleges.

Abstract of the answer of David N. Eastabrooks.

He says he was present at sale at plaintiff's office, made several bids, because he was friendly to Daniel, and supposing the right might sell for a trifle, and believing, from the course already taken, that an attempt might be made to disturb said Daniel in the quiet possession of his property, paid for, as he believes, with his own hard earnings, and justly and fairly purchased, he bid for same, hoping thus to save Daniel from any further trouble and expense, but disclaims any intentions of defrauding or deceiving Jonathan's creditors.

The purchase of the premises by him of Daniel, was *bona fide*, for valuable consideration, and not with design to defraud the plaintiff or Jonathan's creditors.

Much testimony was introduced by both parties.

Points of law made in argument by plaintiff's counsel:—

1. By the bankruptcy of Jonathan Vining, all his rights in law and in equity passed to the assignee. Bankrupt Law, sec. 3. But, in addition to this, the assignee is clothed, not merely with such rights, as the bankrupt himself could enforce, but with all the rights of creditors generally, in cases of fraud, and to the extent of the creditor claims. *Smith* v. *Gordon & al.*, 6 Law Reporter, 313; *Mitchell* v. *Winslow*, *Ib.* 352; *Martin* v. *Root & al.* 17 Mass. 222—8; *Gibbens* v. *Peeler*, 8 Pick. 254; *Holland* v. *Crafts*, 20 Pick. 321—30; *Sands* v. *Codwise*, 4 Johns. 536.

2. By the proceedings had, and the sale and deed from assignee to plaintiff, all the rights the assignee had, passed to the plaintiff.

3. In equity the bankrupt was the owner of the estate in dispute, and the defendants hold it in fraud of creditors, on the ground that the bankrupt's money paid for the land. If the bankrupt's money paid for the land, it is settled that equity will follow the money into the land, and make it available to creditors, or to the assignee who represents them. 2 Story's Eq. 443, (sec. 1201,) and cases cited; *Gardiner Bank* v. *Wheaton & als.* 8 Maine, 373; *Legro* v. *Lord*, 10 Maine, 161; *Buck* v. *Pike*, 11 Maine, 9; *Gordon & al.* v. *Lowell & als.* 21 Maine, 251.

4th. The facts show, that the purpose of Jonathan and Daniel, in taking the deed in the name of Daniel, was fraudulent.

5th. The defendant, Estabrooks, is affected with notice, and stands in the place of Daniel, and subject to all the trusts and equities that his grantor was. 1 Story's Equity, 392, (sec. 403); *ibid.* 383, (sec. 395); *Parkhurst* v. *Alexander*, 1 Johns. Chan. 394; *Frost* v. *Beekman*, *ibid.* 288—9; *Johnson* v. *Strong*, 2 Johns. 510.

Vose, for defendants.

TENNEY, J. — The deed under which the plaintiff claims purports to convey the right, which the assignee of Jonathan Vining had in the premises; but the notice given by the as-

signee prior to the sale was, that he should dispose of the right which the bankrupt had in the land at the time of his bankruptcy. The plaintiff seeks a decree as a purchaser of the right which Jonathan Vining had to the land in controversy in law and in equity. He does not claim as a creditor of Jonathan Vining, and does not state in his bill that he ever held that relation to him. Neither does he bring the bill as representative of any creditor or creditors of the bankrupt, by assignment or otherwise; but the foundation of his alleged right to prevail in the suit is, that by the purchase he stands in the place of the bankrupt at the time of his bankruptcy; and the claim asserted is in no respect to be regarded as superior to the right, which he represents. Whatever may have been the rights of Jonathan Vining's creditors, or the right of his assignee touching the property, as distinguished from the rights of the debtor, in a controversy with Daniel Vining or his grantee, they are not in litigation in this suit.

The conveyances to Stevens and Jewett, and to Lord, are treated by the plaintiff as *bona fide* on the part of the grantees respectively. It is not denied, that the quitclaim deed of Jonathan Vining, of his interest in the premises, to James Child and others, on the 26th of March, 1831, in consideration, that he was discharged from imprisonment on executions in favor of the grantees, was also a *bona fide* and valid transaction. After this release Jonathan Vining had no further interest in the land. The legal title was in Lord, and if Vining had any equitable interest, it passed to his creditors by that deed.

2. But it is insisted, that after the conveyance made by Lord to Daniel Vining, on August 23, 1833, Jonathan Vining had a resulting trust in the premises, by virtue of having paid to Lord the full consideration.

It is a well settled principle, if one purchases an estate with his own money, and the deed be taken in the name of another, a trust results by *presumption of law*, to the one *who pays the money*. "This is a well known and universally admitted rule in equity." *Boyd* v. *McLean*, 1 Johns. Ch. 586; *Buck*

v. *Pike*, 2 Fairf. 9. It is now regarded as also settled by the weight of authority, that where a trust is claimed as arising by operation of law, in consequence of the consideration having been paid by the one asserting the claim, for the conveyance made to the alleged trustee, this payment may be proved by parol; that such evidence is admissible not only against the face of the deed, but in opposition to the answer of the supposed trustee, denying the trust. This proposition, however, has been denied, as being in violation of the statute of frauds. Roberts on Statute of Frauds, 99. But the question has been considered at rest since the time of Lord Hardwicke generally, in chancery practice, rather by the force of authority, which had long prevailed, than by any reasonable basis, on whieh the doctrine can be supported. Sir Thomas Clarke is reported to have said, in *Lane* v. *Dighton*, 1 Amb. 409, that if it was *res integra* he should have thought parol evidence ought not to be admitted, yet he conceived himself bound by the determinations of Lord Hardwicke to receive and act upon such evidence, notwithstanding such evidence is too dangerous in its consequences. The same view was taken by Sir William Grant, Master of the Rolls, in *Linch* v. *Linch*, 10 Vesey, 511, and by Chancellor Kent, in *Boyd* v. *McLean*, 1 Johns. 582, where he says, the cases uniformly show that the courts have been deeply impressed with the danger of this kind of proof as tending to perjury and the insecurity of paper title, and they have required the payment by the *cestui que trust* to be clearly proved. This court have manifested a regret that long practice had established the doctrine, and have felt the necessity of requiring full and convincing proof of payment, as the basis of a resulting trust, in favor of the one making it against the person having the legal title. *Buck* v. *Pike*, 2 Fairf. 9. And so cautious have courts been in the reception of such evidence, although the proofs have been allowed to be read; yet if there was any secret in the cause not understood, the relief sought has been denied. *Gascoigne* v. *Theving*, 1 Verm. 366; *Kirk* v. *Webb*, Prec. in Ch. 84; *Linch* v. *Linch*, before cited.

A doubt was formerly suggested, whether a resulting trust could be sustained, when only a part of the consideration was paid by the party claiming to be the *cestui que trust.* Lord Hardwicke is represented to have said, in *Cross* v. *Norton,* 9 Mod. 233, that "the resulting trust, arose to the one who paid the *whole* consideration, but he never knew it when the consideration moved from several persons; for this would introduce all the mischiefs, which the statute of frauds was intended to prevent. Suppose several persons agree to purchase an estate in the name of one, and the purchase money appears by the deed to be paid by him only, I do not know any case, where such persons shall come into the Court and say, they paid the purchase money, but it is expected there should be a declaration of trust. But in *Wray* v. *Steele,* 2 Ves. and Beame, 389, the Vice-Chancellor says, "Lord Hardwicke could not have used the language ascribed to him. What is there applicable to an advance by a single individual, that is not equally applicable to a joint advance, under similar circumstances?" Chancellor Kent thinks the doctrine in *Cross* v. *Norton* incorrect, and says the cases recognize the trust, when the money of A formed only a part of the consideration of the land purchased in the name of B. The land in such case is to be charged *pro tanto. Botsford* v. *Burr,* 2 Johns. Chan. 405. Judge Story adopts the principle of the later cases. *Powell* v. *Mon. and Br. Man. Co.* 3 Mason, 347.

But these cases all show manifestly, a determination in Courts, not to enlarge by construction or analogy, the doctrine, in allowing the introduction of parol evidence, to contradict the language of the deed, and the answer of the alleged trustee, in order to raise a resulting trust; but to confine the party presenting such a claim rigidly within the limits which practice has established. And no case has been found where a resulting trust has been held to arise upon payments made in common, by the one asserting his claim and the grantee in the deed, wherein the grantor acknowledges the receipt of the consideration from him alone, when the amount belonging to one and the other is uncertain, and unknown even to those

who make the payments; and no satisfactory evidence is offered exhibiting the portion, which was really the property of each. The trust springs from a presumption of law, because the alleged *cestui que trust has paid the money.* Such presumption must be attended with no uncertainty. The whole foundation is the payment, and this must be clearly established. The principle has its origin in the natural presumption, in the absence of all rebutting circumstances, that he who supplies the money means the purchase to be for his own benefit, rather than that of another; and that the conveyance in the name of the latter is a matter of convenience and arrangement between the parties for other collateral purposes. 2 Story's Eq. sect. 1201.

The presumption of a resulting trust may be rebutted by parol evidence. If the plaintiff sets up an equity founded on parol proof, it may be rebutted, put down, or discharged by parol proof. There may be parol waiver of even a written contract. 2 Story's Eq. § 770, a; *Paine* v. *Dyer*, 17 Vesey, 356; *Botsford* v. *Burr*, before cited. Facts and circumstances which satisfactorily contradict the presumption, are received as effectual. 2 Story's Eq. 1202. And the common case of rebutting the presumption of a trust is, when the purchase may be fairly deemed to be made for another, from motives of love and natural affection. The purchase by a parent in the name of the son, would ordinarily be considered as intended for the benefit of the latter, so as to rebut the presumption of a resulting trust for the parent. But this last presumption may be rebutted by evidence, manifesting a clear intention that the son shall take as a trustee. *Ibid.* Where money is advanced as a loan to the party taking the deed, upon the credit of the borrower alone, it cannot be pretended that any presumption of a rebutting trust would arise. *Boyd* v. *McLean*, before referred to.

The answer of the defendant, Daniel Vining, is full, that in August, 1831, he made a contract with Lord, for the purchase of the land, made a payment, took a bond for a deed, and made other payments from time to time, with his own means,

till the whole consideration was paid, and the conveyance was made to him. This is responsive to the bill. But the answer is attempted to be overcome by the evidence introduced by the plaintiff. When the answer and all the evidence are considered, there is much uncertainty in relation to the particulars of the transaction, which took place between the father and the son. It is proved that Daniel Vining was twenty-one years of age in April, 1831; that as early as the fall of 1829, he went to Calais, and labored there from time to time till he paid the sum due to Lord, from his own means or those of his father, or both, and received a conveyance; that in the summer of 1831, Lord having advertised the land for sale, and the father having made no payment to him and being insolvent, the latter caused the son to be informed of the condition of the land and the family; had endeavored to obtain the money for Lord, but could not; every effort had failed, and that there was an opportunity for the son to make a bargain; that it was a time of distress with him, and the family were exposed to be turned out of doors. In pursuance of this request, the son came with a sum of money which was paid towards the farm, and in the course of a few months after, another sum of more than one hundred dollars, was obtained by the son at Calais, by way of a draft on Mr. Barnard, and was received by Lord. The father and the son worked much at Calais between the time the first payment was made to Lord and the time, when the conveyance was made to the son, in making shingles. The business was carried on by the aid of their own and the labor of others, who were employed by them, and was apparently profitable. They were both active and industrious men. The father had a family dependent upon him for support; and such had been this burden, that he had never been able to rescue himself from insolvency. The son was unmarried and was legally bound to afford support to no one, but his parents. Both worked upon the farm, when not at Calais for the purpose of raising money. It appears, that the son was willing to make common cause with his father in supporting the family, and freeing the farm from the debt that lay upon it. The en-

tire money received by Lord was the avails of their eastern labor, unless there might have been a small sum furnished by the wife of the father, which according to the same testimony, was more than supplied, after the payments were made, from a surplus remaining. The money received when they were both at Calais was in a common fund, and when needed, taken from the common depository, to which both had access at pleasure. The son was manifestly willing to expend the whole avails of his labor, under the probable hope that he should eventually secure the farm to himself; the father reposed confidence in him, that he would continue as he had done, to afford him and his family the assistance, which he had before manifested no reluctance to do, when he was obliged in his distress to call upon him. There is no evidence in the case, tending in the least to show, that any accounts were kept between the father and the son, whereby either could ascertain otherwise than by wild conjecture, what sum had been acquired by one or the other as the net earnings, after deducting their expenditures respectively. It would not be strange, that the father should suppose long after the necessary fund was obtained and expended for the desired purpose, that much was the avails of his own labor and enterprise. The son, on the other hand, knowing that he had labored hard, saw the family made comfortable, when they had before been threatened with expulsion from their residence, the farm freed from incumbrance, when for years previous, the father had not been able to stop even the accumulation of interest to its whole extent upon the principal, might well suppose that the debt had been all paid, "with his own hard earnings." Both might be correct in some measure, but both might also, be partially in error. However this may be, when the relation existing between them, and all the facts and circumstances disclosed in the case are examined, it cannot be considered, that there can be the legal presumption, that here was a trust resulting to the father. There is nothing which can satisfy the mind, that what was done by the two, was intended for the exclusive benefit of the father, or that the son was to hold the relation of trustee to him for

any part of the land. If the father really believed at the time he was expending his labor in order to raise the means of payment, for the land, it is rather to be regarded as a loan to the son, to be returned in the gratuitous kind offices, which his advancing age might make necessary, and which he did not appear to doubt, would be cheerfully rendered.

All legal presumption, that it was the expectation of Jonathan Vining, that he had a trust interest in the farm, is effectually repelled by the uniform declarations made by him in the most solemn manner, that he had no interest therein. His acts in negotiating a loan to be secured by a mortgage upon the land, as the agent of Daniel, speak emphatically the same language. It was not until a difficulty arose in the family which had not been anticipated, that his views were changed, and he sought to accomplish a purpose, which could not be done, without his stamping his former declarations with the character of perjury. The most charitable construction, which can be put upon his conduct in reference to the land is, that he did not suppose he had any equitable interest in it, at the time of the conveyance to his son, and notwithstanding some of the avails of his labor contributed with the earnings of the son to accomplish the purchase from Lord, still it was done under such circumstances, that the presumption, by operation of law, if any could be regarded as having arisen, is effectually rebutted. *Bill dismissed with costs.*

NOTE. — WELLS, J. was not present at the argument, and took no part in the decision.

THE STATE *versus* ANSON BARTLETT *& al.*

In a charge for a conspiracy, if the act to be done is in itself illegal, the indictment need not set forth the means by which it was to be accomplished.

If the act to be done is not in itself unlawful, but becomes so from the purposes *for* which, and the means *by* which, it is to be done, the indictment must set out enough to show the illegality.

The crime of conspiracy to obstruct and injure the administration of public justice consists in the unlawful purpose.

An indictment, charging a conspiracy to hinder and injure the administration of public justice, by obtaining a counterfeit bill from the hands of a person to whom it had been uttered, so that it could not be had as evidence upon a criminal prosecution, is sufficient. It need not allege the means to be used, nor that the bill was in the hands of the person named, nor need the bill be described, nor need it be alleged, that the defendants knew that it had been uttered wilfully.

THIS was an indictment against defendants for a conspiracy.

The defendants contended that the second count was insufficient in law.

1. Because it does not particularly set forth the means intended to be employed by the defendants, and show that those means were illegal and criminal.

2. Because it does not set forth specifically the object, purpose and intentions of the alleged conspiracy, and show that such objects constituted crime, in law.

3. Because said indictment does not set forth any certain description of crime, and does not state the facts by which any crime is constituted.

4. Because the conspiracy, as charged, is not to do an illegal act in itself; and the object to be effected thereby and the means to be employed to effect it, are not sufficiently set forth.

5. Because it does not set forth that said "counterfeit bank bill," was in the hands, possession, or under the control of said Gilmore, or that said Gilmore in fact had such bill or any right to it.

6. Because it does not sufficiently set forth and describe said bill.

7. Because said count does not set forth, that said Fish

knew that the bill was not true and was false and counterfeit, or that said Bartlett and Hewett knew that said Fish had so uttered said bill, or that it was false and counterfeit.

But the Court overruled the objections, and ruled that the indictment was sufficient, to which rulings the said defendants excepted.

Morrill and *Bradbury*, for defendants.

The charge is of a conspiracy to hinder, obstruct and injure the administration of public justice.

The inquiry is, when may an individual be said to do an "illegal act," "injurious to the administration of public justice?"

1. "The act," must in and of itself, be "illegal," independent of, and without respect "to, the administration of public justice." The act must be shown to be *unlawful; malum prohibitum* or *malum in se.*

2. It must be injurious to the "administration of public justice."

3. In order to "injure the administration of public justice," "*public* justice" must be in the *act* or *condition*, of being administered. The term implies *doing*, and not a *state*, a procedure, the *act of administering.*

The indictment is insufficient in this: — 1. It does not allege or charge that "any illegal act," was done, nor an "intent to do an illegal act," for any purpose. 2. Nor does it allege that public justice was being administered, that there were, or were to be, any judicial proceedings. Nor does it appear, or is it possible to conceive how "*the administration of public justice,*" was to be injured and obstructed by the attempt to obtain the bill.

The rule is, when the acts set out are not of themselves necessarily unlawful, but become so by their peculiar relations or circumstances, all the matters must be set forth in which its illegality consists. 1 Chit. Crim. Law, 189; *The People* v. *Eckford*, 7 Cowen, 535; *Lambert* v. *The People*, 9 Cowen, 578; Law Reporter, April No.; 4 Wend. 229.

It is not even charged that Gilmore had such bill in his

possession. Whether what is alleged they conspired to do, be unlawful, depends upon the *means* used, or the *objects* aimed at.

It is not charged that they resorted to any "illegal acts," or used any improper means, to effect the purpose, or that in fact *any* act was done to obtain the bill. It is a charge for conspiracy "to obtain," not for obtaining. They conspired to obtain, but never did obtain.

The bill is not sufficiently described. 1 Chit. Crim. Law, 142.

Tallman, Attorney General, for the State.

TENNEY, J. — The persons against whom the verdict was rendered, with John C. Fish, who was acquitted, were charged in the second count in the indictment, with unlawfully conspiring, combining, confederating and agreeing together, deceitfully and fraudulently to obtain from Arza Gilmore and to get into their possession, a certain false, forged and counterfeit bank bill, which the said John C. Fish had before that time uttered and tendered in payment as true to the said Gilmore, with the fraudulent intent, wrongfully and wickedly to hinder, obstruct and injure the administration of public justice, against the peace of the State, and contrary to the form of the statute in such case made and provided. The statute relied upon in support of this indictment, is c. 161, § 11, which provides among other things, that if two or more persons shall conspire, confederate and agree together with the fraudulent and malicious intent, wrongfully and wickedly to do any illegal act, injurious to the administration of public justice, shall be deemed guilty of conspiracy.

A conspiracy at common law, consists in the unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, or in the unlawful agreement to compass or promote a purpose not in itself criminal or unlawful, by criminal and unlawful means. If the crime consists in the illegal object, the purpose must be clearly and fully stated in the indictment. When the act is itself illegal there is no occasion to state the means by which the conspira-

cy was effected. When an indictment charged that the defendant conspired by divers false pretences, and subtle means and devices, to obtain from another large sums of money, and to cheat and defraud him thereof, it was held that the gist of the offence being the conspiracy, it was quite sufficient to state only that fact and its object, and not set out the specified pretences. 2 Leach, 796; 2 B. & Ald. 204.

If the act becomes illegal from the means used to effect it, so much must be set out in the indictment as will show its illegality, and charge the defendant with a substantive offence. In a combination to marry paupers, in order to throw the burden of maintaining them, on another parish, it is necessary to show that some threat, promise, bribe or sinister means were used, because the act of the marriage being itself lawful, the procuring it requires this explanation, in order to be charged as a crime. East's P. C. 461—2; *Commonwealth* v. *Hunt*, 4 Metc. 111.

These principles of the common law are applicable to prosecutions for conspiracies under the statute, inasmuch as the latter has furnished no modes by which prosecutions may be conducted. Such modes are to be sought in the rules prescribed by the common law.

The crime charged in this indictment, consisted in the conspiracy, with the fraudulent intent, wrongfully and wickedly to hinder, obstruct and injure the administration of public justice by the means alleged in general terms in the indictment. The crime consisted in the illegal purpose to be promoted by the combination, and not by illegal and criminal means to effect a purpose, not unlawful. The means in themselves considered might have been lawful. The indictment states distinctly, the combination to obtain possession of the bill, alleged to be counterfeit, which was tendered to Gilmore by Fish, as true and in payment; and for the purpose of hindering, obstructing and injuring the administration of public justice. It is objected, that the indictment does not set forth, specifically, the means intended to be employed in effecting the purpose entertained, and show that those means were criminal; also that it does

not set forth specifically, the object, purpose and intention of the alleged conspiracy, and show that such objects constituted a legal crime. We have already seen, that if the purpose be unlawful, the means may not be stated; and if they are stated, it is not essential, that they should be unlawful aside from the object, which they were designed to promote. If the counterfeit bill had been tendered and passed to Gilmore, as charged in the indictment, and the defendants had conspired together to obtain that bill, and it was done with the design to hinder, obstruct and injure the administration of public justice, it cannot with propriety be said, that more was necessary to establish their guilt, because they had not disclosed in what particular form, they believed that public justice would be administered, or what would be the particular consequences, if any judicial investigation should be made. Their opinions might have been entirely vague upon that subject, although they might well apprehend, that the uttering of such a bill might expose some one to danger, if it remained in the hands of the person, who was supposed to have it in possession.

If they attempted by a conspiracy to obtain the bill from Gilmore, in order to prevent an examination by a magistrate, a Court or a jury, touching all the facts and circumstances with its possession by Fish, and his uttering the same to Gilmore, it was a distinct and an unlawful purpose. The destruction of the bill, or the withdrawal of it, so that it could not be had at such examination, would be a hindrance, an obstruction and injury to the administration of public justice, and injurious thereto. By the authority of adjudged cases, a more specific description of the purpose was not required. *King* v. *Eccles*, 3 Douglas, 337.

It is further objected, that the counterfeit bank bill is not alleged in the indictment to be in the hands, possession or control of Gilmore, or that he had such bill or right thereto; also, that the bill is not described; and that it is not alleged that Fish knew the bill was not true, or that the other defendants knew that said Fish had uttered the bill, or that it was false.

If it was the intention of the defendants to obtain the pos-

session of the bill, in order to prevent a judicial investigation, touching the character of it, and the acts and motives of Fish, in uttering it; and they agreed together to promote that purpose, it was such a conspiracy as the statute contemplates. The possession and the rightful control of the bill by Gilmore, the particular description of the bill, the knowledge of Fish, that it was spurious, or of the other two persons charged in the indictment, that Fish had passed the bill, and that it was counterfeit, were not necessary elements, to constitute the crime, for which they were indicted. The combination and the unlawful purpose could exist, and all these facts be wanting.

Exceptions overruled.

SAMUEL SMITH & *ux. versus* JOHN LAMBERT, *Executor.*

After the lapse of a year, an action for a legacy may, *under some circumstances,* be maintained by a residuary legatee against the executor, before a final settlement of the estate.

To maintain such action, it must appear that there are assets in the hands of the executor; but if it also appear that there are other and superior claims upon the assets, to their full amount, the residuary legatee must be postponed.

For the maintenance of such an action, it is not essential that the probate records should show assets, liable to a residuary legatee; though such records would be evidence which the executor could not controvert. After the lapse of a year, there is a *presumption* that the debts due from the estate, have all been paid.

It is not within the jurisdiction of the probate court to decide *who* are entitled, as legatees, under the will; or to decree *to whom* or at *what time* legacies or distributive shares shall be paid. Such a decree would be merely void. The allowance by the probate court to an executor for money paid to a legatee, beyond his just proportion, furnishes no protection to the executor for making such payment.

TRIAL before SHEPLEY, C. J.

Assumpsit for a residuary legacy made to Mrs. Smith by the will of her father. The will gave to his widow one third of all the estate, and to his oldest son two dollars, and the residue to his other seven children, of whom Mrs. Smith, the

plaintiff, was one, in equal shares. The will was approved, and the defendant was commissioned as executor, in 1840.

The inventory amounted to $1196,59. It was of personal property only, and consisted almost wholly of notes, upon annual interest, due to the estate from the oldest son, and secured by mortgage of real estate.

The executor settled his first administration account in 1848, after the commencement of this suit. He therein charged himself the whole inventory, and claimed and was allowed for items amounting to $965,83. Among the items were sums to the amount of $753,08, paid to legatees as follows, viz.: to the widow, $280,76; to the plaintiff, Mrs. Smith, $58,58, to four others respectively, $99,74; 100,00; 100,00; 114,00. The executor also settled a second account in April, 1848, in which was allowed him $78,53. No debts appear to have been paid since 1843.

If, from the amount of the inventory, there should be deducted the sums paid for debts, funeral charges, and administration expenses, and also the amount to which the widow was entitled, the account would show a balance in the executor's hands. Of that balance the plaintiffs demanded and now claim, one seventh. The final settlement of the estate has not yet been made.

The cause was submitted to the Court for nonsuit or default.

May and *Burgess*, for the plaintiffs.

1. To maintain this suit, it is not necessary that the amount of the legacy should be ascertained by the executor's account, before nor even after the commencement of the suit. Provincial statute of William and Mary, chap. 3, to be found in Ancient Charters and Laws, chap. 19, page 258; statute of Mass. passed in 1783, chap. 24; statute of Maine, passed in 1821, chap. 51, sect. 43; *Farwell* v. *Jacobs*, 4 Mass. 634.

2. The plaintiffs have but to prove the bequest, the probate of the will, the official capacity of the defendant, and his reception of assets; of these facts, the probate records are

evidence. *Farwell* v. *Jacobs*, before cited; *Cowden* v. *Perry & al.* 11 Pick. 503; *Parks & al.* v. *Knowlton & al.* 14 Pick. 432; *Atkins & ux.* v. *Hill*, 1 Cowper, 284.

3. After a demand, the burden is upon the defendant, to justify his refusal. This he may do under his plea of *plene administravit*, by showing that the *assets received* have been exhausted in the payment of superior claims; or he may show a release, or payment. Upon proof, or even upon suggestion that the assets may be wanted for the payment of prior claims, the Court will continue the action, or stay execution until the matter be made certain, or they may require a bond of the plaintiff to refund, as the case may require. *Cady* v. *Comey & tr.* 10 Metc. 459.

The reception of assets may be shown by the records of the Court of probate, but not necessarily so. It may be shown *aliunde*, as by confession or otherwise. *Farwell* v. *Jacobs*, before cited; *Knapp* v. *Hunneford*, 7 Conn. 132.

Morrill, for defendants.

At common law no action could be sustained for a legacy. If an action can be sustained it must be by force of some statute provision. R. S. Mass. (1836), chap. 66, § 16. This statute is like the stat. 1783, by which it was enacted, in general terms, that any person having a legacy, might sue for the same in an action at common law. By the Provincial statute it was enacted, "that any certain legacy, or any residuary or uncertain legacy, reduced to a certainty by the executor's account, may be sued for at common law.

Under these provisions, the decisions in Massachusetts have been made, and they have always held, that no action lies at common law, until the legacy was reduced to a certainty. R. S. c. 108, § 25; 4 Mass. 635. "Any residuary legatee, or any person having a particular legacy given him, under any last will, may sue for and recover the same of the executor, in an action of debt at common law."

When has an executor, according to the common law, assets in his hands, which belong to the residuary legatee and which he may sue for in the form given by the statute?

Not until all the specific legacies are paid, debts, charges and expenses, and the whole liabilities of the estate are discharged, has he assets for such purpose.

Until this is done it cannot be known whether there is any estate for the residuary legatee, and no action at law lies in his behalf. 7 Pick. 14; 8 Pick. 484; 7 Greenl. 467; 2 Wend. 608; 17 Johns. 301; 4 Mass. R. 635; Stat. Mass. 1783, title Legacy; Stat. Mass. 1836, c. 66, § 16; R. S. c. 108, § 25.

The residuary legatee may not have his action, until he is prepared to *allege* and *prove* that *assets* have come into the hands and possession of the executor sufficient *after* all the aforesaid purposes, and that those assets are in his hands. This state of facts must be reduced to a certainty, either by the account of the executor, or by having him cited in, or he must take his remedy on his bond.

The will directs the executor to distribute to residuary legatees *after* payment of debts and charges, &c. No specific time when to be paid, is given.

This action is brought, without the possibility of knowing whether there will or not be any thing to distribute after payment of debts, &c.

The writ is defective, and it is fatal, not *alleging* that there are assets in the hands of the executor to pay what is demanded. 4 Mass. 634; 7 Cowen, 701.

An executor is not to be considered as refusing to account for property received by him, until he has been cited by the Probate court for that purpose. 7 Pick. 14; 8 Pick. 484; 7 Greenl. 467.

Tenney, J. — The statute allows one year to an executor or administrator, in which to administer an estate, and pay all claims against it, unless other provisions are contained in a will annexed to letters testamentary; or unless the condition of the estate is such, that it cannot be done. Hence a particular legacy is payable in one year, if no time of payment is specified in the will, provided there are assets belonging to the

estate in the hands of the executor, subject to the legacy. *Sullivan & ux.* v. *Winthrop & al.* 1 Sum. 1; *Dawes* v. *Swan*, 4 Mass. 208. A residuary legacy depends upon a further contingency. It cannot be known with certainty, that any thing will be received by the executor, upon which a residuary legatee will have a claim, until the extent of the liabilities of the estate are ascertained, and it can be known, that there will be assets remaining after paying the expenses of the funeral, administration, debts and particular legacies. The law presumes, that the state of the affairs of the testator cannot be fully known, and administration perfected within a less period, and consequently an executor is not subject to a suit for a claim against the estate within that time. But it is not reasonable, that he should be at liberty for an indefinite length of time to keep open the administration, and omit to settle his accounts in probate, and thereby avail himself of that fact alone, to postpone the payment of claims, which were at first contingent. Accordingly he is required by his bond to make and return into the probate court, within three months, a true inventory of all estate, which has come to his possession or knowledge; and to render upon oath a true account of his administration within one year, and at any other times, when required by the Judge of Probate. And he is made chargeable in his account with all goods, chattels, rights and credits of the testator, which may come to his hands, and which are by law to be administered, whether included in the inventory or not. R. S. c. 106, § 8 and 41.

When it is made to appear, upon a final settlement of an estate, disposed of by will, that there is in the hands of the executor, an amount to be paid to a residuary legatee, the latter is entitled to receive the same. And if the estate does not appear to have been fully settled, there is nothing in the statute precluding a residuary legatee from receiving so much of the legacy, as he is entitled to receive by virtue of the will, the state of the executor's accounts, and the assets in his hands. In looking into the history of the legislation upon this subject this is manifest. By the Provincial statute of

5 William & Mary, c. 3, it was provided, that any certain legacy, or any residuary or uncertain legacy reduced to a certainty by the executor's account may be sued for, and recovered at common law. In the statute of Massachusetts, passed in 1784, c. 24, there is a revision of the Provincial statute, and it is enacted in general terms, that any person having a legacy given him, may sue for and recover the same at common law. The statute of this State of 1821, c. 51, § 43, gives the right to an executor, who is a residuary legatee, to bring an action of account against his co-executor of the estate in his hands, and may also sue for and recover his equal and proportionable part thereof; and any other residuary legatee shall have a like remedy against the executor. And any person having a legacy given in any last will may sue for and recover the same at the common law. By Revised Statutes, c. 108, § 25, and § 17 of act of amendment, page 766, "any residuary legatee, or any person having a particular legacy given him, under any last will, may sue for and recover the same of the executor in an action of debt, or other appropriate action." A change in the statute first referred to, was intended in that of 1784, and the provision made in the latter has been preserved in all the subsequent revisions; that any person having a legacy given him by will may sue for and recover the same without its being ascertained in amount to a certainty by the executor's account. The statute of 1784, c. 24, early received a judicial construction by the Supreme Judicial Court of Massachusetts, previous to the separation of this State therefrom; and the statute of this State of 1821, and the Revised Statutes, are to be considered in connection with that construction, which by a well-known rule of law is regarded as adopted, when those re-enactments took place. Judge Parsons, after referring to the statute of 5 William & Mary, c. 3, and that of 1784, c. 24, says, "in consequence of these statute provisions legacies have always been recovered by actions at law, in which the legatee shows the bequest, the probate of the will, the official capacity of the defendant, and his reception of assets, making him liable to

pay; of which the probate records are evidence." *Farwell* v. *Jacobs*, 4 Mass. 634.

This opinion was given in a case, where it was expressly found, that sufficient assets came to the hands of the administrator *de bonis non*, with the will annexed, and the claim was not that of a residuary legatee, and in consequence thereof, not contingent in amount. The statute under which that case was decided did not require, that an uncertain residuary legacy should be reduced to a certainty by the executor's account, or in any other mode, but it did require, according to the construction given to it, that an executor in order to be liable to a residuary legatee, should have received assets, making him liable to pay. It is undoubtedly true, that before a residuary legatee is entitled to receive his legacy, it must appear that there are assets in the hands of the executor; and if it is made further to appear, that the full amount of such assets are subject to other and superior claims, the residuary legatee must be postponed. This principle is involved in the very meaning of the term, residuary legatee. But in this respect it stands precisely the same as a particular legacy. The right to recover a residuary legacy, and one which is particular, is placed by the statute upon the same general basis. Neither can be legally claimed, without there being assets in the hands of the executor liable to pay; the latter is recoverable in full, if there are assets sufficient for the purpose; the exact amount of the former cannot be determined, till the administration is completed, and no part thereof can be claimed from assets no more than sufficient to pay the expenses, debts, and particular legacies, which are chargeable to the estate. But it was evidently designed that a residuary legatee, should not be postponed in the receipt of the intended bounty of the testator, till the executor had fully closed his administration. Such a construction, would render the change made by the Legislature of Massachusetts, in 1784, in substance, of no avail. It is manifest that the Provincial law must in many instances, especially when large estates were intended to be given to residuary legatees, have operated with great and unnecessary severity. It was deemed

unreasonable, that when it was evident a large estate would at some time come to the possession of a residuary legatee, who was not the executor, that the executor should hold the whole till the final close of the administration, and at the same time, be able by defending a suit for an insignificant claim against the estate, to delay to make his last settlement, because of the uncertainty of the amount, for which he would be bound to account.

If it should be shown by any competent evidence, that the funeral expenses, the costs of administration, allowance, if any, to the widow, the debts against the estate and all particular legacies are fully paid, and there is left in the hands of the executor assets, a residuary legatee has a right to demand and receive such part of those assets, as he is by the will entitled to. And if not paid after a proper demand, he can sue for and recover the same in an action at common law, which is appropriate.

It is no longer necessary that the executor's account in the probate office should exhibit assets, liable to a residuary legacy, to entitle the one to whom it belongs to receive it; still such account which has been finally settled in probate, is evidence of the highest character, and such as the executor cannot controvert. And under the statute, it is immaterial whether it is filed and settled before the commencement of the action or not, provided it shows that assets were in his hands, after all claims besides those of the residuary legatees were settled, at the time demand was made and before the action was commenced. If by such account, there appeared to have been, when demand was made on the executor, a balance in his hands after paying all claims against the estate arising from expenses, allowances, and particular legacies, and more than a year had elapsed after he assumed the trust, it is a legitimate presumption, that there are no outstanding debts against the estate; for the executor's duty required, that the funds should be appropriated in the payment of debts, in preference to the discharge of particular legacies. And if the payment of certain debts were charged against the estate, in addition to the

payment of particular legacies, there would be the same presumption, that no other debts remained; *a fortiori*, would this presumption arise, when so long a time had elapsed after the executor received letters testamentary with the will, that there could be no existing debt of the estate, which was not barred by the statute of limitations. Such presumption might be rebutted as in other cases, by proof of a state of things which would show that there were claims against the estate, which might absorb the assets on hand. The executor might produce evidence, that he was defending a suit brought against the estate, before the statute of limitations had attached, and if the claimant should be successful, the judgment would exhaust the entire funds. It would be competent for the Court, before which the suit of the residuary legatee might be pending, to order the same continued, unless the plaintiff therein should give such security as the Court might order, on taking a judgment, to refund what he should receive thereon, if it should be necessary to discharge the prior claims on the estate. *Cady* v. *Comey and trustee*, 10 Metc. 459.

So far as the settlement of an executor's account in the probate office, should be within the jurisdiction of the probate court, it would be conclusive upon all. But the allowance of a charge against the estate, not within the probate jurisdiction, would be entirely nugatory. The payment of a sum of money to a supposed legatee, beyond the amount to which he was entitled, would furnish no protection to the executor, although his account containing the charge therefor, might have been allowed. In the case of *Cowdin* v. *Perry*, 11 Pick. 503, the Court say, "But the question, *to whom* and at *what time*, a legacy or a distributive portion under the will, is to be paid by an executor is one of which the judge of probate has no jurisdiction. Any decree directing the executor to pay or not to pay a legacy to a particular person, or at what time a legacy should be paid, whether made upon or without notice, would be extra-judicial, and would afford the executor no justification. It is difficult to conceive how a subsequent ratification or al

lowance of a payment, already made, can be of any greater force or effect."

By applying these principles to the case at bar, a result will be attended with no material difficulty. The will of Benjamin Davis was proved, approved and allowed on the second Tuesday of December, 1840, and on the same day, the defendant, who was appointed executor by the will, received letters testamentary, with the will annexed. The testator gave his wife in the will, one-third part of all the property real and personal, of which he died seized and possessed, after paying all his just debts, funeral charges, the expenses of administration, and a legacy of two dollars to his son Benjamin, who was a debtor to the estate, and from whom were received the principal part of the funds, which came to the possession of the executor. All the residue of his property was given to seven of his children, who were named, in equal shares, one of whom was Sally Smith, the wife of Samuel Smith. This action was brought by Samuel Smith and his wife to recover a balance which they claim as residuary legatees, a demand having been made on July 4, 1847, which was previous to the commencement of the suit.

An inventory was returned by the defendant, in March, 1841, of certain personal property amounting to the sum of $1196,59. The defendant settled his first account of administration in the probate office, on the second Monday of March, 1848, in which he charges himself with the personal estate of the testator, as by the inventory, and claims the allowance of certain sums paid out, a considerable portion of which are to the residuary legatees, of amounts unequal. After deducting from the sum, which he charges himself, the amount paid in debts against the estate, including one of his own, the funeral expenses, and costs of administration, and the amount to which the widow was entitled, there remains a balance, one-seventh part of which exceeds the amount, which the plaintiffs have received, but is much less than the sums, which several of the residuary legatees have received from the defendant respectively. The defendant also settled a second account on April

1, 1848, but no copy thereof has been furnished the Court, and no argument has been founded thereon, on either side.

It was not suggested at the trial that there were any outstanding claims against the estate, or that its administration was not in reality closed. If any debts remained against the estate at the time the suit was brought, they were barred by the statute of limitations, unless seasonably put in suit, and pending, which does not appear. The payment to other residuary legatees beyond their proper proportion is no protection to the defendant, notwithstanding the charges have been allowed in probate. It appears by the date of the charges in the defendant's account settled in the probate court, that there were assets in his hands after paying all claims against the estate, superior in their nature to that of the plaintiffs, at the time this demand was made upon him. Subsequent charges have not been sufficient to reduce the amount in his hands to such an extent, as to absorb the assets then in his possession.

From the amount charged by the defendant to himself, deduct the payments made for funeral expenses, all the costs of administration, debts paid, and the particular legacy to Benjamin Davis; from the balance so found, take one-third part thereof as the claim of the widow; and one-seventh part of the residue, after taking therefrom the amount already received by the plaintiffs, will be the share belonging to them, which together with interest from the time of their demand, will be the damages, which they are entitled to recover. By agreement of parties, *Defendant is defaulted.*

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF OXFORD,

1849.

MEM.—HOWARD, J. was not present this term.

THOMAS CLARK *versus* ZEBEDEE PERRY.

There is a breach of covanent, when a stockholder sells shares in a manufacturing corporation, and covenants that they were free from all incumbrance, if the shares of the stockholders were by statute made liable for the debts of the corporation, and if at the time of the sale, the assets of the corporation are not equal to its liabilities.

THIS is an action of covenant broken, in the conveyance by the defendant to the plaintiff, of two shares in a manufacturing company. The conveyance was made by a warrantee deed in the usual form of conveyance of real estate, and contained the usual covenants. The breach relied on, is upon the covenant, that the shares were free from all incumbrances, and is alleged to consist in this, that at the time of the conveyance, the assets of the company were not equal to their liabilities.

R. K. Goodenow, for plaintiff.

When the conveyance was made, the creditors of the company had a statute lien on the shares of the individual stockholders.

The statute of 1836, chap. 200, sec. 3, (concerning corporations,) declares, "that in all corporations hereafter created by the Legislature," (with certain exceptions,) "the shares of the individual stockholders shall be liable."

The shares, when conveyed to the plaintiff, were by force of the statute, pledged to the creditors of the corporation. The assets of the company not being equal to their liabilities, the shares were liable. A title, free from all incumbrances, could not therefore be given.

This lien of the creditors was, as every lien is, an incumbrance, which might or might not be injurious to the plaintiff. It did eventually operate to his prejudice. It is analogous to the lien by judgment in the courts of New York and the Federal Courts. *Jenkins* v. *Hopkins*, 8 Peters, 345.

It belongs to a large class of liens which are deemed in law an incumbrance, as an inchoate right of dower, *Porter* v. *Noyes*, 2 Greenl. 22; also, the statute lien for taxes, &c.

Gerry, for defendants.

A mere liability to be taken, like other private property of the stockholders, could not constitute a lien upon the shares.

If there was a breach of the covenant against incumbrances, it must have been in *presenti*. *Ellis* v. *Welch*, 6 Mass. 246; *Bond* v. *Appleton*, 8 Mass. 472.

The covenants in the deed are to be construed with reference to the nature of the property conveyed. Mere remote liability, uncertain and contingent, that may or may not ever become operative, depending entirely upon the success of business, cannot constitute a legal incumbrance. *Spring* v. *Tongue*, 9 Mass. 28.

The liabilities of the corporation cannot be an incumbrance on the shares, unless made so by statute.

The agreed statement of facts shows no authority, on the part of the company, to assess a tax on the shares, or in any way involve the shares for the corporate debts, and the moment they were transferred to plaintiff they ceased to be liable to attachment for any debts, previously contracted. *Andover Turnpike Co.* v. *Gould*, 6 Mass. 40.

The statute only provides that the *stockholders* shall be liable, not that their *shares* shall be holden.

It does not appear that the corporation had assessed any tax upon the shares.

The mere diminution in value of the shares, by reason of the company debts, constitutes no breach of the covenants.

The covenants are only that the seller was the owner of the shares, and that they had not been incumbered by himself or by others, although liable to assessments.

WELLS, J. — The defendant conveyed to the plaintiff two shares in the South Paris Manufacturing Company, by a deed of warranty, containing the usual covenants. It is alleged, that at the time of the conveyance, the assets of the company were not equal to its liabilities. And the parties have submitted to the decision of the Court the qustion, whether this fact would constitute a breach of the covenant, that the shares were free from all incumbrances, at the time of the conveyance. In order to decide this question, we must, in the first place, determine whether the shares are liable for the debts of the corporation.

The act of Feb. 16, 1836, making the shares of stockholders liable for the debts of the corporation, took effect on the day of its passage, by its own provisions. It was operative on all corporations afterwards created.

By the act of March 12, 1834, all public acts were to take effect in thirty days from the recess of the Legislature, unless the provisions of any law should otherwise order.

By the act of March 8, 1821, c. 137, § 6, it is provided, that all acts incorporating manufacturing companies, shall be deemed and taken to be public acts.

The act incorporating the South Paris Manufacturing Company was passed Feb'y 6, 1836, but being made by statute a public act, did not take effect, until thirty days after the recess of the Legislature, and was therefore subject to the provisions of the act of Feb'y 16, which made the shares liable for the corporate debts.

The shares, conveyed by the defendant to the plaintiff, were by law liable for the debts of the corporation, at the time of the conveyance.

It is altogether contingent whether the shares will ever be taken for the debts of the company, and as the assets may rise in value, it may be able to pay all its debts. The stockholders, at the time of the conveyance, may be holden for the debts of the company and be compelled to pay them, and a resort to the shares of the plaintiff may never be had.

In the case of *Spring* v. *Tongue*, 9 Mass. 28, the pew, at the time of the sale, in which the defendant had covenanted, that it was free from all incumbrances, was liable by the act of incorporation, for any assessment, which might be necessary to pay for building the meeting-house. An assessment was made for expenses, which accrued before the purchase by the plaintiff, in building the house, and which were paid by the plaintiff to prevent a sale of the pew. It was decided that this was not an incumbrance, for which the defendant was liable in damages, that the damage to the plaintiff arose from the diminished value of the pews in the general estimation.

It does not appear in the case cited, but that the pews, at the time of the sale to the plaintiff, were equal in value to the amount of the expenses. But in the present case it is stated, that the assets were not equal to the liabilities, at the time of the conveyance.

An incumbrance may exist, although it is uncertain whether it will ever ripen into actual damages, they may be altogether contingent, while the incumbrance is certain and existing.

In *Porter* v. *Noyes*, 2 Greenl. 22, it was held, that an inchoate right of dower was an incumbrance on land, and not a mere possibility or contingency. So also an outstanding mortgage is an incumbrance upon the land, and though undischarged, it is a breach of the covenant against incumbrances. *Sprague* v. *Baker*, 17 Mass. 586.

In the present case, as the shares are liable for the debts of the corporation, which at the time of the conveyance, had not

assets sufficient to discharge them, such liability would be an actual incumbrance upon the shares. But the damages would be but nominal. No actual damage could arise, until the purchaser was disturbed, in the enjoyment of his shares.

According to the agreement of the parties, the action is to stand for trial.

ZACHARIAH GAMMON *versus* STEPHEN CHANDLER.

Whether a judgment, rendered by a justice of the peace, has been appealed from, must be determined from the record. Parol evidence is not admissible upon that question.

For the fees and disbursements of an attorney in obtaining a judgment for his client, he has a lien upon it; and that lien cannot be defeated by a discharge given by the client.

Such lien is effectual, though the judgment debtor had no notice that the attorney relies upon it, or even that an attorney had been employed.

S. C. Andrews, for the defendant.

1st. The record of the justice is not conclusive. Parol evidence should have been admitted to contradict it. *Commonwealth* v. *Bullard*, 9 Mass. 270; *Bangs* v. *Snow*, 1 Mass. 181.

2d. Presumption of law, in relation to matters of fact, may be repelled by oral testimony. *Davenport* v. *Mason*, 15 Mass. 85; *Jackson* v. *Leggett*, 7 Wend. 377; *Jackson, ex dem., Genet* v. *Wood*, 3 Wend. 27.

3d. At common law, an attorney has no lien for his costs. *Getchell* v. *Clark*, 5 Mass. 309; *Baker* v. *Cook*, 11 Mass. 236. Nor does the statute of 1821, give any rights to the attorney, but merely prohibits the officer from setting off the costs of the attorney, in cases where set-off is allowed. Rev. Stat. chap. 117, §§ 1 and 37.

4th. An attorney never has a lien upon a judgment for his costs against the adverse party, *unless* such party has notice of his lien. *Baker* v. *Cook*, 11 Mass. 236; *The People* v. *Hardenburgh*, 8 Johns. 335; *Potter, Judge, &c.* v. *Mayo &*

als., 3 Greenl. 34; *Stone* v. *Hyde & al.* 22 Maine, 318; *Martin* v. *Hawks*, 15 Johns. 405.

5th. The Court will protect an attorney's lien to the same extent as the rights of an assignee. *Bradt* v. *Koon*, 4 Cowen, 416.

6th. Where a *bona fide* compromise of the suit has been made, between the plaintiff and defendant, without notice of the lien, the defendant cannot be compelled to pay the attorney his costs. *Chapman & al.* v. *How*, 1 Taunton, 341; *Pinder* v. *Morris*, 3 Caines, 165.

7th. Where a judgment is appealed from, it becomes wholly inoperative, and no execution can issue upon it; nor can it be the foundation of an action of debt. The effect is the same, if the appeal, when duly claimed, be not allowed. *Campbell* v. *Howard*, 5 Mass. 376; *Bemis* v. *Faxon*, 2 Mass. 141.

Bennett, for plaintiff.

TENNEY, J. — This is a suit upon a judgment of a justice of the peace, upon an issue presented by the pleadings, in favor of the plaintiff, for the fees and disbursements of the attorney, by whose agency the judgment was obtained. The case comes before the Court on exceptions to the ruling of the Judge of the District Court, "upon the facts agreed by the parties," at the trial. The defence is, that no final judgment was obtained; and parol evidence was introduced, showing that after the trial by the justice, and after a judgment was announced by him, an appeal was claimed and allowed, and subsequently, the demand embraced in the suit was settled and discharged. The copy of the record of the judgment of the justice was duly certified by him, and the Judge of the District Court disregarded the parol evidence of the appeal, and held, that final judgment having been shown by the justice's record, it was conclusive. He also ruled, that the action could be maintained for the fees and disbursements of the plaintiff's attorney in the original action, notwithstanding the discharge given by the creditor.

The attorney of the creditor, who recovers a judgment, has

a lien upon it, and upon the execution, which may issue thereon, for his fees and disbursements in the suit; but such lien does not attach to the claim which is the object of the suit, till it has ripened into final judgment. Such have been the decisions under statutes in Massachusetts, substantially the same as those of this State, enacted since separation; and our statute of 1821, chap. 60, sect. 4, has received a similar construction. *Baker* v. *Cook*, 11 Mass. 236; *Potter, Judge*, v. *Mayo & als.* 3 Greenl. 34; *Stone* v. *Hyde*, 22 Maine, 318. The Revised Statutes of this State, chap. 117, sect. 1 & 37, recognize the same right of the attorney, and limit it to the execution and the judgment.

Whether a final judgment has been rendered or not, must depend upon the record of the Court, before whom the suit was commenced. This evidence cannot be controlled or varied by parol testimony. *Moody* v. *Moody*, 2 Fairf. 247; *Southgate* v. *Burnham*, 1 Greenl. 396. The copy of the judgment of the justice, which appears in this case, shows that his judgment was final, and that no appeal therefrom was taken. The creditor was entitled to his execution upon that judgment, and the evidence relied upon by the defendant could not impeach it.

It is insisted, that the action cannot be maintained, because the attorney neglected for a long time to collect the costs, and omitted to give notice to the debtor of his intention to resort to his lien upon the judgment and execution. The statute having given to the attorney the lien against the debtor, without any restriction, the omission to enforce it, cannot deprive him of that right, without his consent express or implied.

The statute does not require that the attorney should give notice to the debtor of his design to rely upon his lien in order to retain it against the discharge of the creditor. And in this case, it is not necessary that it should be decided, whether the lien is lost by such discharge, if the debtor was ignorant that such security existed, by reason of having no knowledge, that an attorney was employed in the suit. By the facts agreed in the case, the defendant had full information upon

this point. Pleadings were filed before the justice, and it is to be presumed that this was done by the attorney, when one was employed; and it further appears, that at the time of the settlement and discharge relied upon by the defendant, he lent the creditor a sum of money to enable him to make payment of the costs to the attorney, for whose benefit this action is prosecuted to obtain them. *Exceptions overruled.*

STILLMAN BARD *versus* CHARLES F. WOOD *& als.*

One cannot act in an official capacity, except by consent, upon questions in which other parties are interested, if he stand within the sixth degree of relationship, to either party, according to the rules of the civil law, although he be related in an equal degree to the other party.

Therefore in a disclosure upon a poor debtor's bond, a person, who is an uncle to both of the parties, is disqualified from acting as one of the examining magistrates.

When a debtor, after having duly cited his creditor, shall have taken the poor debtor's oath, although before magistrates not having jurisdiction, the damages are to be assessed according to statute of 1848, chap. 85.

DEBT, upon a poor debtor's bond. The debtor, after having duly cited the creditor, took the poor debtor's oath before two justices of the peace and quorum. One of the justices was an uncle to both the creditor and debtor. Plaintiff objected to his competency. The case was submitted to the Court for decision according to the rights of the parties.

Walton, for plaintiff.

1. One of the justices being an uncle to the creditor and debtor, was incompetent to administer the oath. *Ware* v. *Jackson*, 24 Maine, 166.

2. Judgment should be rendered in conformity to the provisions of the Rev. Stat. chap. 148, § 39; *Barnard* v. *Bryant*, 21 Maine, 206; *Bunker* v. *Hall*, 23 Maine, 26.

3. The act of 1848, § 2, does not change the mode of assessing the damage, where the justices who administer the oath have no jurisdiction. So far as relates to this question, the language used in the act of 1848, is precisely the same as

that used in the Rev. Stat. chap. 115, sect. 78. Consequently the above decisions apply with equal force to the act of 1848.

May, for defendants.

The condition of the bond has been performed; the oath was administered according to the statute; the justice being related equally to both parties, was disinterested within the meaning of the statute.

In case the Court are of opinion that the bond is a statute bond, and that the condition was not performed, the plaintiff, is entitled only to the real and actual damage sustained. Stat. of 1848, chap. 85, § 2.

WELLS, J. orally. — The statute requires that the justices shall be disinterested. Rev. Stat. chap. 1, rule 22, provides that when a person is required to be disinterested, in acting upon any question, in which other parties have rights, any relationship to either of said parties, within the sixth degree inclusive, according to the rules of the civil law, shall be construed to disqualify such person from acting on such question, unless by the express consent of the parties, interested therein. In this case, the justice was within the fourth degree of relationship, and there was no express consent. Though he was *equally* related to both parties, we think he was incompetent, and therefore the justices had no jurisdiction.

A question arises as to the computation of damages. The case comes within the letter of the statute of 1848. That statute includes all cases, where the oath has actually been taken, although the justices had not jurisdiction. And under that statute, the damages must be assessed.

Defendant defaulted.

SAMUEL MORRELL *versus* INHABITANTS OF DIXFIELD.

A surveyor of highways, who, after expending the assessments committed to him for the repair of the road, and finding the same to be insufficient, is directed by the selectmen to proceed in the work, and thereupon expends a further sum, has no remedy against the town for remuneration, *unless* such direction was in *writing*.

Conversation by the moderator and others, in town meeting, relating to a subject legally under its consideration, cannot be proved, as evidence against the town.

The plaintiff and another person made separate claims against a town, growing out of some connected transactions. The town voted to allow the plaintiff 700 dollars, provided the other person would accept $200 for his claim, which he refused to do. *Held*, the town had the right to affix the condition; that it was not of that class which is void because impossible to be performed; and that it would not support an action for the plaintiff.

ASSUMPSIT, tried before TENNEY, J.

The plaintiff was surveyor of highways in Dixfield. A list of assessments upon certain of the inhabitants was committed to him, to be expended in the district assigned to him. In that district a bridge needed repairs. After expending upon it the amount of said assessments, he applied to the selectmen who *verbally* directed him to proceed with the work, which he accordingly did.

Compensation for the sums expended under that direction is claimed in this action. The suit also embraces other claims.

The facts will sufficiently appear in the opinion of the Court.

G. F. Shepley, for plaintiff.

The first ruling excepted to was wrong. The statute, c. 25, § 74, authorizing a surveyor to employ additional labor where the sum assessed is not sufficient to complete the repair of the ways within his limits, with the assent of the selectmen obtained in writing, is directory; and their parol order may well be proved, after having approved the acts of the plaintiff in this regard, by drawing an order to pay him for extra labor, and for money expended and materials found and hired. *Kellar* v. *Savage*, 5 Shep. 444.

The second ruling was wrong. A surveyor of highways is

to exercise his best skill and judgment in the repair of roads in accordance with the wishes of the inhabitants of the town. These wishes are not required to be expressed in writing, or recorded.

But it may be shown by parol what they were, as expressed by the moderator of the meeting that appointed him surveyor, without having been contradicted but approved of by those present. Such exposition is a part of the *res gesta* and proper evidence from whence to draw a conclusion, whether or not plaintiff acted *bona fide* in the discharge of his duty. That he did, is shown by the acts and approval of Marrow, while the work was going on. *Knowlton* v. *No.* 4, 2 Shep. 20. Plaintiff's fault was in being too faithful to the interests of his town. No negligence is alleged against him, no want of honest intentions. While the work was progressing, no one supposed that he was exceeding his authority, if he did exceed it. *Thayer* v. *Boston*, 19 Pick. 511.

The town, by accepting and using the work, are liable. *Abbott* v. *Hermon*, 7 Greenl. 118; *Canal Bridge* v. *Gordon*, 1 Pick. 297.

But there is an express promise. The town voted to pay plaintiff $700 in full for his claim, and he accepted the offer. That was a binding agreement, irrevocable by the town. It makes no difference with the plaintiff, if the town, being indebted to him, (there being another claim held by a third person,) chose to offer this third person a sum of money also. There was no *condition* to be performed, and the plaintiff's claim became absolute, when he accepted the offer of the town. *Nelson* v. *Milford*, 7 Pick. 25; *Bancroft* v. *Lynnfield*, 18 Pick. 566; *Allen* v. *Taunton*, 19 Pick. 485; Co. Litt. 206, 207, a and b.

When Morrell paid Eustis for the stones taken *bona fide* from his soil, to be put in the abutments, the town became indebted to him at once for that amount, and having used it are liable to pay him the amount by him expended therefor.

Walton, for defendants.

SHEPLEY, C. J. — The plaintiff appears to have been a surveyor of highways for the year 1842, for the district called Webb's river in that town. It became necessary to repair a bridge made across Webb's river in that district, and the plaintiff, as surveyor, built an abutment of stone and extended it on each side beyond the bounds of a road which had been used for forty years, thereby making the passageway on to the bridge wider, than it had before been. The abutment appears also to have been so built, by its extension further into the river or otherwise, as to obstruct the passage of the water, more than it had formerly been, to the mills owned by Charles L. Eustis. An action of trespass *quare clausum* was commenced by Eustis against the plaintiff to recover damages occasioned by these acts of the plaintiff. There being no proof of the existence of a way, except the long continued use of it, the plaintiff was unable to make a successful defence, and Eustis recovered a judgment against him for damages and costs, which has been satisfied. This action has been commenced against the town to recover the amount of damages, costs, and expenses paid and incurred on account of that suit.

Upon the proof introduced a nonsuit was ordered, and exceptions were taken to that order, and to the exclusion of certain testimony.

1. The plaintiff offered proof, that the abutment remained unfinished after the money assessed and committed to him had been expended, and that by verbal directions from the selectmen he hired persons to labor upon it; but it was excluded.

Provision is made by statute, c. 25, § 74, that when the sum appropriated is insufficient, "such surveyor, with the consent of the selectmen obtained in writing, may employ inhabitants of the town upon the repair of ways in his limits."

The former statute, c. 118, § 15, did not require, that the consent of the selectmen, or the major part of them, should be in writing. Under the provisions of that statute no urgent necessity was considered sufficient to enable a surveyor to

recover for expenses thus incurred, without the consent of the selectmen, obtained as the statute required. *Haskell* v. *Knox*, 3 Greenl. 445; *Moor* v. *Cornville*, 2 Fairf. 367. The change in the language of the statute requiring the consent to be obtained in writing, was doubtless introduced to prevent any dispute respecting the fact, whether such consent had been obtained. It may also have been intended to protect the town against any inconsiderate action of the selectmen, and to make them more sensible of the responsibility incurred by giving such consent. The previous decisions are of authority still to show, that no action can be maintained by a surveyor without the consent of the selectmen, obtained in the manner prescribed by statute, to recover from the town compensation for such labor. The rights of the town cannot be affected by such employment of labor without its consent.

The argument is, that the town has received benefit from the labor thus performed, by the use of the abutment for the passage of its inhabitants, and should therefore be considered to have ratified the plaintiff's proceedings.

The town and its inhabitants were entitled to use the way as it was formerly made, and by the use of it, as it has since been made, they do not assert any right dependent upon the performance of that labor. It was decided, in the case of *Moor* v. *Cornville*, 13 Maine, 293, that the use of a bridge repaired by a surveyor by labor employed without the consent of the selectmen, would not authorize a recovery of the expense from the town. The testimony was properly excluded.

2. The testimony offered to prove, what was said by the moderator and by other inhabitants of the town in open town meeting, respecting the manner in which the abutment was to be built, was also properly excluded. If the town, in its corporate capacity, could be affected by such remarks, its most valuable rights might be subjected to the control of a small minority. Such remarks cannot be considered as parts of the *res gesta*, for they were not the remarks or declarations of the town, or of persons, for whose remarks it was in its corporate capacity responsible.

3. It is further insisted, that the acts of the plaintiff must be considered as ratified by the town by its paying him by an order drawn by the selectmen on February 29, 1844, for labor, for powder, and for the use of tackle, warps and blocks, to build the bridge. All this may have been appropriate and have been applied to build it without exhibiting any expenditure to make the abutment in a manner not authorized by law. It is only when payment is made in whole or in part of expenses known to have been unauthorized, that the acts, by which such expenses were incurred, can be considered as ratified.

4. At a town meeting holden on July 3, 1846, a vote was passed to pay the plaintiff "seven hundred dollars, provided C. L. Eustis accepts of two hundred dollars voted him on condition, and a final settlement is obtained."

The plaintiff made known his readiness to accept of that sum in full of his claims, but Eustis did not accept the two hundred dollars upon the conditions annexed, and no final settlement was effected.

It is said, that as the condition was one, which the plaintiff could not possibly perform, the engagement to pay became absolute upon the performance of such part of the condition, as he could perform.

It was not an impossible condition, not one, the performance of which was out of human power, and not therefore one which was void. Com. Dig. Condition, D. 1, 2.

Upon the legal testimony presented the action could not be maintained. It is therefore unnecessary to consider, whether the amendment was or was not properly allowed.

Exceptions overruled.

JOHN N. HODGE, *Complainant, versus* BENJAMIN K. SWASEY *& al.*

Upon a defendant's complaint for cost, when the action against him has not been entered in Court, he is bound to furnish evidence that the writ was served upon him; otherwise costs will, *of course*, be allowed against him.

Though an attachment may have been made upon a writ, yet if a summons be not served, the defendant is not bound to appear at the Court even, though he should have procured from the officer, (upon a tender of his fees,) an attested copy of the writ. Such an attachment, with such a copy, so obtained, would not constitute a legal service.

THIS is a complaint for costs. The respondents had sued out a writ of attachment, returnable to the District Court, against the petitioner, and delivered the same for service, to an officer, who thereon attached a threshing machine, the property of the complainant, and carried it away; and it has never been returned.

The complainant, on tendering the fees, demanded and obtained of the officer an attested copy of the writ. The respondents did not enter their said action in Court; whereupon the petitioner, at the return term of said writ, presented this petition for costs.

Harley, for respondents, cited R. S. chap. 114, sect. 24.

No service was made on the complainant. No summons was handed to him or left for him. He was under no obligation to appear at Court. Without a service, the Court could have no jurisdiction for the original plaintiffs. And if there could be no jurisdiction for *them*, there could be none for the *complainant*. The copy was wrongfully given by the officer.

Washburn, for complainant.

The officer, on making the attachment, gave to the complainant an attested copy of the writ. That may be regarded as a sufficient service, equivalent at least to a separate summons. It was competent for the defendant in that suit, by entering his appearance under the action on the docket, to waive the service of the summons.

If the plaintiffs made an illegal service, it is not for *them* to take advantage of it. If they do not choose to pursue their action, they cannot escape the payment of cost. Rev. Stat. chap. 115, § 56; Howe's Practice, 201, 202; *Gilbreth* v. *Brown*, 15 Mass. 178.

G. F. Shepley, in reply.

The question is, whether there was such a service on the petitioner, as would compel him to appear. If he was bound to appear, the Court now has jurisdiction. If he was *not* bound to appear, the Court has no jurisdiction.

The obtaining from the officer a copy of the writ, upon a tender of his fees, cannot be viewed as a service by copy. And if it could, it would be no *legal* service, for the law requires in such actions a "separate summons." There was then, no service of the writ, upon the complainant. The Court had no jurisdiction of his person, and could have issued no execution against him. He was not bound to appear, and costs cannot be allowed him, for attending voluntarily at a Court, to which he was not called.

SHEPLEY, C. J. orally. — The complainant alleges that his goods were attached, and that he was summoned to appear at the Court. The facts show there was no service on him, unless his procurement of a copy of the writ, would make one. Rev. Stat. chap. 114, §§ 23 and 24, provides that a writ may be framed to attach the goods, or it may be by original summons, with an order to attach. But in either case, a separate summons must be served. The writ in this case was in common form of a writ of attachment. It was not served. The officer was bound to give the copy, which the petitioner procured. It was no act of the respondents. There was then no service, nor was there any attempt to make one. The question then is, whether, when there has been no service, a defendant's complaint for costs can be sustained. We think it cannot be done. When such a complaint is made, the proper evidence of service should be presented. The complainant's remedy is

by another, and perhaps, more efficacious procedure. The complaint is dismissed.

Harley moves for cost against the complainant.

Per CURIAM. — Costs are allowed, of course.

WILLIAM ESTES *versus* MICAIAH BLAKE *& al.*

Upon a witnessed note, on which a partial payment has been made within twenty years, there arises no presumption of payment, from mere lapse of time.

The remedy of the holder is upon the note itself, and not upon any implied promise, supposed to arise from such payment.

ASSUMPSIT, upon a witnessed note, payable more than twenty years before the commencement of this suit, on which a part payment had been made, within said twenty years.

Frye, for defendant.

The plaintiff's right arising from the partial payment of a note, is upon the promise, implied by law from such payment, and not upon the original note. Such an implied promise, is a new cause of action. *Little* v. *Blunt*, 9 Pick. 448; *Barrett* v. *Barrett*, 8 Greenl. 353; Greenl. Ev. 2, § 440.

And, in the application of the statute of limitations, it is to be placed in the same category with all other implied promises. 1 Greenl. Ev. § 39.

Gerry, for plaintiff.

WELLS, J. orally. — A payment upon a note within six years of the commencement of the suit, extends its vitality to six years after such payment. So a payment made upon a witnessed note, gives it new life for the next twenty years. The principle is the same in both cases. The payment is an acknowledgment, that it is an existing note, and operates to destroy the operation of the statute of limitations for that period, and negatives a presumption of payment, from mere lapse of time. *Judgment for plaintiff.*

STEPHEN GREENLEAF, JR. *versus* RACHEL HILL, *Ex.*

A note, payable at a future time, with interest annually, was confided for collection to the defendant, who collected it. In the absence of proof as to the time or the amount of the payment, the presumption is, that it was made at the payday of the note, and that the interest was paid annually.

In a case brought from the District Court by exceptions, this Court cannot authorize the remittitur of any excess of interest allowed by the jury in the verdict.

EXCEPTIONS from the District Court, GOODENOW, J.

This is an action of assumpsit on a contract or obligation of which the following is a copy, viz:—"Whereas I hold a note signed by Reuben Wing and Nathan Carver for $300,00 and interest, dated January 18, 1837, annually in four years from date, also a note against the same persons for $245,00 and interest annually in two years, of same date, now for value received I promise to pay Jane Hill Greenleaf one eighth of said sums when collected."

The plaintiff introduced testimony that the defendant had collected the money upon the $245 note, and that on the 30th day of Nov. 1843, the defendant gave up to the promisors the $300 note, receiving in payment, or in lieu therefor, six notes of fifty dollars each, payable in one, two and three years then next with interest, and that the last of said fifty dollar notes was paid, February 25, 1847, to the defendant, the other fifty dollar notes having been paid to the defendant as they became due, and long before the commencement of this suit. The plaintiff also introduced testimony that he was reputed to be the husband of the said Jane Hill Greenleaf; that they came to Norway as man and wife, before this said obligation was given; and that they lived together as such till the middle of Nov. 1846, when the said Jane Hill Greenleaf died. To the admission of this testimony the defendant objected, but the objection was overruled.

The plaintiff also proved that, within the last three years of the said Jane Hill Greenleaf's life, he showed this obligation twice to a neighbor.

The amount payable to said Jane Hill Greenleaf, as specified in said obligation, fell to her as her proportion of the estate of her father, who died about that time.

Hereupon the defendant contended, that the plaintiff's action was not maintained; because 1st, there was no sufficient proof of the marriage; 2d, that there was no sufficient proof that the plaintiff had ever been properly put into the possession of the obligation; 3d, that a demand was necessary previous to the commencement of the suit. But the Court ruled otherwise, and directed a verdict for the plaintiff, if they believed the testimony, and directed the jury to allow annual interest up to Nov. 30, 1843, and simple interest since. Hereupon the jury returned a verdict for the plaintiff for $125,75.

To all which rulings and directions the defendant excepted.

Dunn, for the defendant.

This action cannot be maintained, as the money was not "collected," when it was commenced.

The exchange of notes was not a payment.

There was no sufficient or legal proof of marriage. Reputation of it is not sufficient. The defendant cannot prove a negative.

There was no proper, competent, or legal proof that the obligation had been reduced to possession, by the plaintiff.

Even if said Jane Hill Greenleaf was the wife of the plaintiff, yet this action cannot be maintained.

By the statute of 1844, chap. 117, the property of the wife is to remain "as her own property"; and, by sect. 3, she can only release to the husband, the "control of such property," and he can only receive the income. And by the statute of 1847, chap. 27, this new provision in statute law is made to apply to all married women, whether made before or after the passage thereof.

George F. Emery, for plaintiff.

SHEPLEY, C. J. orally. — The giving up of the $300 note, and receiving other notes, in room of it, may be deemed a payment. The $245 note was paid, but the case does not show at what time it was paid. In the absence of proof, the presumption is, that it was paid at its maturity, and that, upon both notes, the annual interests were paid, as they became due. Thus, the $245 note, is to be considered as paid on the 18th January, 1839, and the $300 note, on the 30th November, 1843.

The instruction required the jury to allow *annual* interest upon the one-eighth of the $245 note, from its date to 30th November, 1843, more than four years after it was paid to the defendant. In that respect, the ruling was erroneous. If it were a case before this Court, a *remittitur* of the excess might be authorized; but that cannot be done, on exceptions from another Court. *Exceptions sustained.*

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF FRANKLIN.

1849.

JOHN WITHEREL *& al. versus* GEORGE R. RANDALL.

Exceptions from the District Court will be dismissed, if introduced into this Court before the action shall have been prepared by nonsuit, default, verdict or otherwise, for its final disposition in the District Court.

Thus, an amendment having been allowed in the District Court, exceptions were taken, and, before any further proceedings were had in the District Court, the exceptions were entered here. *Held*, the exceptions must be dismissed.

The want of the seal of the proper court, to an original writ, is an unamendable defect.

EXCEPTIONS from the District Court, GOODENOW, J.

Assumpsit. The writ was without seal. The defendant moved that it be quashed for that cause. The plaintiff moved for leave to affix a seal, which was allowed, and the seal of the Court was affixed, and the defendant's motion was refused. The defendant excepted, and before any further proceedings were had in the District Court, the exceptions were entered here.

Walton, for defendant, cited 9 Pick. 446; 3 Fairf. 196; 19 Maine, 204.

Sherburne, for plaintiff.

The seal is the only part of an original writ, the form of which is exclusively under the direction of the District Judge; and yet, if he has no authority to allow the correction of an error in relation to it, it is certainly that part of a writ over which he has the least control. But no case is to be found where the Supreme Court has doubted the authority of the Court of Common Pleas or District Court to correct any error which might appear in their own seal.

The Supreme Court has no judicial knowledge or control of the seal of another Court. It does not follow, that a seal cannot be affixed, merely because it is matter of substance. This may show that a Court is not bound to allow such amendment, but it does not take away the right to do it. It is the every day's practice of our Courts to amend matters of substance. Their established rules allow it.

In *Mathews* v. *Blossom*, 15 Maine, 400, the Court allowed a writ of original summons to be changed to a writ of attachment, and declare at the same time, that it is matter of substance. So in *Ordway* v. *Wilbur*, 16 Maine, 203.

Whatever technical importance may be attached to the seal, there is really no part of a writ, so truly a matter of form, and nothing else but form, as the seal. It neither adds to nor takes from a writ; it conveys no information as to the parties, the action or the cause of action. It is often so faintly impressed, as to make it impossible to say whether it belongs to one Court or another, and the real substance of the writ is the interpretation of the seal.

The *teste* of a writ may be amended, and is declared to be matter of form, although required by the constitution of the State. *Ripley* v. *Warren*, 2 Pick. 592.

The signature of the clerk has been decided in New York to be amendable. *Pepoon* v. *Jenkins*, Coleman's Cases, 55.

The *date* of a writ is amendable. *Parkman* v. *Crosby*, 16 Pick. 297.

The *ad damnum* is amendable. *Danielson* v. *Andrews*, 1 Pick. 156.

SHEPLEY, C. J. — This Court has twice decided that an original writ, without the seal of the proper court, is defective; and that the defect is not amendable. *Bailey* v. *Smith*, 3 Fairf. 196; *Tibbets* v. *Shaw*, 19 Maine, 204. In the present case there was no waiver by a plea to the merits.

The exceptions appear to have been properly taken, but the case was irregularly introduced into this Court before there had been any proceedings in the District Court suitable to present it for final judgment on the merits. *Dagget* v. *Chase*, 29 Maine, 356.

Exceptions dismissed.

GILBERT HILLMAN *versus* NATHAN WILCOX.

An affirmation or representation of the quality of an article, at the time of selling it, is held to be a warranty, if so intended by the parties to the sale, and not intended merely as the expression of an opinion.

If the seller represent the article to be sound, when he in fact knows that it is not sound, and if the purchaser relies on that representation as a warranty, the seller is liable. And the purchaser may elect to pursue his remedy, either by action of tort or of assumpsit.

EXCEPTIONS from the District Court, GOODENOW, J.

Assumpsit upon a warranty in the sale of a yoke of oxen by the defendant to the plaintiff. The oxen were unsound, and the plaintiff contended that the defendant warranted them to be sound. There was much testimony, and it was somewhat conflicting, as to the language used by the defendant in making the sale.

R. Goodenow, for defendant.

The representation of the defendant, in order to constitute a warranty, must have been one of the terms or elements of the contract, and made at the time of sale. 3 Black. Com. 166; Comyn on Con. 257; 3 Starkie's Ev. 1666.

Even if, after the contract was perfected, and the property had passed from the defendant, he did say he would warrant the oxen sound, it was but *nudum pactum.* 2 Espinasse's N. P. 631.

A warranty of soundness of a chattel is *never implied.* 2 East, 314; 2 Black. Com. 451; 3 *ib.* 165; 3 Starkie's Ev. 469, note e.

The rule of the common law is well established, that upon a sale of goods, if there be no *express warranty* of the quality, and no actual fraud, the maxim *caveat emptor* applies, and the goods are at the risk of the buyer. *Winsor* v. *Lombard,* 18 Pick. 59, 60; 2 Kent's Com. 3d ed. 478; *Mixer* v. *Coburn,* 11 Metc. 562.

An assertion respecting the article sold, in order to amount to a warranty, must be positive and unequivocal, and one on which the buyer places reliance.

As to the form of action and the distinction between an action of assumpsit on a warranty, and an action founded in deceit, and the evidence to sustain each, I refer to 2 Dane's Abridg. c. 62, a 4, § 1, 2, 3, to 16; *Thompson* v. *Ashton,* 14 Johns. 314, 316; *Myer* v. *Eveth,* 4 Camp. 22; *Cutler* v. *Cox,* 2 Blackford, (Jas.) 178; 3 Starkie's Ev. 1665, and note; and *Evertson* v. *Mills,* 6 Johns. 138.

H. & H. Belcher, for plaintiff.

Wells, J. — This was an action of assumpsit upon a warranty, alleged to have been made by the defendant upon an exchange of cattle, in representing those owned by him to be sound. It is now well settled, that an affirmation or representation, in relation to the quality of a chattel at the time of the sale or exchange, is considered a warranty, when it is so intended by the parties, and is not mere matter of opinion. *Hastings* v. *Lovering,* 2 Pick. 214.

The Judge of the District Court instructed the jury, "that this was an action of assumpsit, and to maintain it, it would be necessary for the plaintiff to prove, that the defendant

warranted the cattle to be sound at the time of the sale; that representations that they were sound, if false and the defendant was proved to have known they were false, would not be sufficient to maintain the action in its present form, although they would be sufficient to maintain an action for deceit in a different form from this action."

If the defendant represented his oxen to be sound, when he knew they were not, and the parties relied upon the representations as a warranty, he would undoubtedly be liable to an action *ex delicto* for the deceit. The plaintiff might elect to sue him in assumpsit or case, if the representations were intended as a warranty. 1 Chitty's Plead. 138; *Williamson* v. *Allison*, 2 East, 446. The plaintiff might adopt either form of action. He would not be compelled to explore the disposition of mind, with which the defendant made the representations, if they were sufficient of themselves to imply a warranty. He could not be deprived of his action of assumpsit upon representations amounting to a warranty, because they were made by the defendant *malo animo*. When there is a warranty the *scienter* is immaterial, and upon a breach of it, the form of action may be in case or assumpsit.

It appears from the case of *Williamson* v. *Allison*, that the ancient mode of declaring upon a broken warranty was in tort, that the warranty is the thing, which deceives the buyer, who relies upon it and is put off his guard, and the breach of it establishes the deceit, but it was found more convenient to declare in assumpsit for the sake of adding the money counts.

In that case the declaration was in tort, for a breach of warranty, and although the *scienter* was alleged, it was held unnecessary to prove it.

The exceptions are sustained
and a new trial granted.

Charles Noyes *versus* Charles Shepherd & *als.*

In protecting his own property, every person is bound to use ordinary care not to injure the property of others.

Imminent danger from fire or flood, cannot excuse or exempt a person from the use of ordinary care to prevent unnecessary injury to property of others.

What would, under such circumstances, be ordinary care, might differ from that degree of caution and prudence, which would be required when no immediate danger was impending.

If one, in attempting to rescue his own property from such imminent danger, shall do injury to another's property, he is not protected from liability, by the absence of all malicious or evil design, and of all such gross carelessness as would authorize an inference of bad intention.

The cases in which the Court may decline to set aside a verdict, when it was rightfully found, though under erroneous instructions, are only those cases in which the Court is able to perceive that, under correct instructions, a different verdict could not have been rightfully found.

Action of the case. The evidence tended to prove the following state of facts: —

There was a pond of deep water, which had no visible inlet or outlet, upon a hill, half a mile from the Sandy river, having its surface about 100 feet above the surface of the river. At the foot of the hill there was a brook, coming from another direction. The defendant, Shepherd, owned the hill and most of the land between the hill and the river. His dwelling-house, shop and barns were on the margin of the brook. The plaintiff had a dam and mill upon the brook near the river. The water of the brook was found to be insufficient for working the plaintiff's mill; and he had obtained permission from Shepherd to tap the pond, by making a shoal and narrow canal through its bank, to let the water flow into the brook above the mill; upon condition he would insert a flume and secure the water thoroughly from gullying, and letting out the mass of water in the pond. The plaintiff made, and for two years had used the canal; but did not secure it, so as entirely to prevent the water from washing away some of the earth upon the bottom and sides of it.

This action of the water created alarm to Shepherd and to the inhabitants of the village below, lest the bursting out of the pond should inundate and sweep away their buildings. Shepherd put a dam across the canal, but not of sufficient tightness to stop the water from leaking around it, through the banks, which were of gravel and quicksand. The alarm in the community continued to increase. There was much diversity of advice as to the best method for averting the danger. Shepherd and the other defendants supposed that a few feet of the water might be drawn off in safety, by placing a tight platform along on the bottom of the canal, and then removing the dam by degrees to the level of the platform; and that afterwards, by deepening the canal and making a new platform upon the bottom, another few feet of water could be drawn off in safety; and that by continuing that process, the danger might be ultimately avoided. They were admonished that such a course would be unsafe, but concluded to make the attempt. They entered upon the work, and removed a part of the dam. The flow of water was soon too great to be controlled. The channel rapidly grew wider and deeper, and in a few hours the pond burst out. The inundation swept away Shepherd's buildings, the bridge, the plaintiff's dam and mill, and the houses of many other persons, who escaped only at the imminent hazard of life.

This action is brought to recover for the loss of the plaintiff's dam and mill.

WHITMAN, C. J. instructed the jury, that if the defendants were at the pond and aided or assisted Shepherd in letting it out, having good cause to apprehend imminent danger (from the bursting out of the pond) to their own property or that of the neighborhood, this action could not be maintained, unless the jury were satisfied that the defendants had some malicious or evil design toward the plaintiff, or were so grossly careless in what they did, as that the jury, from such carelessness, might reasonably infer that they were actuated by some evil intent; and that a mere mistake or misjudgment in regard to the best course to be pursued, and acting upon such mis-

take or misjudgment would not render them liable, unless the jury were satisfied that there was a want of good faith, or reasonable precaution in what they did to avoid the impending danger. That Shepherd's property being in such danger, the other defendants might well aid him in fairly endeavoring, according to their best skill and judgment, to prevent the mischief feared and impending.

May, for plaintiff.

It is conceded that the pond had given indications of bursting out, and that Shepherd's property was in imminent danger. What, then, were the defendants' rights? Could they lawfully let out the water at all? If so, were they bound to the exercise of *extraordinary* care, or of ordinary care, or of no care at all?

The first part of the instructions to the jury was, that the defendants were not liable, unless they had some malicious or evil design, or were guilty of such gross carelessness as showed an evil intent. The second part of the instructions do not materially qualify the foregoing.

It is true that by implication, the jury might infer from the second half that defendants would be liable for a mere mistake or misjudgment in what they did, *provided* such mistake or misjudgment were accompanied with bad faith or a want of reasonable precaution, and so far as any of the defendants were aiding Shepherd, this part of the instructions seems to require the exercise of *their* best skill and judgment. But in deciding what these instructions mean the Court will look at *all* the language and give effect to its plain and obvious import.

The jury must have understood that a want of reasonable precaution was synonymous with gross carelessness; and that a want of good faith was synonymous with a malicious or evil design. Otherwise they were at full liberty to say, if they thought so, that no care at all, or the very slightest care was reasonable precaution. Who can tell, in any given case, what is *reasonable* precaution, without knowing whether the law of the case requires ordinary care, or extraordinary care, or even

the slightest care? The remark of the Judge, that the other defendants might well aid the defendant, Shepherd, in fairly endeavoring, according to their best skill and judgment, to prevent the mischief feared and impending, does not prescribe the rule of ordinary care as to them; for the exercise of *their* best skill and judgment may or may not have been ordinary care.

The instructions then, fairly understood, excused the defendants from all liability, unless they *had a malicious or evil design*, or were guilty of *such gross carelessness* as would authorize the jury to infer an *evil intent* in what they did.

But the jury should have been instructed that the defendants were liable, notwithstanding the imminent danger to the property of the defendant, Shepherd, if they let out the pond, and the plaintiff sustained damage thereby, unless in doing so they exercised *ordinary care and common prudence.*

The rule of law in such case is, that if the defendants had a right, under the circumstances, to let out the pond, the exercise of such right must be accompanied by a cautious regard to the rights of others. No protection of one's own property will justify the doing of any acts which will endanger the property of another, who is not in fault, unless such acts be done with caution, or at least with ordinary care. *Pantown* v. *Holland*, 17 Johns. 92; *Barnard* v. *Poor*, 21 Pick. 378; *Bachelder* v. *Heagan*, 18 Maine, 32; *Howland* v. *Vincent*, 10 Metc. 371.

"It is immaterial as respects the right of action, whether the acts of the defendants were by their intention and purpose injurious to the plaintiff, or the mischief which ensued was accidental and beside their intention, or contrary to it." *Cole* v. *Fisher*, 11 Mass. 137.

Sherburne, for defendants.

The first part of the instructions are so connected with the latter part, that a jury could not have been misled, even if, when standing alone, they would be too strong for defendants.

Assuming it to be necessary that the defendants should have

acted with reasonable precaution or ordinary care, (which amounts to the same thing,) the whole instructions taken together go to that extent. They amount to nothing more than several distinct hypotheses, either of which, if found by the jury, would charge the defendants. If the jury found gross carelessness, or an evil intent, or a want of reasonable precaution, in either case the verdict must have been for the plaintiff.

But the first part of the instructions, if standing alone, would not have been erroneous, as applied to the facts in the case. Whatever was done, if any thing, by Shepherd, was done under the influence of great danger to his property. The danger had been brought upon him by the gross negligence of the plaintiff. The acts of a man so situated, are not to be scrutinized as they might be under other circumstances, and least of all, by the man whose wanton acts caused the injury. Under such circumstances, the plaintiff must prove carelessness so gross as to amount to evil intent, before he can sustain this action.

The burden of proof is on the plaintiff to show either gross carelessness or an evil intent. Such is the substance of the averment in the writ, and it must be proved. It is the gist of the action, and if the court had omitted the last part of the instructions entirely, and the part which the plaintiff complains of had stood alone, it would have been strictly correct upon the facts as reported. *Bachelder* v. *Heagan*, 18 Maine, 32; *Howland* v. *Vincent*, 10 Metc. 372; *Clark* v. *Foot*, 8 Johns. 329; *Thurston* v. *Hancock*, 12 Mass. 220; *Callender* v. *Marsh*, 1 Pick. 418.

The distinctions in the degrees of care, to which the plaintiff's counsel refers, have no application to a case of this kind. They apply more particularly to bailments.

The plaintiff should also show that he acted himself with ordinary care. The evidence is, that he took no care to preserve either his own property or any other. If Shepherd had not used more care than plaintiff did, the pond would have gone out weeks before it did go. Taking the evidence strong-

est against Shepherd, he only removed a dam which he had himself put in to keep the pond within its proper bounds. If, then, the removing this dam really caused the pond to break out, it must necessarily have gone much sooner, if Shepherd had not put it in.

If the defendant, Shepherd, could have saved his property by such precautionary measures as he attempted, it would have been culpable negligence in him not to have done it. 2 Greenl. Ev. § 473. Indeed, it is hard to conceive a case in which one would be authorized to raise his hands for the protection of his property, if this does not furnish it. The pond and the fall were a nuisance, and made so by the plaintiff.

"A nuisance is said to be any thing which worketh hurt, inconvenience or danger. That Shepherd erred in his notions of what could or could not be done, is no evidence of heedlessness or carelessness.

But he did not err. The pond he knew must come out; and the effects were of course uncertain. He had a right to draw it off in the-day time, that if his property was lost, he might at least save himself and family.

But however wrong the instructions might have been, the jury came to a right decision. The burden of proof is on the plaintiff, and there is nothing in the case to show, that there was any want of care on the part of the defendants in what they did, nor that what all or either of them did was the cause of the loss.

If the verdict is right, the Court will not disturb it, however wrong the instructions may have been.

Shepley, C. J. — The rules of law applicable to cases of injury, occasioned by the lawful acts of one person to the property of another, appear to be quite well established.

A person is required so to conduct in the exercise of his own rights and in the use of his own property, as not to do injury by his misconduct or by the want of ordinary care to the rights or property of another.

If the party, whose rights or property has been injured, has by the want of ordinary care contributed to occasion the injury, he will not be entitled to recover damages resulting from it. *Bachelder* v. *Heagan*, 18 Maine, 32; *Kennard* v. *Burton*, 25 Maine, 39; *Barnard* v. *Poor*, 21 Pick. 378; *Howland* v. *Vincent*, 10 Metc. 371; *Clark* v. *Foot*, 8 Johns. 421; *Livingston* v. *Adams*, 8 Cowen, 175; *Gardner* v. *Heartt*, 1 Denio, 466; *Cook* v. *Champlain Transportation Co.*, *ib.* 91; *Massey* v. *Goyner*, 4 C. & P. 161; *Proctor* v. *Harris*, *ib.* 337.

Imminent danger expected from fire or flood, cannot excuse or exempt one from the use of ordinary care to prevent unnecessary injury to the property of others. What would under such circumstances be ordinary care must be determined by a jury; and it might not be the same care or an equal degree of caution, which would reasonably be expected, when there was little or no cause to apprehend immediate danger. However imminent the danger may be, a person must be held responsible for an injury to the property of another, occasioned by negligence of a less culpable character than such gross carelessness, as would reasonably authorize an inference, that it was done with an evil intent.

The first clause of the instructions appears to have required, that the jury should so find, to authorize a verdict for the plaintiff.

The second clause seems rather suited to guide the jurors in their deliberations respecting the effect of an erroneous judgment formed by the defendants, than to call their attention again to the degree of care, which the defendants were required to exercise. It does not appear to be suited to destroy entirely the effect of the former clause upon their minds and to leave them to conclude, that it was to have no influence. When it is perceived, that the instructions contained in the former clause were erroneous, and that they might and probably did have an influence upon the minds of the jurors, the plaintiff must be considered as aggrieved by the instructions.

The counsel for the defendants insists that the verdict should not be set aside, because the injury was occasioned in part at least by the misconduct or negligence of the plaintiff. No such question appears to have been presented to the consideration of the jury, whose province it was to decide upon it.

He further insists, that the pond had become a nuisance, and that the defendants might lawfully abate it. No such question appears to have been presented to the jury. It is not the duty of the Court to decide it.

He also insists, if the instructions were erroneous, that the verdict was right, and that it ought not to be set aside. The rule deducible from the cases cited to support it, is only applicable to cases, in which the Court is able to perceive, that under correct instructions a different verdict could not have been rightfully found. The present case does not come within the rule. *Verdict set aside and new trial granted.*

EPHRAIM W. WOODMAN *versus* PETER RANGER.

A process of forcible entry and detainer, cannot be sustained, under chap. 128, of the Revised Statutes, unless the complaint *allege* that the relation of landlord and tenant had subsisted between the parties; or unless either the entry or detainer was forcible.

THIS was an action of forcible entry and detainer, founded upon chap. 128 of the Revised Statutes.

The plaintiff offered to prove the relation of landlord and tenant between the plaintiff and defendant, and that the tenancy had expired previous to giving the thirty days notice; plaintiff further proved that he gave the defendant notice in writing more than thirty days before filing his complaint.

WHITMAN, the presiding Judge, ruled that the action could not be maintained on the second section of the statute unless the complainant could show that the entry and detention, one or both, were forcible. And that it could not be maintained

on the fifth section, because there was no allegation in the complaint, that the complainant was landlord and the respondent his tenant, and that his tenancy had been determined.

A nonsuit was ordered, as complainant did not propose to prove either a forcible entry or detainer; and the plaintiff excepted.

Cram, for complainant.

Tripp, for defendant.

By the Court. — The nonsuit was rightly ordered.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF SOMERSET,

1849.

THE STATE *versus* JOHN W. WEEKS.

An indictment for maliciously breaking down a dam, belonging to a person named, cannot be sustained except on proof that such person had some interest in the dam.

EXCEPTIONS from the District Court, RICE, J. presiding.

Indictment for maliciously breaking down, injuring and destroying a reservoir dam, the property of Andrew Morse, Jr., erected for the purpose of maintaining a head of water for the use of his mills; to the injury of said Morse.

Evidence was introduced, tending to show, that the defendant had some cause to believe that he himself owned the dam, and had the right to control it; and that, needing the water for the use of a mill which *he* owned on the stream below, he opened the bulkhead and let down some water. There was no other injury done.

The counsel for said Weeks, requested the Court to instruct the jury, (or advise them, if instructions should be declined,)

1st. That if the defendant owned the reservoir dam at the time of the act complained of, he is entitled to their verdict.

2d. That if he *believed*, he had the right to that dam and

to do the act complained of, and had good reasons so to believe, then he is entitled to their verdict.

3d. That if he opened the bulkhead, and did it because he wanted the water, and not with the malicious intent to injure Mr. Morse, then he is entitled to their verdict.

The first two requested instructions were declined and the last was given. And upon the subject matter of the requests, the Court stated to the jury, that it was of no consequence whether said Weeks owned the dam or not; that if he did own the dam, and did not really desire to use the water, but merely under a pretence that he needed it, did maliciously and for the purpose of injuring Morse, cut away the bulkhead, then the verdict should be against him. The verdict was against the defendant and he excepted.

J. S Abbott, for defendant.

The dam is described in the indictment as the property of Morse. It was necessary that the proof should conform to the allegation, even if it had not been necessary so to allege. The case not only fails to exhibit any the slightest evidence of ownership in Morse, but does exhibit evidence to disprove the allegation, and thereupon the Court not only declines to give the requested instructions, but does instruct the jury that, "it was of no consequence whether said Weeks owned the dam or not."

Matter of description must be proved as alleged. *State* v. *Noble*, 15 Maine, 477; *State* v. *Furlong*, 19 Maine, 230; *Commonwealth* v. *Mahar*, 16 Pick. 120; *Commonwealth* v. *Morse*, 14 Mass. 217; *Commonwealth* v. *Manley & al.* 12 Pick. 173.

Tallman, Attorney General, and *Hutchinson*, County Attorney, submitted the case without argument.

Shepley, C. J. orally. — There was error in the instruction, that it was of no importance whether Weeks owned the dam or not, also in the instruction, that the defendant might be convicted, although the dam was not owned by Morse. The ownership by Morse, being alleged, must be proved. The in-

struction dispensed with such proof, and authorized a conviction, even if the dam was not owned by Morse, but was owned by Weeks himself. *Exceptions sustained.*

JOHN PIERCE *versus* HARRISON STEVENS.

Replevin can be maintained only by one having the right to possession.

Parol evidence is admissible to prove that, at time of making a mortgage of personal property, the parties agreed that the possession should remain with the mortgagor. Such evidence does not contradict the mortgage.

REPLEVIN for a horse, which Charles Pierce had mortgaged to the plaintiff, and which the defendant also claims under said Charles. The defendant offered to prove by parol that, at the giving of the mortgage, it was agreed by the parties to it, that the mortgager should be entitled to the possession of the horse for one year, which had not expired when this replevin suit was commenced. This evidence was rejected. The defendant, after verdict against him, filed exceptions.

J. S. Abbott, for defendant.

The writ is dated 15th of April, 1847. The mortgage bill of sale, 28th of July, 1846. The year had not expired, during which it was proposed to prove that the debtor, Charles Pierce, had the right to the possession and use of the horse. The plaintiff had not the right of possession, and so could not maintain this action, and the evidence offered should have been received. *Wyman* v. *Dorr*, 3 Maine, 183; *Ingraham* v. *Martin*, 15 *ib.* 373; *Lunt* v. *Brown*, 13 *ib.* 236; *Putnam* v. *Wyley*, 8 Johns. 432.

Bronson, for plaintiff, submitted without argument.

TENNEY, J. orally. — Without any stipulation to the contrary, a mortgagee of either real or personal estate is entitled to immediate possession. But the parties may legally contract that the possession may remain with the mortgager. As to personal property, such an agreement does not contradict the

mortgage, and may be proved by parol. A plaintiff having no right to the possession, cannot maintain replevin.

Exceptions sustained.

GEORGE W. COLLINS *versus* JAMES LAMBERT *& al.*

Where a poor debtor has been discharged from arrest on execution, by taking the poor debtor's oath, on a disclosure of his property, the discharge will not be defeated by a mistake, honestly made, in the *quantity* of one of the items of property disclosed, provided he delivers all there was of it to the officer, for the benefit of the creditor.

THIS was an action of debt on a poor debtor's bond. Defendant introduced a certificate, showing that he had taken the oath required by one of the conditions in the bond. To avoid the effect of this certificate, the plaintiff relied on the fact, that the debtor disclosed a quantity of grain, and refused to deliver it to an officer, having an alias execution on the same judgment, who demanded said grain of him within thirty days after the time of the disclosure.

The debtor disclosed, that he had *about* twelve bushels of oats and peas. The return of the officer on the alias execution showed, that he called upon the debtor and demanded the property so disclosed, and that the debtor refused to deliver any more than seven and one-half bushels of oats and peas.

The defendant then offered to show, by verbal testimony, that at the time of said disclosure, said oats and peas were not threshed, and that the defendant afterwards threshed the same, and delivered to the officer all there were after they were so threshed. To the introduction of this testimony the plaintiff objected, because it contradicted the disclosure of said debtor, and because it added to the disclosure a material fact, namely, that the debtor had a quantity of grain unthreshed, while the plaintiff had acted in good faith in procuring the officer to demand the property disclosed, relying on the statements in the debtor's disclosure, that he had the property so disclosed.

The Court admitted this testimony, and the jury returned a verdict for the defendant.

Exceptions were taken by the plaintiff.

D. D. Stewart, for plaintiff.

J. S. Abbott, for defendant.

TENNEY, J. — The debtor made disclosure that he had about twelve bushels of oats and peas, and was permitted to take the oath prescribed in R. S. chap. 148, § 28, and obtained the certificate according to the 31st section of the same chapter. Upon a demand made by the officer who had in his possession an alias execution issued upon the same judgment, for the property disclosed, the debtor delivered seven bushels and an half of oats and peas, and refused to deliver any more. In the trial of the action, upon the bond given by the debtor and his surety, it was permitted in defence to be proved, that at the time of the disclosure, the oats and peas referred to therein, were not threshed; that they were threshed afterwards, and the whole amount were delivered to the officer. This evidence was objected to, on the ground that it contradicted the disclosure, and added to the disclosure a new fact.

It is not understood that oats and peas are essentially changed by being threshed, though their condition is somewhat altered. In common parlance, they may be denominated oats and peas, although they may not be in a merchantable state. The debtor did not disclose that they were threshed, or in a condition to be treated as a marketable commodity; and from the mode of expression in reference to the estimated amount, it is to be inferred that the quantity was uncertain. The evidence objected to, but allowed, does not contradict the disclosure or necessarily add any new fact.

The purpose of the law is to give to the creditor the benefit of attachable property, which may be disclosed by the debtor; and if through the fault of the latter the former is deprived of his just rights therein, the bond may still be broken, notwithstanding the oath may be taken, within the time prescribed to save the forfeiture, and a certificate, that the oath was so taken,

obtained. But if all the property disclosed is delivered in good faith, upon a proper demand, in a condition to be available as much as when the disclosure was made, it is sufficient, and the condition of the bond is saved.

Exceptions overruled.

AMOS F. PARLIN *versus* AMOS F. CHURCHILL.

If an execution has been returned satisfied by a levy upon property, and the property did not belong to the debtor, the creditor's remedy may be by action of debt upon the judgment.

Where a judgment in a writ of entry had been recovered, and the demandant had elected to pay the betterments, allowed to the defendant by the jury, if *after* such proceedings, an execution against said defendant in favor of a third person be levied by a sale of his right in the same land in virtue of possession and improvement thereof, the sale conveys no rights in the land, nor any right in the money to be lodged with the clerk, by the demandant in the writ of entry, for the betterments.

Though the avails of such sale have been indorsed in satisfaction of the execution, such indorsement is not a bar to an action of debt upon the judgment.

DEBT on judgment. The case was submitted for decision upon facts agreed. The defendant resided upon a lot of land. The judgment was recovered in 1843. In Feb. 1847, the defendant's right, title and interest in the farm upon which he resided was seized on an execution issued on said judgment, and was sold at auction to the plaintiff, and out of the avails the execution was returned satisfied in part; viz., for the sum of $236,49. The said sale was made under sect. 36, chap. 94, of the Revised Statutes.

In 1844, one Jonas Marshall commenced an action against this defendant, Churchill, to recover possession of said farm, and in February, 1847, he recovered judgment for the same. The jury appraised Churchill's betterments at $371,25, and Marshall elected to pay the same. Execution for possession was issued, Aug. 3d, 1847, and afterwards Marshall entered into the possession of the farm.

P. M. Foster, for defendant.

The only question relates to the $236,49, indorsed on the execution.

The officer's return establishes a discharge to that amount. If the plaintiff under his purchase at the auction, obtained any thing beneficial, it is not for him to say he gave too much for it. It is for him to prove he obtained nothing. In fact the defendant had an interest which the plaintiff took, beyond the mere amount of betterments. There were crops which he took, or could have taken, prior to Marshall's possession. But especially the sale to the plaintiff carried to him the right to the money deposited by Marshall with the clerk for the betterments.

J. T. Leavitt, for plaintiff.

Shepley, C. J. orally. — The improvements or betterments, as they have been called, passed to Marshall, who had recovered judgment and elected to pay for the improvements, prior to the sale to the plaintiff. By those proceedings in Court, Churchill's claim was all extinguished. There was nothing which the officer could sell. It is, however, contended, that the sale was an assignment of the right to the money to be paid for the defendant's improvements. Perhaps it would have been so, if the sale had been prior to Marshall's judgment. *Defendant defaulted.*

Elijah Frost *versus* Levi Tibbetts.

To an action on promises, a special plea of bankruptcy is bad on general demurrer, if it do not allege that the debt sued for was not of the classes excepted in the first section of the bankrupt law; such as fiduciary debts, &c.

Assumpsit for $50, had and received. Defendant pleaded a special plea; setting forth, *in extenso*, proceedings in bankruptcy upon his own application, and a discharge as a bank-

rupt, &c. The plea then describes the plaintiff's claim and avers that it was proveable in the bankruptcy proceedings, and was barred by the bankruptcy discharge, but it contained no averment that the debt was not created in consequence of a defalcation of a public officer or while acting in a fiduciary capacity.

There was a general demurrer.

D. D. Stewart, for plaintiff.

E. E. Brown, for defendant.

1. If the debt had been of the excepted classes, that fact was proveable by the plaintiff under a replication which he might have filed to that effect.

2. The plea *does* negative that the debt is of the excepted classes. It avers that the debt was proveable in bankruptcy and was barred by the discharge in bankruptcy.

3. It sets forth what the debt was, that the Court can judge whether it be of the excepted classes.

HOWARD, J. — The defendant pleaded specially his discharge in bankruptcy, the plaintiff demurred generally and the demurrer was joined.

Since the statute of 1831, c. 514, was repealed by the general repealing act of 1840, the right to plead specially exists in all cases at common law, unless restricted by statute. The R. S. c. 115, § 18, does not restrict this right, in terms, or by implication. It extends rather than restricts the defendant's rights in pleading specially. He "*may* in all cases plead the general issue," and give any special matter in defence, by filing it in the form of a brief statement; or, he "*may* at his election, plead such matter specially, after the general issue is pleaded;" but this statute does not require that he *shall* adopt either course in presenting his defence.

A discharge and certificate in bankruptcy, constitute no bar to the recovery of debts of the bankrupt created in consequence of a defalcation as a public officer, or while acting in a fiduciary capacity, unless the creditor prove such debts under the commission. The plea of the defendant does not

allege that the plaintiff's debt was not one of the excepted classes of debts, under the United States bankrupt law of August 19, 1841, § 1. The facts pleaded may all be true, and yet the plaintiff may be entitled to recover. Such facts should be stated in the plea in order to constitute a bar, that, on general demurrer, they would exclude the right of recovery.

Although there is a provision in § 4 of the bankrupt act, that the discharge and certificate shall, in all Courts of justice, be deemed a full and complete discharge of all debts, proveable under that act, yet, it has reference to those debts which could be the foundation for a voluntary application of the debtor for a discharge, and which are not excepted, in the law establishing the system of bankruptcy.

Alleging that the debt of the plaintiff is founded on a promissory note, does not show that it was not fiduciary, or take it from the excepted classes of debts, under § 1, of the act. *Sackett* v. *Andross*, 5 Hill, 327; *Morse* v. *City of Lowell*, 7 Met. 152; *Chapman* v. *Forsyth*, 2 Howard, 202; *Fisher* v. *Currier*, 7 Met. 430.

The plea does not show that this was a debt upon which the discharge and certificate might operate, and it is therefore bad. *Judgment for the plaintiff.*

TIMOTHY HUSSEY *& al. versus* GEORGE W. COLLINS *& al.*

Upon a mere contract of indemnity, no action lies until the plaintiff has sustained some damage by the breach of it.

ASSUMPSIT, alleging that the defendants, in consideration that the plaintiffs would sell and did sell and deliver to them a horse, of the value of $80, by their contract in writing agreed with the plaintiffs to carry on a certain lawsuit, commenced by one Levi Hunnewell against the plaintiffs, free from expense to the said plaintiffs, and if the suit should terminate against the plaintiffs, to save them harmless and pay all damages aris-

ing from said suit. And the plaintiffs aver, that Hunnewell did recover judgment against them for the sum of seventy-five dollars damages, and costs of suit, taxed at twenty-six dollars and fifty-seven cents, which is now in full force, and upon which execution hath been issued against the plaintiffs.

The foregoing facts were admitted, and also that the plaintiffs had paid no part of the execution.

Hutchinson, for plaintiffs.

Delivery of the property of the plaintiffs to the defendants, in exchange for property delivered by the defendants, the title of which they were bound to warrant, constitutes a good and valuable consideration for the promise of the defendants in the writing declared upon. Cro. Jac. 474; Roll. Abr. 90; 2 Black. Com. 30; 2 Kent's Com. 374, and in numerous cases in all the Reports.

The damages are the whole amount of the judgment recovered by Hunnewell against the plaintiffs, as the proceeds of this judgment will discharge the plaintiffs from their liability, and complete justice be done. 3 Pick. 429.

The promise of the defendants upon a fair construction of the writing, was to defend the suit, *Hunnewell* v. *Husseys*, the plaintiffs, and in case the judgment should be against them, to pay the amount recovered. The defendants have done neither, and are therefore justly liable to this action upon their broken contract.

D. D. Stewart, for defendants.

Shepley, C. J. — The declaration alleges in substance, that the defendants by a written contract made on December 30, 1845, agreed to defend an action commenced by Levi Hunnewell against the plaintiffs free of expense to them; and to save them harmless from all damages occasioned thereby. That Hunnewell recovered judgment against them at the Oct. term of the District Court in this county, in the year 1846, for the sum of $75,00, damages, and $26,57, costs of suit.

By an agreement of the parties the declaration is to be regarded, as stating the facts correctly, and it is further agreed,

that the execution issued on that judgment against the plaintiffs has not been satisfied, and that neither of them has been arrested upon it.

There is no allegation or proof, that the plaintiffs had paid any thing on account of that suit, or that they had been otherwise injured thereby. The judgment may never be enforced against them. It may be, that the defendants have made arrangements to prevent it.

There must be proof of damage actually suffered, to enable one to maintain an action upon a contract of indemnity. *Gardiner* v. *Cleaveland*, 9 Pick. 336; *Pond* v. *Warner*, 2 Verm. 532; *Morrison* v. *Berkey*, 7 S. & R. 238; *Reynolds* v. *Magness*, 2 Iredell, 26; *Brown* v. *Spann*, 3 Hill, S. C. 324.

The contract declared upon is a contract of indemnity.

It is unnecessary to consider, whether it was made upon sufficient consideration. *Plaintiffs nonsuit.*

BETSEY LITTLEFIELD *versus* IRA CROCKER.

Land was held under a foreclosed mortgage, made by a husband, in which the wife made no release of dower.

In a suit by her for dower, against the assignee of the mortgagee, she is not barred by having, for the purpose of releasing dower, joined with her husband in his conveyance of the equity of redemption to a third person.

THIS is an action of dower.

The plaintiff was legally married, more than twenty years ago, to Aurin Z. Littlefield, who died in 1846. Said Aurin on the 7th day of November, 1837, was seized of the land, and on that day conveyed the same in mortgage to the Merchant's Bank, to secure the sum of $844,64, payable in eight months. The plaintiff did not release her right to dower in this mortgage deed.

The said Aurin, Aug. 3, 1839, by deed of warranty, subject to the aforesaid mortgage, conveyed his remaining interest in said estate to Jediah Morrill, in which deed the plaintiff joined, and duly released to said Morrill her right to dower.

The bank after the breach of the condition of the mortgage, instituted proceedings for foreclosure, and said mortgage was foreclosed.

After said foreclosure the bank assigned the said mortgage to George W. Stanley, Sept. 12, 1843, who, May 9, 1844, assigned the same to the defendant. That assignment is the title by which the defendant holds the estate. Morrill did not redeem, and derived no benefit from his deed.

Leavitt, for plaintiff.

Bronson, for defendant.

The plaintiff is barred by her release to Morrill. *King* v. *Barns*, 13 Pick. 24, 28; Smith's Leading Cases, 152.

The time of foreclosure had not expired, when the mortgage was assigned. What interest has the plaintiff by which she can obtain dower? A party can recover only upon his own title. Suppose this defendant had conveyed to Morrill, this action could not be maintained.

Shepley, C. J. orally. — The defendant's title is only under the mortgage deed given to the bank, in which the demandant did not join.

Afterwards, her husband conveyed the equity to another person, and in this conveyance she released her right of dower. But to this conveyance the tenant is not a party or privy. Estoppels are mutual. In this case it would not be so. The defence fails. *Judgment for demandant.*

SAMUEL L. VALENTINE, *in error, versus* SARAH NORTON, *Administratrix.*

A writ of error lies to obtain relief from an illegal taxation of costs.

When such illegal taxation is apparent on the record, the error is one of law; when not thus apparent the error is one of fact.

When the error assigned is one of law, there is nothing upon which the Court can act, except the transcript of the record.

Documents and papers filed in the case form no part of the record, unless incorporated into it.

Any action which survives against the personal representatives of one party must be considered as surviving in favor of the personal representatives of the other party. — Per SHEPLEY, C. J.

An action for misfeasance of a sheriff or his deputy does not survive against his personal representatives, nor in favor of the personal representatives of the party injured.

A judgment recovered by an administratrix, for such misfeasance committed in the lifetime of her intestate, is reversible on error.

WILLIAM SNOW, in 1834, recovered a judgment against Moses Norton.

Under the act of 1831, entitled "An act for the abolition of imprisonment of honest debtors for debt," he caused a citation to be issued for said Moses Norton to appear before two justices of the quorum to make disclosure of his business affairs.

The citation was placed in the hands of Samuel L. Valentine, the plaintiff in error, then a deputy sheriff of the county of Penobscot, to be served on Snow. Valentine returned upon said citation that he had left an attested copy at said Moses Norton's last and usual place of abode.

Moses Norton brought an action, in the county of Somerset, against Valentine, alleging that the said return of the citation was false. That action was tried in the District Court, 1837, and a verdict was rendered against Valentine. He filed exceptions to the rulings of the District Judge, upon which, in 1838, a new trial was ordered.

At the September term of the Supreme J. Court, 1839, the said Valentine was defaulted. After default, he appeared and

moved to be heard in damages. The action then stood continued from term to term.

At the June term, 1841, the death of said Norton, plaintiff in the suit, was suggested. The Court in adjudicating the point upon exceptions, being of opinion that the action survived, allowed the administratrix, (the present defendant,) to come in, and prosecute the suit, which was thence continued till the September term, 1848, when the judgment was rendered, and the administratrix recovered against said Valentine, $25,25 damages, and $82,90 costs.

This writ of error is brought by Valentine to reverse said judgment, upon errors alleged as follows: —

1. That the judgment aforesaid was given for the said Sarah Norton, administratrix, against the said Samuel L. Valentine, whereas by the law of the State, the judgment ought to have been rendered, that the action be abated by the death of the said Moses Norton; 2. that the cause of action set forth in the plaintiff's writ was for a tort to the person, and the judgment therefore ought to have been rendered as aforesaid, that the action be abated by the death of the plaintiff; 3. that after the death of the original plaintiff was suggested on the record, the said Sarah Norton, administratrix of the goods and estate of the said Moses Norton, deceased, was admitted to appear in Court, and take upon herself the prosecution of the action; whereas the judgment ought to have been rendered, that the action be abated by the death of the plaintiff; 4. that the said Samuel L. Valentine was defaulted at September term, A. D. 1839, and that fees for travel and attendance were taxed and allowed for the plaintiff, for all the subsequent terms of said Court, including that of last September, when judgment was rendered for the plaintiff, whereas no costs were taxable after said default; 5. that fees for travel and attendance of the plaintiff were taxed, at the term his death was suggested and for each term afterwards, until the said administratrix came into Court and took upon herself the prosecution of said action, whereas no costs were taxable during those terms.

The defendant pleaded, "*in nullo est erratum*," reserving,

with consent of the plaintiff, leave to offer any motions. A motion was accordingly made by defendant's counsel to dismiss the writ of error, on account of a joinder of errors of *law* and *fact*.

As the decision of the Court turned upon only one of the assigned errors, the arguments relative to the others are omitted.

William Abbott, for plaintiff in error.

By the common law, no action could be maintained *by* or *against* an executor, for a tort done to the person or property, real or personal, of the testator. And the maxim, *actio personalis moritur cum persona*, was universally true, as applied to actions founded on tort. 1 Saunders, 216, note 1; 1 Williams' Ex'ors, 511; 5 Pick. 257; Cowper, 372. And this maxim does not embrace all actions, which do not survive. Thus actions, founded upon an express promise, or an implied promise, made to the deceased, where the damage consisted entirely in the personal suffering of the deceased, without any injury to his personal estate, do not survive.

An executor or administrator cannot maintain an action for a breach of promise of marriage to the deceased, where no special damage to the *personal estate*, is or can be stated on the record. 1 Pick. 71; 2 M. & S. 409.

Nor can an administrator maintain an action affecting the life or health of the deceased, arising out of the unskilfulness of medical practitioners, or the *imprisonment of the party*, induced by the negligence of his attorney. 2 Maule & Selw. 416.

Executors are the representatives of the *debts* and *goods* of the deceased, but not of their *wrongs*, except where those wrongs operate to the injury of their personal estate. *Ibid.*

Where, therefore, the action is founded on any misfeasance or malfeasance, or arose *ex delicto*, and where the declaration alleges a tort done to the person or property of another, and where the plea must be not guilty, there the action dies with the person. 1 Saunders, 216, note 1.

This rule has been somewhat modified by the stat. 4 Edw.

III. c. 7, and by our own statutes, so that at this day an executor or administrator may have the same actions for an injury done to *personal property* of the testator in his lifetime, as the testator himself might have had. *Ibid.;* 1 Williams' Ex'ors, Book 3, sect. 1 ; Toller, 157.

But the stat. of Edward III. does not extend to injuries to the *person*, or to the freehold of the testator; and as to injuries to the *person*, the common law remains unchanged, with one or two exceptions, not affecting this case. 1 Williams' Ex'ors, 511 ; 2 Pick. 527 ; Toller, 160.

Where one by tort acquires the property of another, an action lies against the administrator of the wrongdoer; but where by such act the deceased acquired no gain, the action dies. 13 Maine, 454. And an action against a deputy sheriff for non-feasance does not survive against his executor. *Ibid.;* 4 Mass. 482.

The survivorship, or non-servivorship of actions, is mutual. 1 Saund. 216, note 1 ; 1 Pick. 71.

If the stat. 1821, chap. 92, sec. 2, and the Revised Statutes, chap. 104, § 18, be compared with the cases, 13 Maine, 454, and 4 Maine, 432, it will clearly appear that actions for malfeasance and misfeasance do not survive at common law ; and that those statutes, which change the common law as to sheriffs, leave it as it was in regard to deputies.

Let us apply the foregoing authorities to the question in dispute. The original action is case, and the proper plea, not guilty. The action is founded on a tort, and the only allegation of damages in the record is, that the plaintiff was committed to jail, and there confined twelve hours. It does not appear, that his personal property was affected by this confinement ; and that this was an injury to the *person only*, seems too clear for argument.

John S. Abbott, for defendant in error.

As to the common law doctrines presented, it is not important that I should either controvert or admit them.

The original action was defaulted, Sept. 1839, in the lifetime of Norton. Nothing then remained to be done but to

assess the damage and enter judgment. For those purposes, even if Valentine had not been defaulted, the administratrix might properly have come in. How much more, after the default?

She came in, September term, 1841. The Revised Statutes had then been passed. This case is embraced in chap. 120, § 15.

But this identical point was settled upon the former exceptions.

The matter therefore is *res adjudicata.* Valentine having elected to have this question *then* decided by the full Court, cannot now in this form be permitted ever to raise the question. And if the case can be legitimately brought before the Court, after it has been once adjudicated by the full Court upon argument, and their opinion has been carried into judgment, then I cite the decision of the Court in this very case, upon this very point, as conclusive and not to be controverted.

Wm. Abbott, in reply.

It is contended that this is *res adjudicata,* and therefore the writ of error does not lie. I suppose there is no question that a writ of error *coram nobis* lies to the Supreme Court, and I do not well understand why a writ of error should be brought, unless there had been a judgment to reverse.

The taxation of the cost is a matter of law, and the bill itself is a part of the record. If it were extrinsic of the record, it must be a matter of fact, and ought to be assigned as such. The writ of error complains, that "in the *record* and *proceedings,* and also in the rendition of the judgment, manifest error hath happened;" and the Chief Justice is commanded to "send the *record* and *process* of the suit aforesaid, with *all things touching them,*" &c. Surely the writ, judgment and bill of cost must be embraced in these terms. Suppose a defendant should bring a writ of error and allege, that no service had been made upon him, or in case of a judgment upon a report of referees, that the claim had not been signed by the party, might not the writ, or the submission, be produced in proof of the allegations? And yet neither of these facts ap-

pears in the judgment. So in this case, it does not appear from the judgment, that there was any illegal taxation or any taxation at all, except from the result, which is inserted in the judgment, but it does appear from the *record* and *proceedings*. Will not the Court examine them and see, whether there is any thing illegal?

But it is contended that the taxation is correct, and that the plaintiff had a right to tax cost until the action was disposed of, because the defendant was to be heard in damages. No authority is cited to sustain this position unless it be the Revised Statutes, c. 115, § 100. But that is clearly inapplicable to the present case. It only regulates the taxation of cost in actions on the trial docket, that are not defaulted, but says not a word in regard to cost after a default. Where the defendant is to be heard in damages, it is the duty of the plaintiff to give notice to him or his attorney, and if he does not attend, the Court will render such judgment, as the testimony of the plaintiff will justify. The plaintiff may take his own time for moving in the case, and the defendant must abide his time. He has it not in his power to delay judgment after due notice, and it does not appear, even if he had, that he exerted it.

Shepley, C. J. — This writ of error has been sued out to procure the reversal of a judgment rendered at a term of this Court holden in this county in the month of September, 1848. By an agreement between the counsel the benefit of a motion to dismiss is reserved to the defendant in error without prejudice from the plea of *in nullo est erratum.*

A motion is accordingly made to dismiss the writ because there is a misjoinder of errors in law and of errors in fact. It is contended that the three first errors assigned are errors in law, and that the two last are errors in fact.

The two last errors assigned are in substance "that by the record aforesaid it appears," that fees for travel and attendance were taxed and allowed for the plaintiff after the defendant had been defaulted, and that like fees were taxed and allowed after the death of the original plaintiff, until the administratrix came

in and took upon herself the prosecution of the suit. These are not assigned as errors in fact but as errors in law apparent upon the record. The motion is therefore overruled.

A writ of error may be maintained to obtain relief from an illegal taxation of costs. *Field* v. *Turnpike Corporation*, 5 Mass. 389; *Waite* v. *Garland*, 7 Mass. 453; *Thomas* v. *Seaver*, 12 Mass. 379. When such a taxation is apparent on inspection of the record, the error is one of law, when not so apparent, it is one of fact. In the present case the errors respecting costs are assigned as apparent of record, yet upon inspection of the record no such errors appear.

The counsel for the plaintiff in error contends, that a memorandum exhibiting the costs taxed and filed with the papers in the case, is to be regarded as a part of the record. Nothing is presented by the writ of error to a court of errors but a transcript of the record. Papers and documents filed in the case, but not incorporated into the record, constitute no part of it. *Kirby* v. *Wood*, 16 Maine, 81. No correction of the errors alleged to have been committed in the taxation of costs, could be made in this case by an assignment of them as errors in law.

The three first errors alleged are in substance, that the action appears of record to have been in form an action of tort, with a declaration asserting, that the plaintiff in error, acting as a deputy of the sheriff of the county of Penobscot, made a false return of service upon a precept to the injury of the original plaintiff. That during the pendency of that action the plaintiff died, and his administratrix was admitted to take upon herself the prosecution of the suit, and that judgment was rendered in her favor for damages and costs.

The question, whether that action survived, appears to have been presented to this Court at its session in this county in the month of June, 1841, and a decision appears to have been made, that it did survive. Whether the nature of the action was then well understood, or the importance of the question duly appreciated, it is now unimportant to inquire, for it be-

comes the duty of the Court to consider whether there be error in the record of the judgment as presented.

There can be no doubt, that such an action as is there described would not by the common law survive. By the statute then in force, c. 92, § 2, provision was made, that "actions for malfeasance or misfeasance of any sheriff or of his deputies may be sued against the executors or administrators of such sheriff, in the same manner as if the cause of action survived against the executor or administrator at common law." If the action by virtue of the provisions of the statute survived against the personal representative of a deceased sheriff, it must be considered as surviving in favor of the personal representative of the plaintiff, for it could not have been the intention to have it survive after the decease of one party and not survive after the decease of the other. Yet there are no words in the statute declaring that such an action shall survive to the personal representative of the deceased plaintiff. Such however has been the decision. *Paine* v. *Ulmer*, 7 Mass. 317. The sheriff being responsible for the acts of his deputies, who are by law liable to make compensation to him for any damages, which he may have been compelled to pay for their defaults, it would seem to be useless to require, that a circuitous course should be pursued attended by increased litigation to arrive at the result, that the deputies may be required to pay damages occasioned by their misfeasances not only to the person injured, but to his personal representative after his decease. If the design of the statute was to provide, that the cause of action in such cases should survive; and such appears to have been its construction so far as it respects the plaintiffs in such suits, the provision, that such actions might be brought against the executors or administrators of the sheriff, might have been considered as only an affirmance of the common law; and it might have been also considered, that an action surviving by the provisions of a statute might by the common law, be prosecuted by or against the personal representative of a deceased party. If this were

an open question, it might be worthy of consideration, whether the statute might fairly receive such a construction.

The language of the statute already quoted is however an exact transcript from the second section of the act of Massachusetts passed on March 13, 1806; and that language had received a judicial construction before it was re-enacted in this state. *Cravath* v. *Plympton*, 13 Mass. 454. It was decided in that case, that it did not authorize such a suit to be maintained against the personal representative of a deceased deputy sheriff. If the action did not survive against the personal representative of one party, it could not in favor of the personal representative of the other party.

The principle has been adopted in this State, that the Legislature is presumed by the re-enactment of the same language to have sanctioned the judicial construction, which that language had before received. That language, so far as it respects this question, does not appear to have been varied on its re-enactment in the Revised Statutes, c. 104, § 18.

According to the construction, which that language has received, the original action did not survive, the judgment therefore rendered in favor of the defendant in error was erroneous, and it is reversed; and judgment is to be entered in that action, that the suit abated by the death of the plaintiff.

ABNER COBURN & *al. in review, versus* JOHN WARE.

In a suit upon a note which was given by the defendant for land, and which was transferred by the payee to the plaintiff, after it was overdue, evidence is admissible to show a partial failure of consideration, growing out of the fraudulent representations of the payee, as to the value of the land and the quantity of its timber.

THIS action was tried at a former term, see 25 Maine Reports, 330. It now comes up, on review, for trial before TENNEY, J.

The original action was of assumpsit, in favor of the present

defendant, upon a promissory note, dated June 24th, 1835, for $2250, payable to John M. Pollard or order in two years, with interest annually, and negotiated to the original plaintiff after it became due. The note was one of several notes, given for a deed of warranty of half a township of wild land, the rest of which, and part of the note in suit, have been paid.

There had been no offer on the part of the purchasers, the plaintiffs in review, to reconvey the land; or any attempt to rescind the bargain. The original defendants offered to prove that the note was given in part consideration for said land, and that the whole sum, which was ten thousand dollars, had been paid, except the sum now due on this note, and that a much larger sum had been paid than the value of the land. They further offered to prove, that they were induced to purchase the land by the fraudulent representations and certificates of said John M. Pollard, as to the value of the land and the amount of timber thereon. The Judge excluded the evidence for the purposes of this trial, and the defendants in the original action were defaulted, subject to the opinion of the Court.

If that exclusion of the evidence was erroneous, the default is to be taken off.

Bronson and *Kidder*, for plaintiffs in review, decline to argue the case. They merely advert to *Hammatt* v. *Emerson*, 27 Maine, 308.

Hutchinson, for the defendant in review.

1. The offered evidence was properly excluded, under the circumstances of this case, there having been no offer to rescind the contract.

2. Total failure of title, and nothing short of that, could furnish a good defence to the note. No failure of title is pretended. *Howard* v. *Witham & al.* 2 Greenl. 390.

3. If fraudulent representations were in fact made, the plaintiffs in review, by their conduct, by keeping the property, long acquiescence, and paying the notes, as the same became due, waived the right to make this defence, especially against a stranger, a purchaser induced by this very conduct of the plaintiffs in review. 2 Stark's Ev. 641; 7 East, 48; Sugden's

V. & P., 192; Long on Sales, 139; 15 Mass. 319; 3 Greenl. 30; 14 Maine, 364; 7 Greenl. 70; 3 Johns. Ch. 23, 400; 18 Maine, 418; 15 Maine, 332; 22 Maine, 511; 12 Pick. 307.

SHEPLEY, C. J. orally. — It is the opinion of the Court that the excluded testimony was receivable. The point has been acted upon in *Hammatt* v. *Emerson*, 27 Maine, 308.

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

HENRY KNIGHT *& wife, versus* GEORGE LOOMIS, *Adm'r.*

Where an administrator, *de bonis non cum testamento annexo*, is appointed upon the death of an executor, who was also appointed by the will the trustee of a fund arising out of the estate of the testator, such administrator does not succeed to the rights or duties of trustee of such fund.

A testator, among other dispositions of his property, bequeathed to S. W. $1700, in trust, to be put out at interest, and to collect and pay over to the plaintiff the interest on said sum yearly; and required, that said S. W. should give a "special bond for the discharge of the trust." S. W. was also appointed executor of the will, and gave bond as executor, but gave no "special bond" as to the trust fund. He settled all the estate except the $1700, and during his lifetime he paid the interest of that sum annually, as required by the will. At his decease, the defendant was appointed administrator *de bonis non cum testamento annexo*, and gave the bond appropriate to that appointment, and charged himself with the $1700, in his probate account, as having been received of the estate of S. W. *Held*, that the defendant did not become *trustee* of the fund, that he had no right to invest the money at interest, and that the plaintiff could not recover of him the yearly interest provided for in the will.

ASSUMPSIT. Benoice Johnson, formerly the husband of the female plaintiff, by his last will, among other things, bequeathed to her the interest of seventeen hundred dollars during life; one hundred and two dollars to be paid on the 26th of August of each year, during her life. Samuel Weston, now deceased, was the executor. No other trustee was appointed. After said Weston's decease the defendant was appointed administrator *de bonis non*, with the will annexed, and accepted the trust and gave bond accordingly.

The other facts necessary for an understanding of the case, are stated in the opinion of the Court.

J. S. Abbott, for plaintiff.

Leavitt, for defendant.

TENNEY, J. — In the year 1831, Benoice Johnson made his last will and testament, and therein appointed Samuel Weston, Esq. his executor, "with the power to do and perform all the acts and duties, and be subject to all the liabilities, which the law imposes upon executors." By the second item, the testator was to have a decent christian burial, at the expense of his estate; and by the third item, the debts which might exist against the estate, at the time of his death, were to be paid by the executor as soon as practicable after his decease. The fourth item is in the following words, — "I give and bequeath to Samuel Weston, the executor of this my last will and testament, the sum of seventeen hundred dollars, in trust always, and it shall be the duty of the said Weston, to let out upon interest, the said sum of seventeen hundred dollars upon good security, and it shall be his duty also to collect the interest on said sum, and to pay the same to my beloved wife Charlotte, yearly, for and during her natural life, and after the decease of said Charlotte, I order and direct, that the said sum of seventeen hundred dollars, together with any additional sum which arises from the interest on the same and which may remain unpaid, shall be divided into two equal parts; one part thereof I order my said executor to pay to the heirs of Sally Tuttle of said Cornville, and the other part thereof, I order my said executor to pay to the heirs of George Loomis of said Cornville, within one year after the decease of my said wife Charlotte; and I direct that the said Weston shall give a special bond to the Judge of Probate for the faithful performance of his duties under this item."

In the item next following, the testator made a bequest to Benoice Tuttle of another sum in trust, to be disposed of in the same manner, and the interest to be paid yearly to the wife of the testator; and a special bond was also ordered to

be given to the Judge of Probate for the faithful execution of the trust. Other legacies were given in the will, and devises of real estate made.

The will was duly proved, approved and allowed on February 7, 1832. Samuel Weston, the executor named, having given a bond as executor, and received letters testamentary with the will annexed, entered upon his duties as executor; and died before the complete administration of the estate. It does not appear from the case or from any probate records put into the case, whether he gave the special bond provided for in the fourth item of the will or not; or whether he accepted or declined the trust or not, as therein directed.

On Dec. 3, 1839, the defendant was appointed administrator *de bonis non*, with the will of Benoice Johnson annexed, and gave bond as such according to law. On the settlement of an account of administration, in the probate office on the first Tuesday of March, 1848, a balance of $1569,53, was found in his hands, belonging to the estate. This suit was commenced on April 17, 1848, after a demand of payment of the sum claimed in this action, by the said Charlotte and her husband, to whom she was married after the death of Johnson, against the defendant, as administrator *de bonis non*, for the recovery of one half the interest on the said sum of seventeen hundred dollars bequeathed in trust by the fourth item of the will, from August 26, 1843, to August 26, 1847.

Is the defendant liable to the plaintiff in his capacity of executor *de bonis non*, with the will annexed? That he holds in his hands, as administrator, the sum of $1569,53, is conclusively shown by the probate records, unless it has been wholly or partly absorbed since the settlement of the account, which does not appear. The account from which it arose, has been passed upon, by the competent tribunal, from which no appeal was taken or claimed.

By the will, Samuel Weston was not only the executor charged with all the liabilities and duties appertaining to that office, but he was also a legatee in trust, with the peculiar duties prescribed in the will. The whole of the personal estate

was in his hands as the executor; and he was responsible therefor, according to the law and the provisions of the will. So far as he paid debts and legacies as therein required, and was allowed in probate for the same, the estate was administered, and he was exonerated from liability. To the extent of the means in his hands, he was bound to pay debts and legacies in the order, which the law and the will prescribed. If any condition was required to be performed by a legatee, before he was entitled to the receipt of the legacy, the executor was not bound and was not at liberty to pay it, till the performance of the condition. If there were assets for the purpose, Benoice Tuttle, for example, was entitled to receive the legacy to him, on filing the bond required, to the satisfaction of the Judge of Probate, and not before. The rights and liability of Samuel Weston touching the legacy in trust to him, were in no respect different from those of Tuttle, under the legacy in trust to Tuttle, provided Weston accepted the trust. The language employed in one bequest is the same as in the other, *mutatis mutandis.* The legacy of seventeen hundred dollars appears to have been made to Samuel Weston, not in his official capacity; and his duties respecting it are not in any respect different from what they would be if he were not the executor, after his acceptance of the trust and the receipt of the legacy. That such was the intention of the testator is manifest, when it is considered, that the executor was to give a bond to do and perform whatever was required of him in that capacity; the estate was to be administered, and the legacy to Weston was to be in his hands from assets produced as any other legacy was to be paid; and when he received it and entered upon the trust he was to be under a special bond for the execution of the trust. In all the duties appertaining to this trust fund, provided in the will, they are be done by Samuel Weston; and where the bequest is made to Samuel Weston, "the executor of this my last will and testament," it is to be regarded as descriptive of the person, and not as a bequest to him as executor. When the trust should be fully executed, as it would be at the death of the *cestui que trust,*

if he faithfully performed all his duties as trustee, the fund, by the will, was then to be considered in the hands of the executor to be finally disposed of in the payment thereof, in satisfaction of particular legacies, as may be inferred from the use of the word executor, when speaking of this last duty.

But it was competent for Weston, if he chose so to do, to decline the acceptance of the legacy, and the trust under it, notwithstanding he might have entered upon his duties as executor. He could not be considered as having fully accepted the former, till he had given to the Judge of Probate, a bond satisfactory to him. And if he gave no bond as trustee, it was for the Judge to determine, whether or not he had declined the trust. *Groton* v. *Ruggles*, 17 Maine, 137. What would have been his liabilities, if he had neither accepted or declined the trust, in his capacity as executor, we are not called upon to decide.

If he did give the bond, and the legacy of seventeen hundred dollars, in trust, was accepted by him, so far the estate has been administered, and his bond as trustee, is the security of the rights of the *cestui que trust.* But if he gave no such bond and did not accept the trust, and was not considered by the Judge of Probate as declining it, and made no charge to the estate for the amount of this legacy, as passed to him as trustee, the administration was not completed, and that sum was in his hands as executor, if sufficient assets for the purpose were in his possession.

When the defendant was appointed and qualified as administrator *de bonis non*, with the will annexed, and undertook the trust, he could have no power over matters, which had passed from the executor as such, and was under no liability therefor. If he had assets of the estate in his hands as administrator, he is accountable to whomsoever they belong, in that character. By being administrator, he cannot become substituted for Samuel Weston, in his capacity as trustee, under the legacy in trust. To become such, he must accept the trust after it is tendered to him by authority competent to make it. He cannot be treated as a trustee, until he has receiv-

ed such appointment, and accepted it by giving the bond, which the law requires, and which was specially required of the one appointed by the will, under a particular direction therein.

This case differs essentially from a class of cases in Massachusetts, where executors were holden to perform duties as trustees under the will, which were specially required of them in their capacity as executors, and from the nature of those duties, they could not be performed by any others. They were under the testamentary provisions, administration duties, necessary to be done in settlement of the estate in probate; and hence it was held in one case, that if the executor appointed had declined the trust of executor, or had not completed the administration, the same powers and duties would devolve upon an administrator *de bonis non*, with the will annexed. *Saunderson* v. *Stearns, executor*, 6 Mass. 37; *Prescott* v. *Pitts & al.* 9 Mass. 376; *Hall* v. *Cushing & al.* 9 Pick. 395; *Dorr* v. *Wainwright*, 13 Pick. 328; *Towne* v. *Ammidown*, 20 Pick. 535.

If Weston had never accepted the trust under the legacy; and had not administered the estate so far as the legacy to him is concerned, and the assets now in the defendant's hands are subject to this legacy, it is not perceived that the defendant has any power to put out that sum upon interest. To require this of him without the bond provided in the will, would be the sanction of a proceeding, which the testator did not contemplate, and which he manifestly intended to prevent. The putting out the money upon interest, and the annual payment of the income to the *cestui que trust*, was made by the will a special duty to be performed after the administration was so far completed, that there was this fund to be appropriated in that manner. This duty was not made an administration duty. The defendant has not been appointed a trustee of this fund, nor has he assumed the trust by giving the bond, or by any act in disposing of the money received by him as was required in the will of the legatee in trust; neither does it

appear that he has derived in fact any benefit from the money in his hands. As administrator he had no power to let out upon interest any assets of the estate in his hands, upon such security as he, in his discretion, might suppose perfect. A loss of the assets so let out would not be the loss of the estate, but must fall upon him. Whatever sum is in his possession, under a settlement with the Judge of Probate, he holds as administrator and not otherwise. "The general rule has been, not to charge executors with interest, when their accounts are settled in ordinary course; and the reason is, they are not at liberty to risk the money belonging to the estate, they represent; and are to be always ready to pay it over according to the direction of the will, or the decree of the probate court. The rule admits of an exception, when it shall appear that the executor has actually made use of the money, which fact may be proved by direct testimony or from a long delay in settling his accounts, or in paying over balances in his hands, after they have been demanded." *Wyman* v. *Hubbard & al.* 13 Mass. 232; *Boynton* v. *Dyer*, 18 Pick. 1; *Storer* v. *Storer*, 9 Mass. 37; *Stearns* v. *Brown*, 1 Pick. 530.

By extracts from the probate records in the case, it appears that in February, 1840, the defendant filed his account in the probate office, in which he charged himself with the sum of $1700, out of which the money, that was subsequently in his hands, arose. On the first Tuesday of March, 1848, he settled another account with the Judge of Probate, in which he is charged with the sum of seventeen hundred dollars, and is allowed certain claims, leaving the balance, before mentioned, and the records introduced show that he was not then charged with interest, "there being no adjudication thereon."

If a trustee, duly appointed to take charge of the sum bequeathed to Samuel Weston, should call upon the defendant as administrator for the money now in his hands, and it should appear by the will and the condition of the affairs of the estate be subject to such a call, his duty would require the payment. Not being entitled to delay after a proper demand therefor, on account of its being let out upon interest, if such

should be the case, he would not be liable to interest, which he had not received. He cannot, upon the facts in the case, be held in this action. *Judgment for the defendant.*

INHABITANTS OF PALMYRA *versus* INHABITANTS OF PROSPECT.

In a claim by one town against another to recover for supplying certain paupers, the plaintiffs notified the defendants that James Curtis, his wife and their seven children, naming them all, had fallen into distress, &c.

The defendants replied, acknowledging the receipt of the notice "*touching the Curtis family*," and denying that "*Curtis*" had a settlement in the defendant town. *Held*, the defendants were not estopped to deny the settlement of the wife and children in their town.

ASSUMPSIT, for supplies furnished by Palmyra to James Curtis and Eliza Curtis, his wife, and Lewis Curtis, Elizabeth Curtis, Rozilla Curtis, Frances Curtis, Eliza Curtis and William Augustus Curtis, their children, whose settlement was alleged to be in the town of Prospect. The writ is dated April 27th, 1848.

The plaintiffs introduced evidence tending to show that the paupers fell into distress in Palmyra, on February 6, 1847, and stood in need of immediate relief, and that supplies were furnished by Palmyra, and also, that the following notice was sent by the overseers of the poor of Palmyra to the overseers of the poor of Prospect, and by them received on or about the fifteenth of March, A. D. 1847: —

"Palmyra, February 27, 1847.

"Gentlemen. — James Curtis, Eliza Curtis, wife of said James, and Lewis Curtis, Elizabeth Curtis, Rozilla Curtis, Frances Curtis, Eliza Curtis, William Augustus Curtis, their children, inhabitants of your town, have fallen into distress in this town," &c.

The defendants then offered to read, in evidence of denial, an answer from the overseers of Prospect, in words following:

"Prospect, March 19, 1847.

"To the overseers of the poor, of the town of Palmyra: — Yours of the 27th of February, was received about the fifteenth of March, touching the James Curtis family, and calling on us to pay the expenses incurred by them. Mr. Curtis was not a native of our town, but has frequently lived in Prospect, and we forthwith set ourselves about ascertaining whether he had gained a legal settlement in our town, and find he never did," &c.

This reply was seasonably received. The plaintiffs contended that the defendants were estopped by the answer from denying the settlement of the said Eliza Curtis, wife of said James Curtis, and Lewis Curtis, Elizabeth Curtis, Rozilla Curtis, Frances Curtis, Eliza Curtis and William Augustus Curtis. The Court, WELLS, J. overruled the objection and allowed said answer to be read in evidence. The counsel for the plaintiffs except to the ruling.

Bronson, for the plaintiffs, contended for the following positions: —

1. The answer by the defendant town, applies only to James Curtis. It cannot be enlarged by implication. The wife and children may have their settlement in Prospect.

2. By denying the settlement of one of the persons, named in the notice, there is an implied admission that the wife and children have their settlement in Prospect, and the defendants are estopped to deny it. R. S. chap. 32, sect. 1; *Lancaster* v. *Rehoboth*, 4 Mass. 180; *Bridgewater* v. *Dartmouth*, 4 Mass. 273.

3. If the notice had been no more specific than the answer, it could not have extended to the wife and children.

J. & A. Waterhouse, for defendants.

TENNEY, J. — In a suit by one town against another to recover payment for supplies furnished for the relief of a pauper, alleged by the plaintiff town to have his settlement in the defendant town, if the latter would contest the settlement of the pauper, it must, by its legal agency, within two months after

the receipt of notice from the overseers of the poor of the former, requesting payment of the expenses incurred, and the removal of the pauper, send a written answer, stating their objections to such removal. R. S. chap. 32, § 42 and 43.

If the request is made on account of two or more persons, the answer must in some way refer to each one. The objection can apply no further than to those named, or to whom reference is made. Supplies may be furnished to more than one person about the same time, and those relieved may have no connection with each other by blood or affinity; and the notice to the town supposed to be liable, may be given in the same letter on account of both. The written answer stating the objection to the payment of the expense and the removal of the paupers, will not furnish a basis of a defence, on the ground of no settlement of the paupers in the town notified, further than it applies to those who are named or clearly referred to therein. There may also be ground for denying the settlement of one member of the same family, and no reason for contesting the settlement of another; hence the objection may with propriety be limited to a part only of those so situated, who have been aided; as, for example, where a man having no settlement in the State, may marry a woman having one; she and the children, who are the fruit of that marriage, will have *her* settlement. An illegitimate child will retain the settlement acquired at the time of the birth, till such child obtains for himself a new settlement, though the mother may by her marriage or otherwise change hers, and still have the charge of the child. R. S. chap. 32, § 1. In the former case supposed, an objection made to the removal of the husband and father, may not extend to the wife and children; and in the latter, the refusal properly made to remove the child may not be regarded as a denial of the settlement of the mother or her husband.

The statute has prescribed no form for the answer to the notice, or for the objection to the removal. It has given in general terms, the substance only. And in order, that the meaning should be well understood, it is proper, that the

notice and the answer to it should be examined in connection; and if upon a fair construction of the language of both, the objection is intended to be a denial of the settlement of all the paupers named in the notice, the town attempted to be charged will not be restricted in their defence; but if the reasons stated for refusing to pay the expenses incurred in behalf of one, and to remove that one, cannot on a fair construction refer to others, for whose relief remuneration is claimed and removal demanded, the question of the settlement of the latter cannot be the subject of controversy; the town notified is concluded by its silence as to such paupers. But it cannot be regarded necessary in all cases, that the objection should be made, as to each individual, stating his name, as is required in the notice first given. If the answer be such, that, from the facts presented in the notice and the answer, it is manifest, that it was intended, that the objection was made to all, it will meet the legal requirement. If the notice states, that relief was afforded to a man alleged to have his settlement in the town notified, and to his wife, with the usual requests, and the answer thereto should contain the objection, that the man had no settlement in the town, it could not be understood, that it was intended, to concede by the omission of the wife's name, that her settlement would not be contested. In the answer to the notice, that relief had been afforded to a man, his wife and children, each distinctly named, if the objection stated, in reference to the man, from all the facts, presented in a notice and answer, when examined together, is such, that if proved on the trial, would be sufficient alone to fix his settlement, and the settlement of the others mentioned in the notice would follow without further evidence, it is believed, that the objection would apply to the wife and children as well as to him. In a controversy between two towns for the recovery of the expenses in the relief of a man, his wife and children, proof that the man had acquired a settlement in the town defending, would be sufficient to charge it with the expense attending the whole family, unless it should appear, that the wife and children had a different settlement from that

of the husband and father; a settlement once acquired by a man will draw after it the settlement of his wife and children, until a new one has been obtained by the latter.

In the case before us, the notice informs the town of Prospect, that James Curtis, and his wife and children, the names of each being given, inhabitants of the town of Prospect, had fallen into distress in the town of Palmyra, and had been relieved; that Lewis, (one of the children named,) was sick with the small pox, and had been so for three weeks, and that the overseers had made the house a hospital in which they had confined the family and caused them to be vaccinated; and in the opinion of the overseers, no other member of the family had taken the small pox. The overseers of Palmyra request, in the letter, the overseers of Prospect to pay the expense which had accrued, and that which was expected to accrue afterwards, which they informed them would continue to be charged. The answer, signed by one of the overseers of Prospect, purporting to be by order of the board, acknowledged the receipt of the notice "touching the Curtis family," and states, that on inquiry made, although Curtis had frequently lived in Prospect, he was not a native of that town, and had never gained a settlement therein, and that the town of Palmyra must look to some other town for indemnity for the relief afforded him.

At the trial, the answer was objected to as evidence, because it was signed by one only of the overseers of the poor of the town of Prospect, but it was admitted. It was contended that the town of Prospect was estopped by their answer, to deny the settlement in that town, of the wife and children of James Curtis, because it was silent as to them, and referred only to the expense of James Curtis, which, it was stated, they were not liable for; the Court held otherwise.

The statute provides, that the answer may be signed by one or more of the overseers notified. R. S. chap. 32, sect. 43. The answer in this respect is in strict conformity to the statute. The notice states, that Curtis, his wife, and their children, named, are *inhabitants* of Prospect. They were residing in

Palmyra, as appears by the notice, at the time, and it must have been intended, that they had their *settlement* in Prospect. On any other construction the notice will be without meaning, for such a purpose as was evidently entertained by the overseers of Palmyra. No distinction is made in the notice, between James Curtis and the other members of his family, from which it could be supposed, that the same facts relied upon to make Prospect the place of the settlement of James Curtis, were not relied upon to make it also the place of the settlement of the wife and children. There is nothing showing that the children were not minors and subject to his control and actually under his charge. He was responsible for the aid furnished to his wife and such minor children, if paupers, as much as for that for his own individual relief. *Hanover* v. *Turner*, 14 Mass. 227; R. S. chap. 32, sect. 50.

The answer denies the settlement of James Curtis in Prospect, and its liability for supplies furnished for him. From the facts before us, the family of Curtis, who were named in the notice, had a settlement, wherever his should be established; and the statement in the answer, that he had not such a settlement as would impose upon the town of Prospect, the expense for his relief, must have been understood as a denial of liability for the family also, who were dependent upon him for support, and whose settlement would follow his. The reason given for declining to pay for his relief, applied equally to the charge for the relief to the others.

Exceptions overruled.

Isaac Dyer *versus* William Lowell *& al.*

If a proprietor in a tract of undivided land, convey any number of acres thereof in common and undivided, the grantee is entitled to that number of acres of average quality and value with the rest of the tract.

If there be error in the proceedings of commissioners, in setting off lands under a petition for partition, the remedy for the party injured is, not by writ of error, but by writ of *certiorari*.

A co-tenant, thus injured, is not precluded from a remedy by *certiorari*, merely because he was not named in the petition for partition.

It is beyond the power of such commissioners to assign to a petitioner a right of hauling lumber across the land assigned to his co-tenant; or of driving lumber on the stream through such land; or to prescribe in what proportions, among the parties, the expense of maintaining the dam, shall be paid, or that a dam shall be maintained at all.

If the estate be incapable of partition, the whole should be assigned to one of the co-tenants, upon payment of money, as provided in R. S. chap. 121, sect. 25.

The proceedings of such commissioners are erroneous, if they show merely that they assigned to the petitioner, the number of acres he was entitled to, without showing, in substance, that they were of average quality and value with the residue of the tract.

Petition for a writ of *certiorari*.

The respondents had a conveyance of 2730 acres of land in common and undivided, in township No. four, in the fifth range west of Kennebec river.

They applied for partition, alleging that they were seized of that quantity of the tract as tenants in common and undivided, with certain persons to them unknown. And commissioners, appointed under that application, had set off to them 2730 acres by metes and bounds, and made return thereof, but without stating that the lands so assigned were of average quality or value with the rest of the township, or in any form indicating their relative quality or value.

They also assigned to the petitioners, (in language as follows,) "the right to haul and land their timber on any part thereof, across or on adjoining land in said tract, east of the Spencer stream; and further, the right of driving the stream and the use of the dam in common with the other owners,

each party being obliged to bear the expense of keeping in repair said dam, in proportion to the lumber driven through the same.

The return of said commissioners was presented at the Nov. term of the District Court, 1845, and no person objecting thereto, judgment was entered that the same be approved and accepted. It is for the purpose of reversing that judgment, that Isaac Dyer, this petitioner, now prays for a writ of *certiorari*, and makes the following, (among other) assignments of error in the proceedings aforesaid, viz.: —

2d. That the warrant to the commissioners did not direct them to set off the part belonging to the petitioners in 2730 acres, of an average quality and situation of the rest of the tract.

3d. That the report of the commissioners does not show, that they set off said 2730 acres of an average quality and situation of the rest of the tract.

4th. That said commissioners transcended their powers in assigning to said petitioners the right to haul and land their lumber across or on the adjoining land in said tract, east of the Spencer stream; and in the use of the dam in common with the other owners.

J. S. Abbott, for petitioner.

Certiorari is the proper form of proceeding.

This case was formerly before the Court on a writ of error. But the process failed, it being the opinion of the Court that the remedy was by *certiorari* and not by writ of error.

The counsel then argued in support of the grounds, presented in the assignment of errors.

Bronson for defendants.

1. The defendants contend, that inasmuch as said Dyer does not appear to be a party to the record, he cannot sustain the action. R. S. c. 121, § 18, shows error to be the proper remedy. The writ of error failed, in this case before, because the petitioner was not a party to the previous proceedings.

2. That if *certiorari* be the proper process, the Court will

not grant it when no substantive injustice has been done, or when mischievous consequences would follow, or when no substantial error appears in the proceedings. 11 Mass. 417; *Rutland* v. *Worcester*, 20 Pick. 71; *Gleason* v. *Sloper*, 24 Pick. 181; R. S. c. 143.

3. The real grievance complained of, is, that the portion set of to defendants is of greater value than they were entitled to. But it is contended, that this or no other Court can or will interfere to correct matters of judgment, unless some fraud or corruption in the commissioners is alleged or proved.

4. The Court will not interfere when the parties cannot be placed in *statu quo*.

5. All parties interested should be joined in the petition for *certiorari*. Howe's Prac. 493; 3 Mass. 229.

SHEPLEY, C. J. orally. — It is contended that application for *certiorari* is not an appropriate remedy in a case like this. But we think it is, although perhaps it may not be the only one.

It appears by the commissioners' return that they set off 2730 acres, the precise quantity claimed by the petitioner. Their warrant did not require them, nor by their return do they state that they have undertaken, to set off that quantity of average quality or value, or to make a just and equal division as to value. These proceedings were erroneous, because the petitioners' ownership was only that of 2730 acres in common and undivided. They were therefore entitled only to a division which would assign to them land of an average value with the rest of the tract. It ought to have appeared, by the oath of the commissioners, that they had so divided it.

Besides, the commissioners assigned to the petitioners a right to haul and land lumber on the co-tenant's lands, and the right to drive logs there, and use the dam and prescribed the mode of keeping the dam in repair. This they could not lawfully do. If the estate was incapable of division, they should have set off the whole to one of the co-tenants, upon the terms, provided in R. S. c. 121, § 25.

It is not necessary that a petitioner for *certiorari* should be a party to the record, but only that he should be interested in the subject matter, upon which the record acts.

In the statute, there is a special provision for costs against one not named in the record. This must imply the right of such a one to bring this process.

Writ of certiorari granted.

STEPHEN HILTON *versus* ITHAMAR LONGLEY.

Exceptions from the District Court cannot be sustained, if no recognizance was entered into, in that Court.

This rule is not varied by an agreement that *sureties be waived.*

THIS case purported to be on exceptions from the District Court. It appears that exceptions were filed by the plaintiff and allowed in that Court, at its October term, 1848, the defendant agreeing to waive special sureties, and no recognizance was entered into. The plaintiff at the same term, presented a motion for a new trial, and the action stood continued upon that motion, which was overruled at its May term, 1849. The case was entered here at the then next term of this Court.

Abbott, for defendant, moved that the case be dismissed, contending that the Court had no jurisdiction; and that by continuing the action in the District Court, after the exceptions were allowed, there was a waiver of the exceptions.

D. D. Stewart, for plaintiff.

The waiver of special sureties was a waiver of recognizance. 4 Greenl. 62. A recognizance could have been but useless. Being against the plaintiff alone, it could give no higher security to the defendant. Further, the doings in the District Court, after allowing the exceptions, were merely void.

PER CURIAM.—A waiver of sureties does not dispense with a recognizance. There being no recognizance, the appeal cannot be sustained. *Dismissed.*

County Commissioners, *Petitioners for location of public lots.*

Unfinished processes commenced by the County Commissioners, for setting off the public lots in unincorporated places, under the act of 1842, were defeated by the act of 1848, transferring the care of the public lots to agents, appointed by the governor and council.

Such processes are not embraced in the clause of the latter act, "saving all actions now pending and causes of action already accrued.

This was an application to the District Court, Rice, J. for the appointment of commissioners to set off the public lots in an unincorporated township. After notice duly published, William Lowell, Jacob Lowell and Stephen Jewell appear, representing themselves to be part owners of the land, and resisting the prayer of the petition. The matter stood continued till the January term of that Court, 1849, at which term the said respondents moved that the petition be dismissed, because they say that, by an act of the Legislature, passed August 11, 1848, entitled an act in relation to land reserved for public use, the power of said commissioners to have the location, as prayed for, is abrogated.

The motion was overruled, and the respondents excepted.

J. S. Abbott, for respondents.

The motion should have been allowed. The act of 1848 takes from the County Commissioners all power over the public lots, and vests it in county agents. And there is no saving clause for allowing them to proceed in cases then pending. The law, under which they formerly had the power, has been unconditionally repealed. *Cummings* v. *Chandler*, 26 Maine, 453, and cases there cited.

But if the motion to dismiss should not succeed, it is contended that no further proceedings can be had here, than to remit the case to the District Court. The respondents have other objections to interpose, which have not yet been presented.

Hutchinson, for petitioners.

The proceedings are in conformity to the laws in force when

the petition was filed. Statute 1842, of chap. 33, sect. 21, 22 and 23.

The care of the public lots has since been transferred to agents, appointed by the executive; but all actions and rights of action are saved. Stat. 1848, chap. 82, sect. 6.

The location of public lots in pursuance of stat. 1842, chap. 33, is an *ex parte* proceeding, notice not being required. Adverse parties have no right to appear and interfere with the doings of the District Court. *Farrar & al.* v. *Loring & al.* 26 Maine, 207; case decided in Franklin county, June term, 1848, not reported.

SHEPLEY, C. J. orally. — It is urged by the counsel for the County Commissioners, that this is a mere *ex parte* proceeding, and that no person should be allowed to appear and oppose it. The statute does not expressly provide for the appearance of other parties, yet it is obvious they may have important rights.

But whether such parties would or would not have the right to appear, the law upon the other question presented may be decisive of the case.

The act of 1842 authorizes this course of procedure. But the act of 1848 has transferred the power from the County Commissioners to agents appointed by the executive, and it makes no provision for saving such processes already then commenced. It repeals entirely the act of 1842. The only room for question is, whether this process is embraced within the clause, "saving all actions now pending, and causes of action already accrued." Is this an action pending? An action is pending, only where there are different parties, having conflicting interests. This process is not of that character. It is not brought to establish any rights. It relates to property about which there is no controversy.

The commissioners had been authorized to institute actions, to recover for trespasses, and the language of the saving clause is appropriate to such suits, and not to applications like the present. *Exceptions sustained. Petition dismissed.*

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF PISCATAQUIS,

1849.

DANIEL DENNETT *versus* WILLIAM P. LAMSON *& al.*

The interest of a witness is not removed by a receipt, unsealed, in full of all demands made by the party calling him.

EXCEPTIONS from the District Court.

Trover for a yoke of oxen. The ownership was in dispute. The defendants had purchased them of one H. Clapp, and they called him as a witness. Being objected to on the ground of interest, he received from the defendants' attorney a document of the following tenor: — "Dover, March 29, 1849. — Received of H. Clapp one dollar in full of all demands. Lamson & Wyman, by their attorney, A. Sanborn." It was admitted that Sanborn was verbally authorized by the defendants to make and sign such a paper. The witness was admitted.

Everett, for plaintiff.

A. Sanborn, for defendants.

The receipt was a discharge of all remedy which the defendants might have had upon the witness. A *release* of all demands is a discharge of all actions and causes of action, even of conditions not yet broken, or before an action could be brought therefor. Coke on Litt. Book 3, sect. 508. If a

release would have such an effect, why not a receipt? A receipt is presumptive evidence of consideration. And an acknowledgment by deed of a consideration, is but *prima facie* evidence, and may be controlled. 1 Greenl. Ev. § 26, and cases cited.

A *valuable* consideration is not requisite. Consideration of good-will is sufficient.

SHEPLEY, C. J. orally. — The witness was interested. The attempt to remove his interest was ineffectual. The paper was not a release. It was not sealed. It was open and subject to explanation. *Exceptions sustained.*

FRANKLIN BEAN *& al. versus* EPHRAIM FLINT.

Ordinarily, a promissory note, given for a mere quitclaim deed of land, cannot be avoided, though, by means of a defect in the grantor's title, nothing passed to the grantee.

But that rule will not apply, where the parties have stipulated in writing, that the note is not to be paid, unless a title was conveyed.

Such a note, though purchased before the payday, by one having knowledge of such a stipulation, is open, in a suit by him, to the same defence as if sued by the payee.

EXCEPTIONS from the District Court.

Assumpsit on a note, dated February 5, 1847, for $75, payable to S. B. Kittridge or bearer, in one year. The defendant introduced a document of the same date, signed by Kittridge, reciting that said note was given in consideration of a quitclaim deed, made at the same time, by Kittridge to the defendant, and stipulating that if, within the year, it should be ascertained that Kittridge's interest in the land was not worth $75, the note was to be given back, or if the note should have been paid, the money was to be refunded, upon the land being reconveyed by defendant to him.

The defendant then introduced said quitclaim deed from Kittridge to himself, dated 5th February, 1847; also a warranty deed of the same land, from said Kittridge to Nancy Kittridge, made October 29, 1842.

Defendant then called a witness, who testified that one of the plaintiffs is the father-in-law, and the other is the brother-in-law of S. B. Kittridge; that one of plaintiffs admitted that he knew of the conveyance to Nancy Kittridge, and that he was her agent in the transaction, and caused her deed to be recorded, and that when the plaintiff purchased the note, he knew all about the conveyance to the defendant, and the contract connected with it, as above recited, and that S. B. Kittridge had always remained in possession of the land.

Upon this evidence, defendant requested the Court to instruct the jury, that if they believed defendant's note of $75, without consideration, and that the plaintiffs took the same, knowing all the facts relating to the sale, that the plaintiffs could not recover.

This, the Court declined to do, but instructed the jury, that the evidence offered, though believed, constituted no defence to the action; and the jury returned a verdict for the plaintiffs.

Appleton, for defendants.

1. The note was without consideration. There was an entire failure of title to the land, for Kittridge had previously conveyed it to his sister by a warranty deed.

2. By the written contract, the note was to be given up, if the interest conveyed was not worth $75. There was *nothing* conveyed. The objection taken by the plaintiff's counsel is, that the defendant did not tender back a deed. The reply is, that that was not to be done, except when the note had been paid, and the money reclaimed by the defendant. But Kittridge had sold the note, and put it beyond his power to surrender it, and therefore defendant was not bound to give a deed. 2 Peters, 102; 3 Cowen, 75; 16 Mass. 161; 17 Maine, 296; 22 Pick. 166; 4 Pick. 258.

3. The plaintiffs took the note with notice, and therefore stand in no better position than Kittridge. 3 Pick. 452; 5 Pick. 312, 316; 2 Johns. 300; 5 Johns. 118; 10 Wend. 85.

Bell, for plaintiff.

1. The admission in a note, that it was for value received, can be overcome only by clear evidence. 5 Pick. 506.

2. To avoid a recovery, the failure of consideration must be entire. 6 Pick. 427.

S. B. Kittridge was in possession of the land. By his deed, that possession passed to defendant. Consequently, the failure of consideration could not have been entire.

By the Court. — The plaintiffs took the note with notice. It was therefore open to the same defence, as if sued by the payee. The note was given for a conveyance of land to which the grantor had no title. The consideration therefore failed. Ordinarily, when a person gives his note for a quitclaim deed, he cannot, on account of a defect in the title, avoid the payment of it But here was an express written stipulation, that the note should not be paid, unless the land could be held by the defendant.

To this case, the general rule is not to be applied, because the parties have otherwise agreed. *Exceptions sustained.*

Ephraim Flint *versus* John E. Sawyer.

The title arising to a town by a forfeiture of non-resident lands for the non-payment of town taxes, is not perfected, unless nine months fully expire after the date of the assessment, and before the collector makes to the treasurer a certificate of the delinquency, to pay the tax; nor unless the treasurer *authenticate as true*, the copy of his printed advertisement, lodged with the clerk; nor unless it appear that the collector had a warrant from the assessors to collect the tax.

Trespass quare clausum. The acts complained of are admitted. The plaintiff claims title to the *locus in quo*, by virtue of a deed from the treasurer of the town, which, it is admitted, the treasurer was authorized to give. At the time of the conveyance, the town claimed title to the land, by reason of its having been forfeited for the non-payment of taxes assessed upon the same, August 14th, 1844, the same

having been taxed at that time, to Henry N. Pollard or unknown, as lot No. one, in the first range, containing one hundred acres.

The plaintiff, to sustain his title, offered the deed and also the assessment of the town, in 1844, signed by the assessors, and an attested copy from the records of the town of the treasurer's advertisement, dated July 7, 1845, it being admitted, that said notice was published in the "Age," a newspaper published in Augusta, by the printer to the State, on the 18th and 25th days of July, and the 1st day of August, 1845. The tax upon said land remaining unpaid for the term of two years from the date of the assessment, the treasurer made his second advertisement, in said newspaper, dated August 15th, 1846, which was published on the 21st and 28th days of August and the 4th day of September, 1846.

The defendant, to defeat the plaintiff's title, introduced an attested copy of the town treasurer's record of the collector's return to him, dated May 13th, 1845.

E. Flint, pro se.

No assessment shall be void by reason of any error, mistake or omission by the assessors, collector or treasurer. R. S. c. 14, § 88. The assessment is signed by the assessors, and that is sufficient.

To prove that the title was in the town at the time the same was deeded to the plaintiff, it is sufficient to produce the assessment, signed by the assessors, and prove that notice of such assessment was advertised as the statute provides. R. S. chap. 14, sect. 87. The mode of advertising, as provided in sect. 77 and 82, of chap. 14, was changed by chap. 123, of the act of 1844, and the advertisement in this case was made agreeably to the provisions of that chapter.

J. Appleton, for defendant, among other points in defence, presented the following: —

The collector's return should not be made until after nine months from the assessment. That time is allowed the owner

in which to make payment. But, in this case, the nine months had not expired.

The treasurer's certificate of the advertisement does not comply with the statute. It is not officially authenticated. Stat. of 1844, c. 123, § 2 and 3.

R. S. c. 14, § 87, applies only to the preceding sections 77 and 82. It cannot apply to subsequent legislation. And those sections 77 and 82 are repealed by the act of 1844. And if not repealed, they were not complied with.

It no where appears that the collector had the bills with a legal warrant for their collection, without which, his proceedings would be void. The warrant to collect does not appear, nor that he had any.

Shepley, C. J. — The case is presented upon an agreed statement of facts. The town of Elliotsville, by its treasurer duly authorized, conveyed to the plaintiff, lot numbered one in the first range in that town, upon which the trespass is alleged to have been committed. The title of the town rests upon an assessment made in the year 1844 upon that lot, and upon such proceedings, as the statute requires to collect that tax, without success.

Several objections have been made to the validity of the assessment and proceedings, three of which, only, will be noticed.

1. The first section of the act approved on March 22, 1844, c. 123, additional to the fourteenth chapter of the Revised Statutes, provides, when no person shall appear to discharge the taxes, duly assessed on lands owned by non-residents, "within nine months from the date of the assessment, the collector shall make a true copy of so much of the assessment, as relates to taxes due on such real estate, and certify the same to the treasurer of the town or plantation."

It is agreed, that the assessment was made on August 14, 1844. The collector made his return, bearing date on May 13, 1845.

When a statute requires an act to be performed in a certain time from the date of some transaction, the day of such date is excluded, in the computation of the time. *Windsor* v. *China*, 4 Greenl. 298; *Moore* v. *Bond*, 18 Maine, 142; *Rand* v. *Rand*, 4 N. H. 267; *Bigelow* v. *Willson*, 1 Pick. 485; *Jackson* v. *Van Valkenburgh*, 8 Cowen, 260; *Sims* v. *Hampton*, 1 S. & R. 411.

The collector should have waited during all the business hours of the fourteenth day of May, 1845, for the owner of the land to pay the tax upon it, before he made his certificate to the town treasurer. The owner of the land was entitled to the full term of nine months, in which he could make his payment without costs.

The collector's return does not appear to have been received by the treasurer, until the fifteenth day of that month, but the return is made of those lands, on which the taxes had not been paid on the thirteenth day, and they might have been paid on the following day, and within the nine months allowed therefor, and the certificate of the collector and the record of the treasurer, both be true.

2. The treasurer is required by the second and third sections to advertise the names of the owners with the sum of the taxes on the lands respectively, in the newspaper published by the printer to the State, and to lodge with the clerk of the town, where the lands lie, a copy of the advertisement.

The treasurer in this case did lodge with the town on July 7, 1845, a paper by him subscribed, which, from its form and language, might well be believed to be such a copy; but there is no authentication of it, proving it to be a copy of such advertisement. There could be no legal proof, that it was such a copy, without some official attestation or authentication of it as such. This difficulty is however obviated by the agreed statement, that the paper marked C is an attested copy "of said treasurer's advertisements, dated July 7, 1845."

To establish its title, the town was required by statute, chap. 14, sect. 87, to prove, that notice of the assessment was ad-

vertised by the treasurer, as provided in sections seventy-seven and eighty-two of that chapter. Those sections were repealed by the act of March 22, 1844, and the proof must be made according to its provisions. There is a failure in the manner before stated, to prove a compliance with its provisions on the part of the collector in making his return to the treasurer.

3. It does not appear that the collector had received any warrant from the assessors to collect the taxes.

Plaintiff nonsuit.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF PENOBSCOT.

1849.

HENRY WARREN, *petitioner for partition, versus* INHABITANTS OF STETSON.

Where one holding office, has authority, in the exercise of such office, to convey real estate for the benefit of others, his deed, though signed, sealed and delivered, is void, if it purport to have been executed, not in the exercise of *that* office, but of some *other* office.

Thus, where one, who was treasurer of the town, and also of the board of trustees of the ministerial and school fund, executed a deed of land, signing it as "treasurer of the *town*," the deed is merely void, though it would have been effectual if he had, by direction of the board of trustees, executed it as *their* treasurer.

If it be so that the selectmen, treasurer and clerk of a town are authorized to convey the ministerial and school lands, it is essential to the validity of the conveyance that the clerk, *as a distinct branch of the board*, should join in the deed. — Per WELLS, J.

PETITION FOR PARTITION of lands in Stetson, being the ministerial and school lots, in which the petitioner alleged that he was seized of an undivided half.

The inhabitants of Stetson, by brief statement, alleged that the petitioner was not seized of any part of said lands, but that they were sole seized.

At the trial, before WELLS, J. the petitioner offered a deed from Samuel Stetson and others, and it was objected to. A part of it ran thus, "that we Samuel Stetson, treasurer of Stetson, Isaac Bicknell, William Thompson and James Piper, selectmen of said town, being the board of trustees of the ministerial and school lands of said town, in consideration of, &c., give, grant," &c. the lots described in said petition with covenants. The deed was signed "Samuel Stetson, treasurer of Stetson, Isaac Bicknell, William Thompson, selectmen of Stetson," and was acknowledged by Stetson and Bicknell.

By the records of the town, it appeared that the persons named in the deed, were duly chosen and qualified town officers, as named in the deed.

The presiding Judge ruled that the deed did not convey the land; that if said officers were the legal treasurer and selectmen of the town, the deed executed by them, with its description of the grantors, was not sufficient to convey the lots; and that the petitioner must show, that the treasurer of said board of trustees had given bond, before the board could lawfully make the conveyance.

If either of said rulings was right, the petitioner is to become nonsuit, but if both were erroneous, the case to stand for trial.

Warren, pro se.

1. It is not essential to the validity of a deed by trustees of ministerial and school funds, that a bond should be given by their treasurer.

The statute is directory, merely. Statute of 1824, chap. 254.

Whether a duty, imposed by law on a corporation, is directory or essential, must be determined by its nature and objects, the public convenience, and what may have been understood to be the intention of the Legislature. *M. Bridge Proprietors* v. *Brooks*, 13 Maine, 395; *U. S. Bank* v. *Dandridge*, 12 Wheaton, 64; 15 Mass. 107, where it was held that acts of a sheriff or coroner are valid, before bond given.

In actions, brought by trustees of ministerial and school

funds, it is not necessary to prove their organization. 3 Fairf. 381.

This is not like the case of bonds given to Judges of Probate, because in this case, a bond is presumed ; for there are no records, and after a little time, no mode exists of proving that a bond was given ; and, if a record were made, it is for the interest of the town to have it destroyed.

2. The execution of the deed is good.

The seal is good, as the seal of the board. *Mill Dam Foundry* v. *Hovey*, 21 Pick. 417.

The deed is not vitiated by others of the corporation signing it, besides the treasurer. 3 Johns. 228.

General principle as to *form*, is, that if it appears from the contract, that it was the intent that the corporation should be bound, they will be so bound, whatever the particular form of the writing. Angell & Ames on Corp. 239 ; Statute of 1823, c. 220.

A deed by an agent, in his own name, is made good by statute. Statute of 1823, chap. 220, vol. 3, p. 249.

Cutting, for defendant.

1. The deed conveys nothing. There is no pretence that the signers had any but an official interest. The requirements of the statute must be complied with, before the title will pass.

Objections are many, under the statute of February 12, 1834 ; 3d vol. old laws, chap. 254.

If the trustees *could* convey without vote, or by their treasurer, *all* must be parties. The town clerk is nowhere named in the deed, either in the body or as a signer.

The deed names three selectmen, but only two sign it, and only one acknowledges it. It must appear that all the members of the board were consulted. 16 Maine, 184.

But if all had signed it, and the clerk also, it is not the statute mode. See sect. 3. " Any deed duly executed by the treasurer of said board, by direction of trustees, shall be good and effectual in law, to pass the estate."

S. Stetson is named in the deed, as treasurer of *Stetson*, and signs it as treasurer of *Stetson*. But the statute requires the treasurer of the *board* and not of the town. He may be and often is, some other member. He may be the town clerk. The trustees, (sect. 2,) "shall elect a president and treasurer, annually." The *town* treasurer is not ex-officio treasurer of this board.

This body of trustees is a corporation, so declared in the second section. It has a corporate name, different from that in the deed, and has *a common seal*, with all usual corporate powers. Sect. 3, gives the corporation power to sell and convey all ministerial and school lands, and then points out how this corporation can convey, as before stated.

No corporation, duly organized, can convey except by vote or by deed, under the corporate name and seal, and by the authorized officer. If all the individuals, composing a corporation, should execute a deed of corporate property, it would not pass. *Jackson* v. *Campbell*, 5 Wend. 572.

"A deed, describing the grantors as a corporation, executed by the president in his own name and seal, does not pass the title from the corporation." *Hatch* v. *Burr*, 1 Ham. 390; *Stowe* v. *Wise*, 7 Conn. 214.

2. It is clear that the treasurer must have given bond, as the Court ruled. The statute so requires.

Where the statute requires that an officer shall do some act, as preliminary to exercising the duties of his office, as giving a bond, or taking an oath, it must appear that the act has been done, before he can act.

WELLS, J. — The act of February 12, 1824, c. 254, § 2, makes the selectmen, town clerk and treasurer, for the time being, of every town in the State, where no other provision has by law been made, a body corporate, and trustees of the ministerial and school funds, with the powers incident to such corporations. Among the powers enumerated is that of having a common seal. It is also provided, that the trustees shall annually elect a president, clerk and treasurer, that the treas-

urer shall give bond with sufficient sureties, in the opinion of the trustees, for the faithful discharge of his trust, and the clerk shall be sworn to the faithful performance of his duty.

The trustees have been regarded as a corporation. *Trustees of ministerial and school fund in Levant* v. *Parks*, 1 Fairf. 441; 3 Fairf. 381.

If a deed, signed by a majority of the selectmen, town clerk and treasurer, would be valid, *ratione officii*, the deed under which the petitioner claims, not having been signed by the town clerk, one branch of the board of trustees, cannot have the effect of a conveyance.

The third section of the act provides, "that said trustees shall have power to sell and convey all the ministerial and school lands belonging to their respective towns, &c. And any deed duly executed by the treasurer of said board, by direction of said trustees, shall be good and effectual in law, to pass the estate described in such deed of conveyance."

One of the persons who signs the deed describes himself as treasurer of Stetson. But it is the treasurer of the board, chosen by the trustees, not the treasurer of the town, who is empowered to execute the deed.

The deed not having been properly executed, it is not necessary to consider the other question presented in the case, and the petitioner must become nonsuit.

ALDEN B. FARRINGTON, *Plaintiff in error, versus* SAMUEL HOWARD.

An order from the commanding officer of a militia company, addressed to a private in the company, directing him to warn the persons therein named, his own name being on the list with the others, to attend at a company training, is a sufficient warning for him to attend.

ERROR, to reverse the judgment of a justice of the peace, whereby the plaintiff was adjudged liable to a fine, for non-appearance at a militia company training. The only question was, whether he was sufficiently warned. The defendant in

error was commanding officer of the company, to which the plaintiff belonged, and issued an order to the plaintiff, commanding him to warn all the persons whose names were annexed to the order. In that list was the name of the plaintiff, and below said list he made a return in writing, that he had warned all the men named therein.

H. E. Prentiss, for defendant in error.

1. Farrington having made a return, that he had warned himself to appear, thereby acknowledges, that he was warned, and is estopped to deny his own return.

2. Without that acknowledgment, he was bound to attend. When the commanding officer orders a private to warn the non-commissioned officers and privates of the company, annexing a list of their names, including the name of the private, thus ordered to warn the rest, this private is bound to attend himself without further warning. It is an order to *him* to attend also. It is not necessary, that the captain should make out another order to another private to warn the first one. Such a construction would be inconvenient, and contrary to the intention of the statute.

This point has been decided in Massachusetts, under a militia law, similar in this respect to our own. *Cobb* v. *Lucas*, 15 Pick. 1.

D. T. Jewett, for plaintiff in error. — A private cannot warn himself; the order was here for him to warn the men, and the return cannot be construed as embracing himself. 15 Maine, 447.

The case referred to in Massachusetts is plainly distinguishable from the one at bar.

Wells, J. — It was decided in the case of *Nickerson* v. *Howard*, 25 Maine, 394, that the defendant in error was to be regarded as the commander of the company, and that no private in the company could be excusable for refusing submission to him in that capacity.

But it is contended, that the plaintiff in error was not duly warned to attend the meeting of the company.

It appears, that an order from Howard was addressed to him, commanding him to warn the men, whose names were annexed to the order, that his own name was in the list annexed, and he returned at the bottom of the order and below the list, that he had warned all the men named in the list.

In the case of *Cobb* v. *Lucas*, 15 Pick. 1, it does not appear, that the name of the private was in the list, but in the margin of it, there was a direction to him to appear, agreeably to the order. And this was held a sufficient warning.

The name of the plaintiff in error having been in the list of those, whom he was ordered to warn, the reception of it was equivalent to a notice for him to appear, and by reading the order and list, he obtained the same information for himself, which he was directed to communicate to the other members of the company. *Judgment of the Court below affirmed.*

JOHN E. HESSELTINE *versus* DAVIS R. STOCKWELL.

The doctrine of "confusion of goods," may apply to mill logs and other lumber.

Confusion of goods has occurred when the intermixture is such that each one's property can no longer be distinguished. — Per SHEPLEY, C. J.

When there has been a confusion of goods, the common law assigns the whole property to the innocent party, without liability to account, except in certain cases or conditions of the property.

There is no forfeiture, if the goods have been intermixed without fraud.

And, even in cases of fraudulent intermixture, there is no forfeiture, if the goods be of equal value. Each owner is entitled to his proportion of the whole.

If logs belonging to the plaintiff have been wrongfully intermixed with those belonging to another person, so as to form an aggregate lot, in which the logs of the plaintiff cannot be distinguished from the others; and if a detached parcel of such aggregate lot, have afterwards come into the hands of a third person, it cannot be laid down, *as matter of law*, that a confusion of goods has not occurred, or that the plaintiff, in order to recover in an action of trover against such third person, is bound to prove his original ownership in any of the logs constituting such detached parcel.

TROVER, for a quantity of pine mill logs.

At the trial, before WELLS, J. the plaintiff introduced testimony tending to prove, that in the winter of 1844 — 5, one Leander Preble, cut on his own land about 600 M. feet of pine lumber, and also cut on the land of the plaintiff, wrongfully and wilfully, about 100 M. feet of lumber of a similar quality, all of which lumber was marked with the same mark, and indiscriminately hauled and landed on the same landing place. That in the spring of 1845, said lumber was run down the stream and came into the possession of Franklin Adams & Co., and a part of it was taken to market, and the other part remained in the stream, and was subsequently sold by them to the defendant, who in the spring of 1846, run to market all the residue of said lumber, excepting that in controversy, which consisted of about 100 M. feet, that had remained behind, and in November, 1846, was seized by the plaintiff.

Soon afterwards, the defendant took this lumber out of the plaintiff's possession, for which taking, this action is brought.

There was evidence introduced by defendant, that Preble had cut on the plaintiff's land only about 7000 feet, for which he had given his note. And there was much evidence from both parties as to the cutting.

The Court instructed the jury, that the plaintiff must prove that the logs for which he claimed damages, in this action, had been cut on his land, and had been taken by the defendant; and that the plaintiff was entitled to recover for any logs cut by said Preble on the plaintiff's land, and which were taken by the defendant, unless said Preble had paid the plaintiff therefor; and that it did not appear that any question of confusion of property arose in the action.

A verdict was returned for the defendant.

Kent & Cutting, for plaintiff.

A. W. Paine, for defendant.

The jury having found that none of the logs, *taken by defendant*, were cut on plaintiff's land, the only ground of claim to recover is, that these logs, cut by Preble on his own

land, have become forfeited to plaintiff on account of some intermixture, which, prior to the defendant's interference, had been made of the logs cut on Preble's land with logs cut by Preble on the plaintiff's land, although the defendant did not take any of these last named logs.

The verdict establishes the fact that, if any such intermixture ever existed, it had ceased to exist, before defendant seized the logs. The only ground of plaintiff's claim then, is, that by such intermixture the whole mass became plaintiff's *ipso facto*. But such a doctrine, if ever applicable to *any* property, does not apply to mill logs; the right of the parties being limited, to the right to hold so much of the mass as may be equal to his share, though he may not be liable in trespass for *seizing* the whole and holding it until a separation can be effected. *Wingate* v. *Smith*, 20 Maine, 287.

But the doctrine is denied *in toto;* the forfeiture operating or the right to seize existing, only with respect to the mass containing the common property. At most, an action of *trover* will not lie in such a case, although the plaintiff might not be liable in trespass for taking a part or the whole mass indiscriminately. For trover will not lie for goods, in a part of a mass. *Austin* v. *Craven*, 4 Taunt. 646.

And in trover it is necessary to prove *the identity* of the goods; that the property sued for is the actual property of plaintiff. 3 Stephens' N. P. 2702.

In trover, a conversion is effected by the first unlawful act committed upon the property. In case of logs, the conversion is complete the moment after the tree is felled or separated from the freehold. Then is the point of time, at which damages are to be assessed, and of course, the time at which the right of action accrues. A demand and refusal to deliver, is mere *evidence* of conversion and not a conversion itself. 5 N. H., 225; 12 *Ib.* 385.

The conversion, then, in this case, was before any intermixture, and of course the action cannot be sustained, unless defendant is proved to have received a part of the identical

logs cut on plaintiff's land, if *any*. *Barron* v. *Cobleigh*, 11 N. H. 561; *Cushing* v. *Longfellow*, 26 Maine, 306.

And whatever may have been the liabilities of *Preble*, yet the defendant, being *bona fide* purchaser of logs, is certainly not to be holden in damages, unless he has received or possessed himself of those belonging to the plaintiff.

It is, however, a sufficient answer to any complaint made by the plaintiff against the ruling, that it does not appear that any such question as that now discussed was raised at the trial, for the consideration of the jury, but on the contrary, that he claimed to recover "on the ground that the logs were cut on his land." All that appears in the case is, that evidence was introduced tending to prove that Preble cut some logs on plaintiff's land and some on his own of a *similar* quality. It does not however appear that, on the testimony, he claimed any right to damages for any intermixture. Such testimony would form a proper and legitimate proof of the position assumed by him, that the "logs in question were cut on plaintiff's land;" and introduced for this purpose, it was very proper that defendant should introduce evidence, "tending to prove that no logs were so cut." *Besides*, if he claimed to recover on the ground of a confusion, he should have asked for such an instruction as would have called for a finding of the jury on that point.

But the mixing together of goods of a *similar quality* does not affect the title. The intermixture must be of such goods, that it is *impossible* to distinguish the one from the other. *Ryder* v. *Hathaway*, 21 Pick. 305.

Exception may be taken to the closing remark of the Judge, that "it did not appear that any question of confusion of property arose in the case."

This remark was justified by the claim made by the plaintiff, which was on the ground "that the logs were cut on his own land."

It was also authorized by the fact found by the jury, that no logs were so cut on the plaintiff's land.

It was also justified by the character of the action, *trover*

being supported only by proof of actual identity of property, and the question of confusion in such a case as this, would only arise in an action of trespass or in a question of rightful *seizure.*

At most, the remark was but an expression of opinion, and exceptions do not lie. *Phillips* v. *Kingfield*, 19 Maine, 375; *Gilbert* v. *Woodbury*, 22 *ib.* 246; *Dyer* v. *Green*, 23 *ib.* 464; *Ayer* v. *Woodman*, 24 *ib.* 201; *Lord* v. *Pierce*, 25 *ib.* 233.

SHEPLEY, C. J. — This was an action of trover brought to recover the value of certain pine logs.

The logs appear to have composed a part of a larger lot estimated to contain more than six hundred thousand feet, which were cut and hauled by Leander Preble. The case states, that there was testimony tending to prove, that Preble cut on his own land about six hundred thousand feet of pine lumber, and also cut on the land of the plaintiff about one hundred thousand feet of pine lumber of a similar quality, all of which logs were marked with the same mark and hauled and landed on the same landing place.

With other instructions the jury were instructed, "that it did not appear, that any question of confusion of property arose in the action."

What will constitute a confusion of goods has been the subject of much discussion, and it has become a question of much interest to the owners of lands, upon which there are timber trees, as well as to those persons interested in the lumbering business, whether the doctrine can be applicable to the intermixture of logs.

When there has been such an intermixture of goods owned by different persons, that the property of each can no longer be distinguished, what is denominated a confusion of goods has taken place. And this may take place with respect to mill logs and other lumber. But it can do so only upon proof, that the property of each can no longer be distinguished. That the doctrine might be applicable to mill logs is admitted.

in the case of *Loomis* v. *Green*, 7 Greenl. 393. The case of *Wingate* v. *Smith*, 20 Maine, 287, has been alluded to as exhibiting a different doctrine; but the case does not authorize such a conclusion. The instructions were, "that merely taking the mill logs and fraudulently mixing them with the defendant's logs would not constitute confusion of goods." These instructions were, and clearly must have been approved; for an additional element was required, that the mixture should have been of such a character, that the property of each could no longer be distinguished. The opinion merely refers with approbation to the case of *Ryder* v. *Hathaway*, 21 Pick. 298, and says, "the principles there stated would authorize the instructions, which were given on that point in this case."

The common law in opposition to the civil law assigns the whole property, without liability to account for any part of it, to the innocent party, when there has been a confusion of goods, except in certain cases, or conditions of property. Chancellor Kent correctly observes, that the rule is carried no further, than necessity requires. 2 Kent's Com. 365.

There is therefore no forfeiture of the goods of one, who voluntarily and without fraud makes such an admixture. As when, for example, he supposes all the goods to be his own, or when he does it by mistake.

And there is no forfeiture in case of a fraudulent intermixture, when the goods intermixed are of equal value. This has not been sufficiently noticed, and yet it is a just rule, and is fully sustained by authority. Lord Eldon, in the case of *Lupton* v. *White*, 15 Ves. 442, states the law of the old decided cases to be, "if one man mixes his corn or flour with that of another and they were of equal value, the latter must have the given quantity; but if articles of a different value are mixed, producing a third value, the aggregate of the whole, and through the fault of the person mixing them, the other party cannot tell what was the original value of his property, he must have the whole." This doctrine is stated with approbation by Kent. 2 Kent's Com. 365. It is again stated in the case of

Ryder v. *Hathaway*. The opinion says, "if they were of equal value, as corn or wood of the same kind, the rule of justice would be obvious. Let each one take his own given quantity. But, if they were of unequal value, the rule would be more difficult."

In the case of *Willard* v. *Rice*, 11 Metc. 493, the question, whether palm-leaf hats, which were intermixed, were of equal value, does not appear to have been, although it would seem that it might have been, made. The case is not therefore opposed to the doctrine here stated. The doctrine is noticed, in the cases of *Hart* v. *Ten Eyck*, 2 Johns. Ch. 62; *Ringgold* v. *Ringgold*, 1 Har. & Gill. 11; *Brackenridge* v. *Holland*, 2 Blackf. 377.

If no logs were cut upon land owned by the plaintiff, no question could have arisen of confusion of goods. The jury were required by the instructions to find only, that none of those taken by the defendant, were cut on the plaintiff's land. They were not required to find, that no logs, composing the whole lot of six or seven hundred thousand feet, were cut on the plaintiff's land.

If Preble wrongfully cut any logs on land owned by the plaintiff, and mixed them with logs cut on his own land, so that they could not be distinguished, a question respecting confusion of goods, might properly have arisen. The admixture might have been of such a character, that the whole lot of logs, including those in the possession of the defendant, might have become the property of the plaintiff. Or it might have been of such a character, the logs being of equal value, that the plaintiff would have been entitled to recover from any one in possession of those logs or of a part of them, such proportion of them, as the logs cut upon his land bore to the whole number.

While the facts reported might not necessarily prove a confusion of goods, if part of the whole lot of logs were cut upon land owned by the plaintiff, they might have been sufficient to raise that question, and to present it for the consideration of the jury.

The instructions therefore, when considered together, requireing the plaintiff to satisfy the jury, that some of that particular portion of the whole lot of logs, which the defendant had in his possession, were cut upon land owned by the plaintiff, and that no question of confusion of property appeared to arise, were too restrictive. They may have deprived the plaintiff of the right to recover upon proof, that some of the logs composing the whole lot, had been cut upon his land and so mixed with logs cut on land owned by Preble, that they could not be distinguished.

Exceptions sustained, verdict set aside, and new trial granted.

MOSES KNAPP *versus* ISAAC R. CLARK.

Where a judgment for yearly damages has been recovered for flowing plaintiff's land, the judgment is a charge upon the estate complained of, and the owner and occupier of the mill and dam, is liable in an action of debt, not only for what may fall due while he is owner, but for all that was in arrear before his title commenced.

In an action on such a judgment, an amendment, stating the *time* and *mode* of the acquirement of the defendant's title to the mill and dam, it having been already alleged that the defendant owned and occupied the same, introduces no new cause of action, and is admissible.

The statute of limitations does not apply to claims for flowage under a judgment.

DEBT. The declaration set forth a judgment of the Court of Common Pleas, recovered May term, 1836, by the plaintiff against Levi Cram and Benjamin Plummer, Jr., for damages in flowing the plaintiff's land, by the mill-dam of said Cram and Plummer; and recited the petition, the appointment of commissioners, who fixed the annual damages at eighteen dollars, and the subsequent verdict of a jury and judgment thereon, fixing the annual damages at sixty-seven dollars and twenty-five cents, and giving the right to flow the plaintiff's land the whole year. It also alleged that the defendant succeeded Cram and Plummer, in the ownership of the mill and dam, and that

he is now the owner of the same; and that said damages were unpaid from the 11th of June, 1836, to the date of his writ, December 20, 1845.

Against the objection of defendant, the plaintiff, under leave of the District Court, added a third count to his writ, and it was objected to as exhibiting a new cause of action.

At the trial, before WELLS, J., the defendant moved for a nonsuit, on the ground that the original writ exhibited no cause of action, and that the defendant was not liable for damages that accrued before he became owner or occupant of the mill; and that the third count, if it differed in effect from the others, involved a new cause of action, and was illegally admitted. This motion was overruled, and the cause went to trial under the plea of *nil debet*, with brief statements of accord and satisfaction, payment, release and limitations.

The plaintiff introduced record copies of a deed of quitclaim of one-half of the premises, on which the mill and dam are situated, from Geo. A. Pierce to defendant, dated June 6, 1845; and of a deed of quitclaim of the other half of said premises, from John Mooney to the defendant, dated May 9, 1845, and introduced other copies of deeds which connected the title of said defendant with the title of said Levi Cram and Benjamin Plummer.

The defendant called Gilman Cram, who testified that he bought the premises where the mill and dam stand, in January, 1838, and continued to own and occupy them until June 1, 1845. That in the fall of the second, or spring of the third year after his occupation commenced, he made an agreement with the plaintiff, that he would draw the water off, the first of June in each year, and keep it off till after the hay was cut on the plaintiff's meadow, and that the plaintiff should not claim any damages, if the water was kept drained off as aforesaid; and that there was no specific time mentioned for the continuance of the agreement. There was also evidence tending to show that the agreement was performed, up to the time said Cram left the mill in June, 1845, and that the plaintiff,

all that time, cut as good a crop of hay on his meadow as he ever did.

The plaintiff introduced testimony tending to show that no such agreement was ever made, and that if made, it was not performed, and that it was violated in particular instances by leaving the gate down, and had injuriously affected the plaintiff's crop of hay. The defendant offered to show the price at which the plaintiff had sold his hay during those years, but it was excluded by the Court.

The defendant contended he was not liable for annual damages that accrued *before* he became the owner or occupant of the mill; that those might have been collected of the prior owners, who were responsible, and by requiring security as provided by the statute; and that it was by the plaintiff's own laches that they had not been collected; that the statute of limitations was a bar to all, which had been due more than six years; that if the gate had been at any time left down, or the agreement had been in any other respect violated, this was only a ground for an action of damages, or a reason why the whole annual damages should not be remitted; but did not put an end to the agreement; that Cram, having in pursuance of said agreement, forborne to exercise his right of using his mill and flowing plaintiff's land from the first of June until after plaintiff's grass was off, for five years, and the plaintiff in pursuance of said agreement having cut his hay during those years, the agreement was not now to be laid aside on account of some slight and temporary violation from which plaintiff suffered little or no injury.

The Judge instructed the jury, that the defendant, claiming through mesne conveyances under those against whom the original judgment was recovered, was liable for the yearly damages, that accrued before he purchased and were unpaid; and that they should return their verdict for the plaintiff for sixty-seven dollars and $\frac{25}{100}$ a year, for the annual damages, from June 11, 1836, to June 11, 1845, with interest on each years damages from the end of the year when it became payable up to the time of the judgment, unless they found that the agree-

ment, set up by defendant, constituted a defence for some of those years; and if so, they would return their verdict for the years not affected by said agreement; that if they found the agreement set up was actually made and performed, it would amount to an accord and satisfaction so long as it was performed; that the agreement was the accord, the execution of it was the satisfaction; and that the agreement must be executed, or it would be no defence; that when it ceased to be executed it would be at an end; that if they found it executed the first year and not executed the second year, it could not be revived the third or succeeding years, without the assent of the plaintiff.

The jury returned a verdict for plaintiff for $875,95, "no agreement being sustained."

Exceptions were filed to the rulings and instructions and it was also agreed that, if the verdict was too large it might be reduced to such sum as the Court should think proper, and that the verdict might be set aside, and a nonsuit ordered, if the plaintiff is not entitled to recover any thing upon such amendments of his declaration, as the Court shall deem legal.

The amendment allowed by the District Court sufficiently appears in the opinion.

Prentiss and *Rawson*, for defendant.

Defendant is not liable for annual damages that accrued before he became the owner and occupant.

1st. The original petition and judgment being before the Revised Statutes, the damages fixed by that judgment must be regulated by the laws of that period. If by those laws the defendant is not liable, the Revised Statutes cannot make him so.

The Revised Statutes provide for all future complaints for flowage. They prescribe the proceedings and remedies, but they do not attempt to interfere with the past; they make no reference to any old judgments. The Legislature had no power to create a new liability on an old judgment, and they certainly have not attempted to do it.

2d. The statute of 1821, chap. 45, and the decisions under it, fix the extent of the liability of the purchaser of a mill to the damages of the year, when he takes possession. It has been decided, that he is bound by the *amount* of the annual damages, fixed by the judgment against his grantor, and as the damages of the year, when he takes possession, cannot be divided, and he is liable for that part of the year after he purchases, he is liable for the whole year. This question was before the Court and was decided in *Lowell* v. *Shaw*, 15 Maine, 242.

In the case of *Commonwealth* v. *Ellis*, 11 Mass. 462, relied upon by the plaintiff, this question was not *presented, nor argued, nor noticed by the Court*, but the Court, (though the case did not call for it,) make the remark, "that the judgment fixing the annual damages has the effect of a *composition deed*, and that the *composition* thus established runs with the land and binds the grantees, that is, the grantees are bound by the *amount* of damages thus fixed, unless they have a new estimation under the statute. It is not said that the damages run with the land, and that the grantee is obliged to pay those that accrue under a former owner.

But the same question, or one involving the same principle, has been decided in *Holmes* v. *Drew*, 7 Pick. 141.

The marginal note is, "*that a mill owner is not liable for damages done by flowing before his title commenced.*

The statute provides, that the commissioners or jury shall estimate the damages done by flowing, without saying by whom done, and the Court have decided, that this means only the damages done by the defendant, and not those done by a former owner.

So the statute provides, that when the annual damages have been ascertained, the owner of the land may bring his action of debt for the same, but does not say against whom the action is to be brought. Must it not be brought against the owner or occupant for the annual damages so fixed and accruing, while he was owner or occupant?

The plaintiff's laches in not collecting of the former owners was relied upon by defendant in his brief statement, and defendant's counsel requested the Judge to instruct the jury, that if the damages accruing under former owners and occupants might have been collected of them, the defendant was not liable for them. No such instruction was given.

The case of *Lowell* v. *Shaw* goes on the ground that there is laches, when the right of action against the former owner exists. In that case, it did not, as a year's damage cannot be divided. And, as the statute gives the plaintiff *security for his damages*, chap. 45, § 7, it is always laches not to collect of a former owner.

All annual damages which had been due more than six years when the action was commenced, were barred by the statute of limitations. R. S. c. 146, § 1.

The action is not founded on the judgment, but on the annual flowing. The judgment fixing the annual damages *is mere evidence*, and for this reason, we were allowed to plead "*nil debet.*"

Where a judgment ascertains a certain sum to be due from A to B; that record may be sued for twenty years. But here the judgment merely fixes the annual damages, if the *land is flowed*; it does not determine, that it will be flowed, and that those damages are to be paid at all events, if the mill should be burned down, carried away or abandoned. Parole evidence is necessary to the plaintiff to make out his case.

Also this judgment does not determine *who shall sue* or *who shall be sued.* Plaintiff must show by *parole* that he is the owner of the land flowed, and that defendant is owner or occupant of the mill.

The instructions requested should have been given, and those given were wrong.

The agreement to waive damages having been substantially performed by Cram, and the benefit of that performance received by plaintiff, it should not have been thrown away on account of any slight and temporary violation of it, which could have been compensated in damages. *Campbell* v. *Jones*, C.

T. Reports, 570; *Boon* v. *Eyere*, 3 Blk. R. 1312; 1 Metcalf & Perkin's Digest, 116, sect. 400.

The plaintiff having contended, that the slightest violation of the agreement put an end to it; and the defendant having requested instructions to the contrary; and the Court having *refused* to give those instructions, but having instructed the jury, "that the contract must be executed, or it would be no defence": — the jury of course understood the defendant's position to be negatived, and the plaintiff's sustained.

The plaintiff, while the action was in the District Court, moved to amend by adding a third count, alleging that the "defendant is the owner and occupant on the day of the purchase of this writ; that he became the owner by deeds dated May 9th and June 11th, 1845, and has ever since continued the owner and occupant.

According to the strict rules of pleading, this seems to be only an averment of ownership and occupancy on the day of the purchase of this writ. If so, the nonsuit should have been ordered. If it is an allegation of a prior ownership and occupancy, it introduces a new cause of action, for it introduces a cause of action, when the original writ unfolded no cause whatever.

WELLS, J. — The statute of 1821, chap. 45, does not in express terms, make the assignee of the person, against whom the judgment is rendered, fixing the yearly damages, liable for them.

In *Lowell* v. *Shaw & al., adm'rs*, 15 Maine, 242, the defendant's intestate was held liable for the damages, which became due, while he was the owner, for the whole of the year, though he had been the owner and occupant but a part of the year.

But he could not have been holden to pay any damages, unless they were a charge upon the estate. That decision rests on the principle, that the judgment run with the estate, binding the grantee to pay the yearly damages.

If then, the yearly damages are a charge upon the estate

the owner of it is liable not only for those accruing in his own time, but for all those, which are in arrear before his title commenced.

Such is the rule of law in relation to annuities, charged upon the estate. *Trinity College* v. *Tunstal, Parson of Sharingford*, Cro. Eliz. 810; *Swasey* v. *Little*, 7 Pick. 296.

The Revised Statutes, chap. 126, § 19, provide for a lien upon the mill and mill-dam, with the appurtenances and land, for the annual compensation, with a limitation, which it is unnecessary to consider, for the right of exercising the lien is not now in question.

The twentieth section of the same statute, makes the owner or occupier of the mill, when the action is brought, liable for all the damages due and unpaid.

It is unnecessary to decide whether the provisions of the Revised Statutes will apply to a case, where the annual damages have been established, before their passage. For the twentieth section, before mentioned, appears rather to be a legislative exposition of the law, as it then existed, than the enacting of a new one.

The defendant having been charged in the first and second counts of the declaration, as the owner and occupier of the mill, the count admitted by the District Court, stating the time when his ownership commenced, and from whom his title was derived, introduced no new cause of action. The allegation of ownership was sufficient without declaring the time and mode of its commencement.

There is no limitation for this action, except the presumption of payment arising after twenty years. It is founded on the judgment, with which the defendant is connected by privity of estate.

If the agreement set up by the defendant never had any existence, it could not affect the case. If it was entered into, but never was performed by the defendant, it would be inoperative. Nor would a part be equal to a full performance, such as the agreement required.

By the instructions, the defendant was allowed the benefit of

the agreement each year in which it was executed, until it was broken. After it was broken, its continuance would necessarily cease, and could not be renewed without the concurrence of the plaintiff. By the very terms of the agreement, it was to be executed during each year. A failure to do so would terminate it. The special finding of the jury on this part of the case seems to be equivocal, but they probably intended to say, that the agreement was not proved. But it is not necessary to ascertain their meaning.

The price alone of the plaintiff's hay, could not have had any bearing upon the fact, whether the agreement had been executed. It might tend, with other testimony, to show the quality of hay cut upon the plaintiff's land. But the value of hay in the market, depends upon various considerations. Without proof of the market price, which was not introduced, no comparison could be made to test the quality of the plaintiff's hay, which might have brought a higher price, owing to the general scarcity of hay, than to its quality. It might have brought the same price, although of inferior quality. No other testimony was connected with the price or offered to be, rendering the evidence sufficiently relevant, to authorize its admission. *Page* v. *Homans*, 14 Maine, 478.

Judgment on the verdict.

JAMES RICE *versus* SAMUEL WALLACE.

Instructions to the jury cannot be excepted to by the party, in whose favor they were given.

EXCEPTIONS from the District Court, ALLEN, J.

Assumpsit on an account annexed. There was also a count on an award of referees.

At the trial, it appeared that the defendant employed the plaintiff to cut a quantity of hay for a stipulated price; that the claim had been referred to three referees, who examined the hay and awarded the sum to be paid; and notified the defendant thereof, before the commencement of this suit.

It also appeared that the plaintiff made some statements to the referees concerning the matter, in the absence of the other party, and it was testified by one of the referees that the statements did not in any way affect the award.

The Court instructed the jury, that if the plaintiff was present and made material statements, it would render the award invalid. Verdict for plaintiff.

J. Appleton & Mudgett, for defendant, to obtain a new trial, relied upon *Dobson* v. *Groves,* 6 Queen's Bench, 637, cited in Kinne's Comp. 1848, p. 14.

Waterhouse, for plaintiff.

WELLS, J. — There does not appear to be any cause for exceptions, on the part of the defendant, for the instruction given was favorable to him.

Exceptions overruled and judgment on the verdict.

FRANKLIN B. SIBLEY *versus* JOSEPH R. LUMBERT *& al.*

A minute upon the margin of an indorsed negotiable note, representing the note to be the "property of A. B." is not, of itself, proof that A. B. *at the time of the trial,* in a suit upon the note, had any interest in it.

Such a minute, of itself alone, will not preclude A. B. from testifying for the indorsee, in a suit upon the note against the maker.

Since the Revised Statutes, as well as before, a new promise may be implied from a partial payment upon a note.

Such a payment, within six years before the commencement of the suit, will avoid the statute bar of limitations.

Such payment may be proved by parol.

ASSUMPSIT on three promissory notes, all of the same date, signed by the defendants in their copartnership name, Lumbert & Fisher, payable more than six years before the suit, to a third person or order, and indorsed in blank.

Fisher was defaulted. Lumbert pleaded the statute of limitations. On the trial, before HOWARD, J., the plaintiff introduced widow Cynthia Sibley, as a witness; she was objected to by defendant, as interested, because on the face of two of

the notes in suit, was written in pencil, "property of Mrs. Sibley." The objection was overruled. By her testimony, it appeared, that she became the holder and owner of the notes in suit, as her portion of her husband's estate, and had transferred her interest to the plaintiff, before the commencement of this suit; that the indorsements on the notes, (being a number of partial payments from 1840 to 1845,) were all made by Fisher. That while she held the notes, in 1842, she called on Lumbert, for payment, and asked him for goods for the debt out of his son's store. He declined paying in that way, but let her have ten dollars in money. This was in the summer of 1842. In October of the same year, she again called on Lumbert for payment, and his wife was present. Mrs. L. said the debt ought to be paid, and he said it would take all he had to pay the debts. He then let her have, towards these notes, a chaise valued at $250. The reason why this money and chaise were not indorsed, was that the defendant, Fisher, who was her brother, and had assisted her in her business, told her there was no need of indorsing it then; that it would be charged, and be the same thing; that the defendants were copartners in trade, when the notes were given, and their partnership had never been dissolved to her knowledge, but they had not traded since 1840.

Upon this evidence, the case was, by consent, taken from the jury, and submitted to the consideration of the Court. A nonsuit or default is to be entered as the legal rights of the parties shall require.

Peters, for plaintiff.

Cutting, for defendant.

The minute on the note was *prima facie* evidence, that Mrs. Sibley owned it. The case had nothing to repel that evidence. She was therefore wrongfully admitted as a witness for the plaintiff.

Her testimony being excluded, the statute bar is in full force.

Mrs. Sibley, when she received the payments of $10 and $250, made no appropriation. Had she appropriated those

payments upon either one of the notes, the others would have been barred. By omitting to indorse the sums, she must be considered as having received them *on account.* Such a reception cannot be deemed a *payment.*

She says she "does not know that Lumbert said any thing about the debt." How, then, can it appear that *he* intended to make a *payment?*

WELLS, J. — The words in pencil mark, on the face of two of the notes in suit, "Property of Mrs. Sibley," would not necessarily indicate that they were her property, at the time she was offered as a witness. They might be perfectly consistent with her ownership at a prior time.

She was properly admitted as a witness. Her testimony shows, that she was once the owner of all three of the notes, but had transferred her interest in them to the plaintiff, before the commencement of the suit.

While she was the owner of the notes, and within six years from the commencement of the action, Lumbert made a payment to her of ten dollars, and a chaise valued at two hundred and fifty dollars, in part satisfaction of the notes. No direction was made by him, upon which of the notes he would have the payments applied, nor were they indorsed upon either of the notes.

The other defendant having been defaulted, no question arises as to his liability.

The payments made by Lumbert create a new promise by him, and remove the bar arising from the statute of limitations.

Chap. 146, § 19, of the Revised Statutes, requires the acknowledgment or promise, as evidence of a new or continuing contract, to be in writing. But the twenty-third section of the same chapter says, "nothing contained in the preceding four sections shall alter, take away, or lessen the effect of payment of any principal or interest, made by any person," &c.

While a mere acknowledgment or promise must be in

writing to render it valid, a new promise is implied from the fact of a partial payment of principal or interest.

Nor has the latter section pointed out the mode of proof, excepting that an indorsement or memorandum, made by the person to whom a payment shall be made, is not sufficient proof of it, so as to take the case out of the operation of the statute. It has left the fact of payment to be established in the same manner, as would have been required before the statute was passed.

It has been held in Massachusetts, upon the construction of a similar statute, that a verbal admission, of the party to be charged, of a partial payment, may be shown to avoid the effect of the limitation. *Williams* v. *Gridley*, 9 Metc. 482.

In this case there is direct proof of the payments which were made, and a default must be entered.

AUGUSTUS G. RANDALL *versus* JABEZ BRADBURY *& als.*

A written statement, made and signed by the justices before whom a poor debtor disclosed, not purporting to be a record of their proceedings, is not admissible as evidence.

DEBT, on a poor debtor's bond. At the trial, before ALLEN, J. in the District Court, the defendants produced the record of two justices of the peace and quorum, and a certificate that the principal defendant took the oath prescribed, within the time limited in the bond.

The plaintiff then offered a document, signed by the said justices, showing that, at the time appointed for the disclosure only one justice was present and acted, and that he adjourned the hearing to another day, when the other justice was selected; and that then the examination was had, and the oath administered. The defendants objected to the admission of this document, but the Court admitted it as evidence.

The defendants then requested that the jury be instructed to estimate the damages, according to Rev. Stat. chap. 115, § 78.

But the Judge ruled that the provisions of that section were not applicable to the case.

A verdict was rendered for the plaintiff, and the Court assessed the damage, according to the 39th section of said statute. The defendants excepted.

Hathaway, for the defendants.

A. W. Paine, for the plaintiff.

The document objected to was admissible, as the record of the justices. This kind of evidence has always been admitted, and is indeed a part of the record, of which the defendants have introduced another part.

By this record, it appears that an important defect existed in the proceedings of the justices, which has been held fatal, viz.: —

One justice only having been appointed on the return day, he adjourned the hearing improperly. *Henry* v. *Hamilton*, 24 Maine, 451.

Even, though the other party consented and requested to have it done. *Williams* v. *Burrill*, 23 Maine, 144.

Was the defendant entitled to be heard in damages by the jury, agreeably to the provisions of Revised Statutes, chap. 115, § 78?

This enactment was made to relieve debtors from errors in the proceedings in *two* particulars, viz.: —

1. Where the justices were not both of the *quorum.*

2. Where the *notice* was not in legal form.

For any other errors, no relief is given. As in case of the *selection* of justices, where both were improperly selected by debtor. *Barnard* v. *Bryant*, 21 Maine, 206; *Bunker* v. *Hall*, 23 Maine, 26.

WELLS, J. — The plaintiff alleges that the tribunal, which administered the oath to the debtor, was not properly organized, before an adjournment took place, that only one justice had at that time been selected, and that he had no power to adjourn.

A defect in the organization of the tribunal, may be shown by competent evidence. *Williams* v. *Burrill*, 23 Maine, 144.

To prove the want of an organization, a written statement, signed by the justices, not connected with the certificate of discharge, was admitted in evidence.

The statute does not make such statement evidence, it is not testimony under oath, nor does it purport to be a copy of any record made by them. Their statements can have no more validity than those of private persons, unless authorized by law.

The testimony having been improperly admitted, the exceptions are sustained, and a new trial granted.

RUFUS DWINEL *& al. versus* ALEXANDER H. HOWARD *& al.*

Where a purchase has been made of a commodity, to be received at a future day, at a fixed price, payable at a specified time, the seller may rescind the contract, after a failure by the purchaser to pay the full purchase money at the stipulated time.

Where, under such a contract, the purchaser receives a part of the commodity, and pays to the seller a greater sum than that part, at the agreed rates, would amount to; yet, if he fail to pay the residue at the stipulated time, the seller may, for such failure, rescind the contract as to the residue, and without liability to pay back any part of the amount which he had received.

ASSUMPSIT on the following contract, dated March 31, 1842: — "The said Howard & Page agree to sell and deliver to said Patten & Dwinel all the ice which is at the following places, viz: — about 230 cords at R. K. Page's ice house in Richmond, about 200 cords at Pittston, put up by John Jewett, and about 130 cords at hay-barn, so called, at Hallowell, in all about 560 cords. It is understood that said ice is to be made solid measure and to be measured by some person appointed by Gen. Greenlief White in case we do not agree upon the survey ourselves. Said ice to be measured immediately, and the surveyor to examine the ice occasionally, as it is being removed, and the survey completed according to the best of his

knowledge and judgment. But it is distinctly understood that the ice is to be wholly at the risk of said Patten & Dwinel both as to freshet, waste and fire.

"The said Patten & Dwinel on their part are to pay for said ice the sum of four dollars per cord as follows, viz: — $500 cash on delivery or exchange of instruments, and the balance one half in thirty and one half in sixty days, and if any of said ice is taken away sooner, then payment to be made as fast as taken.

"It is also understood that 75 tons, sold by Mr. Jewett at Pittston, is to come out of the quantity enumerated.

"It is understood that the $500 advanced is to go for the last ice received."

The matter was referred to referees, who awarded, that the defendants did not promise in manner and form as the plaintiffs in their declaration have alleged; unless the Court upon the following statement of facts shall adjudge that the plaintiffs are entitled to recover; and if such shall be the judgment of the Court, then said referees award and determine that the defendants did promise, &c., and that the plaintiffs recover of the defendants the sum of eight hundred and ninety dollars and $\frac{65}{100}$ as damages.

Report of facts: —

Benjamin Wales was authorized to measure the ice, and immediately after the contract was entered into and before any ice was received by plaintiffs, its contents were surveyed.

The whole quantity at the time of the survey was three hundred and fifty cords solid measure. The plaintiffs took and carried away two hundred and forty-seven and one half cords. The defendants retained, and sold on their own account, one hundred and two cords and one half. The plaintiffs paid the $500 in advance, also $600 on the 30th of April, 1842, and $125 on the 27th or 28th of May, 1842.

The defendants, both before and after the payment of the $125, and before the time of that payment, which by said contract was to be made in sixty days, refused to deliver to

the plaintiffs any more ice except on the payment of more money.

Jewett & Crosby, for plaintiffs.

Payment of part of price and the survey, vested the whole property in the plaintiffs. This is sufficient between vender and vendee. *Shumway* v. *Rutter*, 7 Pick. 56.

Title in the property is where the risk is. 2 Kent's Com. 498.

Payment of rent of warehouse makes a complete transfer of property. *Chapman* v. *Soule*, 3 Pick. 38; 1 Camp. 452; *Stone* v. *Hodges*, 14 Pick. 81.

Warehouse of vender became warehouse of vendee. *Barrett* v. *Goddard*, 3 Mason, 107.

Delivery of part, equivalent to a delivery of the whole to pass the property. *Macomber* v. *Parker*, 13 Pick. 175.

Where a party has received a part of the consideration for which he contracted, he is bound to perform his part of the contract; and the law leaves him to his remedy by action, to recover damages for any non-payment of the whole consideration. *Perdage* v. *Cole*, 1 Saund. 320; *Campbell* v. *Jones*, 6 Term R. 570; 1 Chitty's Pl. 313; *Dox* v. *Dey*, 3 Wend. 356.

If the day, appointed for the payment of money, was to happen or might happen, before the delivery of the property, the promises were independent; and if independent as to one party, they necessarily are so as to both. *Dox* v. *Dey*, 3 Wend. 356; 1 Saund. 320, n. 4; *Sears* v. *Fowler*, 2 Johns. 272; *Haven* v. *Bush*, *ibid.* 387; *Cunningham* v. *Merrill*, 10 Johns. 203; *Gage* v. *Coombs & trustees*, 7 Greenl. 394.

Words of a similar import as in the contract, viz: —"If any of said ice is taken away sooner, then payment to be made," &c., have received a judicial construction. *Campbell* v. *Jones*, 6 Term R. 570; *Tarling* v. *Baxter*, 6 B. & Cres. 360.

When mutual covenants go to a part only of the consideration on both sides, and a breach may be paid for in damages, the defendant has a remedy on his covenants, and cannot plead it as a condition precedent. Platt on Covenants, 79 to

96, cited in note to *Gardner* v. *Corson*, 15 Mass. 471; *Boone* v. *Eyre*, 1 H. Bl. 273; *Fothergill* v. *Walton*, 8 Taunt. 576; *Dox* v. *Dey*, before cited.

If a future day of payment be fixed by the contract, the seller waives his lien. Long on Sales, 150; Comyn on Con. 152; *Barrett* v. *Goddard*, 3 Mason, 107.

If defendants had a lien, they had no right to sell without notice to plaintiffs. Comyn on Con. 152; *Blexam* v. *Sanders*, 4 B. & C. 477; 7 East, 571; *Stearns* v. *March*, 4 Denio, 227.

After a wrongful sale, they may be treated as purchaser, agent or bailee. *Cummings* v. *Noyes*, 10 Mass. 436; 1 N. H. 151.

No demand necessary on agent, before action brought. *Coffin* v. *Coffin*, 7 Greenl. 298.

An absolute delivery of the property is a waiver of any condition antecedently made. *Hussey* v. *Thornton*, 4 Mass. 405; *Chapman* v. *Lathrop*, 6 Cowan, 110; *Carleton* v. *Sumner*, 4 Pick. 516; *Smith* v. *Dennie*, 6 Pick. 262; *Lupin* v. *Marie*, 2 Page, 169; 6 Wend. 77; 2 Kent's Com. 496.

After laches of plaintiff are known to defendant, he cannot treat the contract as subsisting and afterwards allege the laches as an excuse for non-performance on his part. *Thayer* v. *Wadsworth*, 19 Pick. 349; 7 Greenl. 70.

J. E. Godfrey, for defendants.

Shepley, C. J. — The case is presented by an alternative report of referees, stating the facts proved before them.

The action appears to have been assumpsit, commenced by the plaintiffs to recover damages for a refusal by the defendants to perform a written contract made between the parties on March 31, 1842, for the sale and purchase of a quantity of ice. The defendants agreed to sell to the plaintiffs all the ice at certain places named, at the price of four dollars per cord. Five hundred dollars were to be paid on the execution of the contract, to be applied in payment "for the last ice received."

The balance was to be paid "one-half in thirty and one-half

in sixty days, and if any of the ice is taken away sooner, then payment is to be made as fast as taken."

Five hundred dollars were paid and accepted as the payment on the execution of the contract. Six hundred dollars were paid on April 30, 1842, and one hundred and twenty-five dollars were paid on May 27 or 28, 1842. The quantity of ice, was determined to be three hundred and fifty cords, by an admeasurement made by a person selected by the parties. The plaintiffs had received two hundred and forty-seven and one-half cords of it.

They did not fulfil the contract on their part by paying for the whole of the ice in sixty days. Nor had they paid according to the contract as fast as they had taken the ice away. Under these circumstances the defendants refused to deliver the residue of the ice without payment for it.

When payment is by agreement to be made for goods sold, at the time of delivery, they do not become the property of the purchaser unless payment be made or tendered, or there be a waiver of the right to exact it. *Houdlette* v. *Tallman*, 14 Maine, 400; *Levin* v. *Smith*, 1 Denio, 243.

If the defendants may be considered to have waived their right to claim payment on delivery, so far as it respects the quantity delivered, still the plaintiffs, to be entitled to exact performance by a delivery of the residue, should have paid for the whole quantity of ice within the sixty days. This they failed to do. Having failed on their own part to perform, they cannot recover damages of the defendants for refusing to deliver the residue of the ice. Nor can they recover back the money paid in part execution of the contract. *Appleton* v. *Chase*, 19 Maine, 74.

The report of the referees in favor of the defendants, is accepted.

NOTE. — WELLS, J. was not present at the argument, and took no part in this decision.

FREDERICK A. BUTMAN *versus* PELATIAH HUSSEY.

Where, upon a purchase of real estate by a quitclaim deed, both parties suppose the title to be good, a failure in the title will not, *of itself alone*, entitle the vendee to reclaim the purchase money.

IN 1840, one Diana G. Emery brought an action against Lot Vinal and Waldo P. Vinal, and attached a lot of land on the writ. She recovered judgment and set off twenty-five acres of the land upon her execution in 1841. Afterwards, in 1842, she brought a writ of entry, against Levi G. Vinal to recover the land thus levied, and attached upon the writ, all his land within the county. In 1844, she obtained a verdict upon certain rulings of the Judge, to which said Levi G. Vinal excepted, whereupon the action was suffered to lie in Court undisposed of for a long time. While affairs were thus situated, Levi G. Vinal mortgaged the whole lot, (of which a part had been levied by Mrs. Emery as aforesaid,) to Ebenezer Hussey, to secure a note of $500,00, which he had made to the mortgagee. Upon the death of Ebenezer Hussey, the defendant was appointed his executor. In that capacity he sold and assigned the note and mortgage to the plaintiff for $200. Afterwards, in 1847, Mrs. Emery recovered judgment in her suit against Levi G. Vinal, for said twenty-five acres and for rent and costs, $136,99. To satisfy that sum she levied on a further portion of the land.

The plaintiff thereupon claimed to rescind the purchase, which he had made of the defendant, and demanded back the $200,00, and its interest, and tendered back the note and mortgage and a re-assignment made by himself.

This recision he claimed *first*, upon the ground of false and fraudulent representations by the defendant, upon the strength of which he was induced to purchase. Upon this point the evidence was as follows: —

One Hoyt testified, that at defendant's request, he asked plaintiff to purchase the note and mortgage; that plaintiff replied, "they will get it into Court again, won't they?" To which the witness said, "I do not know;" that, afterwards

the parties had an interview, when plaintiff inquired if there were any claims upon the estate, to which defendant said there was none, except the mortgage to Johnson; that he had examined the records and could find no other. The witness states further, that he believed something was said about dower; that he made no mention of the Emery lawsuit, because he believed it was settled; that he examined the records for the defendant, but did not examine the book of attachments.

If this ground for rescinding the sale cannot be sustained, then the plaintiff claims to rescind, *secondly*, because of mutual mistake.

The case was submitted, with power in the Court to draw inferences as a jury might.

Kelley and *McCrillis*, for plaintiff.

Appletons, for defendant.

WELLS, J. — The defendant, as the executor of Ebenezer Hussey, on the third of June, 1847, assigned to the plaintiff a note and mortgage made to the testator by Levi G. Vinal in 1845.

In May, 1840, the premises assigned were attached by Diana G. Emery, in her suit against Lot and Waldo P. Vinal. This suit was prosecuted to judgment, and the execution was levied upon a part of the premises in 1841.

In September, 1842, a writ of entry was brought by Emery against Levi G. Vinal to recover the premises upon which the levy had been made by her in 1841, and an attachment was made in this action of all the real estate of Levi in the county of Penobscot. Upon a trial of this action, in 1844, a verdict was returned for the defendant, but exceptions were taken, and a new trial was granted in June, 1847. Subsequently a judgment was rendered in favor of Emery for twenty-five acres of the land demanded, and for rents and costs of suit, which were satisfied by a levy upon a portion of the premises assigned.

The plaintiff claims to recover on the ground of fraud or mistake.

Taking what was said by the defendant together, at the time of the assignment of the note and mortgage, it amounts to a declaration that he had examined the records, and that he had found no incumbrance upon the premises, except the mortgage to Johnson.

No evidence discloses, that this declaration was false or made with any intention to deceive. His having overlooked the attachments in his examination, is not inconsistent with honesty. He might have looked very carefully, as he thought, and still not have noticed them.

Joseph Hoit, a witness for the plaintiff, had examined the records of deeds, but not those of attachments, because he supposed the suit of Emery had terminated. He did not mention that suit to the defendant. He called on the plaintiff, at the request of the defendant, to purchase the mortgage, with the belief that there was no incumbrance shown by the records. He was not certain that the rights of dower were mentioned by the parties, but had an impression that they were.

His belief, that the premises were unincumbered, except by the rights of dower, fortifies the conclusion, that the defendant might honestly entertain the same opinion.

But the plaintiff appeared to have had some knowledge of the suit of Emery, for his question put to the witness, Hoit, expressed an apprehension, that it might be further litigated, and indicated that he had some knowledge of the exceptions then pending.

If the plaintiff had a knowledge of that suit, it would embrace also the first, for the last was brought to recover the land, upon which the levy had been made, and the fruit and effect of the first depended upon the result of the last.

It may be fairly inferred from the testimony of Hoit, that the plaintiff had knowledge of the suit, at the time he purchased the mortgage, and could not therefore have been deceived by its not being mentioned.

But, assuming that both parties were equally ignorant of the

existence of the incumbrance, the plaintiff claims a recovery back of the consideration paid for the note and mortgage, on the ground of a mutual mistake.

Where both parties suppose the title to real estate to be good, but it turns out to be otherwise, and the purchaser has taken a deed of quitclaim only, he has not a right, under such circumstances merely, of reclamation of the consideration. Such is not the understanding of the parties, when they use this mode of conveyance. Although the parties believe the title to be good, yet the grantor does not mean to be held responsible for its goodness. He avoids a liability for a latent and unknown defect, by the form of the deed. If the rule of law were different, he would be bound to repay the consideration to his grantee, though he had studiously avoided any agreement to do so, when he had sold in perfectly good faith, because both parties believed the title to be good.

If the grantor practices no fraud, thinking his title to be good, the use of a deed of quitclaim in making a conveyance is equivalent to saying, I believe my title to be good, but I will not be responsible if it turns out to be otherwise. Both parties may be surprised, by the subsequent discovery of a defect of title of which they were previously ignorant, but no liability is thereby created against the grantor. A grantee may always guard his rights in such cases by taking proper covenants. *Joyce* v. *Ryan*, 4 Greenl. 101; *Emerson* v. *The county of Washington*, 9 Greenl. 88; *Soper* v. *Stevens*, 14 Maine, 133.

But relief is not even given in equity in cases of mistake falling within its rules, when the party seeking it could by reasonable diligence have discovered the fact, which caused the injury. 1 Story's Eq. § 146.

The plaintiff did not examine the records, the land lying in the county, in which he resided, nor examine as to the existence of the incumbrance of which he appeared to have had some notice. He could not be considered, under the circumstances, to have exercised reasonable diligence, there having

been no circumvention or purposed concealment on the part of the defendant.

Where it appears by the transaction, that the risk of the title is not taken by the grantee, and there is a mutual mistake in relation to it, a mistake material and essential, equity will give relief. 1 Story's Eq. § 141, *et sequentia.*

So where there was a mutual mistake as to the premises, described in a bond for the conveyance of a lot of land, and no beneficial interest obtained, the assignee of the bond recovered back the money paid for it. *Norton* v. *Marden*, 15 Maine, 45. The action was not sustained, on the ground of a failure of title to the land described in the bond, but because the lot, upon which the parties entered and supposed to be the one described, before making the assignment, was ascertained after the assignment, to be another one. It was a mistake as to the identity of the lot, and the bond did not describe the one, which the parties believed it did.

No grounds are exhibited, upon which the action can be maintained, and according to the agreement of the parties a nonsuit must be entered.

HEMAN L. WHITE *versus* JONATHAN A. CUSHING.

The non-joinder of a co-promisor can be taken advantage of only by plea in abatement.

A discharge in bankruptcy, operates not to *suspend* but to *annul* the validity of a note, due from the bankrupt.

The indorsement of such a note, after such discharge, is of no effect. It cannot enable the indorsee to recover against the bankrupt; and a new promise by the bankrupt to the payee, after the discharge and after the indorsement, cannot aid the indorsee.

ASSUMPSIT upon a note, of the following tenor.

"Borrowed and received one hundred and seventy-five dollars of T. A. White & Co., payable to their order, on Wednesday the 27th instant. "J. A. Cushing & Co.

"Bangor, July 20, 1841."

On the back of the note was indorsed.

"Bangor, August 23, 1843. Received bill of goods rendered to T. A. White, $3,00.

"Without recourse to us. T. A. White & Co."

The writ was dated May 3, 1848, and the statute of limitations and bankruptcy of defendant were pleaded.

On the trial, before WELLS, J. it appeared that the defendant filed his petition in bankruptcy, December 1, 1842; he was declared a bankrupt, February 21, 1843, and obtained his discharge, May 18, 1847.

On the part of plaintiff, it appeared from the testimony of *Thomas A. White*, that he was one of the payees of said note, and indorsed the same to the plaintiff, in March, 1848; that in August, 1843, the defendant made a payment to him upon the note of $3,00, and for some time after the indorsement, the defendant made frequent promises to pay the note; and, at one time, he said he would pay it in a week or ten days.

The case was taken from the jury, and it was agreed by the counsel, that the Court might enter such judgment as these facts would warrant.

Peters, for the plaintiff.

The statute of limitations cannot avail the defendant, because it is clearly and unequivocally proved that defendant made a partial payment on the note.

Nor will the plea of bankruptcy avail the defendant. The partial payment on the note, after the decree of bankruptcy, was in itself a new promise, or sufficient evidence of a new promise, to avoid this plea. 1 Douglass, 192; 2 Rawles, 351; 3 Fairf. 472; 2 Fairf. 88.

The promise made to White & Co. is sufficient in the hands of their assignee. This promise must give the same effect to the note, as if the bankruptcy had not been set up. That the note, under these circumstances, is the same in the hands of the assignee, as if with the assignor, has been decided in *Dean* v. *Hewett*, 5 Wend. 257; 2 Fairf. 152.

Kelley & McCrillis, for defendant.

HOWARD, J. — The plaintiff is indorsee of a negotiable promissory note, signed by "J. A. Cushing & Co." In the writ and declaration no notice is taken of the company, or of any signer but the defendant. The statute of limitations, and a discharge in bankruptcy of the defendant, were pleaded. A new promise to pay the debt was made by the defendant to the payee, after the decree of bankruptcy, and before the note was indorsed, and before the commencement of this suit.

The defendant having pleaded in bar, cannot take advantage of the non-joinder of a co-promisor. If he had intended to rely upon that fact, it should have been pleaded in abatement. 1 Chit. Pl. 29; 1 Saunders, 284, note; *Ziele* v. *Executors of Campbell*, 2 Johns. Ca. 382; *Winslow* v. *Merrill & al.* 2 Fairf. 127; R. S. c. 146, § 22.

It is contended that the new promise, relied upon by the plaintiff, was not proved; or if proved, that it would not enable the plaintiff to maintain this action as indorsee of the note.

The new promise appears to have been established by competent and sufficient proof, but whether it is available to the plaintiff is the more important question.

The note was proveable in bankruptcy, and the certificate and discharge, under the United States bankrupt act of Aug. 19, 1841, § 4, fully and completely absolved the defendant from the contract and the debt. The discharge did not operate merely as a suspension of the remedy, like the statute of limitations, but it extended to the contract itself, affected its vitality, and impaired its obligation. It ceased to exist as a valid contract against the defendant; it became *functus officio* and could not be assigned. *Trueman* v. *Fenton*, Cowp. 544; *Besford* v. *Saunders*, 2 H. Black. 116; *Baker* v. *Wheaton*, 5 Mass. 509; *Depuy* v. *Swart*, 3 Wend. 135; *Moore* v. *Viele*, 4 Wend. 240; *Dean* v. *Hewitt*, 5 Wend. 257; *Walbridge* v. *Harroon*, 18 Vermont, (3 Washb.) 448.

The new promise, to the payee, was a new contract, to be interpreted and enforced upon its own terms, and did not revive the original contract expressed by the note, and was not

negotiable. *Depuy* v. *Swart*, and *Walbridge* v. *Harroon*, before cited. Upon this promise, therefore, the plaintiff cannot maintain his action, and according to the agreement, must be nonsuited.

CITY OF BANGOR, *Petitioners for certiorari, versus* COUNTY COMMISSIONERS OF PENOBSCOT COUNTY.

How far the introduction of one statute remedy is the exclusion of another;—

Where a city charter gives an appeal to the *District* Court, to persons aggrieved by the doings of the city authorities as to damages done by the location of streets and ways, the appellate jurisdiction, given by the general law to county commissioners, upon that subject, is taken away.

Where the county commissioners have rendered a judgment in a matter, of which they had no jurisdiction, this Court cannot refuse to grant a *certiorari*. Proofs that no injustice was done, cannot be received.

The authority given to county commissioners by R. S. chap. 25, sect. 31, relative to the assessment of damages created by the location of roads, is limited to roads established under the provisions of that chapter.

PETITION for a writ of *certiorari*, to the county commissioners of Penobscot. The petition, in substance, alleges that a way was duly laid out by the street engineers, a part of which was located over the land of *Henry Warren*, and they adjudged that he was not entitled to any damages. Warren petitioned the county commissioners for a jury to ascertain his rights; and the commissioners adjudged that a jury should be empanneled, which was done. The jury awarded damages to the petitioner of one hundred and four dollars. That sum, with costs $157,28, the city was ordered to pay.

Among the reasons set forth in the petition for quashing the proceedings of the commissioners, one was, that they had no jurisdiction.

Cutting, for respondents, argued that the commissioners had jurisdiction. The city charter, § 6, gives to the city council the same powers in relation to ways, that the Revised Statutes give to selectmen of towns; each having the exclusive right to lay out, establish, &c. within their respective orbits;

and in the first instance to estimate the damage. But when any person shall be aggrieved by the determination of either tribunal, then the Revised Statutes contemplate an application to the county commissioners.

It is true that § 6 of the city charter provides that the party aggrieved by the decision of the city council may appeal to the Common Pleas, so far as it relates to damages; "*may appeal*," that is he may appeal, or he may apply to the commissioners for a jury. The course is optional with the party, and the party usually would select a jury who go upon the ground, in preference to the one who receive evidence in Court.

But the petitioners fail in one essential particular. They have not shown that they have suffered any damages, or that aught but strict justice has been done to them. In *Cushing* v. *Gay*, 23 Maine, 12, the Court say, "Again, if the error complained of exists, yet, if it nowise operates to the injury of the party seeking a remedy, the Court may in such case, with entire propriety, and in the exercise of a sound and legal discretion refuse its aid."

And why should a party complain, if he has suffered no damages? Or ask aid when he needs none, or has suffered nothing? Let this be the criterion, and your tribunal is safe from needless importunity by way of experimental litigation.

Peters, solicitor for city.

SHEPLEY, C. J. — This is an application for a writ of *certiorari* to bring up a record of the proceedings of the county commissioners, on the petition of Henry Warren, praying that the damages occasioned by the location of a way over his land may be assessed by a jury. Upon that petition, jurors were summoned and such proceedings were had, that the petitioner obtained a judgment for an increase of damages, with costs.

By the sixth section of the act passed on February 12, 1834, incorporating the city of Bangor, the city council had the exclusive right to lay out streets or ways within the city,

and to estimate in the first instance, the damages thereby occasioned.

The same section also provided, that "any person aggrieved by the decision of the city council, may, so far as relates to damages, appeal therefrom to any Court of Common Pleas, within the county of Penobscot, which may be held within six months from and after such decision, which court is hereby empowered to hear and determine the same by a committee, if the parties agree thereto, or by a jury."

For the respondents it is contended, that this jurisdiction is concurrent with that conferred upon the county commissioners, that the party, "may so far as relates to damages, appeal therefrom," or omitting to do so may by a petition, apply to the county commissioners, by virtue of the statute, chap. 25, § 31. The provisions of that section would by the statute, chap. 1, § 17, be so enlarged as to embrace the action of city authorities in the location of ways, "unless such construction would be repugnant to the provision of any act, specially relating to them." But the provisions of the thirty-first section, cannot thereby be made applicable to the assessment of damages occasioned by the location of ways not laid out by virtue of the provisions of that chapter. The provisions of that section are applicable only to ways laid out by virtue of the provisions of that chapter. Ways in the city of Bangor are not laid out by virtue of the provisions of that chapter, but by virtue of the provisions contained in the city charter. The modes of proceeding for the location of ways, and for the first assessment and subsequent increase of damages, are in the two cases, essentially different.

The Revised Statutes have been enacted since the city charter was granted, but the right of the city to have ways located and the damages occasioned thereby assessed, according to the provisions of its charter, is not thereby impaired. It is provided by the fifth section of the general repealing act, that no private act not repealed, shall be affected by the provisions of the Revised Statutes, unless the provisions be different from the former general law on the same subject.

The presence and participation of the parties in the proceedings before the county commissioners could not confer it; and the commissioners had therefore no jurisdiction or power to entertain a petition and cause a jury to be summoned, and damages to be assessed occasioned by the location of a way in the city of Bangor.

If such be the conclusion, it is insisted, that the Court in the exercise of a legal discretion will not direct the writ to be issued, because no injustice appears to have been done. That rule is applicable to cases, in which the tribunal had jurisdiction of the subject matter, upon which it acted informally or illegally; but not to cases over the subject matter of which the tribunal assuming to act had no jurisdiction. The wrong and injury in such cases, consist in the assumption by the tribunal of an authority and in the exercise of it, not by law conferred upon it. *Writ granted.*

ALFRED RICHARDS & *al. versus* THE PROTECTION INS. CO.

The description of property insured in the body of the policy, when the rate of premium is thereby affected, operates as a warranty that the property is of the class described, and is in the nature of a condition precedent, and performance of it must be shown by the insured, before he can recover upon the policy.

Where the conditions annexed to a policy of insurance of goods against fire, and referred to in the body of it, divided insurable articles into several classes, some as being more hazardous, and therefore requiring a higher rate of premium than others, the parties are considered as agreeing to the rightfulness of the classification, and cannot be permitted to prove it inaccurate.

Thus, where the conditions exhibited one sort of goods as not hazardous and another as hazardous, the insured cannot offer proof that no greater risk attached to the insurance of the latter than the former; nor that a particular article, asserted in the conditions to belong to one of the classes, did in reality belong to another class.

A representation by the insured, that the goods insured belong to the former description, is a warranty of that fact. It is in the nature of a condition precedent, and must be proved, before the insured can recover on the policy for a loss.

Such a representation extends not merely to the time of taking the policy, but it warrants that the goods shall continue to be of that description, during the whole continuance of the policy; and that not merely a part of the goods, but all of them are, and shall be of that description.

The violation of such a warranty by the insured, will defeat the policy.

Thus, where a policy was taken upon "a stock in trade, consisting of not hazardous merchandise," and the insured kept, among other goods, for sale, the articles of oil and glass, which in the "conditions," were denominated "hazardous," the policy was thereby vacated.

ASSUMPSIT, upon a policy of insurance of goods for one year.

A classification of hazards was annexed to the policy, and referred to in the body of it.

This classification exhibited certain sorts of goods to be not hazardous, others to be hazardous, and others extra-hazardous.

Among the *hazardous* articles were enumerated oil, glass and tallow.

The policy was upon "a stock in trade, consisting of *not hazardous* merchandize."

The insured traded upon the goods at retail, selling and getting new supplies as opportunities and occasions were presented. Among other articles which they kept for sale, were oil, glass and tallow candles.

Nearly at the end of the year, the goods and the store containing them were destroyed by fire.

In the body of the policy was the following provision: — "this policy is made and accepted in reference to the conditions hereto annexed, which are to be used and resorted to in order to explain the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for."

Two of the "conditions" thus referred to, are specified in the opinions hereinafter stated.

One of the defences set up, was that oil, glass and tallow were kept in the store and traded upon by the plaintiffs as a part of their stock in trade. For the purpose of settling some other questions of fact in the case, the jury were instructed that the keeping and trading upon those articles by the plaintiffs, did not defeat the policy.

A verdict was returned for the plaintiffs which is to be set aside, if that instruction was erroneous.

Cutting & Rawson, for the plaintiffs.

Hobbs, for the defendant.

The opinion of the Court, (WELLS, J. dissenting,) was delivered by

SHEPLEY, C. J. — The suit is upon a policy of insurance of goods against loss or damage by fire. The goods were to constitute the stock in trade of the plaintiffs, and were to be kept in a frame store occupied by themselves. The store and goods were subsequently consumed by fire.

It appeared, from testimony introduced by the plaintiffs, that there were in the store three cans of oil, which might hold about a barrel each, and from which they were accustomed to draw for sale. That there was a barrel of oil in the back part of the store. That there were boxes of glass. These articles composed a part of the stock of goods consumed. There had been tallow candles kept as part of the stock for trade; whether they had been all sold before the goods were consumed, it was uncertain.

To prevent any misapprehension respecting the ground, upon which the decision is placed, it may be proper to notice two clauses of the policy.

The first in effect declares, that if the premises shall be used for the exercise of any trade or business denominated hazardous, extra-hazardous, or specified in the memorandum of special rates, or for the purpose of storing any goods thus denominated or specified, the contract during that time shall be of no effect. This clause suspending the contract under such circumstances is applicable only to the building; and it can have no effect upon the rights of the parties, for there is no proof that the building was used for any such business or for the purpose of storing any such articles.

The second is, "if after insurance is effected upon any building or goods in this office, either by the original policy or by the renewal thereof, the risk shall be increased by any

means whatsoever within the control of the assured; or if such buildings 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, such insurance shall be void and of no effect." Whether there had been a violation of this provision was a question of fact for the jury to determine. They have found no violation of it, and the plaintiff's right to recover cannot be affected by it.

Their right to recover must depend upon the effect of the language used by them in describing the property insured. They procured insurance "on their stock in trade, consisting of not hazardous merchandize."

Four classes of hazards are named in the conditions annexed to the policy, denominated not hazardous, hazardous, extra-hazardous, and memorandum of special risks. The goods insured were by the plaintiffs declared to be of the first class. The goods before named were not of that class, but were of the second class denominated hazardous.

Insurance is proposed to be made upon goods contained in these different classes at different rates of premium. The classes of hazard, and the conditions of insurance annexed to the policy, form a part of the contract between the parties. That contract requires mutual good faith and fair dealing. The law presumes, that the parties acted with intelligence. The defendants did not propose to insure goods of the class denominated hazardous, at the premium affixed for the class denominated not hazardous. Nor did they propose to insure goods composed partly of one class and partly of the other, at the rate of premium affixed to the least hazardous. This appears from the language used; for "groceries with any hazardous articles" are enumerated in the class of hazardous. If the plaintiffs having procured insurance on their stock in trade, consisting of not hazardous articles, could have kept a stock of goods for sale composed entirely of hazardous articles, and could have recovered for a loss of them by fire, they could do so only by compelling the defendants to become insurers and to bear the loss for a compensation less than the

one affixed to such a class of goods, and less than the one agreed upon by the parties as appropriate to such a risk. So if they could have kept goods for sale composed partly of the first, and partly of the second class of risks and could after a loss of them by fire have recovered for them, the defendants would have been compelled to bear the loss for a premium less, than that for which they would have knowingly assumed the risk. The injustice in the latter case would not be so great as in the former, but a recovery would be equally unauthorized according to the terms of the contract.

The description of the property insured in the body of the policy, when the rate of premium is thereby affected, operates as a warranty, that the property is of the character and class described. And that the property is all, and not partly of that character and class. Such a warranty is in the nature of a condition precedent, and performance of it must be shown by the person insured, before he can recover upon the policy.

In the case of *Fowler* v. *The Ætna Fire Ins. Co.* 6 Cow. 673, it was decided, that the description of the property in the policy, was a warranty, and that it, as "a condition precedent, must be fulfilled by the insured, before performance can be enforced against the insurer."

In *Duncan* v. *The Sun Fire Ins. Co.* 6 Wend. 488, the opinion says, "the stipulations in policies are considered as express warranties; an express warranty is an agreement expressed in the policy, whereby the assured stipulates, that certain facts relating to the risk, are or shall be true, or certain acts relating to the same subject have been, or shall be done."

In the case of *Wood* v. *The Hartford Fire Ins. Co.* 13 Conn. 533, the opinion says, "any statement or description, or any undertaking on the part of the insured, on the face of the policy, which relates to the risk, is a warranty."

The insurance in that case, was made on "the one undivided half of the paper-mill, which they own at Westville." The opinion states, "if this relates to the risk, it is a warranty. That it does is evident from the memorandum in the conditions

of the policy, where paper-mills are enumerated among those articles, which will be insured at special rates of premium; that is, a paper-mill is the subject of peculiar risks, and is to be insured upon special stipulations."

This is no novel doctrine. *Bean* v. *Stupart*, Doug. 14; *Pawson* v. *Watson*, Cowp. 787.

And it is admitted to be the law, in the later cases decided in this country. *Delonguemare* v. *Trad. Ins. Co.* 2 Hall, 589; *Burritt* v. *Saratoga County Mutual Fire Ins. Co.* 5 Hill, 188; *Clark* v. *Manuf. Ins. Co.* 2 M. & W. 472.

In the present case, the warranty that their stock in trade consisted of not hazardous merchandize, has not been complied with, but violated by keeping goods for sale, of a different class denominated hazardous, for the insurance of which, a greater premium was required.

One description of goods of the class not hazardous, "are such as are usually kept in dry goods stores." The classification determines to a certain extent, what goods may be thus designated, for it determines, that certain goods must belong to other classes, by their being enumerated as appertaining to them. Such goods as the parties by their enumeration of them, as composing one class, have agreed should be of that class, cannot compose any portion of another class.

The parties have agreed, that oil, tallow and glass belong to the class denominated hazardous. The plaintiff cannot therefore, be permitted to prove, that those articles are usually kept in dry goods stores, and thereby have them transferred to a different class denominated not hazardous.

All the cases decided upon the effect of a stipulation contained in the body of the policy, and operating as a warranty, determine that there must be a compliance with the warranty to entitle the assured to recover. Not because any of the conditions of the policy declare, that it shall be void, if articles of a different class or description are kept for sale, but because one who has violated his own contract of warranty, cannot enforce it against the other party to it.

The position that the insurance in this case attached only

to goods of the denomination not hazardous, and that its validity was not affected by the presence of goods of a different class, cannot be admitted. If it were, the assured might, contrary to his own stipulation to have goods only of one class, keep goods of different classes, thereby greatly enhancing the risk, and yet recover for the loss of the goods composed of the class insured. Nor can the warranty be considered as attaching to part of the goods only. It relates to their stock in trade, and not to a portion of it. Nor can the warranty upon any known principles of law or justice be considered as attaching only to the goods in the store, at the time it was made, and as not operative to prevent the introduction and sale, of a class of goods of a much more hazardous character. Such a warranty would be of little or no value. The premium is predicated upon the same description of risk during its continuance.

The case of *Curry* v. *Com. Ins. Co.*, 10 Pick. 535, is not at variance with the positions before stated. The case was not decided upon the effect of any stipulation, or warranty respecting the property in the body of the policy, but upon the effect of a condition, providing, that the policy should be null and void, if an alteration of the building, affecting the risk, should be made with the assent of the assured. Whether such an alteration had been made, was of course a question to be determined by a jury.

The case of *Merriam* v. *Middlesex Mutual Fire Ins. Co.* 21 Pick, 162, was of a similar character.

In this case, the plaintiffs by their own testimony have proved that their warranty, that their stock in trade consisted of not hazardous merchandise, had not been complied with. There is therefore no occasion to send the case to a jury to have that fact determined.

That warranty attached to the goods insured, at all times during the continuance of the risk.

In the case of *Stetson* v. *The Mass. Mutual Fire Ins. Co.* 4 Mass. 337, the opinion states, "and where the estimate of the risk depends upon the continuance of the material circum-

stances represented to the insurer, these are not to be altered to his detriment, by any act of the insured, without a like effect upon the contract." That is, without avoiding it.

According to the agreement of the parties, the verdict is set aside and a nonsuit entered.

Dissenting opinion by

WELLS, J. — The plaintiffs effected an insurance on their stock in trade, consisting of not hazardous merchandise, kept in a frame store occupied by them.

In the body of the policy is the following provision : —

"And it is agreed and declared, to be the true intent and meaning of the parties hereto, 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 merchandise, in the same terms and conditions denominated *hazardous* or *extra-hazardous*, or included in the memorandum of special rates, unless herein otherwise specially provided for, or hereafter agreed by this company in writing, and added to or endorsed upon this policy, then, from thenceforth, so long as the same shall be so appropriated, applied, used or occupied, these presents shall cease, and be of no force or effect."

The word, premises, mentioned in it, must be understood to mean the store containing the goods insured. This conclusion is evident from the language employed. "Exercising *therein* any trade, business or vocation," &c., and "keeping or storing *therein* any of the articles, goods or merchandise," &c.

But the merely retailing, in the store, in the ordinary course of business, some goods of a character hazardous, extra-hazardous or falling within the memorandum of special hazards, would not bring the insured, within the scope of this clause.

The use prohibited is general in its terms. It is *trade, business*, or *vocation, keeping* or *storing*, and so long as the prohibited appropriation or occupation continues, the force and effect of the policy by the terms of it would cease. Such is the construction, which has been put, upon a similar clause, in a fire policy where the insurance was on the building, in New York, and a different one would probably be a departure from the intention of the parties. 1 Phil. on Ins. 417.

The second condition annexed, to the policy, provides, that "if after insurance is effected upon any building or goods in this office, either by the original policy, or by the renewal thereof, the risk shall be increased by any means whatsoever within the control of the assured, or if such buildings 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, such insurance shall be void and of no effect."

That the provision, before mentioned in the body of the policy, is intended to prohibit a general use alone of the building insured, or when it contains goods, which are insured, is manifested by the more particular and specific terms of the second condition, annexed to the policy. These different provisions do not mean the same thing; they are not identical. And if the storing of a ton of sulphur, in a building, which contained goods insured, as not hazardous, would merely suspend the operation of the policy, until it was removed, some further provision would be required to protect the insurers against the keeping and vending small quantities of the same article. This protection is afforded by the second condition, which does not prohibit the keeping and vending goods deemed more hazardous than those insured, unless the risk is increased. The consequence of such an act, increasing the risk, renders the policy absolutely void. The increase of the risk terminates the insurance, the moment it takes place. And the removal of the cause, which increased the risk, cannot revive the contract.

The goods, insured, in the present case, were those not hazardous, but there were kept for sale, in the store, oil, glass, sulphur, candles and matches, which are mentioned in the other classes of hazards, and it is therefore contended, that the policy is void, and that the Court should so determine, as a matter of law.

But it is nowhere said in any of the conditions, that the policy shall be void, for keeping or vending such articles, when not hazardous goods are insured. If by so doing *the risk is increased*, then the insurance is void. It is the increase of the risk, that determines the result. The quantity and value of what was kept and sold might be so small that no one would say the risk was perceptibly enhanced. Would the keeping and selling an ounce of sulphur, or a quart of oil have that effect? It is not within the province of the Court to decide, that the mere fact of keeping in the store goods more hazardous, by the classification merely in the conditions, is in reality so. Such inquiry, the plaintiffs have a right to submit to the jury. Hardware is classed among hazardous articles, and if the plaintiffs kept an axe in their store, it would not be the duty of the Court to say, that such an act would create a forfeiture of the policy.

Conditions precedent are those, which must be proved before the action can be sustained. The preliminary measures prescribed, in the conditions, must be taken by the insured. But it is never necessary for him to prove, that he has not kept with the goods insured, others of a class more hazardous. Such proof may be offered in defence, and rebutted, if it can be, by counter proof, that the risk has not been enhanced.

The description of the subject matter insured is undoubtedly a warranty that it is such as it is described to be, and if untrue in substance, the policy is void. Thus, where insurance was effected on stock in trade, in a two story frame house, *filled in with brick*, and it was not filled in with brick, the policy was held to be void. *Fowler* v. *The Ætna Fire Ins. Co.*, 6 Cowen, 673.

The thing insured must substantially correspond with the

description. The insured cannot recover for the loss of a wooden house, upon the insurance of a brick one, nor for one, whose size, use or location differs essentially from the description. This doctrine is sustained by many authorities. Phil. on Ins. 410, *et sequentia.*

Each case must depend upon its own terms and conditions, for policies are not always alike.

But will it follow, that where goods are insured as not hazardous, consisting of many and various articles, by a policy like that under consideration, and one or more of the articles with them is hazardous, the policy is void?

It is true, that nothing more is insured, than the not hazardous goods, and they are such as they are represented to be, but some are mingled with them, which are hazardous.

The present risk is on the stock in trade of the plaintiffs, "consisting of not hazardous merchandise," &c., and to such goods only will the insurance attach. They neither warrant nor represent, that hazardous merchandise is not in their store.

There is merchandise to which the description can apply, and some to which it cannot, but in the case of a building, no such separation can be made; it must be viewed as a whole, and must conform to the description.

If policies are to be held void, when merchandise insured is placed with what is more hazardous, than that insured, there are but few, that would be valid under the exercise of a rule so rigid. For in such case, if one, having not hazardous goods insured, should happen to have in his store a pint of oil, a box of glass or an earthen jug, which fall within a higher class of hazards, his policy would be void, although those articles might not serve, in the least degree, to enhance the risk. There is nothing in the policy or the conditions, requiring such severe construction. It is a case manifestly provided for in the second condition before mentioned, and the policy is not avoided unless the risk is increased.

But in the present case, it does not appear, that at the time of effecting the insurance, the articles more hazardous than

those insured, were then in the store. The case does not disclose at what time they were put there, except that it was before the fire. There is nothing in the policy, that can be construed into a warranty, that the plaintiffs would not carry into their store, during the continuance of the risk, an article denominated hazardous or extra-hazardous. For aught that appears, they were at liberty to do so, and the exercise of it would not operate injuriously upon the insurers, if the risk was not enhanced. It is like the case of the alteration of a building insured, which does not avoid the policy, if the risk is not increased. *The Jefferson Ins. Co.* v. *Cotheal*, 7 Wend. 72; *Grant* v. *Howard Ins. Co.*, 5 Hill, 10.

If the insured had no license under the policy, to keep and vend those goods, to which objection is made, the principle that the insurance is not void, unless the risk was increased, and that such question is to be settled *by the jury*, is sustained by the cases of *Curry* v. *Com. Ins. Co.*, 10 Pick. 535; *Merriam* v. *Middlesex M. F. Ins. Co.*, 21 Pick. 162.

The defendants contended, that there were goods kept in the store of a hazardous or extra-hazardous character, or included in the schedule of special risks, and that the right of the plaintiffs to recover on the policy was thereby forfeited.

But the jury were instructed to consider the policy, or the rights of the plaintiffs under it, as not destroyed by these facts.

The Court having withdrawn from the jury what should have been submitted to them for their determination, the verdict, in my opinion, should be set aside, and a new trial granted.

Newton M. Whitman, *in equity, versus* George M. Weston.

A deed of land will not be reformed, (upon a bill in equity,) for a mistake in its boundaries, to the injury of one who has purchased of the grantee in good faith, and without notice of the mistake.

A lot of land was included in a deed to defendant's grantor by mistake in the descriptions of the boundaries, and the defendant purchased the same in good faith and without notice of any mistake. *Held*, that equity would not disturb his title.

Bill in Equity, praying for a decree, requiring the defendant to release to the plaintiff all his right, title and interest in and to a lot of land known as lot B.

The bill alleged, that John R. Adan and others, trustees under the will of Benjamin Bussey, by their deed of July 6, 1844, duly made and recorded, conveyed to him, by metes and bounds, lot B, and that he entered into possession of the same; that on the 6th of July, 1841, the plaintiff took a bond for a deed of said land, from said Bussey's agent; that by virtue of said bond, he, by his tenant, Samuel Lombard, built a house upon the land, and afterwards cleared, improved and cultivated from five to ten acres of it; that said Lombard and other persons, tenants of the plaintiff, continued to occupy and to improve the house and the land, cleared as aforesaid, and were in actual possession thereof, at the time of the conveyance to the defendant; that, while the plaintiff continued such possession, the defendant, between Jan. 1, and Aug. 1, 1847, broke and entered the lot and cut and hauled off a large quantity of pine trees; that the defendant claimed title to lot B aforesaid, by deeds of quitclaim and release, from the heirs of Francis Butler, one of the deeds being dated December 22, 1846, and the others, Feb. 2 and April 1, 1847; that defendant pretended that Bussey, in his lifetime, and prior to the conveyance of said lot to the plaintiff, on July 6, 1844, conveyed said lot B, to said Butler, who has since deceased; that said Bussey, on the 30th July, 1834, conveyed by deed of warranty to said Butler, the following tract of land, to wit: "being and lying on a new road leading from State street to

Orono town line, and lying on the north-east side of said road, beginning at the *north-west corner of lot B*, thence, &c. &c., to place begun at, containing 178¼ acres more or less;" that in drafting said deed, there was a mistake made in the point of beginning, whereby said deed was made to include the said letter B, against the intention of the parties thereto; that neither said Butler or his heirs ever entered into actual possession of any part thereof; that the whole mistake consisted in using the words "north-west," instead of "south-west" corner of lot B, as the place of beginning; that all the calls in the description in said deed, would then be answered by monuments upon the face of the earth, and the quantity of land would agree with the number of acres specified.

The bill also alleged, that defendant well knew all the facts, touching said mistake, and misdescription, and also that the plaintiff was in possession of said lot B, claiming to own the same by his deed aforesaid, duly recorded; that said mistake was not discovered by said Bussey in his lifetime, nor by said trustees, prior to their conveyance to the plaintiff, nor by the plaintiff until after said conveyances to defendant; and that defendant insists upon his title to lot B.

Defendant in his answer admitted nearly all that was alleged in the bill, except the charge that he knew of the mistake and of the plaintiff's occupation of the land. His answer on this part of the case was, that at the time of his purchase, he had never seen the land, and knew nothing about the monuments, that he knew nothing of plaintiff or of his possession of lot B, or of any mistake real or supposed, in the deed to Butler. He was told, there was a lot of land on Essex street, belonging to the Butler heirs, valuable among other things for its pine; that he sent an agent to explore, who reported favorably, and the next day he went to the owners to purchase it, and they conveyed in the precise words of the grant to their father, deceased 18 months before.

Hobbs, for the complainant.

The case of *Peterson* v. *Grover*, 20 Maine, 363, is decisive

of the jurisdiction and power of this Court as a Court of equity.

It is also decisive of the case at bar, on the merits, unless this case is distinguishable from that.

In this case, the mistake is admitted as stated in the bill, or rather the facts from which it is deducible.

The only question is, whether Weston is affected by it, as the grantee of the heirs of Butler, the original purchaser from Bussey.

Weston's title from the minor heirs, is a mere naked release of "all their right, title and interest" in the lot *mistakenly* described, and he took from those heirs, who were of age, a quit-claim deed only, of all their right, &c.

Weston thus stands in the place of Butler and his heirs at law. Between them and Bussey, there could be no doubt of the power of the Court, to grant relief; and Weston is their representative and must yield to the same principles affecting his title. Rev. Stat. chap. 91, sect. 8.

The heirs of Butler had a legal estate originating in mistake, and Weston has no more, and is subject to be set right in equity.

Weston is thus liable, whether he had notice of the mistake or not.

But he had notice, actual or constructive, sufficient to affect his title, or to subject him to the correction of the mistake. *Warren* v. *Ireland*, 29 Maine, 62. *Washburne* v. *Merrills*, 1 Day's Cases in Error, 139, is a strong case for the plaintiff. Story's Eq. sect. 399 to 409.

The notice affecting Weston's title, if any is necessary, need not be so full as that affecting a subsequent purchaser, in case of an unregistered deed.

The case, 1 Day's Cases in Error, was as follows: —

A mortgager, by mistake, made an absolute deed; and the mortgagee who got into possession, sold to a purchaser, by a deed with covenants of warranty. A purchaser under the mortgager, filed his bill against the purchaser under the mortgagee to redeem. The answer set up the statute of frauds in

defence, and on trial, parol proof of the mistake was offered by the plaintiff and admitted, and the deed reformed, and a right of redemption decreed. No point was made of the want of notice. This decree was unanimously confirmed by the Court of errors. Cases cited. 1 Sug. Vend. 6th Amer. Ed. 180, (259 old) note.

Weston, pro se.

TENNEY, J. — Notwithstanding the general principle, that parol testimony is incompetent to vary the effect of written instruments, mistakes therein, whether they are agreements executory, or executed, may be reformed by Courts of Equity, when such mistakes are shown to exist, so that the intention of the parties may be effected. But this relief will never be afforded, when the mistake is not proved to the entire satisfaction of the Court, inasmuch as the parties are presumed to have expressed in their written contract their actual intention. And it is usual to require some other proof than the simple recollection of those present at the making of the contract. If there are other written instruments, which have a relation to that in which the alleged mistake is found, satisfactory light may be obtained therefrom. If there are inconsistencies between one part of a written instrument and another, which cannot be reconciled, and if those inconsistencies disappear by the alteration of a single word, it may be abundantly evident, that a mistake was made.

In this case Butler's grantor could not have intended to convey a tract of land by courses and distances, referring to monuments, which were prepared as the termination of several of the lines described, unless there had been a correspondence one with another; and when by changing the place of beginning, there is a perfect coincidence in the different parts of the description, it is manifest, that a mistake was made by the person, who prepared the deed. How far this could have affected the grantee or his heirs in a suit against either would depend upon the facts which might be presented. As appears by the answer in this case, the defendant had in

fact no knowledge of such a mistake. He took his deed without having seen the land, upon the report made by his agent, who was sent to examine the timber to be found thereon, as it was described in the deed to Butler.

It is insisted, that as the defendant received only quitclaim deeds of the land from the heirs of Butler, he took merely the right which Butler had acquired by the deed to him, and that he stands in no better situation. It is not suggested, that the deeds under which the defendant claims, are different from quitclaim deeds in the usual form, and for a valuable consideration. The bill alleges them to be deeds of quitclaim and release, and they are to receive such a construction as will effect the intention of the parties and not defeat it. Such conveyances have been construed to be a bargain and sale, by which the estate described will pass. *Pray* v. *Pierce*, 7 Mass. 381. By Revised Statutes, chap. 91, § 8, "a deed of release and quitclaim, of the usual form in this State, shall pass all the estate, which the grantor had, and could convey by a deed of bargain and sale." If Bussey's grantee could have been made subject to the equitable principle by which his deed could be reformed for the mistake, it could not have been the intention of the Legislature, that a *bona fide* purchaser, for a valuable consideration, without notice of the mistake, should not be allowed to protect his title, by reason of his holding under a deed of release and quitclaim.

The defendant's answer is full and conclusive, that he had no actual knowledge of the mistake alleged. Had he such constructive notice of it, as will charge him therewith? In order that he should be so affected, the facts which he is presumed to have known when he took his deeds must have been of such a character, that he is not allowed to show by proof, that he had not the knowledge imputed. He was bound to know the state of his grantor's title, as exhibited by the registry and by the deed to his grantor. By these he would find that Bussey conveyed to Butler by metes and bounds, and nothing in the description would reasonably lead him to doubt, that this was in all respects as the parties thereto

designed. The quantity of land by computation, according to the length and direction of the lines, would probably have been greater than that named in the deed; but this is wholly immaterial, for an erroneous computation would not control the monuments or the courses and distances; but the deed left the amount uncertain, as appears by the use of the terms "more or less" applied to the quantity.

The failure upon actual experiment, if such may be supposed to have been made, to find the monuments described by running the courses and distances, beginning at the north-west corner of lot letter "B," could not be constructive notice of a mistake in the description. From the time of the execution of Bussey's deed to Butler, more than twelve years had elapsed before the defendant acquired his title. If monuments were in existence, they might not all have been seen, at the time the deeds to him were executed; but several of them were artificial, and made of perishable materials, and might well be supposed to have fallen and disappeared. If all the monuments could have been seen, there was nothing, which must have carried a knowledge to him that they were monuments referred to in the deed, and nothing to indicate in the least, that they were intended as the monuments by which a conveyance had been made, or that the point of beginning therein was different from that expressed in the description.

The actual possession by the plaintiff of a part of lot letter "B," at the time of the defendant's purchase, was not constructive notice to the defendant of the mistake, even if such possession required him at his peril, to institute inquiries in order to ascertain by what title that possession was held. For by inquiry, the most, which could reasonably be expected as the result, would be that the plaintiff had a deed from those authorized by Bussey's will to give deeds of the real estate of which he died the owner, dated on July 6, 1844, and that on the 6th day of July, 1841, he had a bond for a deed of lot letter "B;" that he subsequently went into possession, built a house and made improvements. All this could not have been a sufficient notice to the defendant, that there had been a

mistake in the boundaries of the land conveyed to Butler, years before. It would at most be evidence, that the same land had been conveyed twice; once by Bussey to Butler, and afterwards, by the trustees under Bussey's will, to the plaintiff, and that the former deed took precedence of the other.

The counsel for the plaintiff relies upon the case of *Washburn* v. *Merrill*, 1 Day's Cases in Error, 139, where by mistake an absolute deed was given instead of a mortgage, as had been agreed. The mortgagee had conveyed. Parol evidence was admitted, which showed the mistake satisfactorily and the deed was reformed. The point was not made that the purchaser of the mortgagee, was a *bona fide* purchaser, for a valuable consideration without notice, and it is to be presumed, that such was not the case. The other case cited from this State, of *Warren* v. *Ireland*, 29 Maine, 62, is not analogous.

Bill dismissed with costs.

EDWARD LINCOLN & *als. versus* DANIEL WHITE.

The interest of a mortgagee in land, prior to foreclosure, is not attachable.

A conveyance of land, belonging to a copartnership firm, in which all the co-partners join, carries with it a presumption, in the absence of any proof, that the consideration money went to the benefit of the firm.

WRIT of entry, to recover an undivided fourth part of a parcel of land in Bangor, called the Coombs wharf.

The plaintiffs are the heirs at law of Benjamin Lincoln, in whose name the suit was brought, and who have come in since the decease of said Benjamin, and prosecute the suit.

At the trial, before HOWARD, J. the plaintiffs introduced the following evidence of title. A mortgage given in 1835, by Royal Clark to Ephraim Lincoln, Samuel J. Foster, and Benjamin Brown; also a foreclosure of the mortgage perfected on the 24th February, 1841, by a possession taken under a *habere facias*, on the 24th February, 1838; and also a deed of warranty, from said Ephraim Lincoln, Foster and Brown,

dated the 23d of February 1841, conveying the land to their ancestor, Benjamin Lincoln.

The defendant introduced a writ in his favor, against said E. Lincoln, Foster and Brown, dated Aug. 20, 1839, and the return of an attachment thereon, of the same date, of all defendants' real estate, in said county of Penobscot ; also the judgment in said suit, at the January term, 1842, and the execution, issued on said judgment, dated January 8, 1842, and a levy on the demanded premises, made January 19, 1842, which was seasonably recorded.

The defendant read Foster's discharge in bankruptcy, obtained on Foster's own application. He also offered Foster's deposition, which was objected to.

It was then agreed that so much of the deposition as was legally admissible, should be used, and that the matter be submitted to the Court for a legal decision. The view, taken by the Court of the facts stated in the deposition, will appear in their opinion.

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

1. The plaintiffs' title is good. The defendant gained nothing by his attachment. The mortgagees had no attachable interest. *Smith* v. *People's Bank*, 24 Maine, 185.

2. The levy, 19th January, 1842, was after plaintiffs' title. The law of copartnership does not affect the matter. The land was held by them as tenants in common, not as copartners. *Blake* v. *Nutter*, 19 Maine, 16.

3. The question arising from the payment being made by one only of the copartners, cannot be raised here, if it can at all. Equity alone, has cognizance of such matters.

Washburn, for defendant.

1. The defendant's title relates back to his attachment.

2. The deed to Benjamin Lincoln conveyed no title. It was a warranty in common form. It did not assign or pretend to assign the debt secured by Clark's mortgage. It would no more convey the land, than a levy would. It was made after the defendant attached the land, and was therefore subject to that attachment.

3. The defendant has title independent of the attachment on the writ. E. Lincoln, Foster & Brown were copartners. On 19th January, 1842, (the day of the defendant's levy) the title was in the firm, *as to their creditors.* As against the defendant, a large creditor of the firm, the deed to B. Lincoln was inoperative; or if not inoperative, it passed the estate in trust for creditors.

The firm, each and every member of it, was hopelessly insolvent from 1839.

4. The conveyance to B. Lincoln was without consideration, or it was for the sole benefit of one member, E. Lincoln.

5. B. Lincoln, the father of E. Lincoln, took the deed, in fraud of company creditors. He knew of the insolvency, and yet took the conveyance in payment of a debt due to him from *one* of the company. An insolvent firm cannot give security on company property for a debt due from one of the members, to the injury of the company creditors.

6. By taking the deed, under such circumstances, B. Lincoln became seized of the property in trust, by implication of law, for the joint creditors, or such of them as should take the land in satisfaction of their debts. White was such a creditor at the date of the deed to B. Lincoln; he levied on this property after the foreclosure became absolute; he therefore (in this view) became *cestui que trust.* He is *cestui que trust in possession.* The plaintiffs *as trustees* cannot recover the possession from him. *Burnside* v. *Merrick*, 4 Metc. 537; *Dyer* v. *Clark*, 5 Metc. 562.

The deed to B. Lincoln, be it remembered, was nearly two years after the dissolution. *Blake* v. *Nutter*, 1 App. 16, is not opposed to this.

Blake was not a *creditor of the firm.* Nutter was defendant, and though he might have held in trust for the creditors of the *firm*, he did not for *Blake.* Had Blake been *defendant in possession, and in under a levy, as a creditor of the firm,* could *Nutter, in that case, have dispossessed him?* That is the question, and is this case.

The conveyance, under the circumstances, (the insolvency,

the dissolution, the knowledge, the private debt, the security,) though made by all the members, was in law a fraud on the joint creditors, and the grantee (B. Lincoln,) would hold in subordination to their interest.

Wells, J. — On the eleventh day of July, 1835, Royal Clark conveyed the demanded premises in mortgage to Ephraim Lincoln, Samuel J. Foster and Benjamin Brown, who conveyed the same premises to Benjamin Lincoln, the ancestor of the demandants, by their deed, bearing date, Feb. 23, 1841.

Ephraim Lincoln, Foster & Brown, recovered judgment for the premises against Clark, in October, 1837, by virtue of said mortgage, and by a writ of *habere facias*, were put into the possession of the same, Feb. 24, 1838. Three years from the time of the entry having expired, there is now an absolute estate in the demandants.

The tenant caused an attachment to be made of the premises, on the 20th of August, 1839, as the property of Ephraim Lincoln, Foster & Brown, and having obtained judgment in his action, made a levy of his execution upon them, January 19, 1842.

But at the time of making the attachment, the interest of the debtors was that of mortgagees, before a foreclosure had taken place, and was not attachable. *Smith* v. *People's Bank*, 24 Maine, 185. Such interest may be conveyed by deed, and before the tenant's levy, it was transferred to the ancestor of the demandants.

But it is contended that the mortgagees of Clark were partners, who were insolvent, and that the money, obtained by the conveyance to Benjamin Lincoln, was received by one of the partners, and appropriated to his benefit alone, and that the tenant, a creditor of the firm, has a right to hold the premises, against that conveyance.

A sufficient answer to this position is, that the testimony of Samuel J. Foster, which is introduced to prove the fact, does not show such appropriation. He does not appear to know what disposition was made of the money received.

The deed, having been given by all the partners, conveyed all their title, and the presumption is, that the consideration went for the benefit of the firm. The grantee would not be accountable for the disposition of it, by the firm, or any one of its members.

According to the agreement of the parties, the tenant must be defaulted, and an auditor appointed, to determine the amount of the rents and profits to which the demandants are entitled.

JOSEPH BRYANT *versus* JOHN WARE.

A trespasser acquires no title to the goods taken, and can convey none. The original owner may follow his property and reclaim it from the trespasser, or any other person claiming through him.

Confusion of goods may occur by the intermixture of timber, shingles, rails or ship knees.

Where lumber was cut upon two tracts of adjoining lands of different owners, by a trespasser, and the whole was so intermixed by him or persons claiming under him, that the part belonging to each owner could not be distinguished and the owner of one tract seized and took possession of the whole; *it was held*, that one claiming under the wrongdoer, could not maintain an action of *trespass* against him for such taking.

TRESPASS *de bonis asportatis*, for a quantity of cedar railroad sleepers, juniper knees, shingles, and juniper timber.

At the trial, before WELLS, J. it appeared, that the lumber was cut in the winter of 1840–1, by one *Samuel Potter*, a part on the land of defendant, and a part on land of *Timothy Boutelle*, the two tracts being contiguous in the town of Alton. The timber was hauled by *Potter* into a brook, for the purpose of being floated to market, and in the following spring, it was run down to the Penobscot river above the town of Orono, where it was rafted into eleven rafts, six of which were run to Bangor immediately afterwards, and delivered by *Potter* to plaintiff, to be held by him to pay what Potter owed him, and the balance to be paid to *Potter*, the plaintiff having supplied Potter while cutting the lumber. The other

rafts were taken by defendant near Oldtown as his property, and soon afterwards he came to Bangor, and took the remaining six rafts out of the possession of plaintiff.

Potter was a trespasser on both tracts, and there were no marks upon any of the timber.

With other rulings, the Court instructed the jury, that if a part of the lumber was cut on Ware's and a part on Boutelle's land, and was all mixed together in such a manner, by those who cut it, that the part cut on Ware's land, could not be distinguished from what was cut on Boutelle's land, then Ware had a right to take the whole, and this action of trespass could not be maintained; also, that if the rafts taken by the defendant near Oldtown, contained more than all the timber cut from his land, it would make no difference *where* he took it, (he intending to take all the timber cut as aforesaid,) if they found that the timber was intermingled, and could not be distinguished as before stated.

The jury returned a verdict for defendant, and the plaintiff excepted.

Kelley and *McCrillis*, for plaintiff.

1. The rule of law, that where one mixes his own with another's goods so that it is impossible to distinguish and identify what belonged to each, the entire property passes to him, whose original dominion was invaded, applies only to cases of *fraudulent* intermixture of goods. 21 Pick. 305. Fraud is not to be presumed, and whether there was any fraud, was a question which should have been submitted to the jury.

2. If there was fraud in Potter, who cut the lumber and intermingled it, the plaintiff being an innocent purchaser, is not to be affected by it. 14 Mass. 137; 10 Johns. 185; 20 Pick. 247; 6 Shepl. 391; 1 Peters, 46.

3. Where one innocently mixes his own with another's goods, each retains his ownership in his proportion, and neither party has a right to retain or take more than his proportion, and if one takes more than his proportion, he is a trespasser. 11 N. H. 558; 21 Pick. 306.

4. The articles, for which this action is brought, are not that kind of property, to which the law of confusion of goods applies. Inst. Lib. 2, title 1, § 27; Story on Bailments, § 40; 15 Vesey, 432; 20 Maine, 287.

5. The instruction should have been qualified, that if defendant *knew* he was taking lumber, which did not belong to him, he was responsible in trespass.

6. If there could be no division of the identical goods, there should be a division in value. Defendant having taken five rafts at Oldtown, and that being more than his share, was a trespasser in coming to Bangor and taking plaintiff's share.

Kent and *A. W. Paine*, for defendant.

HOWARD, J. — This was an action of *trespass de bonis asportatis*, for a quantity of cedar railroad sleepers, juniper knees, shingles and juniper timber. There was evidence, as stated in the exceptions, tending to show that the lumber was cut in the winter of 1840–41, by Samuel Potter, a trespasser, on two contiguous tracts of land, and hauled into a brook, to be floated down to a market. That one of the tracts of land, was owned by the defendant, and that the other, called the college land, was owned by Timothy Boutelle. That in the spring following, the timber was run down to the Penobscot river and rafted into eleven rafts, six of which were run to Bangor, immediately after by Potter, and "delivered to the plaintiff to pay him what Potter owed him, and the balance to be paid to Potter, (the plaintiff having supplied Potter while cutting the lumber.") "That Potter was a trespasser on both lots, on which he cut the timber;" and that "there was no other intermingling of the timber cut from both tracts, except that the logs were hauled into the same brook, at the same landing, and afterwards rafted into the same rafts, there being no marks on any of the timber."

The defendant took the five rafts at Oldtown, as his property, and soon after took the remaining six rafts out of the possession of the plaintiff, at Bangor.

The instructions to the jury, to which exceptions were taken and urged in the argument, were: —

1. That, if a part of the lumber was cut on the defendant's land, and a part on the college land, and the whole was mixed together in such a manner, by those who cut it, that it could not be distinguished, the defendant had a right to take the whole, and that this action of trespass could not be maintained.

2. That if the defendant did take the five rafts at Oldtown, and if they amounted to more than all of the timber cut from his land, it would make no difference where he took it, if he intended to seize all of the timber cut as before mentioned, if they found that it was intermingled, and could not be distinguished as before stated.

If one take the goods of another, as a trespasser, he does not thereby acquire a title to them, and cannot invest another with a title; but the original owner may follow his property and reclaim it from the trespasser, or any other person claiming through him, so long as the identity can be established.

If the timber taken by Potter, as a trespasser, from the land of the defendant, was so mingled with the other timber taken by him from the college land, that it could not be distinguished, it would produce what is denominated a confusion of goods. *Loomis* v. *Green*, 7 Greenl. 393; *Wingate* v. *Smith*, 20 Maine, 287; *Hazeltine* v. *Stockwell*, 30 Maine, 237; *Ryder* v. *Hathaway*, 21 Pick. 298; *Willard* v. *Rice*, 11 Metc. 493; *Betts* v. *Lee*, 5 Johns. 348; *Curtis* v. *Groat*, 6 Johns. 168; *Babcock* v. *Gill*, 10 Johns. 287; *Brown* v. *Sax*, 7 Cowen, 95; *Treat* v. *Barber*, 7 Conn. 280; *Barron* v. *Cobleigh*, 11 N. H. 558.

Where the confusion or commixture of goods, is made by consent of the owners, or by accident, and without fault, so that they cannot be distinguished, but the identity remains, each is entitled to his proportion.

This was also the doctrine of the civil law. (Just. Inst. Lib. 2, tit. 1, § 27, 28.)

But if such intermixture be wilfully or negligently effected by

one, without the knowledge or approbation of the other owner, the latter would be entitled by the common law, to the whole property, without making satisfaction to the former, for his loss. The civil law, however, required the satisfaction to be made. Browne's Civil Law, 243; *Ward* v. *Ayre*, Cro. Jac. 366; 2 Black. Com. 405; 2 Kent. Com. 363, 364, where the civil law is stated differently by the learned Chancellor, page 364; Story's Com. on Bailments, § 40; *Lupton* v. *White*, 15 Vesey, 440; *Hart* v. *Ten Eyck*, 2 Johns. Chan. 62.

If the defendant found his timber, which had been wrongfully taken from his land, mingled with other timber, in the manner stated in the evidence, so that it could not be distinguished, he had clearly a right to take possession of the whole, without committing an act of trespass, even if he may be held to account to the true owner for a portion of it. He had, at least, a common interest in the property, and in taking possession, he asserted only a legal right. Inst. Lib. 2, tit. 1, § 28; Story's Com. on Bailments, § 40.

In any view of the case, upon the facts presented, the instructions were correct. *Exceptions overruled.*

LEWIS HANCOCK *versus* GEORGE A. FAIRFIELD.

Parol evidence is not admissible to control the legal effect of bills of exchange.

An agent who draws a bill in his own name is personally bound.

ASSUMPSIT, against defendant as drawer of a bill of exchange, accepted and protested for non-payment.

At the trial, before WELLS J. there was no question as to notice. The defendant called a witness who testified that on the day the draft was drawn, the defendant, then being sick, showed to the plaintiff a letter from the acceptor, ordering the purchase of some specified lumber for a certain schooner, and directing him to draw on the writer for the amount. The lumber was purchased of plaintiff, the draft was drawn, and

the plaintiff gave to the defendant a receipt in full for the lumber. When the plaintiff signed the receipt, he said he had no claims on the defendant, that all he had to look to was the person on whom the draft was drawn, whom he considered responsible.

The defendant also offered to prove that, at the time the draft was given, the plaintiff agreed that he would not hold defendant accountable, but would look only to the drawee for payment, but the Court rejected the testimony, and also ruled that the evidence admitted did not constitute a defence to the suit. Thereupon the defendant submitted to a default, which was to be taken off, and the action stand for trial, if in the opinion of the full Court, the evidence offered should have been admitted, or if the facts proved were sufficient to constitute a defence to the suit.

Jewett and *Crosby*, for defendant.

An agent who discloses his agency is not bound, but his principal is.

The only exception is, where an agent signs without describing his agency in the contract or as agent.

The reason given is, that he *may* bind himself, and by the form of the contract, it is presumed that he intended to do so.

The inquiry in all cases is, to whom was the credit given. 12 Johns. 385; *Rathburn* v. *Budlong*, 15 Johns. 1.

Presumptions as to the intentions of parties may always be controlled by proof of their actual agreements. They may be rebutted by every sort of evidence, whether at law or equity. *Brady* v. *Cubitt*, 1 Doug. 31; *Davenport* v. *Mason*, 15 Mass. 85; 2 Stark. Ev. 568.

The distinction between cases in the books and the case at bar is this: — where the agent has been held liable, it did not appear that the credit was given solely to the principal; in this case it does so appear. *Miles* v. *O'Hara*, 1 S. & R. 32. The letter shown to plaintiff, at date of draft, forms part of the contract, and sufficiently describes defendant's agency. *Storer* v. *Logan*, 9 Mass. 55.

The evidence offered and rejected showed the true contract.

The rule, relating to the admission of parol testimony to vary a written contract, is given in *Boody* v. *McKinney*, 23 Maine, 517, thus, "parol evidence cannot be received to vary the meaning of a written contract by adding to its *terms*, or by extending or limiting them, or by introducing an exception or qualification, or by proving a different contemporaneous agreement." *Stackpole* v. *Arnold*, 11 Mass. 27, is the leading case. 4 Greenl. 497.

Reason for rule is, that parties have concurred in expressing their whole contract in the terms they use. 10 Mass. 244.

It applies then only to those contracts, which express in words and terms the meaning of the parties. The rule does not apply to contracts, implied by operation of law. *Susquehanna Bridge Co.* v. *Evans*, 4 Wash. C. C. R. 480.

The case at bar is analagous to an accommodation note, where parol evidence is received to show that no consideration passed between the parties, although the note might be good in the hands of a third party. No consideration passed between these parties. *Miles* v. *O'Hara*, before cited.

The evidence offered was admissible to show fraud in the plaintiff in setting up this claim. *Hurst* v. *Kirkbride*, cited 1st Binney, 616; *Hill* v. *Ely*, 5 Serg. & Rawle, 363; *Christ* v. *Diffenbech*, 1 S. & R. 464.

The evidence offered, was to prove an express declaration of parties, contradicting any implied promise.

The law never implies a promise, where there is an express promise, or against the express declaration of the party sought to be charged. *Whiting* v. *Sullivan*, 7 Mass. 107.

McDonald and *Burnham*, for plaintiff.

TENNEY, J. — The bill of exchange declared on, the protest, and the admission of the defendant, that he had received notice of the dishonor of bill by the acceptor, in due season, were sufficient to entitle the plaintiff to a verdict, unless this evidence should be controlled by competent proof. The evidence introduced by the defendant had no tendency to produce

such an effect, and that offered and rejected, was inadmissible according to well settled principles.

"As to agents, if they draw, indorse or accept bills in their own names, although on account, and for the benefit of their principals, they are held personally liable, because they alone can be treated on the face of the bills as parties. If they would bind their principals, they must draw, indorse or accept the bills in the name of their principals, and sign for them and in their names." Story on Bills, sect. 76, and notes and cases cited. In *Stackpole* v. *Arnold*, 11 Mass. 27, the Court say, "whatever authority the signer may have to bind another, if he does not sign as agent or attorney, he binds himself and no other person."

The bill is drawn in the common form, and signed by the defendant. There is nothing thereon, indicating in the least, that he intended to act in any other character, than that of principal. *Judgment on default.*

INHABITANTS OF ORONO, *petitioners, versus* THE COUNTY COMMISSIONERS OF THE COUNTY OF PENOBSCOT.

The County Commissioners, when giving notice of the time and place appointed for viewing the route, in relation to the locating, altering or discontinuing a highway, are not bound to fix on the time and place for hearing the parties. The appointment for that purpose may be conveniently made at the close of the view.

Where it is stated in the record of the Commissioners, of their December term, 1844, that the petition for the road was presented at the preceding August term, 1844, and the survey and location of the road made in November; it is sufficiently plain, that the location was made in November, 1844.

In their return of the laying out of a road, the Commissioners are not bound to adopt the language of the petition; and where the courses and distances are given from one known terminus in the petition, though the boundary at the other may not have the description given it in the petition, still, if the record does not show any want of identity, it is sufficient.

Where a highway is located by the Commissioners, and there are no applications for damages, though the Commissioners continue the petition to the then third regular session after their report or return was made, accepted and recorded, this does not impair the legality of their proceedings.

PETITION for *certiorari*. The substance of the petition sufficiently appears in the arguments of counsel and the opinion of the Court. The following causes were assigned therein against the legality and validity of the doings of the Commissioners, in laying out and establishing the highway.

1. Because at the time, when the petition for this highway was made, entered, notice ordered, and view had, there was pending in the Supreme Judicial Court, an appeal taken by William Jameson, one of these petitioners, from the decision of the county commissioners of said county, discontinuing said road or highway, and the same question was at that time pending before a tribunal having cognizance and jurisdiction thereof.

2. Because the Commissioners ordered, at the August term, 1844, that, after the meeting at Jameson's, and a view, "a hearing should be had, at some convenient place in the vicinity;" but did not fix in the order, upon any place for said hearing, or give any notice, or order any to be given, of the particular place where said hearing should be had.

3. Because it does not appear from the report of said Commissioners, or from the records of their doings, in that year, that said highway was surveyed and located.

4. Because it does not appear from the report of said Commissioners, that the said highway was located and established as prayed for by the petition of said Jameson & al. but on the contrary that it was not so located and established.

5. Because the highway petitioned for was a highway leading from the termination of Cumberland street in the city of Bangor, coinciding with the lower road, so called, and terminating at the Bennock road, so called, near Wm. Jameson's house in Oldtown. Yet the Commissioners laid out and established a highway from near said Jameson's house to *Lime* street, and not to the termination of Cumberland street in the city of Bangor, which are different and distinct termini.

6. Because the road or highway from said Jameson's house to Lime street, was never petitioned for, and never adjudged to be of common convenience and necessity.

7. Because it does not appear that either termination of the highway, as laid out and established on the petition of William Jameson & al. as aforesaid, was in the city of Bangor.

8. Because no person or persons were aggrieved by the decision of the County Commissioners in estimating damages sustained by the laying out and establishing of said road, and no petition for redress in respect of damages, (as by the record appears and as is true in point of fact,) was made or entered at either the first or second regular session of said County Commissioners after the session when their return or report was made, accepted and recorded. And yet the said county commissioners did, illegally and without authority of law, cause said petition to be continued till the third regular session after the report or return was made, accepted and recorded as aforesaid, and did not, as they were bound to do, when they made and recorded their said return, cause to be entered of record that the original petition, upon which their proceedings were founded, was continued until their second next regular session to be held thereafter, nor at such second next regular session have the proceedings on said petition closed and so entered of record as the statute in such case requires.

Washburn, for petitioners.

1. There was another petition for substantially the same road, pending when this was entered, and up to the day of the hearing. While that was pending, another could not be received or recognized; no notice could be given; no proceedings had. While respondents were defending one petition, were they to take notice of, and answer to, another for the same thing? Two actions at law, for the same thing, are not maintainable concurrently.

2. The Commissioners should have fixed on the "convenient place" and given notice thereof, so that persons interested might know *where* to appear.

3. The record is insufficient, unless it shows *when*, in what year, the road was laid out. It does not (and, if the year is not stated, it cannot,) appear that the report was made to the *next* term.

4, 5, 6 & 7. The petition was for a highway between the termination of Cumberland street and Jameson's. On *this* (*i. e.* such a petition as above,) petition, there was notice, but on no other. *This* road (*i. e.* one thus prayed for,) was adjudged to be of "common convenience and necessity." Yet *this* road was never located. The Commissioners instead, laid out *another* road: — one not asked for, and never adjudged of "common convenience and necessity;" whether Lime street is in Bangor, Orono or Hampden, does not appear of record. Cumberland street and Lime street are different places; not substantially the same. 3 Fairf. 271 ; 10 Shepl. 9.

8. There was no application for damage, and yet the petition was continued to the 3d term, and was not closed at the 2d term, as the law provides. Rev. Stat. chap. 25, sect. 5 and 6. It was not an error of *form* merely, but of *substance.* The Commissioners had no jurisdiction for this purpose, at the 3d term. *State* v. *Pownal*, 1 Fairf. 24 ; *Inhabitants of Parsonsfield, petitioners*, 10 Shepl. 511.

Cutting, for respondents.

TENNEY, J.—It is unnecessary to intimate what would be the decision of the Court upon such a state of facts as it is alleged exists, as the first ground for the petition. It is upon the record that we are to determine, whether the writ shall be granted or denied. No record presented to the Court shows that, "at the time when the petition for this highway was made, notice ordered and view had, there was pending in the Supreme Judicial Court for said county of Penobscot, an appeal taken by William Jameson, one of these petitioners from the decision of the County Commissioners, discontinuing said highway."

2. When a petition is presented to the County Commissioners, for the location, alteration or discontinuance, of a highway

within their jurisdiction, if they are satisfied, that the petitioners are responsible, and that inquiry into the merits of their application is expedient, they are authorized to view the premises, after giving such notice as the statute prescribes. R. S. c. 25, § 2. By the next section, the Commissioners are empowered to lay out, alter or discontinue such highway, "if after such view and hearing of the parties and their testimony, which hearing shall be at the time and place of such view, or at some convenient place in the vicinity, after such view, they shall judge the same to be of common convenience and necessity." No notice is required before the hearing here referred to, *after* the view. It is supposed to take place immediately upon the view of the premises and before any separation of the Commissioners, and those interested, who may be in attendance. It was proper that the examination and hearing should not be confined to the place, where the way was proposed by the petition to be laid out. This might be attended with unnecessary inconvenience on account of the weather or other causes. But this hearing is confined by the statute to the time, when the view is made, if upon the ground viewed; if at some convenient place, it may be afterwards; but it was expected, under a fair construction of the statute, to be a part of the same proceedings, and no notice, other than such as would accompany the adjournment to another place, would be of any use; this notice, all who chose to be present under the notice made previous to the view, would have, and every opportunity would be given them to be heard upon the matter pending.

3. The record of the proceedings, at the term of the Court held on the second Tuesday of December, 1844, shows that the petition was presented at the August term of the court, 1844; that after the legal notice a view was had at a session held on the 31st day of October, 1844, and thereafter there was a hearing, and an adjudication, that the road prayed for was of common convenience and necessity; and that on the 19th day of November, the same was laid out. It is objected that the record does not disclose the year of the location.

Where it is stated in the record made at the December term, 1844, that the petition was presented at the preceding August term, and the survey and location made in November, the inference is irresistible, that the location of the road prayed for was in November, 1844.

4. The fourth ground in support of the petition for *certiorari* is substantially the same as the three next succeeding, and they may be considered together. The petition was for a way from the termination of Cumberland street in Bangor, coinciding with the lower road, so called, and terminating at the Bennock road, near William Jameson's house in Oldtown. The Commissioners say in their return, that they "proceeded to survey and locate *said highway* (referring to the petition therefor,) as follows, to wit: — "commencing at a stake on the east side of the Bennock road in Oldtown, and north 85°, east 3 rods and 24 links from the south-east corner of William Jameson's house, thence," &c. And the last line run in the location is, "thence south, 41° 55′, west 113 rods to a stake marked R* on the east side of Lime street." That is certain, which may be made so. The courses and distances are given from one *terminus*, which it is not denied is in compliance with the requirement under the petition, and by following them it can be ascertained, whether the survey will terminate at or near the other. There is nothing in the record, exhibiting any want of identity. The stake standing on the east side of Lime street, may, for aught which appears to the contrary in the record, be the termination of Cumberland street in Bangor. They were not bound to adopt the language of the petition in their return, if they conform substantially thereto. *Cushing* v. *Gay*, 23 Maine, 9; *Windham* v. *Co. Commissioners of Cumberland*, 26 Maine, 406.

8. It appears by the record made at the December term of the Court of Commissioners, 1845, that "this petition was entered at the August term, 1844, at which term notice was ordered, &c., and the same was thence continued to the December term, 1844, at which term the Commissioners made return hereon and caused the same to be recorded, and the same

was thence continued agreeably to statute provision, from term to term, to this term, and now all proceedings on this petition are closed." By Revised Statutes, chap. 99, sect. 8, three terms of the court of County Commissioners are established in the county of Penobscot annually, and the term held in December, 1845, was not the second next regular session after the term held the previous December. The error relied upon with much apparent confidence is, that the continuance being for a longer time, than that provided by the statute, the jurisdiction of the court over the subject of this petition had ceased before the completion of the proceedings; and hence the road has no legal existence.

When the Commissioners make and record their return of laying out, altering or discontinuing a highway, they are required to cause to be entered of record, that the petition upon which their proceedings are founded, is continued, until their second next regular session, thereafter, and all persons aggrieved on account of damages estimated, or omitted to be estimated, shall present their petitions for redress at the first or second next regular session; and if no such petitions be then presented, the proceedings upon the original petition shall be closed and so entered of record; and all claims for damages, not before allowed, shall be forever barred. R. S. chap. 25, sect. 5.

If a court ceases to have jurisdiction of a matter, which had been regularly before it, its subsequent acts touching such matter are void; and in such case as the present, the writ should be granted, if the final adjudication and record were made after the power of the court had terminated. *Cushing* v. *Gay*, 23 Maine, 9. Consent of parties cannot restore a jurisdiction, which has ceased to exist. If by extreme sickness of a majority of the members of the Court, there should be an omission of an order that proceedings be closed and so entered of record, as is provided in the statute, and the power to continue the matter, and to make the order subsequently, has utterly ceased, such order could have no validity, however disastrous the consequences might be.

The various matters, which are entered in the Court of County Commissioners, it is believed, are often continued by order of the Court, by universal practice; and this, where there is no statute requirement of prohibition. In petitions for the laying out, alteration and discontinuance of highways, the Court may have no opportunity to ascertain whether the petitioners are responsible; or that inquiry into the merits of the application is expedient, or for any reason, they do not expect to be able to view the premises before the next session, is it doubted that the power exists to enter a continuance? Is there any greater reason for denying this power, simply for the accommodation of the Court alone, in a case like the present, where it is the second next regular term, after the survey and location of a highway has been returned and recorded. Was it intended that the proceedings should be then closed and so entered of record, on forfeiture of all subsequent jurisdiction over the matter of the petition? The statute prescribes no such consequences as the result of the omission, in direct terms.

In giving a construction to a statutory provision, it is often important to ascertain the object of the Legislature in its enactment. If this object is manifest, much aid may be obtained therefrom.

The purpose of this part of the statute was to give a certain but limited time, within which complaints on account of damages, should be presented. The return, showing where the way was laid, and what damages had been awarded to the owners of the land, over which it passed, was required to be recorded, that complainants might know with accuracy, what had been done to their prejudice; and that the opening of the road should not be indefinitely postponed by petitions, on account of damages, such claims are barred after the second term subsequent to that, when the return is recorded. The Commissioners can hear or receive no petition for damages, or an increase thereof after that time; but it cannot be understood that their general powers are so restricted, that jurisdiction is lost by a continuance of the proceedings for other causes, than

the reception of petitions for damages, or hearing evidence thereon.

By this delay, none could suffer, excepting those interested in having the road opened, and ready for travel. And such a delay would be quite immaterial, compared with that, which would follow a discontinuance of the petition, and all proceedings thereon.

It does not appear, that there was any application for damages; hence, there has been no reception of petitions or hearing of the petitioners, which were illegal; the petitioners for the writ, have sustained no damage by the delay; it is admitted that the road in Bangor and Oldtown has been completed, and that in Orono, it is under contract at a fixed price.

Petition dismissed, and writ denied.

WILLIAM COLBURN *& al. versus* ROBERT AVERILL.

Where a person, not the payee, writes his name in blank upon the back of a negotiable promissory note, at the time of its inception, it is to be regarded as done for the same consideration with the expressed contract, and he will be holden as an original promisor.

If the indorsement be made subsequent to the date of the note, and without a prior indorsement by the payee, it is presumed to have been made for a different consideration, and the party will be regarded as a guarantor. But if affixed after an indorsement by the payee, the party will be treated as a subsequent indorser.

If made without date, it is presumed to have been made at the inception of the note.

ASSUMPSIT upon a note of the following tenor: —

"$700. Orono, Dec. 4. 1837.

"Value received, we jointly and severally promise to pay William and Jeremiah Colburn, or order, seven hundred dollars in June next, with interest. "Hervey Kimball,

"William Averill."

The name of the defendant was in blank upon the back of the note. Several payments made in 1841, were indorsed upon the note, some in the handwriting of said Kimball and

some in the handwriting of said William Averill. The writ is dated December 9, 1846. The statute of limitations was relied upon in the defence.

The Judge presiding, HOWARD J., ruled that the plaintiffs had made out a case, whereupon the defendant submitted to a default, which was to be taken off and a new trial granted, if the whole Court should be of opinion that the ruling was erroneous.

Washburn, for defendant.

This case presents the question, whether one who puts his name on the back of a note, payable to another man or order, at the time of the inception, is liable as a promisor (though it is not admitted that the defendant's name was placed on the note at the inception, but for argument let it be conceded.) It is a new question in this State. Court may do as reason and law suggest. We deny that defendant is a promisor.

The construction that makes him so is narrow, forced, unreasonable and injurious. It is confined, in all the world, to a portion only of New England; based on supposed authority, now ascertained to be no authority; and on reasons inconclusive, contradictory and absurd; first adopted in a State that would now gladly recede, if possible; and which acknowledges that, if a new question, they would not so decide; and that in principle the construction is inadmissible. HUBBARD, J., *Union Bank* v. *Willis*, 8 Metc. 504.

We have attached no peculiar force to the Massachusetts decisions before separation, except in relation to the construction of statutes then existing there, and enacted here since.

But there was no decision in Massachusetts, prior to the separation, which authorizes the charging of the defendant on *this* note, as a promisor. In no case like this had a defendant been thus held.

I propose to examine all the cases having resemblance: —

1. *Josselyn* v. *Ames*, 3 Mass. 274. The note was *not negotiable.* The *payee* (not a third person,) indorsed it, and was sued, and he had agreed to pay the note.

2. *Hunt* v. *Adams*, 5 Mass. 358. The defendant at the

inception, wrote at the *bottom* of the note, "I acknowledge myself holden as surety for payment of the demand of the above note."

3. *Same*, 6 Mass. 519. Same memorandum as above.

4. *Same*, 7 Mass. 518. Same memorandum as above.

5. *Carver* v. *Warren*, 5 Mass. 545. There was a written promise in words at the time of the inception, and on this promise an action was sustained.

6. *White* v. *Howland*, 9 Mass. 314. Here also was a promise written out in full to pay the note.

7. *Moies* v. *Bird*, 11 Mass. 436. In this case, note from A to B or order, indorsed by C at plaintiff's request, a day or two after the making, but in pursuance of an agreement, and in fact *not negotiable.* SEWALL, C. J. charged the jury that C was liable as an original promisor, *unless he proved a different intent and purpose.*

Rand, in his argument, in 4 Pick. 311, says, this note was misstated in the report; *it was not payable to order.* The decision was in fact on a note not negotiable; and PARKER, J. admits in the opinion that it was not in form negotiable.

Thus stood the cases at the separation. And we find no case, that authorizes the holding as a promisor, one who at the making, places his name *in blank* on a *negotiable* note, payable to another.

One reason on which all these cases were sustained, was that the *defendants could not be charged as indorsers*, or guarantors.

In this case he might, as the 8th Metc. and sundry other cases to be cited hereafter, show. The reason assigned in *Moies* v. *Bird, it is admitted by the Massachusetts Court, fails in a case like this.*

How stand the cases in Massachusetts, since the separation?

1. *Sumner* v. *Gay*, 4 Pick. 311, is a case like the present. The plaintiff declared against the defendant as guarantor and promisor, and had judgment. It does not appear whether the defendant was held as promisor or guarantor.

2. In *Tenney* v. *Prince*, 4 Pick. 387, the opinion assumes,

that the cases had decided from the time of *Josselyn* v. *Ames*, that "where indorsement is made at the time of making the note, the person indorsing is to be treated as an original promisor," "because" as he "*cannot be answerable as an indorser, he shall be answerable as an original promisor.*" All this is *obiter dicta.*

The Court has not decided, that in case of a negotiable note, where the defendant might be held as indorser, that he would be answerable as promisor.

The Court say in this case, that they would not be justified "*in extending the liability of these anomalous indorsers.*"

The New York cases, that are cited in the above, either did not sustain the positions for which they were cited, or have been since overruled.

3. *Baker* v. *Briggs*, 8 Pick. 122, recognizes the doctrine that a defendant, in a case like this, would be chargeable, as an original promisor.

4. *Chaffee* v. *Jones*, 19 Pick. 260, recognizes the same. C. J. says, this sort of note is "peculiar to New England" and he might have said, to two or three States only. Yet, he says distinctly, that this is only the legal import "independent of any intrinsic evidence;" he intimates clearly that you may vary this import by proof.

5. *Austin* v. *Boyd*, 24 Pick. 64, assumes the doctrine of *Baker* v. *Briggs*, to be correct.

The two cases last cited, give some reasons why the defendant cannot be held as guarantor, (for it seems to be conceded everywhere, that he must be held as guarantor, if possible, before considering him a promisor. One is only charged as promisor, to prevent entire failure of remedy) but these reasonings are bad. Among them, is this: — that there is no new consideration. Now here, in Massachusetts, in New York, and everywhere, men have been held as guarantors, times without number, where the guaranty was entered into at the very time the original promise was made, and where there was no new or independent consideration. In three-fourths of the cases

of guaranty, it is so. *Chaffee* v. *Jones* admits, "*he may be guarantor, if it be proved that such was the intention.*

Now, in this case, (if plaintiff could consider the defendant as any thing more than indorser,) he might regard him as guarantor. He might fill up a guaranty over his name. If so, he could hold him in no other relation. The reason assigned for regarding him as maker, fails. It is not necessary so to consider him in order to have a remedy. *Sampson* v. *Thornton*, 3 Metc. 275, affirms what was supposed to be the doctrine of *Hunt* v. *Adams*, (but which *clearly*, *certainly* was not.)

Union Bank v. *Willis*, 8 Metc. 504, HUBBARD, J. in giving the opinion, says, "If the subject were a new one, we should hesitate in giving countenance to such an inequality as to hold that any person, whose name is written on the back of a note, should be chargeable as a promisor.

In Maine the subject *is* "a new one." The Court is not bound by a course of decisions to give countenance to the inequality. This construction, in ninety-nine cases out of a hundred, makes a contract never thought of by the parties, and operates gross injustice. No man, (not a lawyer,) ever yet put his name on the back of a note, intending to be liable as if he had put it on the face.

And it is unnecessary to hold him as a maker to prevent utter failure. All the cases that say any thing about it, declare, that if the intention was to be a guarantor, and it is so proved, then he *may* be and will be so held; all say the holder may *fill up the blank according to the intention and purpose.*

Where there is no evidence of what the intent was, why presume an intent to be a promisor, when this very intent is repelled by the fact of the name being on the back and not on the face?

The reason sometimes given, that the defendant cannot be charged as an indorser because he did not place his name on the note as such, inasmuch as his indorsement did not negotiate, or could not negotiate, the note, is bad; a second indorser's name does not negotiate the note, is not put there for

that purpose, yet, he is not chargeable as a promisor or guarantor. So of a note payable to bearer, why not, if this be good reasoning, hold such indorsers as promisors or guarantors?

But the law is, and the reason of the thing is, that the defendant in all these cases, shall be liable as guarantors or second indorsers, and never as original promisors, unless words to that effect were written at the time.

Mr. Justice STORY seems to have perceived that none of the cases in Massachusetts prior to the 4th Pick. covers one like this. Story on Notes, § 473, p. 587, § 476, p. 591, and notes, and he mentions that C. J. PARKER, in *Oxford Bank* v. *Haynes*, 8 Pick. 423—6—7, seems "to have limited the doctrine to notes not negotiable." See note 1, p. 591.

In New York the earlier cases inclined to the "original promise" doctrine. But the later cases maintain a different doctrine, and lay it down broadly and clearly, that the party, whose name is placed, at the inception, on a negotiable note payable to another, assumes only the liability of an indorser. *Dean* v. *Hall*, 17 Wend. 214; *Seabury* v. *Hungerford*, 2 Hill, 80.

Hall v. *Newcomb*, 3 Hill, 233, was a case like this in every particular; the Court lay down the law fully and clearly in favor of defendant, and make distinction between notes negotiable and those not negotiable. They say, that the plaintiff might, by indorsing the note, have put it in such form as to charge the defendant as second indorser." 7 Hill, 416.

Such is the law in England. *Bishop* v. *Hayward*, 4 T. R. 470; *Hill* v. *Lewis*, 1 Salk. 132. Every indorser of a note may be declared against as the drawer of a bill. Chitty on Bills, 141—142, 7th Am. ed.

In Connecticut, HOSMER, C. J., dissented from the right to fill up the indorsement so as to make the defendant liable as promisor.

The interpretation must be such as to carry into effect the true intent of the parties. Story on Pr. Notes, § 479, p. 598, ed. of 1845.

The statute of limitations is pleaded.

If defendant is liable only as guarantor or indorser, the note is barred as to him. The defendant is not bound by any promise or payment of the makers, not liable in the same relation. *Gardiner* v. *Nutting*, 5 Greenl. 140.

Even if he was a joint and several promisor, the note is barred. Revised Statutes, chap. 146, § 19, declares, that no promise or acknowledgment shall be binding unless it be *express* and contained in some writing *signed* by the party to be bound thereby. Section 20, that if there are two or more joint contractors, no one shall be bound by any acknowledgment or promise made or signed by another. Section 24, *if there are two or more joint contractors, no one of them shall lose the benefit of this chapter, so as to be chargeable by reason of any payment made by the others.*

Grant the defendant was a co-promisor, or joint contractor, he made none of these payments; they were made and indorsed by others. *And he is not to lose the benefit of chap.* 146, *by reason of payment by another.*

The plaintiffs may cite § 27, to the effect that "none of the provisions of this chapter respecting the *acknowledgment of a debt*, or a *new promise* to pay it," shall apply to such "*acknowledgment*," or "*promise*," made before the act took effect; i. e. August, 1841; *but they do apply to the effect resulting from a mere payment of part by one of the joint contractors.*

Section 27 applies to § 19, not to § 24. It excludes 24, *ex industria*, "or payment" would have been added after "promise," had it been so intended. The chapter recognizes three ways to renew a debt, — 1. acknowledgment, — 2. promise, — 3. payment in part.

Section 24 says, part payment shall never prejudice the joint contractor; § 27, that "acknowledgments" and "promises" before 1841, shall stand good against joint contractors, but does not say that "payment" shall. They are all distinct in sections, in nature and character. *Pierce* v. *Tobey*, 5 Metc. 168.

Cutting and *Wilson*, for plaintiffs.

The defendant's name appearing on the back of the note, we hold him as an original promisor.

In the absence of proof, the legal presumption is, that his name was placed there at the inception of the note. *Baker* v. *Briggs*, 8 Pick. 130; "where a person, not the payee of a note on demand or on time, puts his name on the back, at the time of its inception, he is liable as an original promisor or surety, but not as indorser." *Baker* v. *Briggs*, 8 Pick. 122; *Sumner* v. *Gay*, 4 Pick. 311; *Chaffee* v. *Jones*, 19 Pick. 260; *Austin* v. *Boyd*, 24 Pick. 66; *Samson* v. *Thornton*, 3 Metc. 279; *Shepley* v. *Waterhouse*, 22 Maine, 497; *Emery* v. *Vinal*, 26 Maine, 305; Story on Bills, 59, 472—480; Chitty on Bills, 214; 8 Metc. 510.

The limitation bar does not apply.

Partial payments have ever been considered an acknowledgment of indebtedness, and prior to the statute of 1841, before cited, payment by one joint promisor, was binding on the co-promisors. *Pike* v. *Warren*, 15 Maine, 392, and cases cited; *Hunt* v. *Bridgham*, 2 Pick. 581; *Banks* v. *Hall*, 2 Pick. 368; *Sigourney* v. *Drury*, 14 Pick. 387.

The last indorsement was made on July 31, 1841, less than five years before the commencement of this suit.

Howard, J.— The plaintiffs, as payees, sued the defendant as promisor of a note, upon the back of which his name appears in blank. The principal question presented by the report, is, whether he can be regarded as an original promisor.

It has been familiar law in this State, before and since the separation from Massachusetts, that, when a person, as in this case, not the payee of a promissory note, writes his name upon the back of it, at its inception, in blank, he is to be regarded as a surety and an original promisor; although no case embracing the doctrine, in terms, appears in our reports.

While different Courts, of high character, sustain, vary or deny this doctrine, all concur, that thus writing the name upon the back of the instrument constitutes a contract, which

is to receive a reasonable and an available construction. We hold, that there are certain general rules, and principles to be followed in the interpretation of such contract, in the absence of other evidence, which may lead to satisfactory results, amid conflicting decisions.

The contract is to be construed as it was at the time it was made. If made at the inception of the note, it is to be presumed to have been for the same consideration, and a part of the original contract, expressed by the note. If made subsequently to the date of the note, and without a prior indorsement by the payee, it is to be presumed to have been for a different consideration, and the party will be regarded as a guarantor; but if made after a prior indorsement by the payee, the law presumes it to have been done in aid of the negotiation of the note, and the party will be treated as a subsequent indorser. If made without date, it will be presumed to have been made at the inception of the note. Chitty on Bills, 214, note; Story on Promissory Notes, § 59, 472 — 481, and notes; *Hunt* v. *Adams*, 5 Mass. 358; *Moies* v. *Bird*, 11 Mass. 436; *Baker* v. *Briggs*, 8 Pick. 122, 130; *Bank* v. *Willis*, 8 Metc. 504, 510; *Chaffee* v. *Jones*, 19 Pick. 263; *Austin* v. *Boyd*, 24 Pick. 66; *Emery* v. *Vinal*, 26 Maine, 305; *Parks* v. *Brinckerhoff & als.* 2 Hill, 663; *Pinkerton* v. *Bailey*, 8 Wend. 600.

Upon the application of these principles, to this case, the defendant must be regarded as an original promisor.

Payments were made by the signers to the face of the note, and indorsed upon it, before the Revised Statutes took effect, and within six years next preceding the commencement of this action. This placed the note in a position not to be affected by the statute of limitations, as to all the promisors. R. S. c. 146, § 27; General Repealing Act, § 4; Act of Amendment, of chap. 1, § 4, of R. S. (c. 1, 1841;) *Pike* v. *Warren*, 15 Maine, 392; *Shepley* v. *Waterhouse*, 22 Maine, 497; *Parsonage Fund* v. *Osgood*, 21 Maine, 176; *Crehore* v. *Mason*, 23 Maine, 413; *Hunt* v. *Brigham*, 2 Pick. 581;

Sigourney v. *Drury*, 14 Pick. 387; Story on Promissory Notes, § 57, 58.

The ruling of the presiding Judge was correct, and judgment must be entered upon the default, according to the agreement.

ELMIRA PAYSON *versus* DENNY M. HALL.

To the validity of a sale of real estate, made by a collector, for the non-payment of taxes, it is indispensable that he take the oath of his office before acting therein.

To maintain title under such a sale, it is not sufficient to show that the person making the sale had been chosen as collector and acted therein.

The oath of office taken by one as constable, who was chosen prior to the Revised Statutes, could give no validity to his sales of land, since the enactment of the Revised Statutes, for non-payment of taxes, unless the oath were either in the form prescribed in the Act of 1821, or in the Revised Statutes.

A certificate that one chosen as constable, made oath, prior to the Revised Statute, "to the true and faithful performance of his duties," in that office, is insufficient.

A tax sale is void, if the collector making the sale was also the purchaser, though acting in the purchase, as the agent of another person.

WRIT OF ENTRY to recover a lot of land with a house thereon, in Oldtown.

To prove title the demandant offered a deed to her from Lore Alford, in his capacity of collector of taxes of the town of Oldtown, for the year 1841, dated May 6, 1842, duly acknowledged, and recorded November 26, 1842; also, the records of assessments and valuation of said town, for the year 1841, from which she read the certificate of Samuel Cony and Joshua Wood, as assessors of Oldtown, for the year 1841, dated May 7, 1841; also, as set against the name of Isaac Smith, for the year 1841, "house and lot occupied by him at Great-works." Under the head of valuation was set against said property $575, and in the column of State, county and town taxes for 1841, was set $11,50, and under the head of

deficiency of highway taxes for 1840, was set $1,26, and the signatures of said Cony and Wood, as assessors for 1841, at the foot of said record of valuation and assessments.

The demandant then offered the records of the said town of Oldtown, from which she read the record of the warrant, dated March 27, 1841, for town meeting and the return thereon; also the records of the meeting, held April 5th, 1841, in pursuance of said warrant, from which she read a vote choosing by ballot Samuel Cony, Joshua Wood and Samuel Pratt, selectmen; also a vote whereby it was voted to pass over the fourth article of the warrant, which was to choose assessors; also a vote whereby Lore Alford, was chosen constable for the year then ensuing; also a vote as follows: — "Voted to put the collection of taxes at auction to the lowest bidder, which was accordingly done, and bid off by Lore Alford, at five mills per cent.;" also a vote that Lore Alford be the collector of taxes for the ensuing year by giving bonds according to law.

To show that the abovenamed officers were duly sworn, the demandant offered and read the certificate of Charles Blanchard, as town clerk, dated April 7th, 1841, of the administering the oath to Samuel Cony and Samuel Pratt, as selectmen; also another certificate under the same date, by the said Blanchard, as clerk, of his having administered to said Cony and Pratt the oath of office as assessors; also, a certificate by said clerk, under date of April 9, 1841, of his having administered to Joshua Wood the oath of office as selectman; also, another certificate of the same date, by said clerk, that he had administered to said Wood the oath of office as assessor; also, the original certificate of John H. Hilliard, as justice of the peace, and record thereof as follows: —

"Penobscot, ss. April 5th, 1841. — Then personally appeared Asa Smith, John B. Smith, Joshua Lunt, Jr., Lore Alford and Henry Morgan, and severally made oath to the true and faithful performance of their duties as constables of Oldtown. Before me, J. H. Hilliard, justice of the peace."

"A true copy, attest, Charles Blanchard, town clerk."

Also a vote, whereby Charles Blanchard was chosen clerk of said town for the year 1841, and the original certificate, dated April 5th, 1841, of his having taken the oath, necessary to qualify him to act as clerk of said town, before J. H. Hilliard, justice of the peace, and the record of the same.

The demandant also offered and read, from the same book of records, a warrant, dated April 11th, 1842, for a town meeting to be held on the 18th day of April, 1842; also from the records of the doings of the meeting, held on the said 18th day of April, the demandant read the vote whereby Charles Blanchard was chosen clerk of said town for the year then ensuing; also an original certificate of his having taken the oath as town clerk before Samuel Cony, justice of the peace, dated April 18th, 1842, and the record thereof; also a vote, whereby John Rigby was chosen treasurer, together with the record of his having taken the oath as treasurer before Charles Blanchard, town clerk, on the 18th of April, 1842.

The demandant then offered the tax bills for 1841, signed by Samuel Cony and Joshua Wood, as assessors of Oldtown, dated May 7, 1841, directed to Lore Alford, collector of taxes for the town of Oldtown for 1841, in which were the following property and tax thereon, set against the name of Isaac Smith, viz: — "house and lot occupied by him at Great-works." Against said property, under the head of value, was $575,00, and under the head of estate and income, $11,50, and under the head of deficiency of highway tax in 1840, was $1,26; also the warrant under the signature of Samuel Cony and Joshua Wood as assessors of Oldtown for 1841, under date of June 7, 1841, directed to Lore Alford, collector of taxes of the town of Oldtown.

The demandant also offered and read from said book of records of valuation and assessments, signed by said Cony and Wood, assessors for 1841, the following: — "Total amount of valuation $256,039; tax on same, two cents on a dollar; also the receipt of Lore Alford, as collector of Oldtown for 1841, acknowledging the receipt of said warrant and bills, under date

of June 12, 1841; also a paper, purporting to be a bond, signed by Lore Alford, as principal, and Eli Hoskins and others as sureties, dated 1841, given to the inhabitants of Oldtown for the faithful performance of his duties, as collector of taxes for said town, for the year 1841.

The demandant also offered an office copy of a deed dated November 1, 1833, from Jonathan N. Conant to Isaac Smith, duly acknowledged, and recorded March 11, 1834; also an office copy of a deed, dated Nov. 14, 1833, duly acknowledged, and recorded March 11, 1834, from Rufus Dwinel and others to Isaac Smith, of the premises in controversy.

To show that the premises were duly advertised for sale, the demandant offered copies of the Portland Advertiser, dated 28th of December, 1841, and the 4th and 11th of January, 1842, and copies of the Democrat, printed in Bangor, dated the 21st and 28th of December, 1841, and 4th of January, 1842; also a resolve of the State, passed in the session of 1841, making the Portland Advertiser, the State paper; also, the affidavit of Gilbert G. Bradbury, dated June 3, 1842, before J. H. Hilliard, a justice of the peace, made on one of the original advertisements, and recorded in the Penobscot registry July 23, 1842.

The demandant then offered the record and return of Lore Alford, as collector of taxes of said town of Oldtown, for the year 1841, to John Rigby, treasurer of Oldtown, for 1842, dated June 1st, 1842, of his doings in the sale of real estate in said town, as collector, with a certificate thereon signed by said Rigby, as treasurer of Oldtown. It is admitted that said return was made to the treasurer, within thirty days after the sale of said real estate. The demandant also introduced the record of the same, as recorded in the treasurer's book of records of said town.

The demandant then introduced Lore Alford, who testified that he acted as collector of taxes in Oldtown, for the year 1841; that when he sold, he waited two hours after the hour appointed, on each of the days he sold, before selling; that he adjourned from the 4th to the 5th, and from the 5th to the

6th, for want of purchasers; that Isaac Smith and family, occupied the premises demanded, from 1838 or 1839, until the same were bought by Hall, the tenant, who now occupies the same; that when he sold and had a bid for the whole, he invariably inquired if any one would pay the tax and charges for a less quantity than the whole of the land; that the tax bills and warrant, offered as above, were put into his hands by the assessors; that the book offered as the records of Oldtown, was the records of that town, and that the book offered, as above, as the record of the valuation and assessments of Oldtown, was kept in the office where the selectmen and assessors transacted their business in the year 1841; that he had frequent occasion to examine it, and always found it there; that he would not be certain that they went into that office before the first of June; that prior to that time, they might have had another office.

On cross-examination the witness testified, that the demandant was sister to his wife; that she was not at the sale; that he struck off the premises to her at her request; that he bid off for her all that appears by his return to have been so bid off; that the demandant furnished the money in advance, and that she purchased with his advice; and thinks she furnished the money on the first day of the sale. He further testified, that the demandant gave him general authority to bid off for her such lots as he should see fit, and this lot was so bid off; that some particular lots were spoken of, but he did not know that this was one of them.

J. Hilliard, for plaintiff, among other views, contended, 1st. that the collector was duly qualified to act. He was duly chosen, gave bond and was duly sworn. The oath which he took as constable was sufficient. The form prescribed is but directory, not essential. The language of the certificate is a substantial compliance with the law. R. S. chap. 1, sect. 3, rule 21. The oath of constable embraces that of collector. Statute of 1821, chap. 116, § 25; *Colman* v. *Anderson*, 10 Mass. 105.

2. He was collector *de facto;* a purchaser at his sale need

establish nothing more. *Nason* v. *Dillingham*, 15 Mass. 17; *Bucknam* v. *Ruggles*, *ib.* 180; *Doty* v. *Gorham*, 5 Pick. 487; Statute, 1831, chap. 501, sect. 2.

Cutting, for defendant.

"It has been held with great propriety, that to make out a valid title, under tax sales, great strictness is to be required, and it must appear that the provisions of law preparatory to, and authorizing such sales, have been *punctiliously* complied with." *Brown* v. *Veazie*, 25 Maine, 362.

Alford was *not* a collector, for the case no where finds, that he was sworn as a collector by taking the oath or any oath prescribed by statute.

Neither was he a collector *ex officio*, in consequence of being chosen constable; for the statute of 1821, chap. 116, sect. 23 provides, "if such collector or collectors so to be chosen shall refuse to serve, or if no collector shall be chosen, *then* the constable or constables of such town shall collect and gather such rates and taxes."

On one of two contingencies only, could a constable serve as collector. 1st. The collector chosen must have refused to serve, or 2d. when no collector had been chosen; neither of which has happened.

This constableship is an after thought, brought into the case, to bolster up a defective title, so that this same constable or his sister, may obtain property for $15, worth as many hundreds.

But Alford was not even so much as a constable; he was never qualified as such by taking the requisite oath.

The sale was illegal and void, because the collector could not, at the sale, be the seller and also the purchaser. "The respective duties of buyer and seller are incompatible with each other." *Pierce* v. *Benjamin*, 14 Pick. 359.

Alford himself, "further testified that demandant gave him general authority to bid off for her such lots as he should see fit, and this lot was so bid off."

If a collector cannot purchase for himself, neither can he for another. That a collector should be an agent for another, and that other a sister, bears fraud on its face.

SHEPLEY, C. J. — By this writ of entry the demandant claims to recover a dwellinghouse and lot situated in the town of Oldtown.

In proof of her title she produced a deed from Lore Alford, made by him in his capacity of collector of taxes for that town, for the year 1841, and purporting to convey the premises to her. The taxes for that year, having been assessed, before the Revised Statutes were in force, were to be collected according to the provisions of former statutes. It was provided by the act of March 12, 1831, that it should be sufficient for a party claiming under such a title, to produce in evidence the collector's deed duly executed and recorded; the assessment signed by the assessors, and their warrants directed to the collector; and to prove, that such collector complied with the requisitions of law in advertising and selling such real estate. Although this statute was repealed, it was continued in force by the Revised Statutes for the collection of such taxes. *Shimmin* v. *Inman*, 26 Maine, 228. The assessment and warrant were produced, signed by the assessors.

In defence, objection is made, that Alford was not legally qualified to act as collector. There is no evidence that he was sworn as a collector. Two answers are made by the counsel for the demandant to this objection. The first is, that it is sufficient that he was acting as collector. The second is, that he was chosen and sworn as a constable, and that his oath as such included the oath of a collector.

With reference to the first answer it may be observed, that when constables or sheriffs perform acts by virtue of judicial precepts, it is usually sufficient to show, that they were officers *de facto*, without producing proof, that they were legally qualified to do so. A person injured by such acts has a remedy by action against the officer, and his rights are secured by a final resort to the official bond. But one injured by the misconduct of a collector of taxes cannot be protected by a resort to his official bond for redress, that having been made for the security of the town alone. He must be permitted to avoid the acts of one assuming without lawful authority to be a col-

lector, or be in many cases without remedy. If a person without election and legal qualification could act as a collector of taxes and as such make sale of an estate, and the production of a deed made by him in that capacity were to be considered as effectual without proof of his election and qualification, there would be no effectual security for the faithful discharge of his duties. Such was not the intention of the Legislature. The party is required to produce the collector's deed, not the deed of a person assuming without right to act in that capacity. The tax payer is entitled to have his interests protected in the sale of his property by the obligations imposed by the official oath.

With reference to the second answer made to the objection, it may be observed, that the collector does not appear to have been legally sworn as a constable. The oath which was administered to him and other constables, is presented by a copy of the certificate made by the justice. It states, that they "severally made oath to the true and faithful performance of their duties as constables of Oldtown." It neither states, that the oath prescribed by the statute of 1821, c. 116, § 25, was administered, nor that they were "duly sworn," or were "sworn according to law," which have been considered as sufficient evidence, that the oath prescribed by the statute had been administered. R. S. c. 1, § 2, art. 21. There is nothing indicative, that the certificate of the justice does not present the oath, and the only oath administered to them.

The demandant is also required to prove, that the collector complied with the requisitions of the law in advertising and selling the estate. The collector is required to sell to the best bidder. c. 116, § 30. A collector cannot faithfully and legally perform his duties, who is both seller and purchaser. *Pierce* v. *Benjamin*, 14 Pick. 356. In this case the collector was not the purchaser, but he acted as the bidder and purchaser for the demandant, who was not present when he made the sale. An auctioneer is by the law regarded as the agent of both seller and purchaser. A collector of taxes cannot consistently with a faithful and legal discharge of his official duties become

the agent of a purchaser, whose interest it is to acquire the whole estate or as much of it as possible, by payment of the taxes and costs, and whose agent, to be faithful, must have the same interests, while a faithful discharge of official duty would require him to sell as little as possible of the estate, to obtain such payment. His official duties and those of his private agency would come into direct conflict. The performance of one duty is inconsistent with the faithful performance of the other. A sale made under the circumstances presented in this case cannot be considered as made by a collector of taxes in compliance with the requisitions of the law.

Demandant nonsuit.

ABEL KENDALL *& al. versus* WILLIAM MOORE *& al.*

In a lease of real estate for a stipulated time, a covenant, that the lessee shall pay the rent and peaceably give up the possession at the end of the term, "and for such further time as the lessees may hold the same," is a security both for the surrender of the estate and for rent *during the occupation*. In such a case the holding over beyond the term, is a tenancy at will.

Lessees for a time fixed, who hold over, are not liable for rent longer than for the time of their occupation.

ASSUMPSIT, to recover rent. These facts were admitted by the parties.

The plaintiffs made a lease of a tenement in Oldtown to the defendants, on the 8th of June, 1843, for the term of one year, for thirty-five dollars to be paid in quarterly advance payments, and for such further time as the lessees may hold the same.

The defendant, Moore, went into immediate occupation under said lease, and remained in possession until sometime in December, 1844, when he moved out. The house remained vacant till May, 1845, when the plaintiffs leased it to another. The other defendant never occupied the premises personally or with his family. He removed from Oldtown about the 1st of January, 1844.

H. Morgan was authorized to receive rents on the property in 1843–4, and to look after the buildings.

The first year's rent was paid and also the rent for the first quarter of the second year and no more.

About the time the second quarter's rent of the second year fell due, Morgan requested Moore to pay the rent or leave, but he did not request him to leave at the time he did.

Washburn, for plaintiffs.

The lease was made June 8, 1843, the rent to be paid quarter yearly in advance.

Moore, one of the lessees, entered immediately, and remained in occupation till December, 1844. He then left, and the house was vacant till May, 1845. His occupation was that of both the defendants.

The first question is, how much is due from one or both of the lessees? It is not denied, that Moore is liable. The rent was paid to Sept. 8, 1844.

The defendants holding over, were liable for another year, unless the plaintiffs should resume the possession and occupation before the expiration of the second year. *Mosier* v. *Reding*, 3 Fairf. 478.

The plaintiffs entered and took possession in May, 1845. Till this time the defendants were liable. The defendants claim that they are only liable from September to December, 1844, but this cannot be.

The only remaining question is as to the liability of the defendant, Hasty. The lease was to both jointly *and is signed by both as principals.* Hasty was as much liable as if he had occupied in person. He stood in the same relation to the plaintiffs as did Moore, and had the same right to occupy as Moore.

The covenants were the covenants of both, and of both as principals. The covenants are for performance by both, one as much as the other. Moore is to do nothing that Hasty is not to do. Both agreed to perform not only for the year, but "for such further time as the lessees may hold the same."

Both agreed to "deliver up the premises to the lessors," &c., and both failed to do so.

The lease was made as it was, purposely and understandingly.

The defendants then are jointly liable for the amount due. *Mosier* v. *Reding*, before cited; *Brewer* v. *Knapp, & al.* 1 Pick. 332.

In the latter case the lease was to A, as principal, and B & C, *as sureties*, and to them jointly and severally.

The case turned on the fact that B & C were sureties, and so understood to be.

J. Hilliard, for defendants.

The defendant, Hasty, is not liable; he was bound for one year only. The phrase "for such further time," &c. refers to taxes, not to rent; the provision for paying taxes being erased, the above phrase goes out with it; as it now stands, it has no meaning, no antecedent. *Brewer* v. *Knapp*, 1 Pick. 332.

No action can lie on the lease, for rent accruing after the year. Subsequent rent must be claimed by virtue of a new and implied contract only, created by actual occupancy alone, in absence of a new express contract. *Salisbury* v. *Hale*, 14 Pick. 423; Minot's Digest, page 433, letter d, § 3.

Hasty never occupied; he had left the country long before; no promise can be implied against him; he may well say "*non in haec foedera veni.*" If this view is correct, it is immaterial whether Hasty be regarded as a principal or a surety; but in fact, he was surety only.

The case of *Salisbury* v. *Hale*, above cited, will probably be relied on by plaintiff; that case differs essentially from the case at bar. There, in the lease, the word "rent," was inserted immediately before the words "taxes and duties." And the Court say, "this shows, we think, that the promise to pay, for such further time, extended to both rent and taxes. The reasonings of the Court support defendant's position.

If Hasty is not holden, neither can Moore be held. *Bull* v. *Strong & al.* 8 Metc. 11.

Should Moore be held alone, he can be held only for what remains due for the time he actually occupied; he left sometime in December, 1844. But the house remained vacant till May, 1845, and it will be attempted to hold him for rent up to that time; this cannot be done.

Whatever the law may have been formerly, it is now well settled, that a holding over after termination of a lease, even under seal, is a tenancy at will only. The payment of rent during the time of holding over is to be governed by the terms of written lease, in other respects, tenancy at will. *Wheeler* v. *Cowan*, 25 Maine, 286.

Tenancies at will, when rent is in arrear, may be determined by thirty days notice in writing. Rev. Stat. chap. 95, § 19.

The case finds that when rent of second quarter of second year fell due, the plaintiff's agent notified Moore to pay or quit. He did not pay, as it is now claimed in this suit, but quit soon after, at the end of the quarter. The tenancy was therefore determined by both parties. *Wood* v. *Partrige*, 11 Mass. 493.

Wells, J. — It is not necessary to decide the question, whether where a lease is made to two, and but one occupies the premises and holds over after the expiration of the lease, the other can be holden for the rent accruing after its termination. For the terms of the lease, in this case, imply a continuing liability after the expiration of the year, for such further time as the lessees may hold the premises.

The lease contains the following provisions, "And the lessees do covenant to pay the rent in quarterly advance payments, and to quit and deliver up the premises to the lessors or their attorney, peaceably and quietly, at the end of the term aforesaid; in as good order and condition, reasonable use and wearing thereof or inevitable accident excepted, as the same are or may be put into, by the lessors, *and for such further time as the lessees may hold the same*," &c.

In the printed form, which was used, the part relating to

the taxes, which immediately preceded the last clause above mentioned, was erased.

The contract must be taken as the parties have made it, and they must be bound by that interpretation of which it is fairly susceptible. After having modified it, they are not at liberty to say, that it does not mean what the language implies.

The phrase "and for such further time as the lessees may hold the same," embraces the obligation to deliver up the premises in such state as the lease required, at some period after the year, if they held them beyond that time. And there would seem to be a like reason for extending the obligation to the payment of rent, in order to furnish security for it by an express covenant, as to a delivery of the premises. But it is not by its terms restricted to either, and must therefore include both the payment of rent and delivery of the premises.

It is contended, that by holding over and the payment of the rent for the first quarter of the second year, there was a tacit renewal of the contract, so that the defendants would be liable for the rent, after they vacated the premises, for the second year, or until the plaintiffs finding them vacant took possession.

A holding over by the consent of the parties was a renovation of the contract, by the rules of the common law. *Right* v. *Darby*, 1 T. R. 160. But by our statutes a tenant holding over by consent, after the expiration of the term, is considered as a tenant at will only, and is entitled to notice to quit. Chap. 91, § 30; chap. 95, § 19; chap. 128, § 5; *Wheeler* v. *Cowan*, 25 Maine, 283.

There was no time stated in the lease, beyond the year, in which the defendants were to hold the premises, but they were at liberty by it to leave them at any time after the year had expired, and could not therefore be liable for rent after their occupation had ceased. Moore occupied the premises until December, 1844, when he left them, the other defendant never having entered upon them. For the time Moore had

possession the rent was paid except that due for the last quarter, which the plaintiffs are entitled to recover, with interest from the time when it was payable.

ASA W. RUSSELL *versus* CALVIN COPELAND.

The obligor in a bond for the conveyance of real estate, after demand for a deed, is entitled to a reasonable time to prepare it.

And where the note, on the payment of which the conveyance is to be made, is paid to an indorsee, the obligor is entitled to reasonable notice that the condition is fulfilled before he makes his deed; but it is not necessary that the note should be exhibited to him.

Where a bond for the conveyance of land, after reciting the conditions upon which the conveyance should be made, stipulates that the obligee shall pay all taxes upon the land; *held*, that the payment of the taxes was not a condition precedent to the conveyance.

Nor can the obligor set up in defence, that the obligee had not in readiness a mortgage deed of the same premises, provided in the condition to be given on receiving the conveyance, to secure the balance of the purchase money.

In such action, on breach of the bond, the damages are the value of the land, at the time it should have been conveyed.

Nor can the obligee's right of recovery be defeated by a tender of a deed after action brought.

DEBT upon a bond, for the conveyance of land from defendant to the plaintiff. The bond was in the penal sum of $800, reciting that the obligee was to pay for the land $800, for which he had then given his eight notes of $100 each, payable, one of them each year, with interest, and conditioned that the obligee should have a deed, if he should punctually pay the first note, and give back a mortgage to secure the residue. After the statement of the condition, a stipulation was subjoined that the "obligee should pay all taxes."

The notes were negotiated to one Hill, and the plaintiff paid to him the first before it was payable.

The remaining notes were unpaid, and had been passed back into the hands of the defendant.

On the trial, it appeared that the plaintiff, in July, 1844, after the expiration of the first year, met the defendant in a carriage,

in the town in which both parties lived. The plaintiff then asked defendant for a deed, and he said he would attend to it in a few days. He was asked to set some time, when he would attend to it; and was urged so to do. The defendant said he would attend to it soon, that the plaintiff was safe on his bond, and that he wished to see his counsel first. The plaintiff did not exhibit the note he had paid, or say any thing about having paid it. The writ in this suit was dated August 16, and served on the defendant, Sept. 17, 1844.

It also appeared that after this action was commenced, and on the 30th September, 1844, the defendant tendered to the plaintiff a deed of the premises, which the plaintiff refused to accept. The defendant asked plaintiff several times, whether he had his mortgage ready. At that time, the defendant told him that he had called on him several times for his deed, which was not denied.

There was no evidence upon the question of damages, other than that exhibited by the papers in the case.

The Court, WELLS, J., instructed the jury that such a demand, if the defendant made no objection to the time and place as unsuitable, was sufficient; that they must be satisfied the defendant had knowledge of the payment of the note at the time of the demand; that it was not necessary that the plaintiff should have exhibited the note at that time, or that there should be any positive or express evidence of such knowledge, but that the jury might infer such knowledge from the language and conduct of Copeland at the time of the demand and of the tender of the deed; that the making and having in readiness a mortgage by plaintiff, and payment of taxes, were not necessary to entitle the plaintiff to maintain this action, but that defendant had a right to a mortgage when he tendered a deed to the plaintiff, if it was accepted; that the tender, after this action was brought, was too late, and was inoperative; and that, if they found for the plaintiff, the measure of damages would be the penalty named in the bond and interest.

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

J. Crosby, for plaintiff.

A. Knowles, for defendant.

TENNEY, J. — By the terms of the condition in the bond, the defendant was obliged, upon the payment to him, first to be made, if within the time stipulated in the note, to convey the land described in the bond. If he had held the note at the time of the payment, he would have been entitled to a reasonable time after demand in which to have made and executed the deed. As he did not receive the money himself, he had the same opportunity to prepare and execute the deed after the demand, and after he had obtained knowledge, reasonably satisfactory, that the payment had been made. He should have knowledge, that the condition, which the plaintiff was to fulfil to entitle him to a deed, had been performed, before he was required to have it prepared. But the law does not require, that the note taken up, should have been presented to him as the evidence, that it had been paid. His knowledge of the payment, could be shown by any competent proof, like any other fact.

The evidence, that the plaintiff demanded the deed of the defendant was, that he called upon the defendant in the highway, first having been to his house for the purpose, and expressed his wish, that the conveyance should be made, several months after the payment of the note; that the defendant replied he would attend to it in a few days; and upon being urged to appoint a time, when it should be done, he said that he would attend to it soon, and that the defendant was safe by his bond. Also when the defendant tendered a deed to the plaintiff after the commencement of this action, the latter stated, he had called upon him several times for the deed, but was unable to obtain it, which the former did not gainsay. This evidence, if true, was sufficient to authorize the jury to find for the plaintiff upon this point.

The defendant cannot avail himself of the omission on the part of the plaintiff, to discharge the taxes assesssed upon the land; the condition in the bond required no such duty of him, before he was entitled to receive a deed.

Was it necessary, that the plaintiff should have tendered a mortgage deed of the land at the time of the demand upon the defendant, for a conveyance? The title of the land had never passed from the defendant, and without a deed from him, the mortgage deed could not have been of the least benefit. A ceremony that is useless, the law does not require. All that was necessary on the part of the plaintiff, was a readiness to conform to his part of the contract. The defendant was not bound to make delivery of the deed, without receiving the mortgage at the same time, for the security of the residue of the purchase money, but he was required after the plaintiff had made payment of the money, in fulfilment of his agreement, and a readiness to do every thing else incumbent on him was manifested, to have done all which was necessary to make the conveyance, short of the actual delivery of the deed, before he could exact the security contemplated. *Smith & al.* v. *Jones*, 3 Fairf. 332.

The tender of the deed after the commencement of this action, was subsequent to the breach of the bond, and resort to legal means for indemnity according to the evidence, and could have no tendency to defeat a recovery, if the plaintiff was otherwise entitled to maintain the suit.

The penal sum in the bond, is eight hundred dollars, and the consideration therefor was the plaintiff's notes for the same sum, drawing interest from their dates. The case shows that no other evidence was adduced on the subject of damages. The notes, excepting the first, are unpaid and in the defendant's hands. No offer has been made by the defendant to cancel the unpaid notes, or surrender them to the plaintiff. The loss, which the plaintiff has sustained, by the failure to make and deliver the deed by the defendant, is the value of the land at the time, when the conveyance should have been made, and interest thereon. The value of the land at the

time of the contract was fixed by the parties, and the case exhibits nothing tending to show that the value has since changed. *Hill* v. *Hobart & al.* 16 Maine, 164. The jury were allowed by the instructions to add to the penalty, the interest as damages. It does not appear from what time the jury were instructed that the computation of interest should commence, nor does it appear from the case, what was the amount of the verdict. It cannot be assumed, therefore, that interest was allowed from an earlier time, than was proper.

Exceptions overruled.

THOMAS WENTWORTH *versus* CHARLES KEAZER *& al.*

A certified copy by a justice of the peace, of a record of a judgment rendered by him, is the proper evidence, on a plea of *nul tiel record*, to support an action of debt upon such judgment.

But it is competent for the defendants to prove, by parol, that what purports to be such a certified copy is not authentic.

One who has been a justice of the peace, has no authority to certify copies after two years from the expiration of his commission. Authentications made by him after that term are merely void.

EXCEPTIONS from the District Court.

Debt, upon a judgment recovered before A. G. Brown, Esq. a justice of the peace. Plea, *nul tiel record.*

The plaintiff offered a paper purporting to be a certified copy of the record of the judgment, to which the defendants objected.

The defendants offered to prove by parol that Brown was not a justice of the peace at the date of said judgment; that he had removed from the State of Maine without depositing his records in the office of the clerk of the Courts of the county for which he was commissioned; that the same had not been transcribed by any other justice of the peace; that seven years and more had elapsed since said Brown had been a justice, during which time he has constantly resided without the State; and that the paper aforesaid was signed and certified by him since the commencement of this suit.

The Court rejected that evidence; and ruled that a copy of the record, duly certified, was the proper evidence to maintain the action; and that the paper offered was admissible, and sufficient for that purpose.

A. Sanborn, for plaintiff.

Dinsmore, contra.

HOWARD, J. — The ruling of the Judge of the District Court that a copy of the record of a judgment of a justice of the peace, duly certified and authenticated, was the proper evidence to maintain the plaintiff's action upon the issue of *nul tiel record*, was undoubtedly correct. But it was competent for the defendant to show, that what purported to be a certified copy, was not authentic. It was competent for him to prove by parol, as he proposed to do, that more than seven years had elapsed after the justice's commission had expired, without renewal, before he certified the copies of his judgment in this case. R. S. chap. 116, § 28. This statute restricts the authority of such justice to certify copies of judgments rendered by him, to two years from the time his commission expired. If made after that time, his certificate would not be competent or admissible evidence. *Exceptions sustained.*

LUTHER SNELL *versus* BANGOR STEAM NAVIGATION COMPANY.

When a verdict has been returned, affirmed and constructively recorded, the duties of the jury in relation to it, have been fully performed, and their power exhausted.

Any reconsideration by the jury, of such a verdict, though by order of the Court, is inoperative; and any alteration in it, made upon such reconsideration, is invalid.

ASSUMPSIT. The jury returned into Court the papers committed to them, with a verdict of $592,08, in favor of the plaintiff, which was received, affirmed and constructively recorded. The plaintiff, after making some examination of the

papers, suggested to the Court, that the jury had fallen into a mistake in fixing the amount of the damages, and moved, that the papers be recommitted to them, and that they be sent out to re-examine the subject.

This motion was resisted by the defendant, but it was allowed. The jury were sent out accordingly, and they returned a verdict of $720,92, in favor of the plaintiff, which was received, affirmed and recorded. The defendants excepted.

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

Dinsmore, for plaintiff.

1. A sealed verdict is of no force. The jury separate by agreement of parties for their own convenience, but in the eye of the law are supposed to be together till they return their verdict into Court. *Root* v. *Sherwood*, 6 Johns. 68; 8 Pick. 170; 3 Black. Com. 300.

2. A verdict, when erroneous, may be rectified by the foreman, at the time of delivering it. *Goodwin* v. *Appleton*, 22 Maine, 453; *Blakely* v. *Sheldon*, 7 Johns. 32; *Root* v. *Sherwood*, 6 Johns. 68; 8 Pick. 170.

3. There will not be a new trial, if it appear to the Court, on the whole matter disclosed by the report, that justice has been done by the verdict. 4 T. R. 468; *Brazier* v. *Clap*, 5 Mass. 1; *Jones* v. *Fales*, 5 Mass. 5; *Newhall* v. *Hopkins*, 6 Mass. 350.

TENNEY, J. — If it is apparent to the Court, that the jury, in finding a verdict, which has been received, but not recorded, have acted under a misapprehension of the facts, have misunderstood the law given to them, or that the verdict is wanting in form; or if in the apprehension of the Court, there has been any mistake, it may, in the exercise of a discretion, direct them to retire and re-examine the matter submitted to them, and the verdict which may be afterwards received, though differing entirely from the former, may be recorded; and this will be the verdict of the case. *Root* v. *Sherwood*,

6 Johns. 68; *Blackley* v. *Sheldon*, 7 Johns. 32; *Goodwin* v. *Appleton*, 22 Maine, 453.

It often occurs, when a case has been committed to a jury, and they have not agreed at the time, when the Court propose to adjourn to a future hour or day of the term, that the jury are informed, that after agreeing upon a verdict they may seal it up, separate, and return the verdict into Court, when it shall next after the agreement be in session. When the verdict shall be opened in Court, it is not improper for the Court to send the jury out, for the purpose of changing the form of the verdict, and when the amended verdict is received to have it recorded. In such a case it would be the same verdict. *Winslow* v. *Draper*, 8 Pick. 170. After the verdict has been sealed and the jury have separated, if they should be directed again to retire to make correction of a mistake, which should arise wholly from an erroneous computation, which depended upon fixed rules, it would not be reasonable that such verdict should be set aside. It has not been held a sufficient cause to vacate the verdict, that a member of the jury had absented himself for a time from his fellows, before it was agreed upon, the Court being satisfied, that no wrong was intended, and that no attempt to influence his mind in relation to the case had been made. *Burrill* v. *Phillips*, 1 Gall. 360. And where there has been a separation of the jury without the permission of the Court, after the cause was committed to them and before an agreement, the weight of authority is, that the jurors who are guilty of the wrong may be punished, but the verdict may stand, if no one has tampered with them. *Smith* v. *Thompson*, 1 Cowen, 221, and note (a.)

If the verdict has been recorded, the jury are to be discharged, and their finding so recorded, becomes the verdict of the case. After that, the Court have no power to re-commit the cause to the jury for their further consideration ; and if it should do so, and another verdict unlike the first, should be received and recorded, it would be void. The jury have done all which they are authorized by the law to do, and the order

of Court cannot give effect to that, which the law will not allow. This doctrine is distinctly implied in the cases before cited, but the points presented in them did not call for a decision upon the question, which we are now considering.

"After verdict recorded, the jury cannot vary from it, but before it be recorded, they may vary from the first offer of their verdict, and that verdict, which is recorded, shall stand." Co. Litt. 227, b. "When the jury have given their verdict and have affirmed it, it is beyond recall, and the jury are discharged of the case. No juror can then be allowed to say that he will not agree to it, or that he agreed to it upon mistaken principles." "When the verdict has been returned and affirmed, it is marked on the docket by the clerk, and is considered as then recorded, although the record of the case is not made up until afterwards." Howe's Practice, 258; 3 Black. Com. 378.

In the case before us, the jury having separated during the adjournment of the Court, subsequently returned a sealed verdict for the plaintiff. After it was opened and "rendered with the usual formalities," upon a suggestion of a mistake, of the plaintiff's counsel, in the amount found, they had upon motion permission of the Court, against the objection of the defendants, to retire, and they "*rendered*" a verdict, much increased in amount, for the plaintiff. It may well be supposed, that the error which they were allowed to correct, was one of a clerical character, or one which could be corrected in computation, by the principles, which they had found by their verdict for the plaintiff, were applicable to the case. The exceptions certainly show nothing to the contrary. There was no suggestion, which appears by the case, that the jury had been influenced by any one, or that any conversation had taken place between a member of the panel and other persons during the separation. And if the permission was given, before the affirmation of the verdict, it was not inconsistent with usage which has been sanctioned. If they were allowed then, to retire for such a purpose only, and they made no other alteration than

that which was intended by the Court, the second verdict was the same, which the first was designed by the jury to be.

It appears by the exceptions, that the jury at the time they offered their sealed verdict, "rendered their verdict with the usual formalities." When they came in again, they "rendered their verdict." We understand that the first verdict was *affirmed*, before the jury were permitted to retire a second time; as it cannot be considered as rendered with the usual formalities, without including the affirmation. The last verdict was rendered, after a perfect one had been received and recorded; the jury had then performed their whole duty and were discharged of the case; and had no authority to revise their doings, or to render another verdict; their power by the law, having been exhausted, could not be revived by the Court.

Exceptions sustained.

THE STATE, *in behalf of White's administrator, versus* THE CITY OF BANGOR.

The forfeiture, incurred by a town for a defect in its highways, whereby a loss of life occurred, may be recovered by the administrator or executor by an indictment.

Such an indictment is not barred by the statute, which requires *actions or suits*, by individuals, for the recovery of forfeitures, to be commenced within one year; or by that other statute, which requires process, for the *use of the State*, to be commenced within two years.

Where an indictment alleges the person, deceased, to be late of B. in the county of P. the right of the administrator to prosecute the indictment may be proved by letters of administration granted by the probate court of another county.

Allegations in an indictment, suited only to negative an expected defence, need not be proved.

EXCEPTIONS from the rulings of the District Court, upon an indictment for a defect in a highway, whereby one White was alleged to have lost his life. The verdict established the fact, that White, while in the use of ordinary care, lost his life

through a defect in a highway of the city of Bangor, of which defect the city had seasonable notice.

The indictment was found more than two years after the accident.

Peters, for the defendants.

1. The statute of limitations is a bar to this indictment. R. S. chap. 25, sect. 89, and chap. 146, sect. 15 and 16. This indictment is in its nature a civil remedy. If the word "indictment" were not in the statute, there would have been a remedy, and it would have been by action of debt. The process by indictment is given for the benefit of individuals. In the mode of proof and in all but the form, it is merely a civil remedy.

2. The certificate of the probate record was improperly admitted. It was a record of administration granted in Cumberland county; whereas the deceased was alleged in the indictment to have been, at the time of his death, a resident of Bangor, in Penobscot county. Chap. 106, sect. 1, and chap. 105, sect. 3, Revised Statutes.

This record went to contradict the indictment. It was a variance between allegation and proof. The jurisdiction of a Judge of Probate depends upon the residence of the party deceased.

Ingersoll, for the State.

SHEPLEY, C. J. — This indictment was found upon the statute, chap. 25, § 89, which provides, that if the life of a person shall be lost through any defect in a highway, the town liable to keep it in repair, shall forfeit not exceeding one thousand dollars, to be paid to the executor or administrator of the deceased person for the use of his heirs, to be recovered by indictment. The death of Nathan C. White occurred on August 31, 1845, and the indictment was not found until October, 1847.

1. The first question presented by the bill of exceptions is, whether the prosecution was barred by the statute of limitations.

The fifteenth section of c. 146, is applicable only to actions commenced by persons, to whom forfeitures are given in whole or in part; and it requires, that such actions should be commenced within one year after the offence has been committed. The sixteenth section authorizes forfeitures in such cases to be collected for the use of the State, by indictment or information, found within two years, if persons interested in them have not proceeded to collect them within one year.

In the present case the forfeiture was not recoverable by action. It was of a description differing from forfeitures provided for in those sections. The decision of the Judge of the District Court was correct.

2. The second cause of complaint is the admission of a record of the appointment by the judge of probate for the county of Cumberland of Edward White as administrator of the estate of Nathan C. White, in which the latter is described as "late of Brunswick."

In the indictment, the same person is described as "late of Bangor."

The judge of probate for each county is authorized by statute, chap. 105, § 3, to grant letters of administration on the estates of persons deceased, inhabitants of or residents in the same county. The deceased might in a legal sense have been an inhabitant of the county of Cumberland, and at the same time a resident for a temporary purpose in the city of Bangor. The indictment may have been correctly drawn and the judge of probate for the county of Cumberland have been legally authorized to grant letters of administration. If he had no jurisdiction, the validity of his proceedings could not be called in question collaterally in the manner proposed. The provisions of the statute, chap. 105, § 22, forbid it, except in cases of fraud, and in cases, in which the want of jurisdiction appears on the record. In this case there was no want of jurisdiction apparent upon the record, and no fraud was alleged.

3. The third cause of complaint is found in the instructions given to the jury.

The alleged defect in the highway "was a hole or pit" dug for the purpose of sinking a public reservoir. The jury were instructed "that the defendants would be justified against the accident by showing it to be properly fenced or lighted for protection against accident. And defendants would be bound to show such circumstances of protection." The instruction contained in the former clause could have occasioned no injury to the defendants. Its effect was to limit rather than enlarge their legal liability. If by the language of the latter clause the jury would have understood, that the defendants would be liable, unless they had caused the pit to be properly fenced, or to be lighted for protection, there might have been cause of complaint. For the defendants might have made the street safe and convenient by a temporary covering of the pit or in some other way, without fencing or the use of light. But the language used does not appear to have been designed to inform the jury, that the defendants could be relieved from responsibility only by proof that the pit had been fenced or lighted. Nor would they be likely so to understand it. They would not understand, that the defendants were bound to prove one of those two particular kinds of protection, but only to show circumstances of protection such as would be alike useful and safe. Thus understood it is not liable to any just objection. The existence of the pit in the street had been established, and it could not in that state be considered safe and convenient without some suitable protection.

The allegations contained in the indictment, that the defect had been continued "without any sufficient railing or fence and without any sufficient light hung out or placed in the night time to prevent the injury and damage, that might happen," were not necessary or material to a perfect description of the offence. If an indictment contain allegations or averments suited only to negative a defence anticipated, proof of them is not necessary to authorize a conviction. It will be sufficient to prove the offence alleged, and if there be no proof

such as those allegations were framed to deny, the allegations are wholly unimportant.

These being the only errors insisted upon in argument, the exceptions must be overruled, and judgment must be entered according to the verdict.

JOHN PRESCOTT *versus* FREDERICK HOBBS *& al. adm'rs.*

The principle of the common law, that for a breach of the covenant of seizin of real estate, and of good right and lawful authority to convey the same, a right of action does not pass to the assignee of the grantee, has been controlled by sections 16 and 17 of chapter 115 of the Revised Statutes.

Such an assignee may maintain a suit upon such breach against the grantor of his grantor; but as a pre-requisite, he must, at the first term, file in the Court, for the use of his grantor, a release of the covenants in his, the said grantor's deed.

Where the ruling of the Judge is, in itself, correct, it will be sustained, although the *reason* he gave for it be incorrect.

COVENANT broken, upon the covenants contained in a deed of real estate given by Benjamin Bussey, the defendant's intestate, to N. D. Coombs, his heirs and assigns.

The covenants were that Bussey was seized of the premises, and had lawful right to convey. The land was conveyed by Coombs to the plaintiff.

WHITMAN, C. J. ruled that the action was not maintainable, because brought in the name of the assignee of the intestate's grantee.

J. Appleton, for plaintiff.

Hobbs, for defendants.

WELLS, J. — The plaintiff's action is against the representatives of the grantor of Coombs, from whom his title is derived. He alleges, that the intestate was not seized, at the time of the conveyance, and that he had not good right, and lawful authority to sell.

It is a principle of the common law, that the covenants in a deed, made by one, who is not seized, of seizin, and of good right and lawful authority to sell, are broken, as soon as made, and that a right of action, for a breach of them, does not pass to the assignee of the grantee; that such right is a chose in action, and belongs exclusively to the grantee. *Marston* v. *Hobbs*, 2 Mass. 433; *Bickford* v. *Page*, *Ibid.* 455; *Griffin* v. *Fairbrother*, 1 Fairf. 91.

The 16th § of chap. 115, R. S. indicates, that a right of action shall pass to the assignee of the grantee, for a breach of the covenant of seizin; but the language necessary, to perfect such an intention, is not used throughout the whole section. It subsequently limits the enactment to cases of incumbrances, arising from mortgages. But § 17 dispels the obscurity of the prior one. It takes from the grantee, after he has assigned to a third person, the power to release the covenants of seizin and freedom from incumbrances, "so as to bar or any way affect the right of such third person, to maintain an action against the first grantor, for breach of said covenants of seizin, and freedom of the premises from incumbrances."

This section deprives the grantee, after the assignment, of the power of releasing such covenants; and recognizes the right of the assignee, to maintain an action, to recover damages for the breach of them.

Taking both sections together, the meaning and purpose of the Legislature is too plain, to be disregarded. It is manifest, that a right of action for a breach of the covenant of seizin, as well as that against incumbrances, is intended to be given to the assignee of the grantee. Although our conclusion is, that the plaintiff could maintain an action for the alleged breach of the covenants, in his own name, yet the facts proved were not sufficient to sustain it. When the facts proved or offered to be proved, are not sufficient to maintain the action, a nonsuit is properly ordered, even if a wrong reason is given for the order.

Both the act of March 23, 1835, and the sixteenth section of chap. 115, R. S. require, that the plaintiff shall file in Court,

at the first term, for the use of his grantor, a release of the covenants in his grantor's deed, and all causes of action on any such covenants.

The plaintiff not having made any such release, the action cannot be maintained. *Nonsuit confirmed.*

WILLIAM O. AYER *versus* EDWARD S. FOWLER *& al.*

A certificate of two justices of the peace and quorum, that they had seasonably administered the poor debtor's oath, and specifying the mode of their appointments and proceedings, and showing that the same were in compliance with the statutes, unless it be invalidated, is a bar to an action upon the bond given by him to procure his release from arrest on execution.

A copy, (certified by one of the said justices, in his capacity of justice of the peace,) of the debtor's application for a citation to the creditor, is not admissible to invalidate the certificate of the two justices.

Neither for that purpose can the plaintiff introduce a copy, (certified by one justice as aforesaid,) of the citation or of the officer's return upon it, or of the officer's statement of his mode of appointing one of the justices.

A justice of the peace, who issues a citation in such a case, acts ministerially. Such a citation need not be entered upon his judicial records. A copy of it or of the proceedings of the officer upon it, though certified by him, is not admissible in evidence.

Neither, for the purpose of invalidating the certificate of the two justices, is a copy of the disclosure admissible, unless certified by them both.

In a suit upon such a bond, parol testimony is inadmissible for the plaintiff, to show that one of the justices was appointed for the creditor by the officer, before the hour appointed for the disclosure; or to show that the debtor disclosed a note due to him, which was not appraised; or to show that the debtor had conveyed his property in fraud of his creditors.

DEBT on a debtor's six months bond. He read a certificate from two justices of the peace and of the quorum, that he had, within the six months, taken the oath mentioned as one of the conditions of the bond. To avoid the effect of that certificate, by showing some defects in the proceedings, the plaintiff introduced certain documents, which were objected to, but are to be used, so far as legally admissible in evidence. These documents were: —

1. A paper, certified by M. T., as justice of the peace, to be a copy of the debtor's application to him for a citation to the plaintiff, of the debtor's intent, to take the poor debtor's oath, and of the time and place appointed therefor.

2. Also, on the same paper, a copy certified in the same way, of the citation and of the officer's return of service thereon.

3. Also, on the same paper, a copy, certified in the same way, of the deputy sheriff's statement, that he had appointed M. T. as one of the justices of the peace and quorum to hear the debtor's disclosure, the creditor having failed to make an appointment for himself.

Also, three affidavits, subject to the same objection as would lie against the testimony, if offered on the stand; viz.: — 1st. an affidavit of one Dority, a deputy sheriff, to show that said M. T. was appointed by him, before the hour set for the disclosure, thereby precluding the plaintiff from his privilege of selecting one of the justices.

2d. An affidavit of one Hall, to show the same fact, and also the fact that the debtor disclosed a note due to him, which was not appraised.

3d. An affidavit of one Clark, to show that just previous to the disclosure, the debtor conveyed some of his property in fraud of his creditors.

The case was submitted for the decision of the Court on legal principles.

Morrison, for plaintiff.

1. The justices had no jurisdiction, not having been legally selected.

2. It is competent to prove this by parol. 23 Maine, 144.

3. Having no jurisdiction, their proceedings were void. 21 Maine, 191; 23 Maine, 26.

4. Property was disclosed and not appraised.

5. The copies in the case are legal evidence. Justices do not keep records jointly, the law recognizes no such course. Each justice keeps his own records. If both keep the records they must from necessity keep them separately.

6. The copy of the citation and the testimony of Dority, show that the selection of the justice by him was before the time appointed for the disclosure, and it does not appear, that he selected him as an officer.

A. Sanborn, for defendants.

HOWARD, J. — Fowler was arrested on execution, and gave the bond in suit, with the other defendants, as his sureties, under the provisions of the R. S. chap. 148, § 20. It was contended in defence, that he had complied with the first condition of the bond, by seasonably citing the creditor, submitting himself to examination, and duly taking the oath prescribed in the 28th section of the same chapter. He produced a certificate of two justices of the peace and of the quorum, in conformity with the provisions of the 31st section of that chapter and it was admitted without objection.

This certificate contained a statement of the manner of selecting the justices, or organizing the tribunal as follows: —

"We, the subscribers, two disinterested justices of the peace and of the quorum, in and for the county of Aroostook, selected in the manner provided by law, to wit, Thomas J. Hobart by the debtor, and the creditor failing to select, Mark Trafton by Charles W. Dority, a deputy sheriff of said county of Aroostook, hereby certify," &c.

This certificate, unless invalidated, would constitute a bar to the action. *Agry* v. *Betts & al.*, 12 Maine, 416; *Granite Bank* v. *Treat*, 18 Maine, 342.

The plaintiff offered in evidence, a paper purporting to be a *copy* of the original application of the debtor to Mark Trafton, as a justice of the peace, — of the citation to the creditor, by the justice, — the officer's return of service of notice upon the creditor, — a certificate of the selection of Mark Trafton, as one of the justices to hear the disclosure, "the creditor having failed to select," all being upon the same paper, and each attested as a true copy, by "Mark Trafton, justice of the peace."

Trafton acted ministerially when he issued the citation; it formed no part of his records as a judicial officer, and a copy of it, and of the proceedings of others upon it, certified by him, could not be admitted as evidence.

The case of *Knowles*, 8 Maine, 71; *Walf* v. *Washburn*, 6 Cowen, 261; 1 Greenl. Ev. § 493.

A paper alleged to be a copy of the disclosure of Fowler, taken by interrogatories and answers in writing, signed by the two justices of the peace and of the quorum, and certified by "Mark Trafton, justice of the peace and of the quorum," as a true copy, was then offered, subject to objections.

The two magistrates, when duly selected for the purpose, constitute a tribunal of a judicial character, with powers and duties conferred and regulated by statute. They are empowered to examine and adjudicate upon the notification and return; to examine the debtor on oath, concerning the state of his affairs, and his ability to pay the debt, — to administer oaths, and hear other legal and pertinent evidence, and to decide upon it; and if requested by the creditor, to cause the interrogatories to the debtor and his answers to be in writing, and subscribed and sworn to by him. "The creditor may have a copy of the interrogatories and answers *certified by the justices*," by paying for it. Both justices constitute the tribunal; both may adjudicate and decide, but neither can do it separately from the other. So copies may be authenticated by both, but not by one of them. R. S. c. 148, § 24—32; *United States* v. *Percheman*, 7 Peters, 85.

A copy of the disclosure could not be admitted in evidence, if duly signed and certified by one of the magistrates only. But the paper now offered and under consideration, does not purport to be a copy of the interrogatories and answers *signed and sworn to by the debtor*, but only a *copy of a copy* of the interrogatories and answers certified by the magistrates. It would seem to be, at least, two removes from the original, and could not be received as evidence, if properly certified.

The testimony of Hall, Dority and Clark, if admitted, would not enable the plaintiff to maintain his action.

Plaintiff nonsuit.

DAVID PINGREE & *al. petitioners for certiorari, versus* THE COUNTY COMMISSIONERS OF PENOBSCOT.

The expense of making highways through unincorporated tracts of land, is to be borne wholly by the proprietors; or wholly by the county; or by both jointly, in such proportions as the County Commissioners shall adjudge.

In locating such a highway, it is indispensable to the validity of their doings, that the Commissioners decide at whose expense, in whole or in part, the highway shall be made; and also whether the tract or any part of it, and what part of it, if any, will be enhanced in value, by means of such location.

PETITION, with a view to quash the proceedings of the County Commissioners in locating a highway through an unincorporated tract of land, not included within the bounds of any organized plantation. The petitioners are the proprietors of the tract.

In locating the highway, the Commissioners did not decide whether the tract or any portion of it, would be thereby enhanced in value. And this omission was one of the reasons assigned in the petition for quashing the proceedings. No assessment has been made, toward the expense of making the road.

Kelley and *McCrillis*, for petitioners.

J. Waterhouse, contra.

No adjudication as to the enhancement of value was called for.

1. The petition, on which these proceedings were had, prayed for the location of the road only. The Commissioners were not called upon to make an assessment, or to decide whether any part of the tract was enhanced in value by such location. It will be in season to decide that, any time pre-

vious to an assessment, to which it relates. R. S. chap. 25, § 44 and 45.

2. No assessment has ever been made. Therefore no injustice has been done by neglect to adjudicate as to enhancement of value. 17 Mass. 357; 23 Maine, 9.

HOWARD, J.— The petitioners are owners of land in *township* numbered four, Penobscot county, and not within the limits of any organized plantation, or incorporated town. The highway in question, was located over a portion of their land, and through the adjacent towns of Lincoln and Lee, then incorporated.

Two errors are assigned as reasons for granting a writ of *certiorari* to quash the proceedings of the County Commissioners, in reference to the location.

1. That no such notice was given to the petitioners, of the pendency of the petition, for the location of the highway, as is required by law; and that it did not appear by the records of the County Commissioners, whether the owners of the *township* were known or unknown.

2. That the County Commissioners did not decide whether the *township*, or any part of it, was enhanced in value by the location of such highway.

A consideration of the first error assigned, does not become material to the disposition of this case, in the view we take of the matter embraced by the second.

By the Rev. Stat. c. 25, § 44, County Commissioners are authorized to lay out highways, "in or through any tract, township or plantation," other than towns or organized plantations. "And the same shall be done at the expense of the proprietors of said tract, township or plantation, or of the county, or partly at the expense of each, as said Court shall order. All the proprietors of such tracts of land, townships or plantations, last mentioned, shall be held to pay their proportion, according to their interest, of all costs and expenses of making and repairing the ways aforesaid." By other provisions of the same chapter, the County Commissioners are authorized to apportion

assess and raise sums sufficient to defray the expenses, necessary for the construction and repair of the highway, so located by them. The 47th § is as follows: — "Whenever any highway shall be laid out by the County Commissioners, through any unincorporated tract of land, the said Commissioners *shall decide* whether, in their opinion, such tract, or any part thereof, will be thereby enhanced in value. Said Commissioners may, upon a plan of said tract, whether consisting of one or more townships, make as many divisions, as they may think equitable, conforming, as near as convenient, to known divisions, or separate ownerships; and they may assess upon each division, which they shall consider to be enhanced in value, towards the expense of making and opening such road, such sum, as in their judgment, shall be proportionate to the value, and the benefits likely to result to it, from the establishment of such road."

Viewing all these provisions together, it is apparent that it was the intention to require necessary ways to be made through the lands in unincorporated places, at the expense of the proprietors, wholly, or in part, if the County Commissioners should so determine; although the lands should not be particularly benefited by the way; and to compel those, whose lands were particularly benefited, to pay more than others, according to the value of the land, and the benefits likely to result from the establishment of the way.

All proprietors in such unincorporated places, as well as the county in which they are located, would be interested that the County Commissioners should decide, at whose expense the way should be made, and whether, in their opinion, any portion of the tract would be enhanced in value; as such decision would determine the extent of the respective liabilities, for constructing the way, and might materially affect the price and value of the "divisions, or separate ownerships." Hence, the statute requires, absolutely, that they shall make such decision, whenever they shall lay out such way.

Upon looking into the record of the County Commissioners, we perceive that they did not comply with the requirements of the 47th section of the statute referred to, in any respect, in

locating the highway described; and it appearing that the petitioners are aggrieved, by the apparent irregularity and defects, in such location, a writ of *certiorari* is granted.

Humphrey Chadbourne *& ux. & als. versus* John M. Rackliff.

If, pending a writ of entry by several demandants, the tenant purchase the share of one of them, the writ may be amended by striking out that one's name.

A conveyance of land by an administrator, under a license from the probate court, after the time limited by law for the operation of the license, is void.

Such conveyance cannot be considered as made under a license. To such a conveyance, the limitation of five years, provided in chap. 52 of the statutes of 1836, does not apply.

An assignment of a satisfied mortgage, conveys no interest in the estate.

When the condition of a mortgage has been performed, it cannot be set up to defeat the title of the mortgager.

The rule that a bill in equity is the appropriate remedy for a mortgager, does not apply, when the mortgagee is not in possession, and when the condition of the mortgage has been fulfilled.

A suit by husband and wife to recover land, which she had deeded, when an infant, is a disaffirmance of her act of sale.

A writ of entry by heirs, to recover land which belonged to their ancestor, is not barred by the pendency, in the court of probate, of a petition by the administrator, for license to sell the same for the payment of debts. Such license, if obtained, will not be defeated by a judgment in favor of the heirs.

Writ of entry, to recover seven-eleventh undivided parts of a farm, in Corinna. The plaintiffs are heirs of Enoch Hayden, who died in May, 1834, to whom the farm once belonged, and are seven of the eleven children remaining. Writ dated Feb. 8, 1847.

The tenant exhibited a mortgage deed, given by said Hayden to the town of Corinna, in 1823, conditioned to support one James Adams and wife, and save said town harmless, and also an assignment of it, from said town to himself, dated in July, 1848. Since the commencement of this action the title

of one of the plaintiffs has been acquired by the tenant. The Court allowed the other plaintiffs to amend the writ by striking out his name.

While Enoch Hayden lived, he continued to maintain Adams and wife. They survived him four or five years, during all which time they were supported by the widow and children of Hayden, but chiefly by the oldest son, Freeman, at whose request the mortgage was assigned by the town to the tenant, as above stated. Susan, one of Hayden's daughters, while a minor, deeded her portion of the estate, which came by mesne conveyances, to the tenant. She and her husband are plaintiffs in this suit, to recover back the same.

In January, 1836, the administratrix of said Hayden's estate, obtained license from the probate court, to sell land to the amount of $250, for payment of his debts; and in December, 1837, she made a sale to the tenant.

After the commencement of this suit, application was made to the judge of probate, by the administrator *de bonis non*, upon the estate of Hayden, to sell the land for the payment of debts. From the decree granting the license, an appeal was taken, and is now pending in this Court.

The Judge instructed the jury that, under the deed from the town of Corinna to the tenant, he could acquire no title in the premises; that the proceedings in the probate court, and the doings under the same, were inoperative to affect the demandant's title to their six-eleventh parts; that the deed from Susan Hayden, having been executed during her minority, was voidable, and she, by bringing this action, having elected to avoid the same, it was now inoperative, unless, after having arrived at the age of 21 years, she had confirmed the conveyance by some act or declaration.

The jury returned a verdict for the demandants, for six-elevenths of the land.

Exceptions were filed to the rulings and instructions.

Knowles, for defendant.

The deed of Susan Hayden was only voidable. It was given but a few months before she arrived at her majority;

she did no act to disaffirm it for ten years. Her assent to it is to be presumed from lapse of time. This suit is not her act, but her husband's. Being voidable only, she should have given notice, or done some act in disaffirmance, in a reasonable time after arriving at her majority.

The tenant further claims to hold the premises, as assignee of the mortgage, given by Enoch Hayden to the town. *Carl* v. *Butman*, 7 Greenl. 102.

Enoch Hayden agreed to support the paupers, and secured his contract by the mortgage. This mortgage was outstanding at the time of Hayden's death, the paupers still living, and relying upon the town for support. The premises were holden for their maintenance, and must have been sacrificed, if some one had not interposed to prevent it. To save the estate, and acquire a solid title, Freeman Hayden assumed the obligation, and supported Adams and his wife. He thus became the purchaser of the mortgage; as much so, as though he had paid a sum of money due. All his rights thus acquired, were duly transferred to the defendant by the assignment of the mortgage. The persons who supported Adams and wife, after the death of Enoch Hayden, were mere strangers to the transaction between him and the town. They were under no obligations to discharge his bond. They acquired the same rights of any other persons purchasing. If the town, upon the death of Enoch Hayden, had contracted with some other person to support Adams and wife, and had transferred the mortgage to such person, he would have had a claim upon the estate for what he might so expend; or if the town had supported them, the cost would have been charged upon the land, and his heirs must have paid up the incumbrance, before they could hold the premises. So the defendant has a right to hold the premises for what it cost to support James Adams and wife, after the death of Enoch Hayden.

The acts of the town in their assignment to the tenant, show that they recognized a contract with Freeman, for the support of the paupers.

It may be said the town sustained no damage, and therefore

the mortgage became void. But the assignee, who stood in their place, sustained the expense of supporting Adams and wife for years.

The Court will uphold a mortgage, when it is for the interests of the assignee. Defendant has no remedy unless he can hold under this mortgage. *Thompson* v. *Chandler*, 7 Greenl. 377; *Gibson* v. *Crehore*, 3 Pick. 475.

The estate is still under administration, and a petition is pending for leave to sell enough of the estate to pay the debts. There is no other property.

The demandants cannot maintain this action, as it was not commenced within five years from the time of sale by the administrator. Rev. Stat. chap. 112, § 18.

Here was a petition to sell by the administratrix, a license to sell and other formalities complied with, and a sale made as shown by the deed introduced. The statute contemplates that there may be defects in such sale, and is therefore peremptory that they must be taken advantage of within five years. The deed of the administratrix must now be considered good.

Cutting and *J. E. Godfrey*, for demandants. The demandants are entitled to six-elevenths of the premises, unless the tenant shows a better title.

He claims under the administratrix's deed of December 9, 1837. This deed is void because she did not sell within one year from the date of probate license. Whoever claims under a statute conveyance must show a statute compliance. Stat. of 1821, chap. 52, § 3 and 12.

Another source of the tenant's title is a mortgage deed from Enoch Hayden to the inhabitants of Corinna, and an assignment of the same to himself. That deed was not assignable, it did not run to the town's assigns. They were special trustees, and the mortgage was a personal trust.

The town never sustained any damage, consequently the mortgage became void.

There was no notice or request made to the overseers. R. S. chap. 32, § 48.

There was no understanding between overseers and Freeman Hayden about pay, or an assignment of the mortgage. This is all an afterthought, brought in here to bolster up a defective title, made in July, 1848, more than a year after this suit. Freeman Hayden had no legal claim against the town.

The petition of the present administrator to sell the estate for the payment of debts, as it respects the demandants, may be regarded as an idle act, the same being appealed.

As to the amendment allowed, of striking out the name of the demandant, who conveyed his interest after the suit to the tenant, see *Thayer* v. *Hollis*, 3 Metc. 369; *Rehoboth* v. *Hunt*, 1 Pick. 224.

SHEPLEY, C. J. — This writ of entry was brought to recover seven-eleventh undivided parts of a farm situated in the town of Corinna.

Enoch Hayden, the former owner, died in the month of May, 1834, intestate, leaving eleven children then alive. The demandants are his children, and they will be entitled to recover, unless the tenant has acquired a superior title. He has acquired the title of Henry W. Hayden, one of the original demandants by a conveyance from him, made on May 27, 1848, since the commencement of the suit. The demandants obtained leave to discontinue as to him; and to this exception is taken.

An amendment of like kind was refused in the case of *Treat* v. *McMahon*, 2 Greenl. 120, and in the case of *Pickett* v. *King*, 4 N. H. 212. And was allowed in the cases of *Rehoboth* v. *Hunt*, 1 Pick. 224; *Thayer* v. *Hollis*, 3 Metc. 369; *Johnson* v. *Huntington*, 13 Conn. 47; *Wilson* v. *King*, 6 Yerg. 493.

Authority to permit such an amendment is claimed by the Court in Massachusetts without any statute expressly authorizing it. *Stevens* v. *Fitch*, 2 Metc. 505. And in the case of *Minor* v. *The Mechanics' Bank of Alexandria*, 1 Peters, 46, it is said, "in the administration of justice, matters of form,

not absolutely subjected to authority, may well yield to the substantial purposes of justice."

When an action appears to have been properly commenced, and one defendant is discharged upon proof of infancy, the suit has been maintained against the others. *Hartness* v. *Thompson*, 5 Johns. 160; *Woodward* v. *Newhall*, 1 Pick. 501; *Cutts* v. *Gordon*, 13 Maine, 474.

The case of *Treat* v. *McMahon*, appears to have been decided upon a motion without opportunity for consideration or argument. There being little distinction in principle between allowing the name of a plaintiff or of a defendant to be struck out of a writ, the authority of that case is somewhat impaired by the case of *Cutts* v. *Gordon*.

In the present case the action was properly commenced by those, who were equally interested in the land as tenants in common. The right of the tenant to retain the whole estate, or of the remaining demandants to recover their shares, was in no degree affected by permitting the name of one demandant to be struck out. No change was required in the pleadings or issue except as to the proportion demanded. The same testimony would be required. Under such circumstances the administration of justice was best promoted by allowing the demandants to erase the name and to proceed with the suit.

The tenant claims title to the remaining six-eleventh parts, first by a conveyance from the administratrix of the estate of the intestate, made on December 9, 1837. She appears to have obtained a license to sell so much of the real estate of the intestate as would raise the sum of $250, at a probate court holden on the last Tuesday of January, 1836. The statute then in force, chap. 52, § 12, provided, that no such license should be in force for a longer term than one year from the time when it was granted. That conveyance having been made more than one year, after the license was granted, was wholly inoperative. The argument however is, that the demandant's right to recover is barred by the provision contained in the same section, that no action shall be sustained by an heir unless brought within five years after a delivery of the deed.

That provision applies only to actions "for the recovery of any real estate sold under such license." When an estate is sold, after the statute has determined that the license was void, it cannot be considered as sold under the license. No license then existed.

The tenant next claims to hold the estate as assignee of a mortgage made by the intestate to the town of Corinna on August 1, 1823, to save the town harmless from the support of James Adams and his wife so long as either of them should live. There is no testimony tending to prove, that either of them were at any time afterward chargeable to the town, or that the town incurred any expense on their account. On the contrary it appears, that they were supported by the intestate during his lifetime, and by his widow and children, or by two of his children, after his decease during the life of Adams, and the life of his wife.

The testimony of Freeman Hayden does not prove an agreement made between himself and the overseers of the poor of the town, that he and his brother should support Adams and wife at the expense of the town, or that the mortgage should be held or be assigned to them for their security for such support. All pretence of any claim on their part against the town was extinguished by lapse of time long before the town executed a release of its interest in the premises to the tenant, on July 24, 1848. That release being nothing more, at most, than an assignment of a satisfied mortgage conveyed no interest in the estate. When the condition of a mortgage has been performed, it cannot be set up to defeat the title of the mortgager. The tenant, when this action was commenced, was not in possession under the mortgage. He has since attempted to purchase in that title. The rule, that a bill in equity is the proper remedy when the mortgagee is in possession under his mortgage, is not applicable.

The fact, that a license has been granted, on petition of an administrator *de bonis non* of the estate, to sell real estate for the payment of debts, and that an appeal from such a decree

is pending in this Court cannot prevent a recovery by the demandants. Their recovery will not prevent a sale for such a purpose, if the administrator can legally obtain a right to sell. Nor will his right to obtain a license for that purpose be affected by a recovery.

The tenant claims one undivided eleventh part by a conveyance made by Susan Hayden, while she was unmarried and an infant. It is insisted, that her acquiescence amounts to a ratification; and that she has done no act exhibiting her pleasure to avoid the operation of that conveyance.

The opinion in the case of *Boody* v. *McKenney*, 23 Maine, 523, stated, that when an infant had conveyed real estate, mere acquiescence for years would afford no proof of a ratification. That some act must be performed, from which it could be inferred, and that an entry was a sufficient disaffirmance. After her marriage she could properly act only in connexion with her husband. Their uniting in this suit is equivalent to an entry for such a purpose. *Exceptions overruled.*

ELBRIDGE G. BOOTHBY, *in Equity, versus* BANGOR COMMERCIAL BANK *& als.*

The right to redeem real estate, levied on execution, is limited to one year from the levy.

This principle is not altered by the 28th sect. of Rev. Stat. chap. 94. That section merely provides an additional mode of ascertaining the amount to be paid. That mode is by bill in equity. But such process must be commenced in season to have the amount ascertained and brought into Court, before the year, allowed for the redemption, has expired.

J. A. Poor, for plaintiff.

Kent, for defendants.

SHEPLEY, C. J. — This suit in equity is presented for decision on the bill, answers and proofs. The plaintiff claims the right to redeem certain real estate described, from a levy made upon it by Cyrus Goss, as the estate of Ebenezer French,

on January 6, 1842. The title so acquired by Goss, was conveyed to the Bank; and the right of French to redeem the estate had been acquired by the plaintiff, who on January 4, 1843, offered to pay to the bank the amount of the levy and interest thereon, demanded an account, and presented a deed prepared for execution. The plaintiff offers also in his bill to pay such sum, as may be found due, but there is no proof, that he tendered or brought into Court within one year after the levy was made, the sum at which the estate was appraised with interest thereon and expenses incurred for improvements, deducting the rents and profits received.

The counsel for the plaintiff contends, that by the provisions of the statute, chap. 94, sect. 28, the bill may be maintained without such proof.

If such a construction of that section were to be adopted, the effect would be a repeal, for all practical purposes, of so much of the twenty-fifth section, as limits the right to redeem an estate from a levy to one year, and the extension of that right for an indefinite time, by the mere act of filing a bill in equity, containing certain allegations, within one year. And after the Court had, by proceedings under it, caused the amount due to be ascertained, and had ordered it to be brought into Court, the plaintiff might omit or even refuse performance. He might, by the commencement of his suit, extend the right of redemption so long, as he could delay the ascertainment of the amount due, and thus secure the advantage to be derived from a rise in value; and by a discontinuance of it avoid any loss to be anticipated from a diminution of value.

The debtor or his assignee is obliged by the provisions of the twenty-fifth section, to make his election, and to tender within one year the amount due, if he would redeem. The amount may be ascertained according to the provisions of the twenty-sixth section, by three justices of the peace. By the provisions of the twenty-seventh section, a writ of entry may be maintained to recover the estate, after there has been a tender made of the amount due, within one year. It appears to have been the intention to provide by the twenty-eighth section, a

remedy by one process to accomplish the same purpose, which could be accomplished by both the remedies prescribed by the twenty-sixth and twenty-seventh sections, that is, the ascertainment of the amount due by the former, and the recovery of the estate by the latter. As a substitute for these proceedings, the debtor or his assignee was authorized by the provisions of the twenty-eighth section, to file a bill in equity, without a previous tender, and to have, by virtue of it, the amount ascertained by the Court, instead of being ascertained by three justices of the peace, and to have it brought into Court for the use of the creditor or his assignee, as equivalent to a tender. This having been done, if the creditor or his assignee refused to accept it, the debtor or his assignee might proceed under the bill and obtain a decree, that the title and possession should be restored to him as equivalent to a recovery of the estate, by a writ of entry.

But the debtor or his assignee, if he would elect to proceed by a bill in equity, must do so in sufficient season to have the amount ascertained and brought into Court for the acceptance of the creditor or his assignee, before the year allowed to redeem has expired. The language of the section does indeed declare, that "the debtor may bring a bill in equity for redemption, in the Supreme Judicial Court, at any time within one year after the levy, whether he has made any tender or not." But if he would have any advantage from it, he must be careful to do it in such season, as to enable him to perform all the other duties, required by other provisions of the statute.

When the Revised Statutes were enacted, the course of proceeding in courts of equity, was not very well understood in the community; and the framers of that section may have supposed, that the amount due would be ascertained immediately by an order of the Court, appointing some person for that purpose, without waiting for an answer to be filed. Any misapprehension respecting the benefit possibly to be obtained from such a course of procedure, cannot authorize a construction of that section, which would have the effect to destroy the whole

of the provisions of the statute, expressly designed to limit the right to redeem, to one year after the levy has been made.

That there was no intention by the provisions of the twenty-eighth section, to vary or destroy that limitation, may also be inferred from a note, made by the commissioners appointed to revise the statutes, attached to the ninety-fourth chapter. That note contains these words. "Sect. 29, 30. These change no principle, but simplify the adjustment of respective claims, by a court of equity." There is no remark made in those notes respecting the twenty-eighth section, but it was obviously intended to have been included, for it is the only section, which provides for such an adjustment by a court of equity. It would certainly have been a change of principle in our legislation, to have provided for the redemption of an estate from a levy made upon it at some indefinite time, when the parties to a process in equity, might be ready to present the case to the Court, for a final decree.

Bill dismissed, with costs for respondents.

THEODORE ATKINSON *versus* PHILIP SNOW.

When the immediate effect of a judgment in favor of one of the parties is to confirm a third person, in the enjoyment of an interest in possession, such third person is not competent as a witness for that party.

Thus, in a writ of entry, if the defeat of the action would leave a third person in the further occupation and use of the land, of which he claimed to be in possession, such third person cannot be a witness for the defendant.

D. had been in possession of a lot of land. The defendant was afterwards found to be in occupation of it, and he refused, on request, to surrender the possession to the demandant. In a suit for the land, he set up in defence, that in occupying it, he was acting merely as the servant of D. to whom the possession belonged.

Held, that D. was not competent as a witness for the defendant.

WRIT OF ENTRY, with claim for rents and profits. Plea non-tenure. Replication, that defendant withholds possession from the demandant. Issue joined.

Jewett & Crosby, for the plaintiffs.

J. Godfrey, for defendant.

TENNEY, J. — This is a writ of entry. The defendant pleaded *non-tenure*, to which the demandant replied, that the defendant withheld possession from him, and issue was thereupon joined. The demandant introduced evidence, tending to prove, that the defendant was in actual possession of the land, and refused to surrender it. This evidence the defendant attempted to explain, by showing that the land was in possession of one Smith Dougherty, who had claim thereto, and who had gone to Wisconsin, leaving his wife residing upon it; and that the defendant was employed by Dougherty as an agent for him to take charge of the land and of his family during his absence. And for the purpose of establishing this defence, several witnesses were called, who worked on the land, as they testified, at the request of Dougherty's wife, or if not at her request, that she paid them for their services. Dougherty and his wife were also witnesses in the case to show, that Dougherty had the possession, and not the defendant. All this evidence was objected to.

The demandant's counsel requested the Judge to instruct the jury, that "almost any injury, which can be done to real estate, may entitle a party to recover in a writ of entry, if he will admit himself to be disseized," that "in the present case, the tenant was clearly in possession of a part of the premises described, and whether he intended to hold it adversely to the demandant's claim, or merely for his own convenience, the demandant could not determine, nor was it material; and if the acts proved or attempted to be proved were done by respondent, that he could not defend as agent, for in acts of disseizin all parties engaged are principals;" which instruction was not given.

The instruction to the jury which was requested and not given was properly omitted. When a Judge is requested to give an instruction, and there are parts of it, which are legally erroneous, although other parts, if made in a distinct request

may be properly given, the refusal is not objectionable. If the request had been for the instruction, that if the jury found the defendant did withhold possession, after a demand by the demandant to give it up, he could not defend on the ground that he did so as the agent of Dougherty, the omission to comply with the request might not have been warranted. But as this request was connected with others, which could not have been legally correct, the Judge did not err. He could not have said to the jury, that the defendant was clearly in possession of a part of the premises described, for this was a matter of fact exclusively for the jury; and the first part of the request was for an instruction, which taken in the abstract, was of such an uncertain and indefinite character, that the jury could not have understood how it was to be applied.

No legal objection could be made to the testimony of the witnesses employed by the wife of Dougherty to work occasionally on the land. They were strangers to the possession themselves, and their testimony might be material to show who actually held the possession.

Was the testimony of Smith Dougherty competent to prove, that he and not the defendant was in possession? When the immediate effect of a judgment for one of the parties is to confirm the witness in the enjoyment of an interest in possession, he is not a competent witness for that party. 1 Greenl. Ev. § 392, and 406; *Doe* v. *Williams*, Cowper, 621. In the case last cited, Lord Mansfield says, "a tenant can never be called to support her own possession." *Jones & als.* v. *Wilde*, 5 Taunt. 183; *Doe* v. *Bingham*, 4 B. & Ald. 672; *Brant* v. *Dyckman*, 1 Johnson's Cases, 275; *Jackson* v. *Trusdell*, 12 Johns. 246. The witness stood in this situation, and his testimony was inadmissible. That of his wife, which was also offered, objected to and received, was equally incompetent, as the law regards the interest of husband and wife as identical. *Exceptions sustained.*

RODERICK D. HILL *versus* FRANCIS JORDAN.

If the mortgagee of real estate enter upon the premises, and require the mortgager's tenant at will to attorn to him, or surrender to him the possession, the original tenancy at will is determined.

In such a case, if the tenant refuse to attorn or quit the premises, he becomes a trespasser, and the mortgagee may maintain trespass against him, for the subsequently accruing rents.

TRESPASS, to recover for rents and profits.

Charles J. Trueworthy, in October, 1846, mortgaged to plaintiff certain mills, house and lands. The defendant at the time, was a tenant at will of the property under Trueworthy, and has occupied ever since. In February, 1847, the plaintiff entered upon the premises with a witness, and claimed possession of the same, and notified the defendant to pay subsequently accruing rents to him, or leave the premises. This the defendant refused to do. A nonsuit or default was to be entered, as the legal rights of the parties should require.

Peters, for plaintiff.

A mortgagee has a right, at any moment, to take possession and enjoy the rents and profits. If he goes upon the premises and finds there a tenant at will of the mortgager, the tenant, unless he attorn to the mortgagee, remains as a trespasser.

It matters not whether the condition of the mortgage is broken or not, or whether the entry by mortgagee is to foreclose or not; the property is that of the mortgagee, against the world. And any person, other than the mortgager, found in possession, and who remains there against the will of the mortgagee, is, after notice, a trespasser, and liable to pay rents in this form of action. There being no privity of contract, of course, assumpsit will not lie. This case is virtually decided in the following cases. 1 Metc. 494; 21 Maine, 499; 9 Barn. and Cres. 245.

In the case, 1 Pick. 87, it does not appear that the mortgagee entered upon the premises, and gave direct notice to the tenant.

If tenant had attorned, assumpsit would lie; if he refused

to attorn, trespass is the remedy. In either case, there is a right to recover. The question is only, as to the form of action.

Wakefield, for defendant.

As between the mortgager and mortgagee, the former is entitled to the rents and profits, so long as he remains in possession, and is never obliged to account to the mortgagee for the rents and profits for any of the back years he has been in possession. Powell on Mortgages, vol. 3, p. 946; 1 Pick. 87; 15 Mass. 269.

The lessee of a mortgager, whose lease is made after the mortgage is given, stands in the situation of the mortgager, and there would seem to be no reason, why he should be held to pay rents, more than the mortgager would.

In the case in 15 Mass., above cited, the Court say; "The lessee stands in the situation of the mortgager; and as the mortgagee cannot recover the back rents against the mortgager, when he is left in possession, it seems the better opinion, that he could not recover, in the like case, against the lessee of the mortgager."

The same principle is maintained in the case cited from 1 Pick. 87.

The cases cited by plaintiff's counsel, though apparently in conflict with these principles, are not really so.

The case in Metc. vol. 1, page 494, was assumpsit for use and occupation, brought by the lessor, and it turned on the assent of the lessee, to pay rent to the mortgagee.

The case in Barnwell and Creswell, cited by plaintiff's counsel, was also for use and occupation, by assignees of lessor, who had mortgaged prior to giving the leases.

In that case, the lessee was willing to pay the rent, to the mortgagees.

The case cited from Maine Reports, is brief, and without any attempt at discrimination. If the Court intended to lay down the principle, that a notice by the mortgagee to the mortgager's lessee, determines the tenancy, and makes the

lessee liable to pay rent to the mortgagee, they overrule the case cited in the 1st of Pickering, and their opinion would be in conflict with the principle, laid down in the 15th of Massachusetts Reports above cited.

But all those cases differ from the present. The tenants in all those cases held under leases executed *after* the mortgages were given, and the Court in some of them, seem to recognize a distinction between leases subsequent to mortgages, and those prior to them. But in the present case, the tenant was in possession under a lease at the time the mortgage was made.

The mortgage, perhaps, operates as an assignment to Hill, of the reversion, and he may be entitled to recover the rents in some form of action, but not in this; for defendant, holding under a prior lease, cannot be considered a trespasser.

On his declining to pay rent, the plaintiff might have proceeded in forcible entry and detainer against him.

It is a strong argument against this form of action, that none such is reported to have been brought.

WELLS, J. — The plaintiff, to whom the land was mortgaged, having made an entry upon it, and claimed the possession, such entry put an end to the tenancy at will, subsisting between the defendant and the mortgager. And the defendant by continuing to hold over after the entry, and refusing to become the tenant of the plaintiff, must be considered as having violated his possession, and as a trespasser.

The authorities cited in the argument, and also others, show that the action is maintainable. *Smith* v. *Shepard*, 15 Pick. 147; *Reed* v. *Davis*, 4 Pick. 216; *Mayo* v. *Fletcher*, 14 Pick. 525.

According to the agreement of the parties, the defendant is to be defaulted.

NATHANIEL H. DILLINGHAM *& al. versus* WILLIAM H. SMITH *& al.*

Under our system of statute pleading, the plea of *non cepit* in replevin does not admit the property to be in the plaintiff, *when the plea is accompanied by a brief statement denying that fact.*

Unless the pleading admits the property to be in the plaintiff, replevin cannot be maintained except upon proof of such ownership.

So also the plaintiff must prove his ownership, when the pleadings are such as not to present *merely* an issue upon the property being in the defendant.

Where the defendant had a pile of mill logs of a particular mark on the landing, and the plaintiff voluntarily drew other logs into the same pile, and put upon them the same mark, and the defendant took them all into possession, *it was held*, the plaintiff could not maintain replevin for his *proportion* of the logs, but only for *such* of them as he could *identify* to be his own.

Where in a grant, by the State, of a township of land, there are reserved one thousand acres for public uses, according to the statute of 1828, chap. 393, the fee in such reserved land does not vest in the grantees of the township, even if no town or plantation should ever be established there. The fee is not in them for their own benefit, nor for any other person or party, upon any condition, or limitation or trust whatever.

The State has constituted *itself* the trustee, for the future town or plantation.

Where the County Commissioners caused the reserved land to be set out by an actual location upon the earth, duly entered in the records of the District Court, the boundaries, thus fixed, are conclusive upon the public, whether they include one thousand acres or less than that quantity; and the grantees of the township cannot object that the land set out, does not contain one thousand acres; for they may safely convey and warrant the adjoining lands, by such boundaries. Neither is the location invalidated by being taken in two lots, instead of one.

Where lumber had been cut upon the reserved lots, set out as above mentioned, and had been seized and sold by persons claiming to act for the public, it is competent for the purchaser to prove, by parol, that such persons were the acting County Commissioners.

REPLEVIN, for 1478 pine logs, tried before WELLS, J. upon the general issue and a brief statement, alleging title in the defendants, denying the title of the plaintiffs, and praying judgment for a return.

The plaintiffs read a permit from Isaac Farrar & als. to themselves, of Sept. 6, 1845, to enter upon lots No. 1, 2, 7,

8 and others, in township No. 3, range 13; and cut and haul timber therefrom, during the then next logging season.

The State had previously conveyed the township to said Farrar and others, who signed the permit, reserving however one thousand acres for public uses.

The plaintiffs cut the logs under that permit. The defendants, to show title in themselves, offered a bill of sale of a lot of pine logs, from F. Turner and R. Loring, County Commissioners, to the defendant Smith, and one Hilliard. Also a bill of sale from said Hilliard, of his half of said logs, to Pierce, the other defendant. They also offered the record of the proceedings had in the District Court, Piscataquis county, in relation to the location of land reserved for public uses in the township. From that record it appeared, that lots No. 1 and 6, were located for public uses.

It also appeared, by the testimony of Richmond Loring, that he and Forest Turner, both being Commissioners in March, 1846, went to lot No. 1, and found one Horace Brown at work there, who was cutting and hauling logs for the plaintiffs; that they went with Brown and several of his men to Brown's upper landing, which was on lot No 8, and saw there three parcels of logs; that they requested the men to point out all the logs that were cut on No. 1, and they pointed out the middle parcel, excepting two trees; and they requested the men to put P on the logs of the middle parcel for the purpose of indicating that they had been seized as trespass-timber, cut on public lots. According to their measurement, there were in that parcel from 360 M. to 380 M. feet, and they estimated the other parcels to be 200 M. or 300 M. feet more. At the meeting of the Commissioners in the spring following, the logs so seized and marked, were sold as before stated, to Smith and Hilliard.

It also appeared that these logs were driven down the river by plaintiffs, and that said Brown continued to cut and haul from No. 1 to that landing for the plaintiffs, after the Commissioners were there, till the end of the logging season.

On the question of title, the plaintiffs offered to prove, from

the records of the land office, the original plan of said township, and also the field notes and report of the survey, for the purpose of showing the boundaries and number of acres in each of said lots in said township, and from an actual survey of lot No. 6, which is described in the record of said District Court, as located for a public lot, that it contained less than 251 acres; but the presiding Judge ruled that all evidence on the subject of the number of acres in the lots and of the boundaries of No. 6, which was located for public use, was inadmissible.

Plaintiffs proved that the defendants had taken and detained more timber than they were entitled to by said bill of sale, timber that was cut on lots 7 and 8, and also what was cut on No. 1; that all the logs hauled by said Brown to the landing on No. 8, being 1535, were marked P before they were driven, and that a portion of them were cut on No. 7 and 8, and that the amount detained by them was nearly 200 M. feet more than was cut on No. 1. There was also testimony tending to repel this part of the plaintiffs' case.

The presiding Judge informed the counsel for the plaintiffs, that, if the case should be submitted to the jury, he should rule "that the evidence introduced by the defendants, if believed, was sufficient to entitle them to all the timber cut on No. 1, and that the plaintiff would not be entitled to any portion of the timber replevied, by merely satisfying the jury that a part of the logs marked P, were cut on lots 7 and 8, and that all the logs thus marked, had been taken and detained by defendants, and that the defendants have thereby got more timber than was actually cut on No. 1; but that they must go further and identify the very logs cut on 7 and 8, and could recover only for such logs, as could be thus identified."

It appeared that the logs cut on No. 1, 7 and 8, were marked by said Brown, who cut and hauled them for the plaintiffs, with the same mark, and that the logs cut on 7 and 8, could not be distinguished from those cut on No. 1, and that the logs replevied, were a portion of those cut on 1, 7 and 8.

Whereupon the plaintiffs consented to a nonsuit, subject to

the opinion of the full Court. If any of the views expressed by the Judge were eroneous, then the nonsuit was to be taken off, and the action to stand for trial.

Rowe and *Bartlett*, for plaintiffs, extended their opening argument to thirty-three printed pages, and their closing argument to sixteen written pages, and consequently, only a mere abstract can be given.

The plaintiffs make out a *prima facie* case, and must prevail, unless the defendants show a better title. That title is based upon a pretended location of the reserved lands. We deny that there has been any location.

It is well settled law, that all statute powers must be executed strictly.

This rule of law seems to be too firmly established to be shaken or even questioned.

Our principal objection to the proceedings of the District Court is, that the lots set out, contained less than one thousand acres.

The facts proved, and those which the plaintiffs offered to prove, present a case, not of a defective execution of a power, but of the failure of an attempt to execute; of a non-execution. The severance has not been made, for reserved lands (more than a hundred acres) still lie in common with the lands of the proprietors.

We contend, that the acceptance of the report by the Court does not aid the defect, because the defect was one, which could not be remedied, and the Court had no power to act in the premises. The report was not such as they had a right to consider; and so they had no jurisdiction.

Will this location be valid, if the town which may hereafter exist upon this tract, shall reject it?

We have *assumed* hitherto, that there is a deficiency in the quantity of land set off, but this may satisfactorily be shown from the report of the committee. The body of water which bounds this lot, No. 6, on the east, is described as a lake, and can be judicially known to the Court only as a lake. And in such cases it has been repeatedly settled by this Court, that

in a conveyance, where land is bounded on a pond or lake, the grant extends only to the margin of the water. *Bradley* v. *Rice*, 1 Shepl. 198.

All the proposed proof of deficiency in the number of acres set off, was rejected by the presiding Judge.

The 4th § of chap. 122, Revised Statutes, provides, that the return of the doings of the committee, shall be a legal assignment and location. It is the return, and not the judgment of the District Court, which operates as an assignment and location.

The return, then, produced by the defendants, containing in itself no evidence of the "completion of the service" before it was made, and accompained by no evidence to supply the defect, is not even *prima facie* evidence of title, and should not have been admitted.

The record introduced by the defendants, does not show jurisdiction in the District Court, for two reasons; first, because it does not show affirmatively, that the service was completed before the return was made; and secondly, because it consequently does not show, that the proprietors had notice that the return was to be presented at that term.

But if the jurisdiction of the Court is to be presumed, we then contend, that the record is but *prima facie*, and not conclusive evidence. *Starbuck* v. *Murray*, 5 Wend. 148; *Borden* v. *Fitch*, 15 Johns. 141.

Further, if the record be admissible evidence, and the only evidence, and be taken to be indisputably true, still it does not prove a location. It nowhere states, that the one thousand acres reserved in this township, have been set apart and located.

Another objection to this location is, that it was of two lots. Should not the committee, under the circumstances, have set out the whole in one tract? Can it be contended, that they would have been authorized to set out the thousand acres in one thousand lots, of one acre each?

Our next position is, that *so much* of the act of 1842, (Sup. to Rev. Stat. page 34, chap. 33,) as requires the location of

the reserved lands, and entrusts the guardianship of them to the County Commissioners, and empowers them to sieze timber, cut on those lands, as trespass timber, is unconstitutional and void.

And again, we contend that the evidence offered by the defendants and admitted, to prove title to the logs, through a seizure and sale by the County Commissioners, was improperly admitted.

Parol proof that Loring and Turner were County Commissioners, should not have been received. If any evidence that "they were acting Commissioners," was admissible, it should have been record evidence. They are bound to keep records and their records are the best evidence of their acting in that capacity.

And the seizure in this case, was made by two only. When such seizure is relied upon as evidence of title, the authority to make it, should be shown; that a precedent authority from, or a subsequent ratification by, the "board" should be proved by the record.

The Court will see by the papers annexed to the petition for a new hearing, that in fact no money has been paid for the logs. The vendees gave a bond for the payment of money. The authority of the Commissioners was limited to selling for cash.

We deny the correctness of the doctrine of confusion of goods, as laid down by the presiding Judge.

That ruling was based upon the hypothesis, that the plaintiffs were trespassers, a fact which the jury would not be authorized to find, and also upon another assumed fact, that the plaintiffs created the confusion. The case fails to show that the plaintiffs intermingled the different lots of logs.

Here, logs belonging to different owners, of the same description, and bearing a common mark, have become accidentally intermixed. Such intermixture does not make the owners tenants in common. They do not own *per my et per tout;* but each owns his own logs, by tale, or measurement, in severalty.

The defendants justify their taking, and set up title to the whole, and pray a return. The burden of proof is upon them to show their title. *Greene* v. *Dingley*, 24 Maine, 131. They show title to a portion only, if any, as we say; and on that portion only, can they have a judgment of return. The plaintiffs will be entitled to retain the balance, and if the defendants do not, on the judgment for a return, get their own logs, they have their remedy on the bond. Even if the defendants were entitled to all the logs cut on No. 1, it should have been left to the jury to determine what portion of the logs were cut on No. 1; and the judgment should be, that the defendants should have a return of that portion, less the quantity shown to have been taken and manufactured by them, and that the plaintiffs should hold the balance. *Powell* v. *Hinsdale*, 5 Mass. 343; *Brown* v. *Smith*, 1 N. H. 36.

Kelley, *McCrillis* and *Hilliard*, for defendants.

Shepley, C. J. — The plaintiffs caused fourteen hundred and seventy-eight pine logs to be replevied, claiming to be the owners of them, and deriving their title from the owners of township numbered three, in the thirteenth range of towships. Most of them were cut upon lot numbered one in that township.

The defendants claimed to be the owners of the same logs, and exhibit in proof of their title a copy of the record of proceedings in the District Court in the county of Piscataquis, showing, that lot numbered one was, before these logs were cut upon it, located as part of one thousand acres reserved on sale of that township for public use; and testimony to prove, that the logs cut upon that lot had been seized by the County Commissioners for that county as having been cut by trespassers, and sold to the defendants.

The plaintiffs contend, "that the proceedings had with a view to such location were null and void, through a failure to comply with the statute requisitions." Those proceedings have been examined in the case of *Farrer* v. *Loring*, 26 Maine, 202. The objections now made to the location, so far as they were not then considered, will be noticed.

One objection, upon which many others depend, is, that eight hundred and ninety acres and eighty-six rods of land only were designated for public use.

Whether the fact be so will depend upon the bounds of that part of lot numbered six designated for public use. It is bounded on one side by Chesuncook lake. The plan returned by the committee appointed to make the location would indicate, that the lot, being bounded upon the lake, was regarded by them as extending into the lake, so far as it would be by lines drawn at right angles with the southerly and westerly lines of the lot until united; for those lines are extended by dotted lines on their plan. The use of the term lake as a bound does not necessarily determine, that the land conveyed is limited to the margin. That may depend upon the manner in which the collection of water denominated a lake has been formed; and parol evidence is admissible for that purpose. *Hathorn* v. *Stinson*, 1 Fairf. 224; *Waterman* v. *Johnson*, 13 Pick. 261. The testimony reported does not show, in what manner the lake referred to was formed, whether by the enlargement of a fresh water stream or otherwise. The burden of proof is upon those who allege, that the proceedings are void by a failure to locate the required number of acres, and they fail to establish the fact.

Another and perhaps more satisfactory answer to this objection may be given. The actual location of a grant of a certain number of acres of land upon the earth, conclusively determines the extent of the grant, although there may afterwards prove to be a greater or less number of acres included within the bounds of such location, than were named in the grant. *Machias* v. *Whitney*, 16 Maine, 243. There can be no difference in principle between the location of a grant and the location of a reservation or exception from the grant.

This township having been conveyed by the State since the passage of the act approved on February 20, 1828, c. 393, the reservation was made of one thousand acres to be appropriated for the benefit of the future expected town, as the Legislature of the State might thereafter direct. A location

of the one thousand acres upon the earth, in the manner prescribed by the Legislature, according to the provisions of the act approved on March 18, 1842, c. 33, § 21, must conclusively determine the extent of the rights preserved by the reservation. The State could never be permitted to allege that the acts of its own officers, performed in the manner prescribed, were not conclusive upon its rights. Such lands are not by the legislative act or by the conveyance appropriated. They are, in the language of the act, "to be appropriated." The expected town or corporation can acquire no title to any definite number of acres for any particular use, except by virtue of such appropriation. In a case like the present, it must derive such title from the State subsequent to the actual location, and must therefore be conclusively bound by the location made or ordered by the State. The rule of law applicable to the ordinary location of grants and conveyances of a certain number of acres of land, which decides, that the location first made upon the earth conclusively determines the extent of the grant, the number of acres of land, and the rights of all subsequent purchasers, applies with equal force to a case like the present. If such rule were not applied, the location might be considered effectual and legal, or not, according to admeasurements made by different surveyors and their assistants, at different times, and with different instruments. Nothing would be finally determined. There would be opportunity for almost perpetual litigation. The application of the rule is essential to the security of the title, as well as to the peace of the community. Any losses or gains, which may result from its enforcement, are comparatively of little importance.

The arguments, that the future town would not be bound by the location already made, and that the owners of the residue of the township could not safely convey it, with covenants of warranty, can therefore have no place. Nor can the arguments prevail, that the location was not completed, that the return of their proceedings made by the committee, and the record of them, are defective, because one thousand acres have not been

located. Their return states, "said lots being set off in full, for the one thousand acres reserved in the grant of said township."

Another consideration presented in argument is, that the location could not be legally made in two lots; that if it could be, it might be made in one thousand lots. The act making provision for a location, does not prescribe, that the one thousand acres shall or shall not be located in one or more lots. The manner of location is therefore left to the committee, subject to the approval of their proceedings by the District Court. Should they appear to have acted in a manner injurious to or destructive of the rights of any party interested, it would be the duty of the Court to refuse to accept their proceedings, and without its sanction, they would be inoperative.

The service having been completed by the committee before their return was made, and the persons interested in the township having been notified of their proceedings, and by law informed, when they were to be presented for acceptance, the argument, that the Court had no jurisdiction, is without foundation.

It is contended that the fee of the whole township was conveyed to the grantees, "for their own use forever, unless a town or plantation should hereafter grow up and become located in the tract; upon the happening of which contingency, one thousand acres were to pass to such town or plantation."

The language used in conveyances, is to receive such a construction, if possible, as will give effect to the intentions of the parties. The circumstances under which the conveyance was made, may be examined to ascertain such intentions. The conveyance in this case was made and received with a knowledge of the provisions of the act, approved on February 20, 1828, which declares, "that there shall be reserved in every township suitable for settlement, whether timber land or otherwise, one thousand acres of land." This enactment operated upon the agent of the State, authorized to make conveyances,

and it was equivalent to a direction to him, not to convey the one thousand acres. He could properly reserve such a tract to the State, only by omitting to convey it. The reservation in the deed of conveyance, taken with a knowledge of that act and of the power of the agent, must have been understood by the agent and by the grantees, to have been used as an exception of so many acres, from the land conveyed. The conveyance in this case, differed from those named in the cases of *Shapleigh* v. *Pillsbury*, 1 Greenl. 271, and *Porter* v. *Griswold*, 6 Greenl. 430. In conveyances or grants of the description named in those cases, the lots designed for public use are appropriated to the persons, corporations, or uses named in the grants or conveyances. In the case of *Porter* v. *Griswold*, which did not require that the legal effect of such reservations should be decided, the Court appears rather to have stated, what it believed to have "been generally understood by all concerned, to amount to a condition subsequent, imposing on the grantees, the obligation to cause the specified proportions to be impartially set apart and assigned for the specified purposes," than to have decided what was the legal effect of such reservations. The case does not decide, that the fee was conveyed to the grantees of the township, in trust, for the benefit of the future *cestuis que trust*. The opinion does indeed state, "if on legal principles, Mr. Rice was not the first settled minister in respect to the lot demanded, then no person has as yet existed, capable of taking the same, inasmuch, as there has never been any settled minister in Porter; of course, the fee remains in the original grantees or their heirs, and on this ground also, the action must fail. We may go one step further, and say, that if the title to the reserved proportions, for the uses specified, remains in the Commonwealth, until grantees appear capable of taking, as some have supposed to be the law, the consequence would also be equally a decisive bar to this action." It was sufficient for the decision of the case, that Rice was not the first settled minister of that town, and was not therefore, entitled to recover the lot. If he was not, it is not easy to perceive how it followed "of course," that

the fee was in the grantees of the township. That must depend upon the legal effect of the reservation. While an inclination to opinion is exhibited, that the fee passed to the grantees of the township, a different opinion is stated to be entertained by some, and the true legal effect does not appear to have been either discussed or decided. The effect of such reservations was subsequently presented in the case of *The State of Maine* v. *Cutler*, 16 Maine, 349, and the decision did not determine, in whom the fee was actually vested, while it did decide, that the State in the exercise of its sovereign power might by law, take possession of such lots, and preserve them for the uses designated. It would seem difficult to conclude, that it could do so, if the fee was legally conveyed to the grantees of the township. If it remained in the Commonwealth of Massachusetts, it might well pass to this State, on its separation from that State.

But whatever may be the legal effect of such reservations, there can be little doubt, that in this instance the one thousand acres were intended to be and were excepted from the other land conveyed. The State, by the act before named, and by the reservation contained in the conveyance, constituted itself a trustee, retaining the legal title for the use of the town and retaining the power to designate the particular uses. If the grantees acquired the legal title, the *cestuis que trust* could derive no benefit from it, without their action. But whatever is conveyed to the grantees is conveyed in fee for their own use, without any distinction made between the thousand acres and the residue of the township. There is no declaration of trust, acting upon the one thousand acres, or any obligation imposed upon the grantees to grant or convey the title or to designate the uses. Before the State could be considered to have conveyed the title, and to have reserved, or attempted to do so, a power to declare the uses, the grantees should appear to have acquired the title in trust, or the whole arrangement made by the statute and the conveyance for a reservation would prove to be abortive.

The act of March 17, 1835, c. 170, can have no effect

upon the rights of these parties. It could be applicable only to cases, in which the grantees had acquired the right to locate the lots reserved for public uses.

As the rights of the owners of the residue of the township were not violated by a location of the reservation under the act of 1842, it will not be necessary to consider the argument respecting its constitutionality.

The objection, that parol evidence should not have been received to show, that Loring and Turner were acting County Commissioners, cannot be sustained. *Lowell* v. *Flint*, 20 Maine, 401; *Doty* v. *Gorham*, 5 Pick. 487; *Potter* v. *Luther*, 3 Johns. 431. While making seizure and sale of the logs, they were not in the performance of judicial acts, and their proceedings might be proved by parol evidence. A majority of the County Commissioners might lawfully make seizure and sale of logs cut upon lands located for public uses. Statutes, c. 1, § 3, art. 3, c. 99, § 11; act of 1842, c. 33, § 21.

It appeared in evidence, that the logs seized were designated by the letter P marked upon each log. That Brown, who was cutting and hauling logs under the plaintiffs, caused certain logs cut upon lots numbered seven and eight to be marked in the same manner and to be piled with the logs seized. The presiding Judge decided, that the plaintiffs could not have a verdict for a proportional part of the whole number of logs thus piled together; that they must identify the logs cut, on the lots numbered seven and eight, to be entitled to maintain their action. This decision is alleged to have been erroneous. It is said, that the issue made by the pleadings was, that the logs replevied were the property of the defendants; and that according to the case of *Greene* v. *Dingley*, 24 Maine, 131, the burden of proof was upon them to make out their title. The brief statement in this case, is not like the one presented in that case. In this case, it makes two allegations, that the logs were the property of the defendants, and that they were not the property of the plaintiffs. There does not appear to have been any counter brief statement, restricting the issue to one of these allegations. Under our system of statute plead-

ing, or rather system without pleading, the general issue does not, as at common law, admit the property to be in the plaintiffs, when accompanied by a brief statement denying the fact. When the pleadings do not admit the property to be in the plaintiffs, or do not present only an issue upon its being the property of the defendants, replevin cannot be maintained without proof of property in the plaintiff. *Waterman* v. *Robinson*, 5 Mass. 303; *Wyman* v. *Dorr*, 3 Greenl. 183.

It is not necessary to inquire, whether the testimony proved a confusion of goods. The rule applied in *Loomis* v. *Green*, 7 Greenl. 386, and in *Lupton* v. *White*, 15 Ves. 432, is a just one, that a person, who voluntarily mingles or intermixes his property with the property of another, must by proof distinguish his own property before he can recover the specific property. If the servant of the plaintiffs, so conducted as to render it difficult if not impossible for them to prove their own property, they, and not the defendants, must bear the loss occasioned by it.

The application for a new trial, for newly discovered evidence, must be denied. The fact, that the defendants, instead of paying in cash for the logs, secured the payment by a bond, cannot vary the rights of these parties. It can have no tendency to prove the logs to have been the property of the plaintiffs. And without such proof, as already stated, they cannot maintain the action. *Nonsuit confirmed, and judgment for a return.*

Rufus Dwinel *in scire facias, versus* Luther Stone, *Trustee.*

Whether a partnership existed, is an inference of law from the facts shown to have existed. A mere participation in profit and loss, in the transactions of business, does *not necessarily constitute a partnership.*

It is essential to a copartnership, that there be a community of interest in the *subject matter* of it.

It is essential to a copartnership, that upon its dissolution by the death of one of the partners, the survivors become entitled to retain and dispose of the company effects for a settlement of its affairs.

The contingency which, by the statute, exonerates one from being held as trustee, is not a mere uncertainty how the balance may stand between the principal and the supposed trustee: —

But it is such a contingency as may preclude the principal from any right to call the supposed trustee to settle or to account.

Scire facias, against the defendant, who was summoned as trustee, and was defaulted. He disclosed on the *scire facias*, and was charged upon the disclosure. To that adjudication he excepted.

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

Prentiss and *Rawson*, for the trustee.

One partner cannot be charged as trustee of another. He has no "goods, effects or credits" of the other in his hands; for the other has the same interest in, and possession of them that he has.

The principal, the trustee, and Spaulding, were partners. The disclosure shows they intended to be partners, agreed to be partners, acted as partners, that those they dealt with understood them to be partners, and that they were partners.

This statement of the trustee must be taken to be true; and then partnership is established, unless the plaintiff can show that they were mistaken as to what a partnership was; and that by the *facts disclosed* they were not partners, though they *intended to be*, and *agreed to be*, and thought they were partners, and acted as such.

The agreement to share profit and loss is the essence of a partnership.

There are certain well settled exceptions, but this case is not one of them, and the Courts have regretted that there are any. 3 Kent's Com. 33, 34.

But it is said the legal title was in this trustee. By no means. The mistake has arisen from not carefully noticing the circumstances, and not reflecting that a permit may be given, or assigned by *parol*. *Erskine* v. *Plummer*, 7 Greenl. 447; *Vose* v. *Handy*, 2 Greenl. 322.

But if it should be decided that there was no partnership, the trustee must be discharged, because there was nothing due from him to Sawtelle at the time of service, and it was uncertain and contingent whether there ever would be.

The question must be determined on the state of facts then existing. The accounts may be adjusted after service of the writ; and it may be after service ascertained how facts actually stood at the time of service. But subsequent events can have no effect. Stone's taking Sawtelle's and Spaulding's interest and agreeing to pay all the bills, and the rise in the price of logs the next year, are in that predicament.

SHEPLEY, C. J. — The defendant was summoned as trustee in a suit in favor of the plaintiff, against Nathaniel H. Sawtelle, and suffered a default to be entered, without making any disclosure. This suit is *scire facias*, against him as such trustee. He has appeared and made a disclosure as authorized by the provisions of the statute, chap. 119, § 78, and has been adjudged to be the trustee of Sawtelle for a certain amount. The case is presented on exceptions taken to that adjudication.

It is contended in the first place, that he cannot be liable on his disclosure, because there appears to have been a partnership between himself, Sawtelle, and William Spaulding, in the business, out of which his indebtedness arose.

Partnerships are of different kinds. Some are general, and others are limited to a particular business or to one transaction. There may be a partnership embracing a capital invested in the business and also the profit and loss arising out

of it. And there may be a partnership embracing only the profit and loss. There may be also business transactions, from which the persons concerned may receive profits and be subjected to losses; and yet there may be no partnership. The mere fact of a participation in profit and loss does not necessarily constitute a partnership. Many of the elements constituting one may exist, while others equally essential do not.

One essential element of a partnership is a community of interest in the subject matter of it. *Tenet totum in communi et nihil separatim per se* has been the key-stone of the arch since the days of Bracton. From this arises the right of each partner to make contracts, incur liabilities, manage the whole business, and dispose of the whole property of the partnership, for its purposes, in the same manner and with the same power, as all the partners could when acting together.

Another element is, that upon a dissolution of the partnership by the death of one of the partners, the survivors become entitled to retain and dispose of the partnership effects for a settlement of all its affairs and for a distribution of the remaining fund. However the arrangement of business may assimilate it to a partnership, if it be such, that on the death of one interested, this becomes impossible, it will be evidence, that there was no proper partnership existing.

By the application of these rules, it will not be difficult to determine, whether a partnership proper is proved to have existed by the answers of the defendant. Whether one existed or not, is an inference of law from the facts; and his frequent statements, that they were partners, can have no effect.

It appears from the answers, that a written permission to cut and haul logs, from township numbered six in the eleventh range of townships, was made by Leonard Jones to S. Boody, who assigned it to Sawtelle, who at the same time assigned it to the defendant, who paid fifty dollars for it to Boody by Cooper & Co. and made a conditional assignment of it and of the timber cut under it to Cooper & Co. as

security for the payment of goods furnished by them for the operation. He says, "Sawtelle made no advance except his own labor," which shows, that no capital was promised or advanced on their joint account. The account of the goods thus furnished was kept in such manner, that "Luther Stone, Telos" was made their debtor. Telos was the name of the lake, into which the logs were hauled. All orders drawn upon Cooper & Co. appear to have been signed by the defendant, or by the name, "L. Stone, Telos." The defendant states, "it was understood between me and Cooper, that the business was to be done agreeably to the assignment, which was in my name." He states, that he has no recollection, that there was any understanding between himself, Sawtelle and Spaulding, whose name "the concern should be in;" that "Sawtelle, Spaulding and I finally agreed to take said permit and go on with the operation as partners sharing profit and loss." "Sawtelle had no interest except as partner." It is therefore apparent, that "Luther Stone, Telos" was not used or agreed to be used as the name of a partnership, for he states, that his co-operators made no agreement respecting it, and that he agreed with Cooper & Co. that the business should be done in his name. The account is in effect the same as it would be if Telos was not annexed to it.

These answers clearly show, that the defendant alone paid for the permit, the amount paid for it being charged to him. That the title to it and to the lumber cut under it, was in him alone, subject to the title of Cooper & Co. as mortgagees. There could therefore be no community of interest between the defendant, Sawtelle and Spaulding in the capital, upon which the labor was performed and the business transacted. The labor was performed upon the lumber, and its price or value became immediately incorporated with it. There were no funds, no effects, no means, for profit and loss separate from the lumber or capital. There could therefore be no profit and loss or interest separate from the capital, in which there was a community of interest, and which could constitute a partnership proper.

No one but the defendant, could have disposed of any thing pertaining to the business. If he had deceased, there would have been no property or effects so situated, that the survivors could have made any use or disposition of it, to settle the business, and to obtain payment for their labor, by a distribution of the surplus. The personal representative of the defendant, must have adjusted the whole business, and Sawtelle and Spaulding must have received from him their share of the profits realized, upon a close of the whole business, by way of compensation, for services performed for him.

There was therefore no partnership proper existing between them.

The transaction was similar in principle to that of a common enterprise for profit and loss, which does not constitute a partnership, although it may combine some of its elements. As in the case of *Dreg* v. *Boswell*, 1 Camp. 329, where the owner of a lighter agreed with a person to work in it, and to divide with him the profit and loss. Or, as in the case of *Hesketh* v. *Robinson*, 4 East, 144, where goods were purchased on the credit of one to be transported and sold by another, under an agreement to divide the profits. Or, as in case of a shipment of specie or timber, upon an agreement to divide the profits. *Rice* v. *Austin*, 17 Mass. 205. Or, as on an adventure, in whaling voyage, or in a contract of "mateship," where there is an agreement to share the profits. *Baxter* v. *Rodman*, 3 Pick. 435. Or, as in the manufacture of goods from the raw material, under an agreement to share the net profits. *Denny* v. *Cabot*, 6 Metc. 82; *Loomis* v. *Marshall*, 12 Conn. 69. Or, it may perhaps, in principle, be more like the case of *Finckle* v. *Stacey*, Sel. Ca. chap. 9, where two persons agreed to do a job of work on joint account. In such case, they must share in the profit and loss, and yet they were not regarded as partners.

In the second place it is contended, that the interest of Sawtelle, at the time of the service upon his trustee, was contingent. The statute requires, that something should be "due, absolutely and without depending on any contingency." The contin-

gency referred to in the statute, and in the decided cases, is not a contingency, which may often exist before a settlement of an account, or other business transaction, whether any thing may be found due from the trustee to the principal, who has an absolute right to call upon the trustee to render the account and make the settlement. But is a contingency, which may prevent the principal from having any claim whatever, or right to call the trustee to account, or settle with him.

When the service was made upon the trustee, there had been no settlement made between him and the principal. He afterwards made one, by which the principal surrendered all his rights, without compensation. Such a settlement can have no effect. The trustee states, that the logs had not been sold, and that there was then nothing due from him. But he was not authorized to make a valuation of them, himself, and to declare that nothing was due. It was his duty to close the whole business, by a sale of the logs, and a settlement of all claims upon them, and to make a division of the surplus. If he omitted to do so, as soon as he might have done, that cannot excuse him from accounting, when it was done.

Exceptions overruled.

THOMAS J. DAVIS *versus* SHEPARD SAWTELLE.

Though, in a suit by the indorsee of a note against the maker, the policy of the law may preclude the payee from testifying, as a witness for the defendant, that the note was invalid in its inception; yet, as to subsequent occurrences, he may give testimony of such facts as would defeat the note, or constitute a part of a chain of facts which would establish a defence.

Therefore, in such a suit, the Court will examine the deposition of such a witness, to find whether the facts, therein stated, are such as he could be allowed to testify.

In a suit by the indorsee, against the maker, upon a note, indorsed by the payee "without recourse," the payee is a competent witness for the defendant, to prove any facts which do not impeach the original validity of the note, and which do not impair the credit and character which, by his indorsement, he has given to it.

ASSUMPSIT, on two notes of hand, dated Sept. 11, 1835, for

$200 each, made payable to Thomas Bradbury and Charles G. Bryant, or their order, in one and two years with interest annually. The notes were indorsed by said payees, "without recourse."

At the trial, before WELLS, J., the defendant offered in evidence the deposition of Thomas Bradbury, who was one of the payees and indorsers of said notes. The plaintiff objected to its admission, on the ground that the deponent was not competent to testify to facts showing the notes to be void at their inception.

The Court rejected the deposition, whereupon the defendant submitted to a default which is to stand, if the rejection of the deposition was correct. Otherwise, the default is to be taken off and the action to stand for trial.

The deposition stated the origin of the notes, which was such as the defendant contended made them invalid. It also stated among other things, that the notes were indorsed to the plaintiff; that a bond had been executed by the defendant to the plaintiff; and that the surrender of the bond was the consideration for the notes in suit. It also stated the existence of certain contracts between the witness and the plaintiff, and that the plaintiff knew what was the consideration of the notes.

Jewett and *Crosby*, for the plaintiff.

Cutting and *Hilliard*, for the defendant.

HOWARD, J. — It appears, by the report before us, that the plaintiff brought this suit, as indorsee, on two promissory notes signed by the defendant, dated September 11, 1835, for $200 each, and payable in one, and two years, respectively, to Thomas Bradbury and C. G. Bryant, or their order. Bradbury and Bryant indorsed the notes in blank, except that the words, "without recourse," were appended to each of their names.

The defendant pleaded the general issue, and offered in evidence the deposition of Thomas Bradbury, one of the payees; to the admission of which, the plaintiff objected, "on

the ground that the deponent was not competent to testify to facts showing the notes to be void at their inception."

The presiding Judge rejected the deposition and a default was entered, which, by agreement, is to stand, if that ruling was correct, or to be taken off, and the action to stand for trial, if the deposition is admissible.

The only question presented to us is, whether the deposition of Bradbury is admissible, as evidence in the case.

The maker of a note may call the payee, who indorses without recourse, and who, in other respects, is a competent witness, to prove any facts in defence which do not impeach the original validity of the note, and which do not impair the credit or character which he has given to it. But whether he can prove, further, by the same witness, that the note was void in its inception and that it was obtained for the indorsee, by his consent and procurement, through the agency of the witness, and with a knowledge of all the facts, are questions which are not presented by the report.

Bradbury might have been a competent witness for the defendant, to prove when the notes were indorsed to the plaintiff; the execution of the bond between the parties to this suit, and for the surrender of which the notes are alleged to have been given; the execution of the contracts between the witness and the plaintiff, of August 19, and of September 11, 1835; to what amount notes were given for the surrender of the bond; what disposition was made of them, and whether or not the plaintiff was present at the transaction. His deposition tended to prove these facts which appear to have constituted a part of the defence, and it was therefore admissible. But whether there are portions of it objectionable, and whether the whole, or any admissible portions of it, prove these notes void in their inception, are not questions submitted to us.

According to the agreement of the parties the default is to be taken off, and the case is to stand for trial.

Rufus Cole *versus* John Lee.

Where a second mortgagee of land, ignorant of a prior mortgage, discharged the second mortgage, in consideration of a quitclaim deed of the land, from the mortgager, with covenants of warranty against all claims under or through him; said grantee, after purchasing in the prior mortgage and the debt secured by it, is entitled to recover upon said covenants, against the grantor, the amount paid upon such purchase; provided it was not a greater sum than was due upon the prior mortgage.

The law has not prescribed any form of words, necessary to constitute a warranty in a deed of land.

The prior mortgage is a legal claim, in the nature of an incumbrance. A subsequent grantee has a right at any time to discharge it, and resort to his covenants for redress, even though no measures have been taken to deprive him of the possession of the land.

Covenant broken. The declaration contained several counts; one upon the covenants in a mortgage deed of land from the defendant to the plaintiff, dated November 21, 1837, and another upon the covenants in a quitclaim deed from the defendant to the plaintiff, dated October 5, 1843.

At the trial, before Howard, J., the plaintiff offered a registered copy of a mortgage, made May 14, 1836, from the defendant to one Nickerson, with an assignment thereof to Jabez Snow, made in March, 1837, together with the notes secured thereby; also a mortgage deed, with covenants of general warranty, made Nov. 21, 1837, from the defendant to the plaintiff; also an assignment made September 20, 1847, by Snow to the plaintiff, of the first named mortgage, with the note secured thereby.

The defendant then called upon the plaintiff for the deed of defendant to the plaintiff, dated October 5, 1843, which was produced and read. It was a quitclaim deed of the same premises described in the defendant's mortgage to plaintiff. At the close of the description of the premises, released in this deed, was the following: — "N. B. The mortgage deed given by said Lee to said Cole, Nov. 21, 1837, is fully annulled and satisfied."

Evidence was introduced by each party, as to the value of the premises at the time of the last conveyance to the plaintiff.

There was a controversy relating to the identity of the lands covered by the respective deeds. That matter is sufficiently stated in the opinion of the Court.

The cause was thereupon taken from the jury by consent, and reserved for the consideration of the Court upon the foregoing evidence. Judgment is to be rendered upon nonsuit or default, according to the rights of the parties.

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

The plaintiff claims damages for the breach of the covenants in the mortgage deed of November 21, 1837, and those in the deed of October 5, 1843.

The defendant says this mortgage deed to the plaintiff is canceled by deed from defendant to plaintiff, of October 5, 1843. Such was not the intention, and the law is believed to be otherwise. *Crosby* v. *Chase*, 17 Maine, 369.

But if the mortgage was canceled, then plaintiff claims to recover by virtue of the covenant in the quitclaim deed of 1843.

This was an engagement against every existing title, created by the defendant, paramount and adverse to the title supposed to be conveyed by the defendant to the plaintiff. *Everts* v. *Brown*, 1 Chip. 99; 9 Verm. 191.

Peters, for defendant.

The evidence is contained in the deeds, made a part of the case.

The defendant mortgaged to Nickerson, then mortgaged to plaintiff, and afterwards quitclaimed to him, discharging the mortgage.

No action will lie here on the covenants in the *mortgage* deed from defendant to plaintiff, because that mortgage deed has been expressly and deliberately *discharged* and *satisfied* by a clause in the deed of quitclaim, afterwards given by defendant to plaintiff. That mortgage cannot be upheld for any purpose, when it has been discharged and satisfied by *agreement* of *parties*. It is presumed some benefit and purpose was intended by the agreement, and the parties are bound by it.

The law will not uphold a deed against positive agreement of parties.

There is no warranty in the second deed, (being the said quitclaim deed,) upon which this action will lie.

The parties intended for plaintiff to take the lot as it was, and give up the mortgage notes ; and therefore the release deed was given. The plaintiff was to take the land for what it was worth, and whatever title the defendant had in it.

TENNEY, J. — The first two counts in the writ, are for the breach of the covenant in the defendant's deed to the plaintiff, of October 5, 1843; and the breach assigned is the outstanding mortgage to Nehemiah K. Nickerson, dated May 14, 1836, which it is alleged, covers the same premises. And it is further alleged in one of these counts, that there was at the time of executing the deed of October 5, 1843, a mortgage previously given to Nickerson, which existed at the date of the writ, an incumbrance upon the land. And in another count it is alleged, that the mortgage to Nickerson was assigned to one Jabez Snow, March 22, 1839, and that the same was afterwards assigned to the plaintiff; and the sum secured thereby has never been paid. The third count in the writ is an alleged breach of the covenant of warranty, in the mortgage deed of the defendant to the plaintiff, dated November 21, 1837, of the same land, and it is averred that the covenant was broken by the mortgage to Nickerson, dated May 14, 1836.

It is contended in defence, that the land described in the deed of October 5, 1843, and in the mortgage of November 21, 1837, is not embraced in the mortgage to Nickerson, of May 14, 1836, upon a proper construction of the language employed. The last named mortgage was given to secure the whole or a part of the purchase money, for land conveyed on the same day by Nickerson to the defendant, describing in the deed a lot of land in Bucksport, which it is admitted is the same conveyed in the mortgage deed of Nov. 21, 1837, and in the deed of October 5, 1843, to the plaintiff. The deed from Nickerson to the defendant, also contains the description of a

lot of land in Prospect, and conveys the right of the grantor in the Bucksport and Prospect ferry. The mortgage from the defendant to Nickerson describes the subject-matter of the conveyance, as follows: — "All the right, title and interest, which I have in and to a certain lot of land, situated in said Bucksport, and also one other lot, situated in Prospect, county of Waldo, as also the Bucksport and Prospect ferry, which I hold by virtue of a deed from Nehemiah K. Nickerson to me, dated this fourteenth day of May, 1836, and for a more particular description of said premises, reference is had to said deed, meaning to convey to said Nickerson all the right, title and interest, that said Nickerson has conveyed to me, as also, the new horse-boat, now in Brewer, and intended to run between Bucksport and Prospect." The description and references in this mortgage deed are so clear and full, that no reasonable doubt can be entertained, that all the land and privileges conveyed by Nickerson to the defendant, was re-conveyed in mortgage, on the same day by him to Nickerson.

Immediately previous to the transaction on the 21st of Nov. 1837, between the plaintiff and the defendant, the latter was the owner of the right in equity of redeeming the mortgage to Nickerson. That right in equity he conveyed to the plaintiff in mortgage as security of certain indebtedness. No exception appears to have been made in the conveyance, and there is nothing in the case showing that the former mortgage was mentioned or known to the plaintiff; and it may not be material to the present inquiry that it should have been known or otherwise. The covenants in the mortgage to the plaintiff were in the usual form of those in a warranty deed, and consequently contained the covenant to warrant against the prior mortgage. On the fifth of October, 1843, a new contract was made between the parties to this suit. The defendant, by a quit-claim deed, made conveyance of the land. The consideration stated in the deed was only nominal, but it appears that the former relations between them, entered into at the time the mortgage was given, were changed. The mortgage to the plaintiff, which is particularly referred to in the description of

the land, is, in the deed last given, fully canceled and discharged. The deed then executed is all the evidence, which the case affords of the contract made at that time, and from it, we must conclude, that in consideration of the discharge of the mortgage, the plaintiff obtained an indefeasible title to the defendant's right in the land described in the mortgage; and the defendant's covenants were materially altered. This case is different from that of *Crosby* v. *Chase*, 17 Maine, 369, which is relied upon by the plaintiff. In that case, a deed was executed by the mortgager, and received by the mortgagee, in which was recited that the premises were the same, which the mortgagee conveyed to the mortgager, and of which the latter gave a mortgage, the same day, for the security of the payment of the purchase sum, and then is added, "and this deed is intended to cancel said mortgage and the notes given for the purchase sum." The Court held that the former mortgage was notwithstanding undischarged and in full force. But the reason for this opinion was, that the payment of the original sum secured by the mortgage was defeated by an attachment of the mortgager's right, and by the agreement, which was in evidence in the case, the contract of discharge was not to be operative, if the title should fail by reason of the attachment. Here the plaintiff received the quitclaim deed, which was all that the contract then made required. The title intended to be secured thereby was the defendant's right in equity of redeeming the mortgage to the plaintiff. This right, the plaintiff caused to be canceled by the consideration of this discharge of the mortgage, and the result of the transaction was the same as it would have been, if instead of the mortgage the defendant had, on said 21st of November, 1837, given a deed similar to that of Oct. 5, 1843.

In the deed, by which the defendant released his right to the land described therein, he covenanted that the plaintiff should hold it, so that neither he nor his heirs, nor any person claiming from or under him or them, should by any way or means claim or demand any right or title to the premises or any part thereof forever.

The law has not appropriated any particular form of words to the creation of a covenant; therefore any words will be sufficient, to show the intention of the parties. 4 Cruise, 447 and 449; *Lent* v. *Norris*, 1 Burr. 290; Buller's N. P. 156; Croke James, 391. And all deeds are to be construed by the same rule. *Ellis & al.* v. *Welch*, 6 Mass. 246.

The case does not show, that in any transaction between the parties, reference was made to the mortgage to Nickerson. When the last deed was given there was no agreement touching this mortgage. The defendant's notes secured thereby were outstanding and unpaid, and were binding upon him alone; the plaintiff assumed no liability concerning them. If the mortgage to the plaintiff had been discharged in any other mode than by a release of the mortgager's interest in the land, the defendant would hold the land subject to Nickerson's mortgage. If the defendant, after his deed of the 5th of Oct. 1843, had paid the notes, which he owed, to Nickerson, and thereby discharged that mortgage, it is not perceived by what contract, either express or implied, the defendant could legally claim reimbursement from the plaintiff for the amount paid.

When the whole deed, of Oct. 5, 1843, is taken together, there is nothing in it, which can be construed to restrict the conveyance, as really intended, simply to the right, then in the defendant. If that was the design of the parties, such comprehensive terms after the habendum, would never have been incorporated into the deed. The defendant did not intend to convey a title, which would be indefeasible against all, nor did he so agree; but only against claims and titles caused by him, or those claiming under him. The latter must be understood to refer as well to claims created by him, then existing; to incumbrances, upon the title, which he had previously made; as to those, which might thereafter be derived from himself. *Comstock* v. *Smith*, 13 Pick. 116.

The mortgage to Nickerson, was a legal claim upon the title in the nature of an incumbrance, which was liable to be asserted at any time, against the possession and the right of the plaintiff, under his deed. He was not bound to wait, till

such measures should be taken to deprive him of possession, when his remedy upon the defendant might be fruitless. But as under a deed, containing the common covenant of warranty against incumbrances, he, as grantee, might remove them, and resort to the covenant of his warrantor, in an action for indemnity.

Nickerson had made an assignment of his mortgage to Snow, prior to the deed under which the plaintiff claims; and Snow assigned the same to the plaintiff, before the commencement of this action, and delivered the note which was mentioned in the condition. These assignments are indicative of an intention on the part of Nickerson and his assignee to claim under them, and the right secured thereby is in the plaintiff. The measure of damages will be the price paid by the plaintiff, as a consideration of the assignment, if it does not exceed the amount due upon the mortgage note. *Prescott* v. *Trueman*, 4 Mass. 627; *Wyman* v. *Ballard*, 12 Mass. 304.

According to the agreement of the parties,

Defendant defaulted.

INHABITANTS OF BANGOR *versus* INHABITANTS OF BRUNSWICK.

Where evidence was admitted for the defendant, upon condition that he would prove another material and connected fact, which he was unable to prove, *it was held*, that the jury should disregard the evidence so admitted.

Though the jury were not *expressly instructed*, to disregard the testimony, so admitted, yet, as the proceedings were had in their presence, the Court will presume, that the jury understood the matter, and that they accordingly did disregard the evidence.

Where an action was commenced by one town against another for the support of a pauper, and a verdict was returned for plaintiffs, and while that action was pending, on a motion for a new trial, another suit was instituted between the same parties for the support of the same pauper, and in this, a verdict was returned for defendants, and exceptions filed, and afterwards the verdict in the first action was set aside; *it was held*, that however the first action might be decided, the Court could only render such judgment in the latter action, as the exceptions authorized.

Whether, on the new trial in the first suit, the question of the settlement of the pauper can be raised, *quære.*

ASSUMPSIT, for supplies furnished to a pauper, whose settlement was alleged to be in Brunswick.

There was much testimony introduced at the trial, before SHEPLEY, C. J., as to the settlement of the pauper.

The jury were instructed, as to the facts needful to constitute a settlement, and as to the mode in which a settlement may be lost.

To those instructions, and also to the ruling, relative to the admission of proof as to the handwriting of Judge Perham, as stated in the opinion of the Court, the plaintiffs excepted.

Peters, for plaintiff.

J. A. and *H. Poor*, for defendants.

TENNEY, J. — The defendants introduced the lists of voters of the city of Bangor for several years, during the time, when they contended the residence of the pauper was there. Upon the list of the year when the plaintiff insisted that the pauper had abandoned his residence in Bangor, was written against his name the words "old settler," or something like it, and it was in testimony, that these words were in the handwriting of Judge Perham. This addition to the name of the pauper upon the list, was objected to as being improper evidence in the case, by the plaintiff, but on its being stated on the other side, that it would be proved, that Judge Perham was an alderman of the city of Bangor, that year, it was admitted. But it afterwards appeared by the introduction of the records of the city, that Judge Perham was not an alderman that year.

Selectmen of towns are required to prepare lists of those, who shall appear to them to be constitutionally qualified to vote for State officers, on or before the eleventh day of August, of each year. R. S. chap. 6, sect. 1. By the 36th section of the same chapter, the aldermen of any city, shall be the selectmen of the town, which by the preceding section the city shall be, for the purpose of electing such officers. Any words therefore, which appear upon lists prepared by the aldermen,

in the handwriting of a member of the board, are presumed to have been properly made by authority of the whole board. When the evidence was admitted, it was upon the statement that it would be proved that Judge Perham was an alderman. To make it evidence, it was considered, that it was necessary to show, that it was the handwriting of Judge Perham, and that he held the office, which might authorize him to write the words. One must be shown before the other, and the Judge could not with propriety direct, which should be done first. Either fact alone, would be of no consequence. It turned out, that the counsel who stated that he should prove that Judge Perham was an alderman, was mistaken therein, and the other fact became immaterial. The jury must have understood from what took place, that they were not to regard it.

The counsel for the plaintiff do not seem to have relied upon the exceptions taken to the instructions to the jury. They are believed to be in accordance with principles which are well settled. *Exceptions overruled.*

This action was commenced on Dec. 2, 1845, and tried Oct. term of this Court, 1847. An action between the parties for the recovery for supplies furnished previously, for the same pauper, was tried Oct. term, 1844, and a verdict for the plaintiff then rendered, set aside June term, 1848. At the next term, the exceptions in the action tried in 1847, not having been argued, the counsel for the defendants agreed with the counsel for the plaintiff, that in considering the law raised by the exceptions, the Court should decide, what would be the effect of a verdict and judgment for the plaintiff, in the action first brought and tried, if such should be the result, upon the other action, in which exceptions had been taken; and if the Court should be of the opinion, that a verdict and judgment in the former could have any effect upon the latter, no judgment should be entered in the latter, until the other action should be tried, and all questions of law which might be raised therein, should be definitively settled. Thereupon the Court directed, that the action first brought, should be continued.

The action first commenced stands for trial by the jury, and no restriction is imposed by the agreement, touching the questions, which may be raised at the trial. The other action was tried before the verdict in the first was set aside; and it does not appear that any objection was made to the opening of every question, which could have been presented, if it were the only action which had been or was then pending for relief afforded to the same pauper. Indeed there could have been no valid objection to such a course, inasmuch as no judgment had been entered in the case, when the verdict had been rendered. It was competent for the Court to have continued the action tried in 1847, till there had been a final judgment in the other. If that had been done, the question of settlement of the pauper, could not afterwards have been raised. Rev. Stat. chap. 32, sect. 30. But such was not the course taken, and at the trial of the last action, the provision referred to was inapplicable. A verdict was returned for the defendants, exceptions taken to the ruling, and instructions, given to the jury. These exceptions are all, that is before the Court at this time, and a delay until judgment may be rendered in the other action, either for the plaintiff or defendants, cannot authorize the Court to determine questions different from those presented by the exceptions. The fair construction of the statute is, that when an action is brought to recover for relief afforded to a pauper, and a trial is had upon an issue, in which is involved the question of his settlement, that question shall not be again tried by a jury, in a future action brought for the support of such pauper. It was not intended to affect a case where a verdict had been rendered, and where judgment was suspended only by exceptions. Whether in the trial of the action, which was first commenced, the question of the settlement of the pauper can be raised and tried, is a matter not presented in the agreement, and consequently no opinion is given.

Judgment on the verdict.

MICAH G. JONES *versus* JOHN KNOWLES, JR.

To discharge a note for merchantable boards and clapboards, the articles set out and tendered must be of such quality and condition, as, under the statute, might lawfully be "offered" or "exposed for sale," or "delivered on sale."

The burden of proving such quality and condition is upon the maker of the note.

Acts, intended for a performance, if they involve a violation of law, are void.

EXCEPTIONS from the District Court, ALLEN, J.

Assumpsit on a note to pay twenty-five dollars worth of merchantable boards and clapboards, at the defendant's mill, at a specified time.

The defendant proved that, at the requisite time and place, he set apart hemlock boards and basswood clapboards to that amount, as a payment of the note. But it was not proved, that either of the articles were surveyed by a qualified surveyor of lumber, or that the clapboards comported with the statute requirements, either in being of the prescribed length, width or thickness, or in being straight and well sawed.

Knowles, for defendant.

Merchantable, is that which is fit or likely to be bought and sold. An article may be merchantable in one place, which may not be in another. The parties are presumed to know the sort of lumber manufactured at that mill. The statute does not prohibit such sales. It does not appear that there was any surveyor of lumber in the town. *Coombs* v. *Emery*, 14 Maine, 404; *Mill Dam Foundery* v. *Hovey*, 21 Pick. 417, 430, 431, 441.

The statute, chap. 66, § 11, does not reach this transaction. That section applies to lumber for exportation only.

The case of *Wheeler* v. *Russell*, 17 Mass. 264, is not binding in this State. To adopt it, would violate the intent of our Legislature, and the interest of our citizens. The boards and clapboards were not "offered for sale," nor "exposed to sale." The sale was completed when the note was given.

John E. Godfrey, for plaintiff.

HOWARD, J. — The contract was admitted, but the defendant alleged performance, on his part, in bar of the action. The promise was to pay in "clapboards and boards to be merchantable," at a specified time and place, and it must be presumed, in the absence of evidence of any different stipulation, that they were to be of such description as could be legally offered for sale and delivered.

Though not distinctly stated in the exceptions, we infer from them, and understand from the admissions and arguments of counsel, that there has never been an actual delivery of clapboards and boards, but that such were seasonably designated and set apart by the defendant, to pay the note; that no person was there present with the note, or authorized to receive payment, or accept the tender; that the articles tendered were never actually received by the plaintiff or holder of the note, and that it has never been presented for payment. The tender should have been made in articles of the description specified in the contract, in order to have the effect of payment. The burden of proving the quantity, quality and fitness of the articles offered, or delivered, in fulfilment of his contract, is on the defendant.

The Revised Statutes provide, that "all boards offered for sale, shall previously to delivery, be surveyed," by one of the town surveyors, who shall mark their just contents thereon; that "all clapboards exposed to sale," shall be manufactured of a particular quality of timber, and of a particular length, width and thickness; and that "no boards, clapboards, nor shingles, shall be delivered on sale, until duly surveyed by one of the proper surveyors aforesaid, in the town or plantation where sold, nor until such surveyor shall have given a certificate, of the number, quality and quantity thereof." (R. S. chap. 66, § 2, 11, 17.) Sect. 20, of the same statute imposes a penalty upon "any person, selling and delivering any boards or any clapboards, before they are surveyed." This statute is prohibitory in its terms, and enforces the prohibition by a

penalty. The defendant could not, therefore, tender in fulfilment of his contract, boards and clapboards, which he could not by law sell or deliver. He could not plead a performance which involved a palpable violation of the law. The undertaking being unlawful, the act would be void. Fonbl. Eq. B. 1, chap. 4, § 4, 5; *De Begnis* v. *Armistead*, 10 Bing. 107; *Coombs* v. *Emery*, 14 Maine, 404; *Whitman* v. *Freese*, 23 Maine, 185; *Springfield Bank* v. *Merrick*, 14 Mass. 322; *Wheeler* v. *Russell*, 17 Mass. 258; *White* v. *Franklin Bank*, 22 Pick. 182; *Hallett* v. *Novion*, 14 Johns. 290; *Armstrong* v. *Toler*, 11 Wheat. 258; *Craig* v. *Missouri*, 4 Peter's S. C. 436; *Clark* v. *Protection Ins. Co.*, 1 Story's R. 122.

The instructions given to the jury were not in conformity with these principles. *Exceptions sustained.*

THOMAS G. STICKNEY *versus* CITY OF BANGOR.

If the assessors of a town, through an error in judgment, make upon one of the inhabitants, an over-valuation of his property, and thereby assess him too much in the list of town taxes, or tax him for property not belonging to him, his remedy is not by an action at law, but by an appeal to the County Commissioners.

The right of action against a town, given by R. S. chap. 14, sect. 88, for the recovery of damages, occasioned by a mistake, error or omission of the assessors, does not extend to errors in judgment, made by them respecting the value of personal property, liable to be assessed.

ASSUMPSIT, to recover the sum of $74,80, paid by plaintiff, under protest, to discharge a tax assessed against him on a stock of goods in a store occupied by him in Bangor.

The case came before the Court, upon a statement of facts. A house in Boston agreed with the plaintiff, an inhabitant of Bangor, to consign goods to him at a fixed price, for sale. Whatever amount he could obtain for the goods, above that price, was to be his. He had the right to return any part of them, at his election, and was to pay weekly for those which he should sell. Under that arrangement, goods were furnish-

ed, to the plaintiff. And the goods in his store on the first day of May, 1848, were assessed to him in the city taxes. At that time he had about $500 worth of goods belonging to himself, which were mixed with those consigned as aforesaid.

On the day after the time had expired, in which the inhabitants were notified by the assessors, to bring in their lists of taxable property, the plaintiff filed in their office, a schedule of his property, embracing the $500 of goods, and at the same time, gave notice to them in writing, that the other goods in the store were consigned to him by the Boston firm as aforesaid.

This was before the assessors had taken any steps to make the taxes, except to receive the lists from the inhabitants, and the returns of deputy assessors, of taxable estates within their respective limits.

The plaintiff paid the amount assessed upon said 500 dollars worth of goods belonging to himself. The balance, $74,80, being the amount assessed upon the property consigned as aforesaid, he paid under protest.

Plaintiff was not a general commission merchant, but was a general dry goods dealer. He advertised and sold the goods as his own, and appeared to the world as doing business on his own account. This was with the assent of those who supplied him.

The Court were to render such judgment, on nonsuit or default, as the legal rights of the parties required, objection to the jurisdiction of the Court, being waived.

A. W. Paine, for plaintiff.

The only point presented by the agreed case seems to be, whether, as the laws stood on the first of May, 1848, goods consigned by persons out of the State, to persons within this State, for sale, were taxable here to the consignee?

This depends upon the construction to be given to the "first" clause of the tenth section of the statute, of 1845, chap. 159, the provision of which is, that "*all goods* * * * * *in any city or town in this State, other than where the owners*

reside, shall be taxed in such city or town, if the owners occupy any store therein."

In the case at bar, the goods were avowedly the property of Beebe & Co. of Boston, and the plaintiff was merely their consignee.

It is very clear, therefore, that the case is not within the provision cited, for —

1st. This very clause provides for the assessment to be made to *the owner*, who in this case was Beebe & Co.

2d. The case contemplates the residence of *the party taxed* to be in a different town from that, in which the goods are sold. Here both are in Bangor.

3d. Beebe & Co., who were the *owners, did not occupy the store.* On the contrary, the case expressly finds that the occupancy of the store was in plaintiff.

The case at bar, then, is plainly not one of those contemplated by the Legislature, in adopting the clause under discussion.

The cases contemplated by the enactment in question, are those so frequently existing in such places as New York, Boston, Portland, Bangor and other large places, where persons doing all their business in such cities, have their residences in neighboring towns, beyond the limits of the incorporation, where their business is transacted. Every principle of justice requires, in such cases, the adoption of such a rule, as the one cited, imposed by our Legislature, and no supposed spirit of comity is opposed to it.

On the contrary, it is equally proper and just that, in cases of auctioneers and commission merchants, whose business it is merely to act, as it were, as agents in transferring property from one to another, should be exempt from the imposition of such a burden as that of being taxed for what they had on hand, at any one particular day in the year. With equal justice might the railroad or steamboat corporation, or the packet master, be taxable for the goods which they might respectively have in their custody, as common carriers, on the first day of May.

The statutes of our State and the practice of assessors every where, have accordingly passed by all such property, as not being proper subjects of taxation to the consignee.

All that can be said in reply to this view, would seem to be, that the plaintiff's case came a little nearer the line, where taxation should commence. Suffice it to say, in reply, that he *was a commission merchant*, and that the assessors' notion of what is right or fair, is not to govern a plain provision of the statute.

The case at bar is in fact provided for in the 9th section of the statute, the provision of which is, that "all personal property, whether within or without the State, shall, except in the cases enumerated in the following section, be assessed *to the owner* in the town where he shall be an inhabitant, on the first day of May, in each year." The only exception is the one already commented upon.

Here is a plain and express provision, settling the place of taxation, in such cases as the one at bar.

It is a principle every where recognized in discussions of this nature, that no person shall be liable to be taxed for the same property in two different towns for the same year. *Preston* v. *Boston*, 12 Pick. 7; *Richards* v. *Daggett*, 4 Mass. 538, *et passim*.

Peters, for defendants.

It is plain enough, from facts stated in this case, that whatever the *form* may be denominated, here was virtually a delivery and sale to Stickney, Beebe & Co. holding a lien for eventual security only. Stickney did all the business in his own name; at his own expense entirely, and at his own risk; received and disposed of the goods as any other trader would.

This sort of consignments, which is becoming so common, means only that the so called consignee is not in good credit; and a Boston merchant sells him goods, maintaining a lien upon title, so that other creditors cannot attach. The very least that can be made of these facts, is, that the goods in question were sold and delivered Stickney, to become his, when paid for; that is a conditional sale, the vendee maintain-

ing *possession and control*, and vendor living out of the State, they were sufficiently the property of Stickney, for the purposes of taxation. There is no pretence that these goods could have been taxed to Beebe & Co., and *that* the plaintiff in his argument shows. It is not necessary that a party should have such title to goods as to be indefeasible, in order to be taxed. The fact of intermixture of these goods with plaintiff's own goods, shows the object and extent of what they call a "consignment."

These goods were taxable to plaintiff, by virtue of section 12 of tax act of 1845, chap. 159. Stickney had possession of goods, the title of which was in pledge to Beebe & Co. for payment at *inventoried prices*. If it had been a naked assignment, why does Mr. Stickney have to pay Beebe & Co. certain particular prices, no matter what he may obtain for them on sale. It is a fiction of *fact*, without the use and the honesty of fictions of *law*.

Again, the remedy is misconceived. Plaintiff's goods and those called Beebe's were intermixed, and taxed in gross. Plaintiff chose to pay only a portion of that tax. If any thing was wrong, it is only that Stickney was overrated, and it would be a case of over-taxation. The remedy then should be by an appeal to the County Commissioners. *Holton* v. *Bangor*, 10 Shepl. 264.

"It makes no difference whether one is overrated by the assessors, by including in the valuation property of which he is not the owner, or that for which he is not liable to be taxed, his only remedy is by an application for an abatement pursuant to statute." *Osborn* v. *Inhabitants of Danvers*, 6 Pick. 98.

Such is a sensible construction of the statute. Its object is to make the Commissioners the tribunal of resort for prompt settlement of such differences. And the utility is as much in one kind of overrating as another. Here there was a liability to be taxed for something, and therefore, if any thing wrong, it was merely an overtax.

There is no claim in good conscience for plaintiff, to recover back, having paid what in justice he ought not to feel unwilling to pay. *Smith* v. *Readfield*, 27 Maine, 145.

A. W. Paine, in reply. Assuming that the tax was illegal, I contend that we are entitled to judgment.

1. On principles of common law. The money having been paid under protest, may be collected back under the count for money had and received. *Preston* v. *Boston*, 12 Pick. 7.

The cases, in which the party aggrieved is confined to his remedy of appeal to the County Commissioners, are those of over-valuation only, and do not embrace those cases where distinct and independent parcels of property are taxed to persons having no interest in them, as owners. Where, however, as in *Holton* v. *Bangor*, *the thing* taxed is one and entire, the question is strictly one of over-valuation.

The case cited by defendant from 6 Pick. 98, did not call for so broad a decision as that stated in the marginal note, and I trust our Court will be slow to affirm it. The same Court in the subsequent case of *Preston* v. *Boston*, 12 Pick. 7, have shown a desire to rid themselves of the case, though they have not directly overruled it. One more step will probably effect that. Were the question, there, now an open one, there can be little doubt the decision would be uniform with that of *Preston* v. *Boston*.

Where is there any distinction *in principle* between a tax assessed partly on real and partly on personal estate, and one assessed partly on one species of personal property and partly on another, or partly on one article, and partly on another and distinct article. There being no real difference *in principle*, there should be none *in law*.

2. But whatever may be the rights of the plaintiff, under the count for money had and received, we certainly have a right of action by virtue of the provisions of the 88th section, of the 14th chapter Rev. Stat. The taxing of the property in question to plaintiff, was a "mistake" or "error" of the assessors within the provisions of the section in question. If

so, then by virtue of the agreement of the parties, an action is maintainable, and judgment should be accordingly for plaintiff, on the count for damages under that section.

Shepley, C. J.— The plaintiff claims to recover back a sum of money paid under protest, in part satisfaction of a tax assessed by the assessors of the city upon his personal property for the year 1848.

By the agreed statement it appears, that he was on the first day of May of that year an inhabitant of the city, transacting business there in a shop occupied by him. That a large portion of the goods in that shop, had been consigned to him for sale at fixed prices, by persons residing in Boston; that a smaller portion of them were owned by him; that the goods were mixed together, composing his stock in trade; and that he was assessed as the owner of the whole.

It does not appear, that the assessors had or could have any knowledge, that he was not the owner of the whole stock, until the day limited for presenting to the assessors lists of taxable property had expired, when they were notified, that he did not own more than to the value of about five hundred dollars. They were not bound to regard that statement as correct. He appeared to be in possession and to conduct as the owner, and they might regard the evidence, that he did not own the whole as unsatisfactory, and might believe, that he owned more of the goods, than he admitted to be his own. The city was entitled to have the questions, whether the whole or a greater portion, than was admitted to be his, was liable to be assessed, determined first by the assessors and finally by some competent tribunal. The statute has provided such a tribunal by an appeal from the judgment of the assessors to the court of the County Commissioners.

There may be many cases, in which assessors may judge, that a person is liable to be assessed for certain personal property, when upon a careful examination of the facts by a tribunal more competent or having greater power to ascertain the truth, it may be determined, that he was not liable. If

in such cases, the persons assessed could neglect to place themselves in a position to obtain redress by an appeal to the County Commissioners, and could voluntarily pay such portion of their taxes, as they might think just, and pay the remainder under protest, and then maintain a suit at law to recover back the sum last paid, towns and cities might be subject to a great number of suits, and continue to be subject to them for a long time after those taxes had been paid.

If the plaintiff could maintain this action, he could deprive the assessors and the city of all power to have any final determination made, whether he stated correctly the amount of his personal property liable to assessment, until it had been decided in a suit commenced by himself at his own pleasure. If no agreed statement had been made, it is quite apparent, that the defendants would have been entitled to prove in this case, that the plaintiff was at the time the owner of personal property, liable to assessment, to a much greater amount than he admitted. And thus the question would have been directly presented on the trial of an action at law, whether he had been overrated; a trial not permitted by the statute, which provided a different remedy.

If, as contended, an appeal to the County Commissioners is not, and an action at law is the appropriate remedy, when one person, having in his possession as the apparent owner the property of another, is overrated, the result might be, that every person assessed, who at the time had a trifling amount of property owned by another in his possession, might maintain a suit to recover back the amount alleged to have been assessed on such property. Under such a system towns might be able to do little more, than to collect sufficient to make such repayments with the costs and expenses attending the litigation.

The plaintiff also claims to recover by virtue of the provisions contained in the statute, chap. 14, § 88, that no error, mistake or omission by the assessors shall render the assessment void; and that the party injured may bring his action

against the town for any damages, he may have sustained by such error, mistake or omission.

If such a construction were to be made as would authorize an action at law to be maintained against a town, whenever its assessors made an excessive assessment by including in the valuation personal property not liable to be assessed, the provisions of that statute, which require lists of assessment to be presented and which authorize and regulate the right of appeal, would be of little practical importance. A person liable to be assessed omits to present a list of his personal property, and the assessors place upon the valuation a certain amount of money at interest, for which he is assessed. If he can pay under protest the amount of the tax assessed on such money at interest, and recover it back of the town by proof, that he had no money at interest, on the ground of an error committed by the assessors, it would be very difficult to make a person, who neglected to present a list, pay more taxes for intangible personal property than he pleased.

It could not have been the intention to include in this section any error in judgment made by the assessors respecting the amount or value of personal property for which a person was liable to be assessed. The correction of such errors is to be obtained by an appeal to the County Commissioners.

Plaintiff nonsuit.

CALEB CHASE *& al. versus* ELLIOT G. VAUGHAN.

A copartnership firm was dissolved, upon an agreement that one of the members should assume and pay the company debts. A creditor, on being afterwards informed of the arrangement, replied that he was satisfied with it. *Held,* that reply was not evidence, from which the jury could find that he had discharged the other member of the firm.

A parol contract to discharge one of two joint debtors, if made without consideration, cannot be enforced. — Per HOWARD, J.

HOWARD, J. — Vaughan & Brown were partners, when the plaintiff's claim accrued, and were jointly sued, but Brown

having become a certified bankrupt, the suit was discontinued as to him.

The defence is placed upon the ground, that the plaintiffs have released Vaughan, and agreed to look to Brown individually for their claim.

Brown & Vaughan dissolved partnership soon after they became indebted to the plaintiffs, and it was agreed between them, that Brown should take the effects of the firm and pay their debts. The fact, and terms of the dissolution were communicated to the plaintiffs by Brown, who asked them if it was satisfactory, and they, upon being informed that the firm had not had trouble, said that it was satisfactory to them. But Brown, who was introduced as a witness at the trial, states, "that he never asked the plaintiffs to release Vaughan, and they never said that they would release Vaughan; that he never offered the plaintiffs his private note for the debt of the firm to them, and they never said they would look to him alone for payment of the debt, and that he did not know as he ever asked them to do so."

This is all of the direct evidence in the case, tending to prove the discharge of the defendant, but other evidence and circumstances less direct were introduced and submitted to the jury.

Upon a careful examination of the whole evidence, we are compelled to say, that there is no proof of any contract to discharge the defendant, and that the jury could not legally infer any agreement to that effect, from the facts and circumstances proved.

But if the evidence before us were sufficient to prove such contract, it must have been without any consideration, and could not have furnished a defence to the action. *Jenness* v. *Lane*, 26 Maine, 475; *Smith* v. *Bartholomew*, 1 Metc. 276; *Wildes* v. *Fessenden*, 4 Metc. 12; *Smith* v. *Rogers*, 17 Johns. 340; *David* v. *Ellice*, 5 B. & C. 196; *Lodge* v. *Dicas*, 3 B. & A. 611; *Cole* v. *Sackett*, 1 Hill, 517.

The exceptions are not considered, as the plaintiffs are entitled to a new trial upon their motion.

Joseph Abbott *versus* Hampden Mutual Fire Insurance Company.

A *feme covert* was tenant for life in one third of a lot of land, and tenant for years of the other two thirds. Her husband erected a house on the land, and caused it to be insured as his property, by the defendants, for four years. One article of the defendants' by-laws was, that the policy should be void, if the assured should sell or alienate the property in whole or in part, without their consent. During the life of the policy, the plaintiff and his wife conveyed to the reversioner her life estate, on condition that the grantee should pay her a fixed sum annually, during her life. The plaintiff at the same time, conveyed to said reversioner all his interest in the other two-thirds, and took back a mortgage upon the whole estate to secure the payment of several sums in yearly instalments. The mortgager entered into possession. The house was afterwards destroyed by fire before any of the abovementioned sums had become payable by him. *Held*, that the plaintiff at the date of the policy, had an insurable interest in the house; *held also*, that by said conveyances, the house became a part of the realty; *held also*, that said conveyances constituted such an alienation as defeated the policy.

To constitute such an alienation, it is not necessary that there should be an absolute tranfer of the whole or of any distinct portion of the property. If there has been such disposition of it, that any property has been passed to another, the alienation has occurred.

Tenney, J. — The ninth article of the by-laws of the company, provides among other things, that if the assured shall have sold or alienated the property in whole or in part, without having transferred the policy to the purchaser or the alienee, with the consent of the company, then the policy shall be void and the whole amount of the premium shall be forfeited to the company. The case agreed by the parties does not show, that in the sale or alienation made, (if any was made,) by the plaintiff, of the property insured, he had in any manner the consent of the company. The question upon this branch of the case then is, whether there was such a sale or alienation of the property insured, or any part thereof, as contemplated by the parties in the policy.

Immediately before the transaction, relied upon in the defence as an alienation, the wife of the plaintiff, under the will of her former husband, had a life estate in one undivided

third part of the land, on which the house destroyed was situated. The residue of the land by the same will was held by the wife, till her son, Asa L. Cartland, arrived at the age of twenty-one years, which was sometime previous; and after that he became the owner in fee of that portion of the land. The house lost, was built by the plaintiff upon this land, and, as his counsel insist, it was his property. On the 17th day of September, 1844, the plaintiff and his wife joined in a deed of conveyance of one undivided third part of the land, including the same proportion of the house, to Asa L. Cartland, on condition that the grantee should pay to the plaintiff's wife, annually during her lifetime, the sum of $50, and on failure to make payment according to the terms of the condition, the deed was to become void. At the same time, the plaintiff gave to Cartland a quitclaim deed of the remaining two-thirds; and on the same day, the grantee in those two deeds, conveyed in mortgage to the plaintiff, the whole of the premises, to secure the payment of the sum of $500, payable in five equal annual instalments; and the mortgager was in possession at the time of the loss.

The deed from the plaintiff and his wife, passed to the grantee a freehold estate, subject to be defeated by a breach of the condition. By well established principles of law, an estate of freehold which has vested cannot fail by the omission of the grantee to perform the condition, without an entry for the breach of such condition. This rule however is not universally true. An exception is where the person, who is to be benefited by the condition, already has the possession. Co. Litt. 218, a. The time had not arrived on the event of the loss, when Cartland was bound to perform the condition; and he being in possession, the exception to the general rule mentioned could not apply. The deed of the two-thirds of the land from the plaintiff passed to the grantee, all the interest which the grantor had in the land and the buildings attached thereto; the two deeds therefore conveyed to Cartland a title to the land and the buildings. It cannot be denied that this taken by itself constituted an alienation, which is defined

in Jacob's Law Dictionary to be "the transferring the property of a thing to another." Noah Webster defines the meaning of alienation, "the transfer of title." This would bring the plaintiff into that predicament, which would operate to render void the policy, if the literal import of the ninth article in the by-laws should be adopted. But in questions upon policies of insurance, a liberal construction in favor of the assured has been given, in their interpretation, so that the real intention of the parties, should not be defeated. And it is contended for the plaintiff, that the conveyance to Cartland, being conditional as to one-third part thereof, and being accompanied by a reconveyance by him in mortgage as a part of the same transaction, there was not such an alienation of the property or any part thereof, as would avoid the policy.

The right to enter upon one third of the property conveyed by the plaintiff and his wife, after a breach of the condition, would be for a failure in the grantee to do what was for the wife's benefit alone, and so far at least as she was the exclusive owner, the husband could exercise no control without her consent. Statutes of 1844, chap. 117, and of 1847, chap. 27. After her death no interest would exist in the husband, so far as the *land*, in which she had a life estate is concerned, if he survived her, according to the facts in the case.

By the mortgage the fee in the land passed to the plaintiff, as between the parties thereto, and he had the right to enter as well before as after the breach of the condition. But his estate in the house and the whole of the premises was essentially changed by the entire transaction. The taking of the mortgage did not restore him to the situation in which he stood before the conveyance. He has by the mortgage an interest in all the land, whereas he had none whatever before, in two-thirds thereof, and none in the remainder, excepting the right of his wife. If the plaintiff had no title to the house before the conveyance, he was not possessed of any insurable interest. If the house was built by him, under such authority as gave any right thereto, he had in it, the entire title. By the transaction of the 17th of September, 1844, Cartland acquired

an important interest in the property insured, where he had none before. What was that interest? The house had by means of the deeds and the mortgage, become a part of the real estate, and would be subject to all the principles of law applicable thereto, as real estate, situated as that was. The plaintiff was the mortgagee not in possession, and having no right to enter for condition broken. Cartland was the mortgager in possession.

In *Eaton* v. *Whitney*, 3 Pick. 484, the Court say, "the mortgage is in fact but *a chose in action*, at least until entry to foreclose, and although the legal effect of the mortgage is to give an immediate right of entry, or of an action to the mortgagee, yet the estate does not become his in fact, till he does some act to divest the mortgager, who to all intents and purposes, remains the owner of the land, till the mortgagee chooses to assert his rights under the mortgage." Again, "the equity of redemption, is considered to be the real and beneficial estate, tantamount to the fee at law, and it is accordingly held to be descendible, by inheritance, devisable by will and alienable by deed, precisely as if it were an absolute estate at law." 4 Kent's Com. Lecture 57, page 153. This interest of the mortgager continues till foreclosure; the entry for that purpose is merely to fix the time, when the three years, which is to cause it, shall commence. *Smith* v. *People's Bank*, 24 Maine, 185.

The interest of a mortgager in property in the situation in which this was at the time of its destruction, is an insurable interest; and in Massachusetts, it has been held, that where a house insured against fire, had been mortgaged by the assured, and his right to redeem had been seized on execution at the time of effecting the policy, and he did not state this at the time he applied for the policy, it was not a material concealment.

To constitute an alienation of property, it is not necessary, that there should be an absolute transfer, of the whole or any distinct portion of it. But if there has been such disposition of it, that any property therein has been passed to another, it

cannot be doubted, that there has been an alienation of the property in part.

In the policy given to the plaintiff, as is usual in such cases, the defendants took care, that it should not become a wagering policy, and provided, that the assured should hold the interest until it should be changed by their own consent. "Mutual offices should have the power of exercising a discretion, in the selection of persons, whom they may admit to membership, and whose property they may insure. The character of the person insured may be a subject of importance. If by conveyance of the estate and the assignment of the policy, the purchaser would stand in the place of the insured, and be entitled to indemnity under the policy, the office might be defeated of this right of selection." *Lane* v. *M. M. Fire Insurance Co.* 3 Fairf. 44.

It may perhaps be fairly inferred, that the mortgage given by Cartland was for security of money due on account of the house, and the life estate of the plaintiff's wife; but whether the sum was regarded as the whole of the consideration for the house or not; or whether any payment was made therefor at the time of the conveyance does not appear. The mortgager had it in his power by the payment of the sum secured to take away entirely the interest of the plaintiff; and that such was his design, must be presumed. In no event could the plaintiff's interest at any given time, be greater than the sum which should then be due, if redemption should ever take place. As the sum should be reduced, the interest would diminish in the same proportion. "Generally speaking," says C. J. MARSHALL, in Peter's S. C. Rep. vol. 2, page 25, "insurances against fire are made in the confidence, that the assured will use all the precautions, to avoid the calamity insured against, which would be suggested by his interest. The extent of his interest, must always influence the underwriters in taking or rejecting the risk, and in estimating the premium."

We cannot doubt that there was such an alienation as to make void the policy.

Several other points were raised and discussed in argument;

but the view which we have taken of the one, which we have examined, renders it unnecessary to give the others consideration. *Judgment for the defendants.*

ELIAS HASKELL, *in equity, versus* STEPHEN HILTON *& al.*

After the assignment of all interest in a *chose in action*, upon which a claim in equity is founded, the bill must be brought in the name of the assignee; and it is not necessary that the assignor be a party.

A total want of legal or equitable interest in the plaintiff in a suit in equity, is fatal to the bill; and the objection may be taken by demurrer, or at the hearing.

BILL IN EQUITY, charging that the plaintiff is a creditor of one William Smith, and that the defendants have received and now hold the property of said Smith, by a fraudulent trust, for said Smith's use, and to defeat his creditors.

The defendants filed a cross-bill, presenting to the plaintiff, Haskell, certain interrogatories. The character and the decisive effect of the plaintiff's answer are stated in the opinion of the Court.

Upon the question whether there was such a fraudulent trust, as is charged in the bill, there was a large mass of testimony. Whatever else the depositions might or might not prove, they bear abundant testimony to the industry of the counsel. But as to the issue in this case, their contents are immaterial.

Warren, for complainant.

W. L. Walker, *Appleton* and *Stewart*, for S. Hilton.

E. E. Brown, for H. Hilton.

HOWARD, J. — The plaintiff alleges that in January, 1846, he recovered a judgment, for $3557,07, against Smith, as drawer of three bills of exchange; one of which was payable to the order of the plaintiff, and the others were payable to Fairbanks, Loring & Co., or order, and all bearing date Sept. 22, 1835. That execution was obtained, and levied on a farm

in Newport, as the property of Smith, in February, 1846, in part satisfaction of the judgment. That Smith, being insolvent, had fraudulently conveyed real and personal property, to a large amount, to the defendants, prior to that time; and that the *Newport farm*, was acquired by the defendants, in 1837, in exchange for other real estate, which they fraudulently held in trust for Smith, by his procurement, to keep it from the reach of his creditors.

The prayer for relief is, "that the defendants may be decreed to convey to the plaintiff said farm in Newport, *in confirmation of his title thereto under said levy;* and that they may be held to account for all moneys and payments, received by them, or either of them, "growing out of any matters specified in the bill; and may be held to pay over the same to your orator, or so much as shall satisfy his said judgment, and that he may have such other and further relief as to the Court may seem meet."

There was evidence tending to show that the defendants may have acquired the title to the *Newport farm* in the manner, and for the purposes stated in the bill; yet, it is proved beyond controversy, that Smith never had any title, or legal interest in the premises, and that he became a certified bankrupt, in 1844. The plaintiff, therefore, acquired no legal interest in the farm, by the levy of his execution upon it, as the property of Smith. *Kempton* v. *Cook*, 4 Pick. 305; *Howe* v. *Bishop*, 3 Metc. 26; U. S. Bankrupt Law, August 19, 1841, sect. 3.

In September, 1845, the plaintiff appointed Warren his attorney to collect the demand against Smith, with authority to compromise, adjust and settle the same, as he might think proper, and to institute any proceeding in law or equity, at his discretion, to effect the purpose. But, afterwards in the winter following, and in pursuance of an agreement made the preceding fall, the plaintiff sold to Warren, absolutely and unconditionally, the bills of exchange. In his answer to the defendant's cross bill, the plaintiff says, that "he supposes, by the sale, all beneficial interest in said bills of exchange passed

to said Warren, and that the judgment recovered thereon belongs to him, said Warren; — that this respondent has no beneficial interest in said judgment, and that said suit is prosecuted, to the best of his knowledge, for the benefit of said Warren; but of this he knows nothing more, than that he sold said bills of exchange, by a verbal agreement, to said Warren for $300, which has since been paid to this respondent. That it is agreed and understood, that said Warren is to have all that is recovered of said Hilton in the original suit in equity against Stephen and Nathaniel Hilton."

The proof is conclusive that Warren had the entire legal and equitable interest in the bills of exchange; that he was the real creditor in the judgment against Smith, and that this suit is prosecuted for his sole and exclusive benefit. 2 Story's Eq. Jurisp. § 1047.

It is a general rule in equity that all persons legally or beneficially interested in the matter of the suit, should be made parties, in order that complete justice may be done to all whose rights or interests would be affected by the decree.

Courts of equity disregard the niceties of the common law in cases of assignments of choses in action, by giving effect to the assignment, and requiring the real parties in interest to bring the suit. When the assignment is absolute, and there is no remaining right or interest of the assignor, to be affected by the decree, then, there is no necessity for making him a party to the bill. *Hill* v. *Adams*, 2 Atk. 39; *Brace* v. *Harrington*, 2 Atk. 235; Story's Eq. Pl. § 153, 154, 197; Story's Eq. Jurisp. 1039, 1040; *Executors of Brasher* v. *Van Cortland*, 2 Johns. Ch. 247; *Whitney* v. *McKinney*, 7 Johns. Ch. 144; *Sedgwick* v. *Cleveland*, 7 Paige, 287; *Field* v. *Maghee*, 5 Paige, 539; *Chambers* v *Goldwin*, 9 Ves. 269.

The want of interest in the plaintiff is fatal; and the objection on that account may be taken on demurrer, or at the hearing. Daniel's Ch. Pr. 338; Story's Eq. Pl. 508, 509, 541; *Stafford* v. *London*, 1 P. Wms. 428.

The real plaintiff, in this case, is not before the Court. The complainant having neither a legal, nor an equitable

interest in the subject matter of the suit, cannot maintain the bill. *Bill dismissed with costs.*

BENJAMIN S. CRAWFORD *versus* SAMUEL HOWARD.

Where the judgment of a Court of limited and special jurisdiction is sought to be enforced, its organization is open to inquiry, and its jurisdiction must be established by the party seeking to enforce the judgment.

Thus where one, who was a captain in the militia, was deposed by the sentence of a court martial, and afterwards was prosecuted by the ensign for not performing military duty, he has a right to inquire into the legality of the proceedings of the court martial.

Where, upon a writ of error, it does not appear, but that the original action might have been maintained, though there is error in the proceedings, the judgment must be reversed, but a new trial will be ordered.

THIS was a writ of error brought to reverse a judgment of the Police Court of Bangor, in a suit commenced by Howard, as ensign and commanding officer of a company, in which Crawford was alleged to be liable to do militia duty, to recover a fine for his non-appearance at a May inspection of 1842. At the time of the inspection, there was a clerk of the company, but on the 23d day of said May, he resigned his office.

The plaintiff in error was formerly the captain of this company, and had, prior to this inspection, been reduced to the ranks by sentence of a court martial. Many errors were assigned, but it is only necessary to state the second, viz:—That said Police Court decided "that said defendant could not inquire into the legality of the organization and proceedings of a court martial.

D. T. Jewett, for plaintiff in error.

As to the second error assigned. Courts martial are of limited jurisdiction. Nothing is presumed in their favor. Whoever justifies under their doings, must show, from their records, every fact necessary to their legal organization, and to their jurisdiction. 11 Pick. 441 and 445; 7 Pick. 149; 13 Maine, 269; 19 Johns. 7; 1 Fairf. 24.

Prentiss, for defendant.

If Crawford were at liberty to show that proceedings before the court martial were wrong, he failed to do so. He offered no evidence.

The statute of 1837, *sect.* 10, enacts, that "a copy of the record of any court martial, certified by the president of said Court, together with a duly authenticated copy of the order convening said Court, shall be *conclusive* and *sufficient* evidence to sustain in any Court, any action commenced for the recovery of *any fine* and costs, and agreeably to the provisions of an act to which this is additional.

In *Rawson* v. *Brown*, 18 Maine, 216, it has been decided that the copy of the record and of the order are *conclusive.* These two papers in due form were introduced here.

But we do not need the aid of this statute. A court martial is the *supreme military court*, and when it inflicts only *military punishments* its decrees are final and not liable to review. The original militia law of 1834, sect. 38 and 39, shows this. The law makes the sentence supreme in all cases, except where a civil action is brought, to recover the fine imposed by the court martial, and there it is necessary to show that the same has been awarded in the manner provided in the act. But the *military effect* of the sentence reducing a man to the ranks has never been questioned. Crawford might as well apply to this Court to replace him in the office of captain.

The copy of the record introduced in this case was in the usual form.

Wells, J. — The second error assigned is, that the Judge of the Police Court for the city of Bangor, before whom the action against the plaintiff in error was tried, decided "that said defendant could not inquire into the legality of the organization and proceedings of a court martial purporting to have been held upon Benjamin S. Crawford, the defendant, as captain of said company."

It appears very clearly from the authorities cited, that where

one seeks to enforce the judgment of a court of limited and special jurisdiction, its organization is open to inquiry, and its jurisdiction must be established.

The error assigned is admitted by the plea, and requires a reversal of the judgment.

It was decided in *Nickerson* v. *Howard*, 25 Maine, 394, that a private could not be excused from the performance of military duty, if the proceedings of a court martial, removing the captain of the company to which he belonged, were illegal and void.

The plaintiff in the present action was the captain and the party, over whom the court martial assumed to exercise jurisdiction. If the court had no jurisdiction over him, through the want of a proper organization, he could not be so far affected by its decree, as to be compelled to pay a fine for not doing duty under the ensign of the company. His commission is evidence of his right to command, and the defendant must show, that he has been lawfully deprived of his authority under it.

The tenth section of the act of March 28, 1837, c. 276, relates to actions brought to recover fines and costs imposed by courts martial, and not to those commenced to recover fines for non-attendance at a company training.

It is not the province of the Court, to extend this section of the statute to cases, to which by its terms, it does not apply.

We are unable to determine from what is exhibited to us whether the court martial was or was not properly organized.

It may be that the defendant in error will be able to show, that the action is maintainable.

If it had been made fully to appear, that there were objections to the action which could not be removed, then the judgment would have been reversed without further proceedings, but in the case of *How* v. *Merrill*, 5 Greenl. 318, the rule is stated to be, that where the action may be sustained and the decision of the tribunal exercising jurisdiction is erroneous, a new trial will be granted to correct the mistake and give the party aggrieved the benefit of a legal trial.

The defendant in error should have an opportunity to present his case in such manner, if he is able to do it, as will obviate the objections, which are made.

The judgment of the judge of the Police Court is reversed, and a new trial ordered at the bar of this Court.

AMOS B. WELLMAN *versus* EDWARD R. SOUTHARD *& al.*

In a suit upon a *joint* note, made by the defendants, *in their individual capacities*, prior to the Revised Statutes, the right of one of the defendants to rely upon the statute of limitations is not impaired by any payment or written acknowledgment made by the other since the Revised Statutes, though within six years before the suit.

Neither will the statute bar be any the less applicable, though in fact the makers of such note, at the time of its date, were *copartners* in business, and it was given for a copartnership debt.

Neither will the statute bar be dislodged by proof, that the defendant, within the last six years included the note in an unsigned schedule of his indebtednesses, made by himself for his own use.

While E. & S. were copartners, they gave a joint note in their *individual capacities*, for a partnership debt. E. sold all his interest in the concern to N. who was to pay E's half of the debts. Within the last six years, S. notified N. that the note now in suit was justly due, and N. consented that it should be paid, and S. afterwards collected sufficient of the company claims to pay the note and all other company debts. *Held*, these facts did not remove the bar created by the statute of limitations.

EXCEPTIONS from the District Court, ALLEN, J. The action was upon a joint and several note, dated June 15, 1836, on demand. The writ, dated Sept. 19, 1846, also contained a count for services, and for money had and received. The only defence to the suit was the statute of limitations. Emerson was defaulted.

To avoid the operation of the statute, the plaintiff showed an indorsement upon the back of the note made by Emerson, one of the defendants, as follows: — "Nov. 10, 1843. Received fifty-nine dollars and two cents, in part of the within note, and I acknowledge the note to be justly due from said Southard and myself. M. Emerson."

It also appeared, that the defendants were partners in building mills before the note was given, and that the plaintiff worked for them, and for this the note was given; that in August, 1836, one Newhall bought out Emerson's interest in the company business, and that in the winter of 1842, *Southard*, in an attempt to settle with *Newhall*, made out his bill of items, among which was included the note in suit, as an outstanding debt.

Newhall expressed a willingness to have the debts canceled, and authorized *Southard* to settle the whole mill business, and he was to account to Newhall for one half of the surplus.

In the fall of 1842, the business was closed up, and money to the amount of eight or nine thousand dollars paid into *Southard's* hands.

The plaintiff desired the Court to instruct the jury: —

1. That the agreement between Southard and Newhall was sufficient to prevent the operation of the statute of limitations.

2. That the receipt of funds by Southard to pay all the company debts, at any time within six years prior to the date of plaintiff's writ, would make the defendants liable under the money count.

3. That the payment by Emerson, as one of two joint promisors and his acknowledgment of the debt, made a new promise, sufficient to take the demand out of the statute as to both.

4. That the note, being given before the passage of the Revised Statutes, cannot be affected by them.

The jury returned a verdict for defendant.

Wilson, for plaintiff.

The Revised Statutes could not affect this note, for it was given before they were enacted. They could only apply to subsequent contracts.

This was not a case of a new contract, but the reviving or continuing an existing one.

The act or declaration of one of two or more promisors, binds the whole. 23 Maine, 413; 2 Doug. 652; 14 Pick. 387; 21 Maine, 433; 22 Maine, 499.

Washburn, for defendant.

TENNEY, J. — By the terms of the note, more than six years intervened between the time, when the makers were liable to pay, and the commencement of this suit. Consequently the statute of limitations will apply unless the case is taken out of its operation by other proof than that afforded by the note itself.

One ground relied upon by the plaintiff at the trial, was, that by the residence of Southard beyond the limits of the State, the running of the statute was suspended for such a length of time, that his residence in the State after the note was given and before the suit, was less than six years. Rev. Stat. chap. 146, sect. 28. Under instructions which were unobjectionable, the jury found otherwise.

The plaintiff relied upon the renewal of the promise, which he contends was effectual, by part payment of the note by Emerson, one of the makers, on November 10, 1843, and an acknowledgment signed by him at the same time, that the note was "justly due from him and Southard." Although the makers of the note may have been partners in the business, wherein the plaintiff performed the service, for which the note was given, the note was not given by the firm, but by the individual members thereof in their private capacity, and as such they are sued in this action. The partial payment and acknowledgment of indebtedness therefore, cannot have the effect that it might have had, if it was a debt of the firm. Neither the payment nor the acknowledgment made by Emerson, can prevent the effect of the statute in favor of Southard, as is expressly provided in Rev. Stat. chap. 146, sections 20 and 24. The note is not excluded from the operation of these provisions, by being made before they were enacted. By the fair interpretation of the statute, it was designed to affect contracts then in existence, equally with those, which might be subsequently made. This modification has reference to the remedy and not to the right, and is free from objection.

It is insisted that the facts stated by Newhall in his deposi-

tion are sufficient for the maintenance of the action, on the count for money had and received, notwithstanding the reliance in defence, upon the statute of limitations.

If a sum of money is deposited by a debtor with a party, who has no title thereto, for the purpose of being passed to the creditor, and it is not paid according to direction, after demand by the creditor, he may maintain a suit therefor. But the facts stated by Newhall, are unlike those supposed. The makers of the note are Southard and Emerson. Newhall took the place of Emerson in the business, the liabilities, and benefits of the firm. The expression by Newhall, in 1842, of a willingness to pay Emerson's portion of this debt, when informed by Southard, that it was due from him and Emerson, and afterwards giving Southard the power to collect the debts due the firm, and the receipt by Southard of a large amount of those debts, could not be a new promise such as is required by the statute to have been made by Southard to prevent the effect of the statute; and was not such a transaction as would enable the plaintiff to commence a suit thereon. It was an arrangement between Southard and Newhall, which could in no manner modify or affect the liability of the makers of the note.

The schedule of outstanding indebtedness made by Southard, in which was embraced this note, was not signed by Southard, and if it had been, was not such as the plaintiff could appropriate to himself, in order to avoid the statute.

The instructions given by the Judge were not legally erroneous; and the instructions requested in behalf of the plaintiff and not given, were properly withheld.

Exceptions overruled.

JOHN WILKINS, *administrator de bonis non, versus* ISAAC W. PATTEN.

There were annuitants and also residuary legatees under a will. One of the legatees, being indebted to the estate, gave his note therefor to the executor, and afterwards transferred all his interest in the estate to one of the annuitants, who soon afterwards purchased in all the rights of the other annuitants and of the other residuary legatees. In an action upon the note by the administrator *de bonis non*, for the use of such purchaser; *held*, that said purchases were no defence.

EXCEPTIONS from the District Court, HATHAWAY, J. The action was upon a note, as follows: —

"For value received, I promise to pay Leonard March, executor, or order, fifty dollars on demand and interest."

The note was indorsed to the plaintiff.

Leonard March was executor of the will of Amos Patten. Susan, widow of said Amos, and others, were annuitants under said will, and the defendant and three others were residuary legatees. March resigned his trust, and the plaintiff was appointed administrator *de bonis non*. The note was given for a debt due to the estate.

The defendant afterwards conveyed to said Susan all his interest in the estate, and she afterwards acquired the interest of all the residuary legatees, and also of all the annuitants. Prior to the commencement of this suit, all the debts of the estate had been paid.

The Judge instructed the jury that, if they were satisfied that Susan Patten, at the commencement of this suit, and at time of the trial, was the only person interested in said estate, and that this action was commenced and prosecuted in the plaintiff's name, for her sole benefit, it could not be maintained; that the release from the defendant to Susan Patten conveyed only the balance due him from the estate, and that she being the only party in interest, and accepting that release, the note in suit was canceled, so that no action could be maintained thereon for her benefit.

A verdict was returned for defendant.

W. P. Fessenden, for plaintiff.

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

HOWARD, J — It appeard at the trial, that the note in suit was a part of the estate of Amos Patten, the testator; that Susan Patten and others were annuitants under his will; and that the defendant, John, Willis and Moses Patten, Jr., were his residuary legatees. On Nov. 16, 1842, the defendant conveyed to Susan Patten, by deed of quitclaim, for the consideration of $500, all of his estate, right, title and interest, use, trust, claim and demand, in and to all of the real and personal estate of the testator. On August 9, 1843, John Patten conveyed in like manner to her, all of his interest in the same estate; and there was testimony tending to show that she acquired, subsequently, by purchase, all the interests of the other annuitants, and residuary legatees, to the same estate, and that the debts of Amos Patten were paid.

When Susan Patten purchased the interest of the defendant, it appears, from the evidence stated in the exceptions, that she had no other interest in the estate of the testator, then in the hands of the administrator, (the plaintiff,) than as an annuitant. She had no control, or right of control, over the estate of the deceased, or over the claims and interests of the other annuitants, and residuary legatees, and she could not, therefore, cancel the note of the defendant, which was then a part of that estate, and subject to the claims of all the annuitants and legatees. Her subsequent purchase of the interests of the other annuitants and legatees, did not alter the relation between the parties to this suit. Although she is now the only person interested in the estate of Amos Patten, she did not acquire such interest from the defendant, but in part. The law will regard and protect her subsequent purchases as readily as it will the previous purchase from the defendant.

The instructions of the presiding Judge cannot be supported to their full extent. *Exceptions sustained, and a new trial granted.*

Enoch Bunker *versus* Samuel Miles.

Where the defendant was employed by the plaintiff to purchase a certain horse, and was limited in the price; *held*, that he could not make a profit to himself out of the transaction, and that whatever money remained in his hands after paying the price of the horse, and deducting his stipulated pay for his services, might be recovered in an action for money had and received.

Exceptions from the District Court, Hathaway, J.

Assumpsit for money had and received. It appeared that the defendant bought a horse of one Seaver, in Sept, 1847, and was to give $65, and if he should sell him for more, he was to give Seaver one half of the excess. He went back the same day, and told Seaver he had sold the horse to plaintiff for $80, paid him the one half and requested him to say nothing about it.

It also appeared, that in Sept. 1847, Miles received of the plaintiff $80, with which he agreed to buy that horse for the plaintiff, and for as much less than that as he could, and was to have one dollar for his trouble.

It also appeared, that at the time Miles brought the horse to plaintiff, he was asked if he had saved any thing, and Miles said he had not, and the plaintiff said he would pay him for his trouble, to which it was replied, all right.

The Court instructed the jury, that if they believed the testimony, they would return a verdict for the plaintiff; that if the defendant undertook to act as agent for plaintiff in purchasing the horse, and received his money for that purpose with instructions not to exceed the sum of $80, but to get the horse as cheap as he could, and was to receive one dollar for his services; it was the defendant's duty to be faithful, and if he had received $80, with which to make this purchase, and had done so for $72,50, the plaintiff would be entitled to recover the difference, deducting the one dollar the defendant was to have for his trouble, and also interest from the date of the writ.

A verdict was returned for plaintiff.

J. & A. Waterhouse, for defendant, argued —

1. That the title to the horse was in the defendant, before he had any interview with the plaintiff relative to the trade.

2. Defendant sold the horse to plaintiff on the evening of the same day upon which he bought him of Seaver, and he could not act as agent for plaintiff in the purchase of a horse of Seaver, which he then owned himself.

3. If this is so, then the defendant is not liable in this form of action. If this is a case of fraud, which is all that can be contended for, the plaintiff should have brought his action upon the case for deceit, or have rescinded the trade and returned the horse.

But there was no fraud. The defendant's statement in regard to the price was immaterial, and did not induce the plaintiff to close the trade. If it were otherwise, he has sustained no injury.

Questions of fraud are peculiarly within the province of the jury, but in this case the Court decided the whole case, as matter of law; leaving nothing to be determined by the jury, but the credibility of the witnesses.

A. Sanborn, for plaintiff.

TENNEY, J. — The case was put to the jury upon evidence introduced by the plaintiff alone. It appeared that he placed in the hands of the defendant the sum of eighty dollars and requested him to obtain a certain horse. The defendant was restricted in the price to be paid, to that sum, and was to procure the horse at a less price, if he should be able to do so, it being agreed that the defendant should receive the sum of one dollar for his services in purchasing the horse. He obtained the horse and delivered him to the plaintiff, who received him and disposed of him the same day. The defendant represented to the plaintiff, that he had saved nothing for himself. It appears by other testimony that the price paid for the horse by the defendant did not exceed the sum of $72,50.

If the defendant made a valid contract with the plaintiff, to do the service requested as an agent, and did do it as was agreed, he was not at liberty to make a profit to himself in the transaction, in which he was acting as the agent; and whatever sum remained in his hands, after paying the price of the horse, deducting the compensation to be made to him, was the money of the plaintiff, for which the equitable action of money had and received could be maintained. The instructions to the jury were consistent with these principles and a verdict was rendered for the plaintiff.

Exceptions overruled.

JACOB DRUMMOND & *al. in Equity, versus* DAVID B. HINKLEY & *al.*

A grant to the defendant to have in his own flume, (which is supplied with water from the plaintiff's dam,) "a gate of twelve inches square, or equal to that," was *held* not to justify the use, *within the flume*, of a horizontal wheel, four and a half feet in diameter, propelled on the reaction principle, by the escape of water from the flume, through the wheel by twelve apertures, distributed over an area equal to several square feet, although the areas of all the apertures do not, in the aggregate, amount to more than twelve inches square.

Under such a grant, the grantee is not authorized to apply water upon a wheel, revolving *within the flume;* nor in any way, except outside of the flume and through an orifice or orifices in the flume. — PER WELLS, J.

Whether the allowed quantity of water can lawfully be taken through more than one orifice, *quære*; but if so, it must all be taken through a gate or space not containing a superficies of more than twelve inches square. — PER WELLS, J.

BILL for an injunction and for relief. The defendants had obtained a grant to take water from Pearson's milldam into their flume, through a penstock, and "to have a gate of twelve inches square or equal to that, in their flume." The lower end part of the flume was afterwards built by the defendants, in form of an upright cylinder, into which the water was plentifully admitted through a tunnel formed tube. At the bottom of the cylinder was placed their wheel, revolving

upon an iron plate. It was of "Valentine's reversing centrifugal" patent. It was a horizontal wheel of four and a half feet in diameter, with an upright shaft, and was propelled by the reaction of the water escaping from the flume, through twelve jet openings or orifices of discharge in the wheel, the openings or orifices averaging not more that six inches in length by two inches in width.

The prayer of the bill was, "that the said defendants be ordered and enjoined by the injunction of this honorable Court to desist and refrain from drawing water from their said flume, except through a gate-way twelve inches square, or equal to that, and that they be ordered and enjoined to reduce said gate and gate-way to the dimensions of twelve inches square, or equal to that, and that they be ordered and enjoined to shut said gate and not to raise the same until they shall have reduced the same to said dimensions, and that they be ordered and enjoined to close up permanently and effectually all of said gate-way or opening in said flume, except a superficial area twelve inches square, or equal to that; that is, an area of one hundred and forty-four square inches.

"And that they be ordered and compelled by the decree of said Court, to make reasonable satisfaction to the petitioners for the damages already done, and for such damages as they may, or shall hereafter do to the petitioners by the drawing off of said water and hindering and obstructing them in the use of their mills, and that all proper directions may be given for effectuating the purposes aforesaid.

"And, that in the mean time and forthwith, the said defendants may be enjoined and restrained, in manner aforesaid, from opening, or raising any gate, so constructed by them in said flume, as would or might draw from their said flume, to a greater extent, or more than would be equal to twelve inches square, as aforesaid, and permanently or effectually close or fill up all of said gate-way or opening, except an area equal to said twelve inches square, and so that no more than the last mentioned gate of said area is or can be opened to vent water from said flume.

"And that the petitioners have such other or farther relief in the premises as the nature and circumstances of the case may require and to your honors shall seem meet."

It was asserted by the defendants, that the application of the power, in that form, did not draw more water from the flume, than would pass through a gate of twelve inches square. This position was denied by the complainants.

Upon that question, much evidence was offered. Scientific men, and experienced practical men gave their opinions. Experiments were made and testified to by men practically and scientifically acquainted with matters of hydraulics and hydrostatics. Their results were at variance.

Kent and *Wakefield*, for the plaintiffs.

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

WELLS, J. — The several interests of the parties to this bill were derived from John Pearson. The defendants claim the use of the water, by virtue of a deed from Pearson to Hinkley, one of the defendants, bearing date September 9, 1830. This deed provides for the manner, in which the water is to be taken from Pearson's saw-mill flume, and conducted to Hinkley's flume; and it further provides that Hinkley "is to have a gate of twelve inches square, or equal to that, in his flume." The water is to be taken from such gate.

The defendants admit, in their answer, that they have no right to a greater quantity of water, than would flow through "a gate twelve inches square, or equal to that," in the flume, and say they have not used any greater quantity.

They state, that the wheel used by them, is Valentine's centrifugal reversing water-wheel. "Said wheel has an upright shaft, and is placed at the bottom of the circular part of the flume, revolves upon an iron plate, and is enclosed in a circular band or gate of iron; the wheel has twelve apertures, averaging less than two inches in width, and six inches in length, and is set in motion by raising the said circular gate of iron, in which it is enclosed, and all the water, which passes from the flume, passes and escapes through the twelve small aper-

tures, in said wheel, which are the only gates, or gate-ways or openings, which draw water from said flume." They deny, that more water passes through the apertures, than would by a gate twelve inches square.

The testimony on this point is contradictory. It is principally derived from experiments, and the opinion of machinists and mill-wrights. But from the view we have taken of the case, it is unnecessary to decide upon it.

The mode of estimating the volume of water, as expressed in the deed of John Pearson, cannot be disregarded. He had a right to prescribe the manner in which the quantity of water should be ascertained, and he has done so. It was to be by a *gate* in the flume, twelve inches square, or equal to that. The gate may vary in form, from a square, but its area is limited to a superficies, equal to twelve inches square. If a gate of a larger size is made, and the water is taken through several apertures, although the proper quantity of water may be taken, the grantee of Pearson has never obtained the right to have such a gate, in the flume. Pearson must have intended to prescribe such mode of measuring the water, as would be constantly open to inspection, and would be so obvious, that the quantity could never become the subject of controversy.

It does not fall within the province of judicial tribunals, to mould the contracts of parties, into what they may think to be expedient, nor to limit or extend their meaning. It would be grossly unjust to change the simple and effectual mode, prescribed by the grantor, for determining the quantity of water, to one complicated and perplexing, and to depart from the literal and fair construction of his deed, and thereby involve his heirs in expensive litigation, to ascertain their rights.

It is manifest, the grantor meant to express clearly in his deed, that the quantity of water should be measured by the size of the gate. So much water was to be taken, as would flow through a gate twelve inches square, or equal to that.

The apertures, through which the water runs, in the wheel of the defendants, as we understand, are extended over a space more than twelve inches square. They are made over a

broader area, than is warranted by the deed, and are not permitted, in such manner by it.

It may be that the grantor contemplated, by fixing the size of the gate, that the water should be used in one volume. Its quantity could be more easily ascertained when taken from one, than from several orifices. To ascertain the quantity of water, passing from twelve apertures, in the wheel, must necessarily require an accurate and careful examination, even when the wheel is at rest; and when in motion, it is difficult to perceive how they could be measured, except by the amount of water vented. Some of the witnesses say, that more water will pass through the apertures, when the wheel is in motion, than when at rest, and there is testimony entirely the reverse. Such a question could not be settled, in a manner entirely satisfactory, without actual experiment, but the measurement of the gate would determine the quantity very easily.

The variance between the witnesses, is an apt illustration of the difficulties, arising from a resort to the apertures, to find the quantity of water. And if it were once settled upon any given number and size of them, the controversy might be renewed, as often as others of different size and number should be made.

But we do not give any opinion upon the question, whether the water may be taken, from more than one opening in the flume. Yet we do mean to decide, that if it is taken through several apertures, they must be embraced within an area of twelve inches square, or one equal to that. The deed does not allow any larger opening than that in the flume.

There is also another objection to the course pursued by the defendants, and which is not permitted by the deed.

The water is to be drawn from the flume and is not to be used in it. The deed does not authorize the action of the wheel, in the flume. No such grant is made. The answer states, that the wheel is placed at the bottom of the circular part of the flume, and the passage of water through the apertures is the only mode by which it is taken from the flume. The grantor did not convey the right, to have the water set

in motion, by any machinery placed within the flume. It is not for us to say, whether such use of the water would be an essential detriment to him, but whether he has granted it. He had the power of judging of the degree of interference, which he would permit to be exercised, over his own property, and of the manner, in which it should be done.

The advantages to be derived from the use of improvements in machinery, can never justify the construction of a deed, differing from its plain and obvious import.

The conclusion to which we have arrived, is, that the plaintiffs are entitled to the injunction for which they have prayed in their bill.

Horace Jenness *versus* Jabez True.

Where one owed the plaintiff upon a written contract; and a guaranty that he should perform was indorsed on it by the defendant, the law presumes the plaintiff to have been the party, to whom the guaranty was made, though not named in it.

Plaintiff held a lien contract for the delivery of lumber. He assigned it to A, to secure him for signing an accommodation note, of $1000, which the plaintiff negotiated and sold. In the assignment, he authorized A to use the contract, for making the money to pay the note, if he, the plaintiff, should not, from other sources, supply funds for the purpose.

Afterwards the defendant purchased the plaintiff's remaining rights in the contract, subject to that lien; and gave the plaintiff an obligation that, from the proceeds of the lumber, then in A's hands, the amount of the note should be deducted, for the payment of the note, and for that purpose the defendant supplied some funds to A, which A paid to the holder of the note. A afterwards failed, and the defendant paid to his assignees the amount of the balance, on the note, but they did not pay it over on the note; and the plaintiff was obliged, upon his indorsement, to pay that balance, for which this suit is brought. *Held*, that the defendant, by furnishing the funds to A's assignees, had fulfilled his contract, and was not bound to see to the appropriation of the money.

Assumpsit. The plaintiff sold lumber to W. W. Harris on credit. The contract of sale was signed by both parties. By it, Harris promised to pay the price, and plaintiff retained a lien for his security. Soon afterwards, the plaintiff, wanting to

raise money, procured Adams & Co. to give him their accommodation note of $1000. For security, he assigned to them the Harris contract, and authorized them "to use the contract for the purpose of making, out of the proceeds, sufficient to pay said note, if he, the plaintiff, should not in some other way, place them in funds sufficient to pay it. The plaintiff indorsed the note, and raised money upon it.

Soon afterwards, the plaintiff transferred to the defendant all his remaining interest in the contract. As a part of the trade, the defendant indorsed upon the contract, (then in the possession of Adams & Co.) the following agreements, viz: —

"I hereby guaranty the agreement or contract herein specified on the part of W. W. Harris, and that the sum of $1000 shall be deducted from the proceeds, to be appropriated to the payment of Franklin Adams & Co's note, to Horace Jenness, payable October 27–30, 1846."

"I hereby agree to save Horace Jenness from all and every liability mentioned in this contract with W. W. Harris."

Adams & Co. permitted defendant to manufacture the lumber. Prior to the payday of their note, the defendant had placed $847,38 worth of it in their hands, and that amount they had paid to the holder. The residue of the $1000, with its interest, was paid by defendant to the assignees of Adams & Co. The plaintiff afterwards was compelled, upon his indorsement, to pay the balance, $152,62 of principal and $59,22 interest, and take up the note. It is to recover that amount, ($211,84,) that this suit is brought.

The plaintiff contends that the defendant was bound to pay it, not to the assignees, but to him, to be applied for the discharge of the note, and admits that all other parts of the defendant's contracts had been performed.

The case was submitted to the Court for nonsuit or default, according to the legal rights of the parties. A deposition was referred to. The import of it appears in the opinion of the Court.

Rowe, for plaintiff.

In the trade between these parties, the defendant kept back

$1000 to meet the note. He was bound to see it appropriated upon the note. He assumed the plaintiff's liabilities. That he paid to the assignees of Adams & Co. was no fulfilment of his contract.

A. W. Paine, for defendant.

A construction is to be given to that part of the defendant's contract, which relates to the $1000 note. No other matter is in controversy. The defendant was, out of the lumber, to supply funds to meet the $1000. He did supply them to Adams & Co., the makers of the note. That this was all he was bound to do, will appear from several considerations.

1. The plaintiff contemplated that the funds should go to them. He was contingently "*to place them in funds to pay the note.*" The defendant was only to do what the plaintiff had been bound to do.

2. The defendant took the lumber under an incumbrance. His only duty was to remove that incumbrance. To do that he must pay the party, who held this note. Adams & Co. were that party. The plaintiffs had assigned the contract to them expressly, that they should "*use it for the purpose of making out of its proceeds, sufficient to pay the note.*" The plaintiff himself had invested them with the lien, and he could by the contract, discharge it only by "*placing them in funds*" to pay the note. They had the legal title to the contract, and it was in their possession.

3. The defendant never agreed to pay any body. He only agreed that, "the $1000 should be deducted from the proceeds of the lumber to pay the note." The lumber was at that time in the control of Adams & Co. by a perfect title, for the same purpose of having that deduction made; the purpose of retaining so much out of its avails to meet the note. The paper on which the plaintiff relies, could be nothing more than, that he was not to object to Adams & Co's withholding so much of the lumber.

4. The $1000, was merely a loan to the plaintiff. In his arrangement with the defendant his object was merely to secure Adams & Co. He was not seeking security from

them through the defendant. There was no distrust of *their* solvency.

5. The defendant bought nothing but a right to redeem. Why should he agree to pay any body? Hence his contract was simply to permit the deduction to be made from the lumber, to the amount of the lien. He took no obligation from any one, that, on his paying the $1000, the lien should be discharged. Who could make the deduction? In other words, who could retain the lumber for paying note? Surely no one but Adams & Co. for the whole of it was in their hands.

6. Payment to plaintiff or to his indorsee, would not have discharged the lien. The defendant could be secure in no other way than by placing the funds in the hands of the makers of the note. His doing it would avoid circuity. For if he had paid plaintiff, it would have been the plaintiff's duty to pay it to them.

7. The contract expresses no consideration. The deposition proves one, and that it moved from Adams & Co. to the defendant. On getting the defendant's contract, they credited to plaintiff the $1000, which they had charged him in account.

When the contract was made by the defendant, the note was outstanding in the hands of some indorsee, whose call for it would be upon Adams & Co. the makers. The parties therefore properly provided that the funds to meet it should be placed in their hands.

The plaintiff contends that the defendant was to see the funds appropriated to the payment of the note. But it was not so. He only stipulated that they might retain lumber for that purpose. The words used, as to the appropriation, only express, not how the defendant, but how Adams & Co. were to use the money. They only express the reason of the detainer by them.

Rowe, in reply.

The guaranty by defendant was made at the plaintiff's

request and for a consideration moving from him, and for his benefit alone. Adams & Co. were no parties to it. They did not need it, or desire it. The assignment by the plaintiff had made them secure. They paid no consideration for it. The plaintiff had indorsed the note, and had put funds in the defendant's hands to pay it. The plaintiff had an interest in the solvency of the makers, Adams & Co. The defendant's contract was in fact a guaranty of their solvency; it was an agreement that the note should be paid, in whose hands soever it might be. We do not contend he was to pay it to the plaintiff. In express words, "it was to be appropriated to the payment of the note."

It was therefore the defendant's duty to see the avails of the lien lumber so appropriated.

The amount advanced to Adams & Co. out of the lumber was a mere credit given to them. They received it before the payday of the note. There is no proof that it was placed in their hands towards paying the note. For want of such proof the defence fails. It also fails because Adams & Co., not being a party to the defendant's contract, a payment by him to their assignees, was made in his own wrong.

SHEPLEY, C. J. — A contract was made on June 15, 1846, between the plaintiff and W. W. Harris, by which the plaintiff sold to Harris a lot of timber to be sawed into clapboards, and delivered to the plaintiff at an agreed price.

On July 27, 1846, the plaintiff assigned his interest in that contract to Franklin Adams & Co. "to be held by them for security for the amount" of a note for $1000, made at that time by Adams & Co., and payable to the plaintiff or his order in three months from date. The assignment also provided that Adams & Co. should "use the contract for the purpose of making out of the proceeds sufficient to pay said note, if said Jenness shall not place them in funds sufficient to pay it; if, however, said Jenness shall place them in funds to pay said note before it shall become due, then this assignment shall become void; otherwise remain in full force."

Adams & Co. became entitled by virtue of the assignment, to receive all the clapboards from Harris, and to retain so many of them as would be sufficient to pay their note.

On August 21, 1846, the plaintiff sold his remaining interest in that contract to the defendant, who made the following indorsements upon it.

"I hereby guaranty the agreement or contract herein specified on the part of W. W. Harris, and that the sum of one thousand dollars shall be deducted from the proceeds, to be appropriated to the payment of Franklin Adams & Co's note to Horace Jenness, payable October 27-30, 1846; and also the said Harris shall pay all advances, made on account of said clapboards."

"I hereby agree to save Horace Jenness from all and every liability mentioned in this contract with W. W. Harris."

These contracts, signed by the defendant, must be regarded as made with the plaintiff. The latter is so made in express terms. The former is not stated to have been made with Adams & Co; and they were not parties to the original contract made with Harris. The defendant assumed that Harris should perform, and the law infers, that this engagement was made with the other party to the contract made with Harris, although his name is not mentioned. Adams & Co. could not have maintained a suit in their own names against the defendant. Whatever beneficial interest they had, could have been obtained at law, only in the name of the plaintiff.

The contract cannot be explained or varied by parol testimony. So much of the testimony of Ephraim Brown, as attempts to do this, must be excluded. The rights of the parties must be determined by the terms of their written contracts.

There is no provision, that the assignment to Adams & Co. shall cease to be operative, or that the defendant should place funds in their hands to pay their note before it became payable. The defendant stipulated, that Harris should perform. The effect of such performance after the assignment, would be to place the lumber in the hands of Adams & Co. He also agreed, that one thousand dollars "shall be deducted from the

proceeds, to be appropriated to payment of Franklin Adams & Co's note." This deduction could be made only by them, or by the defendant, by leaving that amount of the proceeds of the lumber in their hands. Adams & Co. were entitled to make the deduction, to be appropriated by themselves to the payment of their note. Their rights derived from the assignment, were not diminished by the agreement made between the plaintiff and defendant. The stipulation on the part of the defendant is not, that they shall appropriate the amount to be deducted to the payment of their note, but that so much shall be deducted for that purpose. The defendant does not agree to pay that note. Having purchased the plaintiff's interest, deducting from the estimated value of it the amount of the note, he engaged to deduct the same amount from the proceeds of the lumber, which was to come into the possession of Adams & Co. and to leave it in their hands to pay their own note. This would have fully accomplished the object designed by the parties, if an event not then contemplated by either party, had not subsequently happened by the failure of Adams & Co. For that event no provision was made. A loss has occurred and the question arises, whether the plaintiff or defendant must bear it. The defendant cannot be compelled to assume the risk and bear the loss without some clause in the contract obliging him to do so. In the absence of any engagement to assume it the loss must rest, where it falls by the operation of law.

It is said in argument, that Adams & Co. were not authorized to apply any of the proceeds of the lumber for that purpose, until their note became payable, and that they failed before that time. They received the assignment for security of the amount of their note, and could detain lumber to that amount as soon as sufficient came into their possession against all other persons, unless other funds were provided for payment of their note. The defendant could not otherwise deprive them of that right, and he did not engage to provide funds from other sources.

Rufus K. Hardy testifies, that "clapboards were afterwards

delivered under said contract to Franklin Adams & Co. to an amount sufficient to pay said note and advances, except one hundred and fifty-two dollars and sixty-two cents, before September 4, 1846, which was the time of our assignment. After that time said True paid to our assignees that balance." This is alleged to be a gross attempt to give a false coloring to the transaction; but upon an agreed statement of facts, making the deposition of a witness a part of that statement, the Court is not authorized to regard the statement as unworthy of credit.

The defendant stipulated, that Harris should pay all advances, but there is no complaint of a failure to perform this engagement.

He also agreed to save the plaintiff harmless "from all and every liability mentioned in this contract with W. W. Harris." The note is not mentioned in the contract made with Harris. It is only mentioned in the assignment with which Harris had no connexion.

The defendant was obliged to deduct the amount of the note from the proceeds of the lumber, or in other words, to leave so much of the proceeds in the hands of Adams & Co., and if he failed to do so there was a failure of performance. He does not appear at any time to have left in their possession or to have deducted the full amount of that sum. There was a lack of $152,62 which was paid at some future day to their assignees. The inquiry is therefore presented, whether that amount was rightfully paid to them. At the time of their failure, Adams & Co. continued to have a valuable interest in the contract, to obtain an amount of lumber sufficient to enable them from its proceeds to pay the note signed by them, or to recover damages as a compensation for a breach of it. That interest was conveyed to their assignees. The plaintiff could not insist, that the damages payable by the defendant, as guarantor of the contract of Harris, should be paid to himself, for he had assented by the assignment, that sufficient lumber to pay their note should be delivered to Adams & Co. The fact that Adams & Co. did not pay the note, which

became payable after their failure, would not destroy their right to receive the lumber or to recover damages, for the assignment was not to become inoperative or void, upon their neglect to pay their note at maturity, but only in case the plaintiff should provide funds to pay it.

The payment by the defendant of the damages recoverable for a breach of the contract by Harris, was therefore rightfully made to the assignees of Adams & Co. *Plaintiff nonsuit.*

CALVIN COPELAND *versus* CALVIN COPELAND, JR. AND JAMES C. BUSWELL.

Where a warranty deed is given of land which is subject to a lien claim, and the grantee agrees in writing, as a part of the consideration for the sale, that he will extinguish the lien, he cannot maintain an action upon the covenants in the deed, to be indemnified for the loss he may sustain by reason of such lien.

If there be a breach of the covenants in a warranty deed made, by the defendant to the plaintiff, by reason of an outstanding incumbrance, and if the plaintiff have neither removed the incumbrance, nor been evicted, he can, in an action upon the covenants for such breach, recover the nominal damages only.

COVENANT broken, upon the covenants in a conveyance by a warranty deed to the plaintiff of a lot of land containing some valuable factory buildings just erected by the defendants.

The breach was alleged to consist in several levies upon the land, by persons who, subsequently to the said conveyance, attached the same in suits against the grantors, for the recovery of lien claims, for labor and materials in the erection of the factory buildings. There was an offer to be defaulted for one dollar.

The facts were as follows: —

The defendants were copartners. They were indebted to the plaintiff in large sums, both as individuals and as a copartnership, and were much indebted for the erection of the factory buildings. The plaintiff had sued them for his debts

aforesaid, and attached the property. Lydia White had some claims on the land.

It was then agreed in writing, between the parties, that the defendants and L. White should convey the property to the plaintiff, for which he should pay a sum to be fixed by an appraisal, viz: —

"The said C. Copeland on his part agrees to pay the said Copeland & Buswell, as follows, viz: — Cancel all notes and accounts due himself and the late firm of C. Copeland & Co. against Copeland & Buswell, Calvin Copeland, Jr. and James C. Buswell; also a warranty deed of the Stillman Moulton farm in Parkman, at seven hundred dollars; *also pay all debts of the firm of Copeland & Buswell, for which said property is holden;* also pay all other debts of the said firm of Copeland and Buswell, as far as said property will go according to the appraisal; the debts contracted for the buildings and water power to have the preference. The remainder of said property, if any, after paying all the debts as above, is to be paid for, one half in stock and one half in grain, one half of each the present winter, and the other half next winter, at cash price, to be paid to the said C. Copeland, Jr. and James C. Buswell, according as each have invested. It is mutually agreed, that if either of the above fails to fulfil the conditions of the above agreement, they or he shall forfeit and pay to the other the sum of two thousand dollars."

The plaintiff offered to prove that, at the time of the appraisal, he expressly informed Copeland & Buswell that he would not have any thing to do with their debts, and that it was agreed that, if any balance should be due to plaintiff on account of the Moulton farm, said balance should be secured to him by mortgage.

The appraisal amounted to $6211,77, and the property was thereupon conveyed to the plaintiff by the warranty deed of the same date with the abovementioned written contract between the parties. And it is upon that deed, the present suit is brought.

The plaintiff settled for the property as follows: —

By deed to L. White of the Moulton farm,	$700,00
And by discharging notes against the firm of Copeland & Buswell, the defendants,	2421,38
By discharging notes against C. Copeland Jr.,	2907,90
" " against J. C. Buswell,	729,10
	6758,38

being an overpayment of $546,61, above the amount of the appraisal.

For that overpayment the plaintiff waived any security by mortgage, and received therefor the note of his son, C. Copeland, Jr., one of the defendants.

The defendants thereupon gave to the plaintiff a receipt in full for the appraisal value of the estate.

Subsequently to the giving and to the recording of said warranty deed to the plaintiff, the several suits for large amounts, alleged by the respective plaintiffs to be for lien claims as aforesaid, were commenced against said copartners, and the attachments and levies were made thereon, which attachments and levies, as the plaintiff alleges, constitute breaches of covenants in said deed of warranty. And this suit is brought to recover damage for the same.

There was much controversy, and much proof, upon the question, whether the alleged lien claims, and the proceedings upon them, were of such a character as to give validity to the levies.

Several questions as to the admissibility of testimony, the amending of official returns, and other matters, were presented and argued. But the view taken by the Court of another portion of the case, renders it unnecessary to publish them.

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

The covenants have been broken. The *lien* debts and judgments, followed by levies, have taken the property deeded to plaintiff.

By chap. 125, sect. 37, 38, all that is requisite to show is, that defendants are owners of the land, that labor and mate-

rials have been furnished, and that a suit has been brought within ninety days. All this has been done.

The statute requires no variation in the form of the writ; nor that the contract should be in writing, as formerly, under stat. chap. 273, sect. 1 and 2. Neither is the taking a note a bar to claim for a lien. 7 Blackford, 218.

The settlement made under contract of December 8, 1846, was strictly in accordance with the legal rights of the parties. The plaintiff having attached all the property of C. Copeland, jr. and Buswell, might arrange his levies as far as his interest extended, regardless of partnership rights, so far as real estate is concerned; the law of copartnership not extending to real estate. *Blake* v. *Nutter*, 19 Maine, 16, and cases cited.

Whether the settlement was in accordance with, or variant from, the contract, is immaterial, inasmuch as the parties have a right to alter or modify their contracts *ad libitum*, and change as they may judge best, the order and priority of their debts.

J. Crosby, for defendant.

SHEPLEY, C. J. orally. — The claim is for a breach of covenant, on account of certain alleged liens upon the estate conveyed. When the grantors conveyed, they took a contract from the grantee that he would pay all the debts of the firm of Copeland & Buswell, for which the conveyed property was holden. It could not then have been the intention of either party that any portion of those debts should remain an incumbrance upon the estate, and constitute a breach of the warranty. The Court are clearly of opinion that, by the contract, the plaintiff was himself bound to extinguish those claims.

It is urged that that contract was limited by a subsequent clause, respecting the appraisement. But that cannot be considered as controlling the effect of the contract.

But if there was a breach of the covenants, the plaintiff does not appear to have been evicted, or to have removed the incumbrance. He is still in possession. He could, therefore, be entitled to nominal damages only.

Judgment for plaintiff, for $1,00 damage, upon the defendant's offer to be defaulted for that amount.

RICHARD HUTCHINSON *versus* INHABITANTS OF GREENBUSH.

A return of satisfaction, made upon an execution by an officer, will not bar an action of debt on the judgment, if it be proved that, in fact, no such satisfaction was made.

DEBT on a judgment recovered before a justice of the peace. The action was referred. The referee made an alternative award, and reported the following to be the facts, viz: —

"After a part payment was made on the execution it was placed in the hands of an officer, and the officer indorsed thereon over his official signature, as follows: —

"Penobscot, ss. May 12, 1840. Received the amount of this execution, and discharge the same in full, and all fees."

"Under that return the plaintiff's attorney indorsed over his signature, — "Received by town order." From evidence introduced by the defendants, it appeared that the officer received from the treasurer, in discharge of the execution, not money, but an unnegotiable town order, payable to one Ballard, drawn by the selectmen of Greenbush upon the treasurer; that the order had then already been paid to Ballard, and taken up by the treasurer; that it was reissued on that occasion, by order of the selectmen; that the plaintiff's attorney authorized the officer to take pay in a town order; that eight years after receiving said order, the officer, without leave of Court, altered his return so that it showed the payment to have been made by a town order."

The referee awarded in favor of the plaintiff, unless the Court should consider the foregoing facts to make out a defence; otherwise in favor of the defendant.

Upon that report, the District Court, ALLEN, J. decided that the plaintiff was entitled to recover, and the defendant excepted.

Ingersoll, for defendants.

1. The return of the officer, as originally made, is conclusive between the parties, and is a discharge of the judgment. It is a return between debtor and creditor. *Lawrence* v. *Pond*, 17 Mass. 433; *Bott* v. *Burnell*, 11 Mass. 463; *Whitaker* v. *Sumner*, 7 Pick. 551, and authorities there cited.

2. The amendment by the officer at the time of the trial before the referee, is void; because it was made without the authority of the Court that issued the execution, and nearly eight years after the original return, and when the precept had been many years out of his possession, and when made, the officer was out of office. An amendment of an officer's return, must be authorized by law, to make it valid. In this case, there was no authority to make it. It was not an *official act*, for which he could be made liable. All official authority ceased when he made his return and handed over the execution to the plaintiff's attorney, and went out of office himself. *Welsh* v. *Joy*, 13 Pick. 477.

3. If the amendment is considered a part of the return, the whole taken together, shows the execution satisfied and discharged. The officer took the town order by the authority of the plaintiff's attorney, and discharged the execution. It matters not whether the order is of much or little value; it was taken, and the execution discharged; the plaintiff's remedy is on the officer, if any, for not getting an order he could enforce against the town.

S. H. Blake, for the plaintiff.

WELLS, J. orally. — The question is merely, whether an action of debt on judgment can be maintained, after a return made by the officer of a full satisfaction of the execution, when in fact no such satisfaction was received. The facts here go behind the return, and prove that the return was erroneous, and these facts are introduced by the defendants.

Judgment on the report for the plaintiff.

WILLIAM T. WILLEY *versus* INHABITANTS OF GREENFIELD.

In drawing an order upon the treasurer, in payment of a debt due from the town, the selectmen have authority to make it negotiable in its form.

The receiving of a town order by the collector in payment of taxes, is not, of itself, a payment of the order.

AN ORDER, for a valuable consideration, payable to the bearer, was drawn by the selectmen upon the treasurer of the town. It was immediately passed by the holder into the hands of the collector, in payment of taxes, and he afterwards negotiated it to the plaintiff.

J. & M. L. Appleton, for the defendants, contended —

1st. That the selectmen had no authority to issue negotiable paper; that they could only draw upon funds, and that therefore the defendants are not bound.

2. That the collector is to be considered, in this respect, as an agent of the town; and the discharge of taxes, due to the town, to the amount of the order, was a payment of the order.

Sewall, for plaintiff.

PER CURIAM. — The mere fact that an order gets into the possession of the collector, in payment of taxes, is not a payment of the order, unless some further act was done, evidential of that intent.

The defence is not made out. *Judgment for plaintiff.*

INHABITANTS OF KIRKLAND *versus* INHABITANTS OF BRADFORD.

In an action for the support of a pauper, wherein it becomes necessary to show that he was resident in the defendant town, upon the day of its incorporation, the plaintiffs do not make out a *prima facie* case, by merely proving that he was residing there a few months before, and a few months after that day.

EXCEPTIONS from the District Court, GOODENOW, J.

The action was for supporting a pauper. The question was,

whether his residence was in Bradford, on the 12th day of March, 1831, upon which day the town was incorporated. There was evidence tending to show that he had a residence for 15 years in the plantation of Bradford; that in the fall of 1830, he broke up housekeeping there, and put out his children in different places; that he and his wife separated, and she stayed in another town, and he went to Glenburn to labor; that he returned to Bradford in the spring of 1832, and remained there several months with his family.

The Judge instructed the jury that, if they found the pauper had an established residence in Bradford with his family, not many months before the day of the incorporation, and also that he returned and was residing there again with his family, not long after said day; and if he was not actually residing or dwelling in the town on the day of incorporation, the burden is on the party alleging that his residence was broken up on that day by his absence, to satisfy the jury that his residence was broken up by such absence.

To this ruling defendants except, the verdict being for the plaintiffs.

Appleton, for plaintiffs.

Kent and *Cutting*, for defendants.

SHEPLEY, C. J. orally. — The instructions excepted to relate to the burden of proof. Generally, throughout the whole of a case, the burden is on the plaintiff.

In this case, the plaintiffs had proved that the pauper's residence was in Bradford, in the fall prior to its incorporation, and that he was found residing there in the spring after the incorporation. The instruction was, in substance, that these two facts made out a *prima facie* case, that his residence was there at the time of the incorporation. The Court deem that instruction erroneous. *Libby* v. *Greenbush*, 20 Maine, 47.

Exceptions sustained.

COMFORT SPOONER *versus* ASA W. RUSSELL.

The statute of 1848, c. 52, requiring that certain promises, in order to have validity, should be in writing, is *prospective* only.

In an action against a bankrupt, on a debt provable in bankruptcy, a new promise to pay the debt made by the defendant after the filing of his petition, and before the passing of that statute, defeats the bankruptcy discharge, as to that debt.

ASSUMPSIT on a note made to the plaintiff in 1840, payable in one year. The writ is dated in 1846. The defence set up is, that the defendant is a certificated bankrupt, having obtained his discharge in 1846, upon his petition filed in 1842.

The plaintiff proved an unequivocal verbal promise, made by the defendant to the plaintiff in 1845, to pay the note.

A. Knowles, for the plaintiff.

J. Crosby, for the defendant.

The action is barred by defendant's discharge in bankrupty, and is not revived, because the new promise is not in writing.

The statute, 1848, entitled an act requiring certain contracts to be in writing, is retrospective, pertaining to the remedy, and merely prescribes the evidence to be received. *Oriental Bank* v. *Freese*, 18 Maine, 109. Retrospective statutes, affecting the remedy, are now of the most common occurrence.

This statute must apply to all suits, brought *after* it became a law, although the *verbal promise* might have been made before. Why then should a distinction be made between actions then pending, and those afterwards commenced? The word "maintained" must refer to actions pending, or it means nothing.

It is a remedial statute, and is to be so construed, as most effectually to meet the beneficial end in view, and prevent a failure of the remedy. *Quimby* v. *Buzzell*, 16 Maine, 474.

The policy of the law at the present time, is to require all new promises, made to revive a promise in any way barred, to be *in writing*.

The Legislature could not have intended, that a person's protection should depend upon the fact, whether the writ was already made, or should be made the next day.

SHEPLEY, C. J. orally. — It has been already decided, that a new promise, made by a bankrupt, after filing of his petition in bankruptcy, is binding upon him. It now only remains to give a construction to the statute of 1848, chap. 52. It provides, that "no action shall be brought and maintained upon a special contract or promise to pay a debt, from which the debtor has been discharged by proceedings under the bankrupt laws of the United States, or the assignment laws of this State, unless such contract or promise be made or contained in some writing, signed by the party chargeable thereby."

The act relates to the future only. It does not apply to suits which had been commenced prior to its passage.

Judgment for plaintiff.

LUTHER JONES *versus* JAMES PHILLIPS.

Upon a complaint to recover damage for injury done to the plaintiff's land, by flowing the same for the support of mills, it is competent for the jury, in their verdict, to include compensation for the injury done to the plaintiff's fences, and for the annual expense of maintaining fences for the future.

COMPLAINT for flowing the plaintiff's land by the defendant's milldam. It was admitted that the jury, in their general verdict, had allowed for the injury done to the plaintiff's fences, and also allowed an annual sum for keeping up the plaintiff's fences in subsequent years.

The parties agreed that the Court should amend the verdict, if necessary, so as to conform to the legal rights of the parties.

Kelley and *McCrillis*, for the defendant.

It was not competent for the jury to allow for expenses of keeping up future fences. It does not appear that the plaintiff

will rebuild or maintain such fences. Such expenses are not of the nature of necessary and permanent damage. They are uncertain and contingent; and cannot be the basis of any allowance. That portion of the verdict should therefore be expunged.

Prentiss, for the complainant.

Howard, J. orally. — It is not objectionable that the jury should include in their verdict the damages on account of the fences, — both those existing, and those necessary to be subsequently maintained. *Judgment on the verdict.*

The County Commissioners, *petitioners for location of public lots, versus* Spofford.

Exceptions from the District Court, upon proceedings under a petition by the County Commissioners, for the location of public lots, cannot be sustained. The mode of correcting errors, if any, in such cases, is by *certiorari*.

Exceptions from the District Court, upon a petition by the County Commissioners for the location of the public lots in an unincorporated township. Spofford, the respondent, appeared to resist the location, and filed the exceptions. The petitioners moved that the exceptions be dismissed.

Cutting, for the respondent.

The Court has jurisdiction. *Bridgton* v. *Bennett*, 23 Maine, 422. Our statute allows exceptions in cases other than those according to the common law. Even if *certiorari* could be granted, it is not matter of right, but merely at discretion. It is therefore but an inadequate remedy.

J. Waterhouse, county attorney, for petitioners.

Tenney, J. — Suppose the exceptions to be sustained, what action could this Court have in the case? There would be no power to remit the case back to the District Court, nor to finish the proceedings here.

WELLS, J. — If there is no power to remand or to proceed; this waste of time should be avoided. Is it not like the case of highways, in which *certiorari* is the exclusive remedy?

HOWARD, J. orally. — Exceptions do not lie. The remedy, if any, is by *certiorari*. *Exceptions dismissed.*

ABRAHAM SANBORN *versus* FRANCIS C. KEAZER *& al.*

Under the operation of the statute of 1848, chap. 85, no action upon a poor debtor's bond can be sustained, if the creditor suffered no damage by the breach of it.

Though there was a breach by reason of the irregular organization of the justice's court, yet if they actually administered the oath, and if the breach occasioned no damage to the creditor, the action must fail.

The breach of such a bond is of no damage to the creditor, if the debtor had no attachable property.

DEBT on a poor debtor's six months bond. The debtor had within the six months, taken the oath, mentioned as one of the conditions of the bond; and the defendants relied upon the certificate of two justices of the quorum, to that effect. The bond was dated December 1, 1846.

It was admitted that neither, at the time of giving the bond or of making the disclosure, had the debtor any property not exempt from attachment and execution.

Several objections were raised against the organization of the justices' court.

WELLS, J. orally. — Though there may have been a breach of the bond, on account of irregularity in organizing the justices' Court, still if, in fact, they administered the oath, the case falls under the act of 1848, chap. 85. If the debtor had no property, the breach of the bond was of no damage to the creditor. In this case there was no property, and therefore no damage. *Plaintiff nonsuit.*

ISAIAH AVERY *versus* ALONZO W. STRAW.

An offer to be defaulted is not an admission of a cause of action in the plaintiff. In this respect, the law was the same prior to the act of 1847, chap. 31.

EXCEPTIONS from the District Court, GOODENOW J.

Assumpsit upon a receipt for an article, attached on a writ by the plaintiff, a deputy sheriff.

The defendant offered to be defaulted for $4. The offer was not accepted. There was no proof that any demand of the property had been made upon the defendant.

The Judge instructed the jury that proof of a demand was unnecessary; that the defendant's offer to be defaulted, though not accepted, dispensed with proof of a demand. The verdict was for the plaintiff, $16,35 damage, and the defendant excepted.

J. Waterhouse, for defendant.

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

The offer to be defaulted, is to be regarded as a confession or admission of the contract declared on, and leaves nothing but the *quantum meruit* in controversy. *Fogg* v. *Hill*, 21 Maine, 529.

It is to be considered like a tender which admits the contract as alleged; after which the plaintiff cannot be nonsuited. *Cox* v. *Brown*, 3 Taunt. 95; 1 Camp. 327.

It is an admission of the cause of action. *Bullen* v. *Homans*, Nev. & Man. 119.

SHEPLEY, C. J. orally. — There was error in the instruction given to the jury. An offer to be defaulted admits nothing except that the defendant is willing to pay the sum offered, and no more. *Exceptions sustained.*

JABEZ FISHER *& al. versus* JOSEPH B. FOSS.

The indorsement of a writ by a copartnership company, in the name of their firm, is sufficient to hold the persons composing the copartnership.

A judgment against the defendant, recovered *after his petition* but *before* the *decree of his bankruptcy*, is not barred by the bankruptcy discharge, subsequently obtained.

IN a former action, between the parties, entered at the May term, 1842, the defendant was defaulted, and judgment on the default was rendered Dec. 1842.

This is an action of debt, upon that judgment. The plaintiffs reside out of the State. The writ is indorsed, "Jewett & Crosby," which is the name of a copartnership firm, the members of the firm being resident and doing professional business in Bangor. In February, 1843, the defendant was decreed a bankrupt on his own application, filed Dec. 9th, 1842, before the rendition of said judgment, and he subsequently obtained a bankruptcy discharge. On account of the bankruptcy, the defendant moved an indefinite stay of proceedings in this Court.

Jewett & Crosby, for plaintiffs.

The judgment became a new debt, at the time of its rendition, and, therefore, was not provable in bankruptcy, the defendant's petition having been previously filed. *Green* v. *Sarmiento*, 1 Peter's C. C. R. 74; *Holbrook* v. *Foss*, 27 Maine, 441; *Kellogg* v. *Schuyler*, 2 Denio, 73.

The defendant's remedy, if any, was by obtaining from the bankruptcy court, an injunction upon the plaintiffs against proceeding to take judgment. *Ex parte, J. S. Foster*, 2 Story's R. 139.

Kelley and *McCrillis*, for the defendant, contended —

1st. That the writ is not properly indorsed. The indorsement should be in the name of some individual or individuals, not in the name of a company firm.

2. The discharge in bankruptcy is a bar. *Downer* v. *Brackett*, 5 Law Reporter, 392. All the proceedings in the action, after May term, 1842, were *ex parte*. The continu-

ance procured by the plaintiffs for judgment, cannot take away the defence of the bankruptcy discharge. In the cases cited by the plaintiff, *Holbrook* v. *Foss* and *Kellogg* v. *Schuyler*, the judgments were recovered *after* the *decree* of bankruptcy. It is the *decree*, which gives the efficacy. The case cited from 5 Law Reporter is in point, to show that debts due *prior* to the decree, were provable in bankruptcy. The judgment now sued, was recovered prior to the decree, and therefore the debt was provable.

3. The motion to stay proceedings should be allowed. It is in accordance with every day's proceeding in the Courts of New York. *Parkinson* v. *Scoville*, 19 Wend. 150; 1 Cowen, 42 and 165; *Robertson* v. *Crowell*, 3 Cowen, 13; *Lee* v. *Phillips*, 6 Hill, 246; *Graham* v. *Pierson*, *ib.* 247; *Sanford* v. *Sinclair*, *ib.* 248.

TENNEY, J. orally. — The indorsement of the writ is unobjectionable. It would hold the persons composing the copartnership.

The judgment was rendered *after* the *petition*, but *before* the *decree* in bankruptcy. It is contended by the defendant's counsel, that therefore it was provable in bankruptcy, and is of course barred by the decree. But such is not the opinion of the Court. Because the judgment became a new debt *after* the filing of the petition, the suit is not barred by the discharge.

There is a motion to stay proceedings, and a case from New York Reports is cited. But the doctrine of that case is not applicable to this. *Judgment for the plaintiffs.*

ROBERT BOYD *versus* STEPHEN PAGE *& al.*

A levy of an execution upon real estate is void, if it embrace more of the debtor's land than was sufficient, at the appraisal, to satisfy the execution and the officer's charges for his fees and the expenses of the levy.

WRIT OF ENTRY. The demandant makes title under a

levy of an execution in favor of one Whipple. The amount due upon the execution was $114,76. In the levy, the land was appraised and set off at the value of $139,28. The officer returned his fees and the expenses of the levy to be $12,26; apparently taking land to the value of $12,26 more than was sufficient to satisfy the execution.

Wilson, for the plaintiff.

The error was merely the mistake of the officer, by including his fees and charges twice. The levy is not invalidated by the mistake. The remedy for the execution debtor is against the officer. *Sturtevant* v. *Frothingham*, 1 Fairf. 100; 8 Conn. 245.

Washburn, for defendant, cited *Pickett* v. *Breckenridge*, 22 Pick. 297.

WELLS, J. orally. — This point has been decided in the case cited for defendant, and we think correctly. The officer, in his return, has stated the amount of his charges. We cannot presume there was any thing more to be charged. More of the debtor's land was taken than was authorized, and the levy was therefore void. *Judgment for defendant.*

ISRAEL HEALD *versus* ABIAL CUSHMAN.

In replevin, if neither of the parties request instruction that the jury should find the value of the articles, they are presumed to have acquiesced in the valuation contained in the writ.

REPLEVIN for a wagon and harness, valued in the writ at $50, and two buffalo robes, valued at $6. When the case went to the jury on an issue of property, they had no instruction to find the value of the property; nor was any such instruction asked by either party. Their verdict found the property of the wagon and harness, to be in the defendant, and that of the robes to be in the plaintiff, but no value was assessed as to either of the articles.

In order to set aside the verdict, A. W. Paine, for the plaintiff, contended that it was defective, by means of its omission to return the value of the articles. The rights of the parties cannot be determined by it. The costs depend upon the value assessed. Till such assessment is made, there can be no judgment.

Prentiss, for the defendant.

The plaintiff is bound by the valuation he has affixed to the articles in his writ. Where neither party calls for any other estimate, it is presumed that valuation is satisfactory to both parties.

TENNEY, J. orally. — The requirement that the value should be ascertained was inserted in the statute, merely to regulate the cost. The plaintiff has made his own estimation, and not having requested instruction that the jury should pass upon the subject, he is bound by that estimation.

WILLIAM SOUTHERLAND *versus* MOSES JACKSON.

A grantor of land, bounded on a street, according to a plan, retains the fee in the soil upon which the street is represented in the plan.

Until the street has been opened, a grantee of one of the lots bounded upon it, according to the plan, can maintain no action for the creating of an obstruction upon the ground, represented by the plan for the street.

Whether such grantee, even if the street had been opened, could maintain such an action, except on proof of special damage, *quære.* — Per WELLS, J.

EXCEPTIONS from the District Court, ALLEN, J.

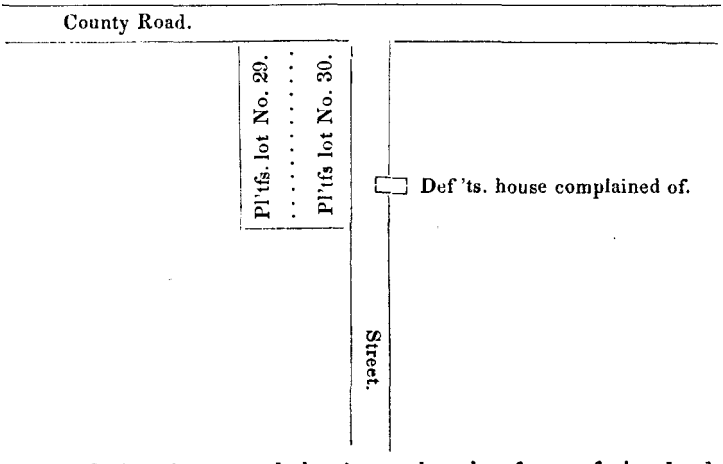
Case for obstructing a street or passage way, to the injury of the plaintiff.

The plaintiff exhibited a deed from Emery and another, to Sleeper, of July 15, 1836, conveying lots No. 29 and 30, according to the plan; and also several intermediate conveyances by which the estate conveyed to Sleeper, vested in the plaintiff. By the plan it appears that Nos. 29 and 30 are bounded on the county road, and that No. 30 adjoined a street, running at

right angles with the county road. The said lots remained vacant and without buildings upon them, until after the commencement of this suit. The plaintiff had no other lands adjoining the street. The land claimed as a street, has always before and since the making of the plan, been used in the same manner as the rest of the farm, either for tillage or mowing. The defendant erected a small wooden house, without a cellar, upon a part of the street adjoining the plaintiff's land.

The street had never been opened or used as a street or passage way; nor had the plaintiff ever requested it to be opened as such, or that the house should be removed.

After Emery's death, fifty acres of the land were assigned to his widow as dower. Those fifty acres embraced within their exterior limits, the lots No. 29 & 30, and the street and the land adjoining it upon both sides, with a reservation of what had been sold by Emery to Sleeper. The fifty acres thus assigned as dower, came to the defendant by conveyance from the widow, who was also the administratrix of her husbands estate.



The Judge instructed the jury, that by force of the deeds introduced, it was the plaintiff's right to have the portion of the premises, marked as a street on the plan, kept open as a street, and that any obstruction of it would entitle him to damages, and that the erection of a house, as testified, was such an obstruction.

The defendant thereupon requested the Judge to instruct the jury, that the defendant, by virtue of *his* deed, had a right to use the land, designated as a street, in any manner not inconsistent with its being made into a street, whenever the parties interested claimed to have it opened and used as such.

This instruction was not given, but instruction was given, that the erection of the building by defendant would entitle the plaintiff to nominal damages at least, and such further damages as they might find the plaintiff had sustained by the erection.

The jury found a verdict for the plaintiff, and the defendant excepted.

A. W. Paine, for defendant.

1. It is conceded, that by the conveyances under which the plaintiff claims title, he has a right of way over the streets laid down on the plan, *so far as is necessary to the enjoyment of his lot, whenever he shall see fit to require it.* And the owner of the fee holds the title of the street, subject to this right, whenever those interested call for it, or the municipal authorities think proper to open the street. This seems to be the result of the various authorities, as collated by Kent, in 3 Com. 433, in note, [5th edition.] Some decisions, subsequently made, will be noticed.

In the case at bar, the lots lay on the county road, and were accessible from it. The street, therefore, *was not necessary*, and the plaintiff had no right to it. *Mercer street*, 4 Cowen, 542.

2. But if plaintiff had any rights to the street, this right was limited by the necessity, which existed for the enjoyment of the lot. The dedication of the street, so far as individuals can enforce rights, is only of so much as adjoins the lot, or connects it with other streets. The plaintiff has no right to go any further than his lots go ; — *39th street*, 1 Hill, 191 — and it will not extend to streets remote from the lot conveyed. *29th street*, 1 Hill, 189.

3. And here no request was ever made to have the street opened. Defendant could only be liable for an unreasonable neglect in removing an obstruction, after the notice to do so.

But whatever rights the plaintiff might claim, under other circumstances, he cannot maintain this action, because the *locus* was never opened or used as a street or passage way; and no request was ever made to have it so opened. It was sufficient for the defendant to hold the property in such a condition as to be able to open it when wanted. The requested instruction, therefore, should have been given. *Clapp* v. *O'Neil*, 4 Mass. 589; *Fenner* v. *Shelden*, 11 Metc. 521.

By the ruling, defendant would have been liable in damages for maintaining a fence across the end of the street.

The plaintiff had suffered no damage; he had no house on his lots; the street had never been opened; and the obstruction complained of was a temporary one, and readily removable when requested.

4. The Judge erred in taking the matter into his own hands. It was for the jury to settle, how far the street is necessary for the enjoyment of the lot, and what constituted an improper obstruction. The Court erred in instructing them, that the plaintiff had the right contended for, or that the building was such an obstruction as necessarily gave him a right to damages.

Kelley, for the plaintiff.

The instruction was correct. *Salisbury* v. *Andrews*, 19 Pick. 250; *Atkins* v. *Boardman*, 20 Pick. 291; *O'Linda* v. *Lothrop*, 21 Pick. 292; *Atkins* v. *Boardman*, 2 Metc. 457.

Where one takes a conveyance of land, bounded on a street, he takes the right to have the street kept open. The doctrine contended for by the defendant, involves the absurdity that, *until* the street is opened, no damage can be recovered for incumbrances put upon it, whereby it *cannot* be opened. The matter presented by the defendant is applicable to the measure of damage, but not to the right of action.

WELLS, J. orally. — Where a street is marked on a plan, the fee remains in the grantor. Until it is opened, no action for obstructing it can be maintained. The instruction was therefore erroneous. If one grantor could maintain such an action, all of them could. Even if the street had been opened, it might be doubtful whether a person living on one of the lots could maintain such an action, except on proof of special damage. *Exceptions sustained.*

JOHN LANCEY *versus* JOSEPH BRYANT *& al.*

In actions of libel, the question of malice is to be determined by the jury.

There is no law, requiring city or town officers to know the contents of all the corporation records.

Diligence and care, in ascertaining the contents of corporation records upon a specific subject, cannot be required of the corporation officers, while it is not shown, that they knew of the existence of such records.

LIBEL against the mayor and clerk of the city of Bangor, for a statement contained in their annual printed report of the financial condition of the city, for the year 1845. The words alleged to be libelous were as follows. — "Balance due from John Lancey, collector of taxes for 1836, $6004,50." It was conceded, that the plaintiff was the collector of taxes for 1836. Evidence was introduced tending to show, that the amount due from the plaintiff was much less than the sum stated in the said annual report.

The case was tried before WELLS, J. He instructed the jury, that if the words, charged as libelous, were false, and tended to defame the plaintiff; and if the defendants had no reason to believe them true, it was evidence of malice; but that the question of malice, was for their determination, upon which they would decide from all the evidence; — that unless they were satisfied, that the defendants acted maliciously in their publication, the verdict must be for the defendants.

The plaintiff's counsel requested the Court to instruct the jury, that the defendants, as mayor and clerk of the

city, must be presumed in law to know the contents of the city records, relative to the transaction between the city and Lancey.

The Court was further requested to instruct the jury, that if the defendants, in the exercise of ordinary care and diligence, could have ascertained, by the inspection of said records and report aforesaid, that the plaintiff did not owe the city so much as was alleged in said annual report, by some four thousand dollars, they would be regarded as having said knowledge.

But the Court declined to give those instructions.

The verdict was for the defendants, and the plaintiff excepted.

The case was submitted without argument.

By the Court. — The plaintiff asserts that the statement made by the defendants in their printed report, was libelous, because it represented the plaintiff to be indebted to the city in a larger sum than he really owed. The instruction left the jury to decide the question of malice. That was correct. The first requested instruction was properly withheld ; for there is no rule of law, that the officers of a city or town must be acquainted with the contents of all its records.

The second requested instruction could not have been properly given. There was no evidence, that the defendants knew there were records relative to the matters, as to which care and diligence were supposed to be required.

Judgment on the verdict.

Samuel Langley *versus* Mason S. Palmer.

Where a note is made payable at any bank in a specified city or town, a demand at either bank is sufficient to charge the indorser. No previous notice need be given to him, at what bank the holder will make the demand.

Assumpsit against the indorsor of a promissory note, paya-

ble in seven months, "*at any bank in Boston.*" The defendant's residence was in Corinth, in Maine. A notarial protest certifies that the notary, at the payday, presented the note at the *Suffolk bank in Boston*, and there demanded payment; to which demand it was replied, that the note would not be paid for want of funds; also that the notary sent by mail to Corinth, and also to Bangor, in Maine, "official notice of the default, addressed to the indorser."

The trial was before WELLS, J. The defendant submitted to a default, which is to be taken off, if upon the above evidence the plaintiff was not entitled to recover.

A. W. Paine, for defendant.

The form of the contract between the original parties is plainly such as gives the holder of the note the right to designate the place of payment.

The promise is, in effect, to pay the specified sum, at such one of the banks in Boston as the *holder* shall elect, which right of election continues up to the time of payment.

This *right* on the part of the holder, imposes a corresponding *duty* to give the maker notice of his election. *North Bank* v. *Abbot*, 13 Pick. 465.

Such a rule should be adopted, in reference to paper of the kind in question, as will best comport with the business and usages of the community, and most promote the safety and convenience of business men. Unless the rule contended for is adopted, no mode is left, which the maker of such paper can adopt to save himself the costs and discredit of a protest or failure. No obligation is imposed on the holder to leave the note at either bank, but, as in the case at bar, he may merely present the note at any, perhaps the last minute of bank hours, until which time the right of election continues.

In the case of *Page* v. *Webster*, 15 Maine, 249, our Court have gone no farther than to decide that, in places containing but *few banks*, the opposite principle should be adopted. The decision would not meet such a case as the one at bar.

There was a deficiency in the notarial certificate of notice.

It gave no information, that the holder looked to the indorser for payment. It merely states, "I gave official notice of the default," without specifying what default was intended.

Garnsey, for plaintiff.

WELLS, J. orally. — The note was made in such form as the defendant chose to accept and to negotiate. The election at which bank in Boston to call for the pay, was with the holder. A demand there was sufficient. *Page* v. *Webster*, 15 Maine, 249. The principle of that decision is applicable equally to a note payable in Boston, as in Portland. The notary certifies that the note was presented when payable, and that payment was refused, and that notice of the default was forwarded to the defendant. Plainly the default spoken of, was that of the non-payment stated before. The law prescribed no form. Taking the whole certificate together, all the facts necessary to charge the indorser, are found in it.

Judgment on the default.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF WASHINGTON,

1849.

Inhabitants of Dennysville *versus* Inhabitants of Trescott.

A mother, who has entered into a second marriage, has power with the consent of her husband, to emancipate a minor child of her first marriage.

Such an emancipation may be inferred from the conduct of the parties.

A minor child who has been emancipated gains no settlement through that of its mother, acquired after such emancipation.

Assumpsit, to recover for the funeral expenses of Elias Anthony Belbarb, and for supplies to his widow and minor children.

At the trial, before Wells, J. two questions were presented to the jury, viz: — 1. Whether Mrs. Daily and her husband dwelt and had their home in the town of Trescott, on the 7th of Feb'y, 1827, the time of the incorporation of said town? 2. Whether she emancipated her son Elias, the pauper, before the 7th of Feb'y, 1827? The jury answered both questions in the affirmative, and found a verdict for the defendants on that ground.

The facts proved in the case sufficiently appear in the opinion.

The jury were instructed, that after the death of the father of Elias, Mrs. Daily had the power to emancipate the child, and that after her second marriage, she could still exercise this power, Daily, her husband, consenting to it; that emancipation was a contract between the mother and minor child, by which she gave up her legal control over him; that it was not necessary to prove an express and specific contract of emancipation, but that it might be inferred from the acts of the parties and from other evidence; that if she had emancipated him before the incorporation of Trescott, he not residing there at the time of its incorporation, would not acquire a settlement in that town by virtue of the settlement acquired by his mother, even if he had no settlement in the State, and had not since acquired one.

To these instructions, the plaintiffs filed exceptions.

Hayden, for plaintiffs.

1. The mother, particularly after the second marriage, had no power to emancipate the minor. 16 Mass. 52, 135; 1 Pick. 197; 18 Pick. 264; 10 Metc. 439; 4 Greenl. 47; R. S. chap. 88, § 4.

2. Emancipation would not prevent the child from deriving a settlement from his mother, unless he had a settlement at the time of emancipation, or gained one afterwards. St. 1821, chap. 122, § 2, clauses 2 and 5; cases cited under 1st point; *Springfield* v. *Wilbraham*, 4 Mass. 493.

3. The mother's control over the child ceases on her second marriage. The step-father has no control, and as the *quasi* emancipation of the minor by the second marriage, does not prevent his deriving a settlement from her, there is no power of emancipation left during coverture. 2 Kent's Com. § 28; 4 Mass. 675; 2 Mass. 215; 10 Metc. 439; 16 Mass. 135; 4 Greenl. 47; 3 Greenl. 290; *St. George* v. *Deer Isle*, *Ib.* 390.

4. Emancipation being a contract to be proved cannot be inferred from acts.

5. Emancipation may give the minor power to gain a settlement separately from the parent, but can deprive him of no rights which the statute gives. 12 Mass. 283; 3 Pick. 172; 1 Greenl. 196; 3 Greenl. 390; 4 Greenl. 47, 293; 2 Fairf. 456; 18 Maine, 374.

D. T. Granger, for defendants.

WELLS, J. — The pauper, Elias Anthony Belbard, was born in April, 1814. His father had no settlement in this State. His mother was married to Daniel Daily in 1821. On the seventh of February, 1827, the town of Trescott was incorporated. Prior to that time, neither of them had gained a settlement. At that time, Daily and his wife dwelt and had their home upon the territory, which was incorporated into the town of Trescott. But Elias did not reside with them. Daily and his wife depose, that after the mariage, Elias never made his home with them; that they did not control him or take any of his earnings; that he acted for himself and took care of himself, went where he pleased and employed himself with whom he pleased; that he lived at different places, and once bound himself to a person, with whom he remained four or five years. He occasionally came to see his mother, who advised him to be a good boy and take care of himself.

By the fifth mode of gaining a settlement, under the act of 1821, chap. 122, § 2, Daily acquired one by the incorporation of Trescott. And by the first mode of the same act, his wife gained one through him. By the second mode, if the father had none within the State, legitimate children follow that of the mother. *Plymouth* v. *Freetown*, 1 Pick. 197; *Great Barrington* v. *Tyringham*, 18 Pick. 264; *Parsonsfield* v. *Kennebunkport*, 4 Greenl. 47. The pauper would therefore take the settlement of his mother, in Trescott, unless he was emancipated.

It is contended by the plaintiffs, that the mother, after her second marriage, could not emancipate him, so as to prevent his acquiring a settlement in Trescott through her, and that

emancipation must be express, and cannot be inferred from the acts of the parties.

The father-in-law is not bound to support the children of his wife by a former husband, in consequence merely of his union with the mother. But by the fifth section of the act before cited, the mother is bound to support her children, if of sufficient ability. The parental relation subsisting between her and her children is not entirely changed by the second marriage. Why should the law require in a case like this, that the children should follow the mother's settlement, unless she had some duties to discharge in relation to them, and that it would be an act of inhumanity to separate them? Upon the death of the father, having no settlement, the children follow that acquired by her, as the head of the family; they cluster around her, and the law presumes she will not be unmindful of their welfare.

As the father can emancipate his child, so that he may gain a settlement in his own right, the mother, by the settlement law standing in his place, must necessarily possess the same power. The consent of the father-in-law to the emancipation could not impair its force.

Under what circumstances a minor child would be considered emancipated against the will of the mother, after the death of the father, it is not necessary to consider. For in the present case, there was no objection on the part of the mother, that the pauper should be independent of her, and the subsequent acts of the parties were in perfect harmony with the disposition previously expressed.

Nor is it requisite that the emancipation should be express and positive. It may be inferred from the acts and conduct of the parties. But it must be proved by such facts, as indicate its existence.

In *Lubec* v. *Eastport*, 3 Greenl. 220, the father and mother being dead, and the child destitute and without a home, he was considered as emancipated.

In *St. George* v. *Deer Isle*, 3 Greenl. 390, the mother of

the pauper was married to a second husband, but the pauper, not residing with her mother and father-in-law, was considered entitled to her own wages, and free to pursue her own course of life. Emancipation was inferred from these facts. Deer Isle was incorporated prior to the act of 1793, but neither that, nor subsequent acts have introduced any new rule of proof in relation to emancipation.

In *Wells* v. *Kennebunk*, 8 Greenl. 200, it is said, emancipation is not to be presumed, though it may be implied from circumstances. And in that case the mother resigned her son to the care of his grandfather, and did not contribute to his support or control him, and he did not seek her aid, or submit to her control, and he was considered as emancipated.

It is moreover contended, that notwithstanding the emancipation, the pauper must follow the settlement of his mother, unless he then had one of his own or had since acquired one. But there the law, relating to settlements, is not susceptible of such construction.

Being emancipated, he could not gain a settlement in the town of Trescott, as he did not reside there at the time of its incorporation, whether he had one in any other town or not. The emancipation disconnects him from his mother, so that he is not drawn to her settlement. He is to be regarded in the same manner, as if he had been twenty-one years of age, and if he had no settlement in the State, then the town in which he fell into distress would be bound to support him.

But upon this question, we are not without precedent. It was decided in *Charlestown* v. *Boston*, 13 Mass. 469, that a minor daughter, whose father was dead, and who was married to an alien, did not take the settlement acquired by her mother, although she had none of her own, because she was considered as emancipated, and that children when separated from their parents, by legal emancipation, are capable of gaining a settlement in their own right, and cannot take a new one gained by their parents.

We see no just cause to disturb the verdict, on the alleged ground, that it is against the weight of evidence. The facts

are sufficient to justify the jury, in the conclusion to which they have arrived. *Exceptions and motion overruled.*

SOLOMON THAYER *versus* JAMES BOYLE.

An indictment on the statute "of malicious mischief," &c. chap. 162, may be maintained, although the facts proved might have supported an indictment, under the statute, chap. 155, for arson.

In such a case, it is not necessary that the offender should be prosecuted *criminaliter*, prior to the commencement of a civil action by the party injured.

In such an action, evidence of the general good character of the defendant is inadmissible; as is also the evidence, that the plaintiff's witness was habitually intemperate.

The jury, in such an action, were instructed to decide upon the *balance of testimony*, as in other civil cases; and that the defendant was not entitled to a verdict, upon merely raising a *reasonable doubt*, as would be the case, in a criminal prosecution. — *Held*, (WELLS, J. *dissentiente*,) that the instruction was erroneous.

TRESPASS, for wilfully and maliciously setting fire to and burning and destroying the plaintiff's barn, with its contents, consisting of, &c.

There were three counts. The first two were founded on the statute, for the treble damage; the other was at the common law.

The defendant's counsel offered evidence of the defendant's good character. It was objected to and excluded.

The defendant's counsel also offered evidence, that one of the plaintiff's witnesses was habitually intemperate. It was objected to and excluded.

Other legal questions raised on the trial, with the views of the Court thereon, will appear in the opinion.

The presiding Judge instructed the jury that, in examining the case, they should decide upon the balance of testimony as in other civil cases; and that the defendant was not entitled to a verdict in his favor, upon merely raising a reasonable doubt, as would be the case in a criminal prosecution.

The trial was before WELLS, J. The verdict was for the plaintiff, and the defendant excepted.

B. Bradbury, for defendant.

1. The statute action cannot be maintained on the allegations in the writ or on the evidence. Rev. Stat. 162, § 13; Rev. Stat. 155, sect. 3, 4 and 5; 7 Mass. 523; 1 Pick. 248; 10 Pick. 235; 20 Pick. 269; 13 Pick. 284; Minot's Digest, art. "statutes," 1.

2. The allegations in the writ and the evidence showing the acts, if committed by defendant, to be a felony, a civil action cannot be maintained at common law, till after prosecution for the felony. 3 Greenl. 458; 4 Greenl. 164; 1 East, 494; Sedgwick on Rule of Damages, 494; 2 Starkie's Ev. 818, 6th Amer. Ed.; Yelverton, 90, note (a) and cases cited; 2 Story's R. 59; Stat. 1844, chap. 102; 5 Bacon's Abr. art. "Trover;" *Crosby* v. *Lane*, 12 East, 409.

3. Evidence of the general good character of defendant, prior to the act complained of, should have been admitted. Greenl. Ev. 61, and cases cited; 2 Starkie's Ev. 215.

4. Evidence of the intemperate habits of the witness, should have been admitted. 1 Starkie's Ev. 181, note (1); Greenl. Ev. 513, note 3.

5. The Court erred in the instructions with regard to the balance of evidence.. *Oliver* v. *Gibson*, decided in Penobscot county, not reported.

Thayer, pro se.

1. The character of the parties is immaterial. 2 Greenl. on Ev. § 269; *Fowler* v. *Ætna Ins. Co.* 6 Cowen, 675; 2 B. & P. 532, note a.

2. The statute on which the action is brought, does not designate the instrument of destruction. Any destruction, whether by fire or otherwise, comes under the statute. Chap. 162, § 13.

3. The common law doctrine of merger of the civil remedy in case of felony, till after conviction or acquittal *criminaliter*, was never in force in this State, except in cases of robbery and

larceny, and that is now done away by statute of 16th March, 1844.

It is the duty of the jury in civil cases, to find according to the balance of testimony, even though a higher degree of certainty were necessary, if the defendant were on criminal trial, for the same act. 1 Greenl. § 13, a, 4th edition.

The opinion of the Court, (WELLS, J. dissenting,) was drawn up by

TENNEY, J. — This is an action of trespass, in which the plaintiff seeks to recover damages for the destruction of his barn, and other property. The first and second counts in the writ charge the defendant with having committed the acts alleged in violation of the statute, and the claim is for a sum three times the value of the property destroyed. The third count is at common law for the wilful and malicious destruction of the same property.

It is contended in behalf of the plaintiff that the right to maintain the suit on the first two counts, is given by the statute, chap. 162, entitled "of malicious mischief, and trespasses on property," sect. 13. By this statute, a person who shall wilfully and maliciously injure, destroy or deface any building or fixture attached thereto, not having the consent of the owner thereof, shall be punished in the county jail, not more than one year, and by a fine not exceeding five hundred dollars; "and shall also be liable to the party injured, in a sum equal to three times the value of the property so destroyed or injured, in an action of trespass."

It is denied by the defendant's counsel, that the statute embraces such a cause of action as that alleged in the writ; and also that the common law remedy is not open to the plaintiff, until after the termination of a criminal prosecution against the defendant, by a conviction or acquittal for the offence charged.

And it is contended for the defendant, that the Revised Statutes, chap. 155, entitled "of offences against habitations

and other buildings, including arson, burglary and similar crimes," sections 3, 4 and 5, have provided a punishment for the crime, which the defendant has committed, if the allegations in the writ are true; and therefore it is not comprehended in the provision relied upon by the plaintiff; and that the supposed liability to the owner of the property is not incurred under the statute.

The civil remedy provided by the statute for the cases therein referred to, is confined to those, where the person who committed the acts is subject to the punishment, on conviction, affixed to the offences therein specified. The owner of the property, injured, destroyed or defaced, cannot obtain redress, by the authority of that provision, beyond those offences, where the perpetrators are made criminally liable thereby.

Under the statute referred to by the defendant's counsel, the defendant, if found guilty upon a trial under an indictment for such an offence, as the one charged against him in the writ, would be exposed to imprisonment in the State's prison for the term of ten years. The Supreme Judicial Court would have exclusive jurisdiction of that offence; and the violations of the statute, relied upon by the plaintiff, are cognizable by the District Court only. Chap. 166, sect. 1, 2.

If the Legislature thought proper to provide the civil remedy for the loss occasioned by the wilful and malicious acts of a party, in causing the destruction of a building by tearing it down, and to deny a similar remedy, when it was destroyed by fire, it was competent for them to do so; but no good reason can be seen for the distinction; and we cannot presume, that such was the design, unless it is so expressly provided, or unless it results from a proper construction of the statutes, which appertain to the subject.

The statute under which this suit is sought to be maintained, provides a punishment for the wilful and malicious destruction of a building, without any restriction or limitation. If there was no other punishment prescribed for such a crime, it could not be doubted, that an indictment therefor, under this

provision, could be supported, provided the requisite proof should be adduced, although the destruction should be caused through the agency of fire, instead of some other instrument. The statute on the subject of malicious mischief is more general than that on the subject of arson. Many degrees of malicious mischief, which are designed to be visited with punishment, are embraced in the chapter which treats of that matter; but there may be many cases which may fall within the legal meaning of the term malicious mischief, and still be so elevated in the scale of crime, that something more than the penalty there provided, should be inflicted. Because a person may be punished, on conviction, for the crime of burning a building, when indicted for arson, it does not follow by any means, that he might not be indicted, tried, convicted and punished for the destruction of that building, upon the same facts, under a prosecution by the authority of the statute "of malicious mischief," &c. It cannot be supposed, that the Legislature intended that it should be excluded from the operation of this statute, because it is treated in another statute, more specifically as a crime of greater magnitude, and may be punished as such.

The cases are numerous, where a person is indicted for a crime, inferior in grade to that, of which the proof may show him to be guilty. The murderer, in fact, may be called upon to answer only for the crime of manslaughter. One guilty of an assault and battery with a felonious intent, may be charged only with the offence of assault and battery. In the statute on the subject of malicious mischief, sect. 9, a prosecution may be instituted against a person for trespass, in wilfully carrying away timber and wood from the land of another, when an indictment for larceny might be sustained for the same acts by virtue of another statute. One indicted for an offence clearly created by the statute, cannot claim an acquittal, because the same facts relied upon in support of the charge would authorize a prosecution for a crime of greater enormity. No person can be twice put in jeopardy for the same offence;

and a judgment on an indictment or complaint of a lower or higher grade, would be a bar to a second prosecution for the same acts.

2. Whatever the law in England may be or have been upon the question, how far a party who has suffered by the crime of another is precluded from seeking a remedy by a civil action, until after the offender has been brought to trial on a criminal charge, in this State and in Massachusetts, the principle contended for by the defendant's counsel, has never been extended beyond cases of alleged robbery or larceny. *Boardman* v. *Gore & al.*, 15 Mass. 331; *Boody* v. *Keating*, 4 Greenl. 164; *Crowell* v. *Merrick*, 19 Maine, 392.

But the Legislature having provided a remedy in civil suits under the statute, which we have considered, the doctrine of merger cannot be applicable to this case, even if it could have been before the enactment of the statute.

3. Was it competent for the defendant to introduce evidence of his general good character at the trial? The doctrine seems to be well settled that such evidence is inadmissible in civil suits. "In civil proceedings, unless the character of the party be put directly in issue by the nature of the proceeding, evidence of his character is not generally admissible." 2 Stark. Ev. 366. "The character of the parties is immaterial, excepting in actions for slander, seduction, or the like, where it is necessarily involved in the nature of the action." 2 Greenl. Ev. § 269. In the case of the *Attorney General* v. *Bowman*, 2 B. & P. 352, note (a), which was an information against the defendant for keeping false weights, and for attempting to corrupt an officer, Eyre, Ch. Baron, said, "I cannot admit this evidence in a civil suit."

In the case of *Ruan* v. *Perry*, 3 Caines, 120, such evidence was admitted, and it was said by the Court, "that in actions of tort, and especially charging the defendant with gross depravity and fraud, upon circumstances merely, as was the case here, evidence of uniform integrity and good character is oftentimes the only testimony, which a defendant can

oppose to suspicious circumstances." But in *Fowler* v. *Ætna Fire Ins. Co.*, 6 Cowen, 673, the same Court say, "the rule in England is this, that in a direct prosecution for a crime, such evidence is admissible, but where the prosecution is not directly for the crime, but for the penalty, it is not." They remark further, "If such evidence is admissible here, it will be proper in every case, where unfair practices are alleged. A specific fraud is charged, that must be met upon its own merits, unless supported only by circumstances; as in the case of *Ruan* v. *Perry*, where a naval officer was charged with gross fraud and collusion with a foreign officer upon slight circumstances. If such evidence is proper, then a person may screen himself from the punishment due to fraudulent conduct, till his character becomes bad. Such a rule of evidence would be extremely dangerous. Every man must be answerable for every improper act; and the character of every transaction, must be ascertained by its own circumstances, and not by the character of the parties."

4. The evidence offered of the intemperate habits of one of the plaintiff's witnesses, was properly excluded. Evidence of this kind has never been held competent here, where the impeachment of the character of a witness has been confined to his general reputation for truth.

5. The jury were instructed, that in examining the case, they should decide upon the balance of testimony, as in other civil cases; and that the defendant was not entitled to a verdict, upon merely raising a reasonable doubt, as would be the case in a criminal prosecution.

"By *satisfactory evidence*, which is sometimes called *sufficient evidence*, is intended that amount of proof, which ordinarily satisfies an unprejudiced mind, beyond a reasonable doubt." 1 Greenl. Ev. § 2. "The measure of proof sufficient to warrant the verdict of a jury varies much according to the nature of the case. Evidence, which satisfies the minds of the jury of the truth of the fact in dispute, to the entire exclusion of every reasonable doubt, constitutes full proof of the fact." 1 Stark. Ev. 450.

The fullest amount of direct evidence cannot produce any thing like the result of mathematical demonstration. The witnesses may be corrupt or mistaken. A high degree of probability, which amounts in the opinion of the jury to a moral certainty, is the most which can be obtained through human testimony. "From the highest degree, it may decline by an infinite number of gradations, until it produces in the mind nothing more than a mere preponderance of assent in favor of the particular fact."

In criminal cases a verdict of conviction cannot be rendered, unless the guilt is fully established in the minds of the jury. Neither a preponderance of evidence, nor any weight of preponderance of evidence, can properly authorize them to pronounce a verdict of guilty against the accused, unless it is sufficient to exclude all reasonable doubt. But in civil cases, "where the right is dubious and the claims of the contesting parties are supported by evidence nearly equipoised, a mere preponderance of evidence on either side, may be sufficient to turn the scale." This happens, as it seems, where no presumption of law, or *prima facie* right, operates in favor of either party. An example of this kind found in the books, is in a dispute between the owners of contiguous estates, whether a particular tree, standing near the boundary, is upon the land of one or the other.

In civil controversies, "a mere preponderance of evidence, such as would induce a jury to incline to one side rather than to the other, is frequently insufficient. It would be so in all cases, where it fell short of fully disproving a legal right once admitted or established, or of rebutting a presumption of law."

Where one claims as devisee against the heir, full proof of the devise is essential. "The title of an heir at law is not to be defeated by conjecture, ambiguity or uncertainty; and even where there is proof of a will having existed, the Court cannot go into conjecture, what it is probable the testator may have done by that will, but it must be shown to contain an actual, express devise, which disinherits the heir." *Harwood* v. *Goodright*, Cowper, 87, by Lord Mansfield.

One attempting to charge another with a debt, must do so by full and satisfactory proof. And where a debt has been proved by competent evidence, the debtor, in order to be discharged, must offer full proof of satisfaction. The law presumes every man to be innocent of a crime, till his guilt is proved. 1 Stark. Ev. 452.

The case of *Oliver* v. *Gibson*, decided by this Court in 1847 in the county of Penobscot, was a suit under the Rev. Stat. chap. 148, sect. 47, for wilfully disclosing falsely as a debtor, who had given a bond to his creditor upon arrest on execution. It was held, that the jury could not return a verdict in favor of the plaintiff, unless the evidence of false swearing in the disclosure was such as is required on the trial of a person indicted for perjury, although the jury may have been satisfied, without such amount of evidence, that the defendant was guilty.

The defendant was charged with having wilfully and maliciously done acts constituting an aggravated offence against society and the laws of the land. If prosecuted criminally, he was exposed to be deprived of his liberty. If held responsible in this form of prosecution, the penalty in way of damages, is a sum equal to three times the value of the property destroyed. The effect upon his reputation and standing in the community by a recovery in this case, would be perhaps very little less than upon conviction for the same on indictment. Until legally proved guilty to the satisfaction of a jury, he is shielded by the presumption of innocence. This protection cannot be taken away, by evidence establishing only a probability of guilt, however strong that probability may be, if it amounts to nothing more. A preponderance of proof, which does not satisfy the mind, can be nothing further than to render the fact in controversy, probable. To dislodge the presumption of innocence, the plaintiff was bound to satisfy the jury of the truth of the charge. We have seen, that this was not done so long as a reasonable doubt remained in their minds. On this branch of the case, the instructions were not so favorable as the defendant had a right to require.

Exceptions sustained.

STATE OF MAINE *versus* DANIEL WILLIAMS.

A juror, belonging to the town, whose book of records was alleged to have been secreted by defendant, was rightfully excluded from the panel on the trial for the offence.

The knowledge of some of the inhabitants of a town, that a book of the town's records was left with the defendant, is not a defence to the charge of subsequently secreting it.

Where one knowingly has an article, belonging to another, and being called on for it, asserts, that it is not in his possession, and denies all knowledge of it, this is competent evidence to be laid before the jury on a trial against him for secreting the article.

And even if kept openly with his own articles of the same kind, that would not necessarily determine, that it was not secreted from its owners.

EXCEPTIONS, from the District Court, HATHAWAY, J.

The defendant was indicted for secreting the treasury book of records, of the town of Amity.

As the clerk proceeded to impannel the jury for the trial, the government objected to one, who was called from said town of Amity. On being sworn, the juror answered, that he had not formed or expressed any opinion in reference to the guilt or innocence of the defendant, had talked with no one about it, and was not sensible of any bias on his mind. The Court ordered the juror to leave the panel, for the reason, that he was the juror from the town of Amity, for embezzling and secreting whose records the defendant was indicted. The defendant objected to the removal of the juror.

The instructions requested and refused to be given, appear in the opinion of the Court. The jury returned a verdict of guilty upon two counts in the indictment.

T. J. D. Fuller, for defendant.

The Attorney General, for the State.

The opinion of a majority of the Court, (WELLS, J. not concurring,) was drawn up by

SHEPLEY, C. J. — The defendant was convicted on an indictment founded upon the statute, chap. 162, § 13, which,

among others, contains a provision, that if any person shall wilfully and maliciously secrete any goods and chattels or valuable papers of another, he shall be punished by fine or imprisonment.

Whether the testimony was, or not sufficient to authorize a conviction, is not presented, and cannot be examined on a bill of exceptions taken to the proceedings in the District Court.

The first question presented has reference to the manner, in which the jurors were impanneled. The attorney for the State having made an objection to one of the jurors, he was examined upon oath, and by his answers he appeared "to stand indifferent in the cause." The case states, that the "Court then ordered the juror to leave the panel on the ground that he was the juror from the town of Amity."

The Court is authorized by stat. c. 115, § 65, on motion of either party, to examine a juror on oath, and if it shall appear from his answers or other competent evidence introduced by the party objecting, that he does not stand indifferent in the cause, he may be set aside. This provision appears to have been designed to secure to a party by his own motion a trial by impartial jurors. Not to deprive the Court of a right to set aside a juror, when it had from any document or other competent testimony ascertained, that he was not, or could not be expected to be impartial.

By the same statute, § 59, jurors may by the Court be transferred from one jury to the other, and for good reason a juror may be excused from further attendance, or for any particular time. The design appears to have been to give the Court such power, as might secure to all parties an impartial trial in the most convenient manner for the despatch of business, and for the comfort of the jurors. The right of the Court to set aside a juror in a civil suit for the purpose of having an unobjectionable jury was declared in the case of *Ware* v. *Ware*, 8 Greenl. 42. It is provided by statute, chap. 172, § 31, that the same challenges of jurors shall be allowed in criminal as in civil causes. And the powers conferred

upon the Court by statute are the same in each class of causes.

The Court below was informed in this case by the return of the venire, that the juror was an inhabitant of the town of Amity, whose books of records were alleged to have been secreted by the defendant. The statute creating the offence provides, that the person shall be liable to the party injured in a sum equal to three times the value of the property destroyed or injured. The fact, that the juror as an inhabitant of that town might be interested, was doubtless the occasion of his being set aside. The defendant was not thereby deprived of a trial by impartial jurors, and does not appear to have been in any manner aggrieved by it.

The next question arises out of the instructions requested and refused. These contain several distinct positions.

One is, that the defendant would not be guilty, if any of the principal inhabitants of the town knew, that the book of records was left with him. The old book of the town treasurer's records, to which the request refers, appears to have been left with the defendant in the spring of the year 1846, and to have been obtained from him by virtue of a search warrant, in the month of December, 1848. Many inhabitants might have known, that it was thus left, without knowing, that it had remained there till the last part of the year 1848. There is nothing necessarily inconsistent between their knowledge and the guilt of the defendant.

Another position is, that if the defendant did no act to conceal the book, other than to deny that it was in his possession, and that he had any knowledge of it, he would not be guilty. This position cannot be sustained. By such denials the defendant might have pursued the most successful course to prevent the owners from obtaining it. It might operate as a most effectual secretion of it.

Another request refused, was, "that if the book, being left in his custody, was not designedly concealed or placed away with a design to conceal it, but was kept openly with his own books and papers, and he did no more than simply to refuse

to deliver it when demanded, and refused to give information, where it was, this would in law constitute no offence within the spirit and meaning of the statute."

This request combines several portions of the testimony, and omits an important fact or piece of testimony, noticed in the other request, that he denied that it was in his possession.

The Court is never obliged to instruct a jury upon the effect of selected portions of the testimony. The Court, however, did incorporate into the instructions given, the essential portions of these requested instructions. The jury were instructed, that the mere withholding or refusing to deliver the books to the town or its officers, or a simple refusal to give information concerning them, would not render the defendant liable. The defendant cannot have been aggrieved by the refusal to comply with so much of the request as alleges, "if it was not designedly concealed or placed away with a design to conceal it," for the jury were instructed, "that the offence consisted in the wilful and malicious secreting of the property from its owners." If it was kept openly with his own private books and papers, that would not necessarily determine, that it was not secreted from its owners.

Complaint is also made of that clause of the instructions given, which declares, "that if it was known to three or four others, then living in the town, that the book had been left there, or that some of them had seen it there, that would not excuse him."

The effect of a knowledge by others that the book had been left there, has been already noticed. The fact, that persons had seen it there, could not prevent the defendant from secreting it from the knowledge of the owners. It has probably often happened, that articles have been seen in the possession of one, who has afterwards effectually secreted them.

Exceptions overruled, and case remanded.

JAMES S. COOPER *versus* JEREMIAH CURTIS *& al.*

The Revised Statutes, chap. 1, sect. 1, provides that every statute shall take effect in thirty days from the recess of the Legislature passing the same, unless the provisions of any statute shall otherwise prescribe.

That section applies, and is in force, as to private as well as public statutes.

Where the charter of a bank is surrendered and accepted, but its power is continued in existence for a limited time, for the purpose of closing its affairs, it is legal that the directors should appoint a cashier under the general banking law.

If the directors were chosen and recognized by the proprietors of the bank as the only board, and they appointed the cashier, who acted under that appointment by their direction, it is not competent for the debtors of the bank to avoid their contracts, on the ground that the directors were not chosen strictly according to the provisions of the statute.

A trustee, created by a bank, may maintain a suit in his own name on a note payable to the bank and indorsed to him while the corporate capacity existed, though the action may not be commenced till afterward.

ASSUMPSIT on certain promissory notes and bills of exchange, formerly the property of the St. Croix bank. They purport to have been indorsed by the bank to the plaintiff, by one Cooper, their cashier. That the notes, and bills were justly due from the defendant was not denied. The objection to a recovery upon them in this action, was, that the said Cooper was not duly authorized to make the indorsements.

The bank, in 1842, had offered to surrender its charter. On the tenth day of March in that year, an act of the Legislature was passed, of which the first section was, that the surrender of the charter of the St. Croix bank is hereby accepted, and the same shall terminate when this act shall take effect. The second section provides, "that said bank shall continue in its corporate capacity, for and during the term of three years from the time this act shall take effect, for the sole purpose of collecting the debts due to the corporation, selling and conveying the property and estate thereof, and for choosing directors for the purposes aforesaid."

It was on the eighth day of March, 1845, that the directors passed a vote authorizing "the cashier to indorse, as cashier, in behalf of the bank, and thereby transfer and assign to the

plaintiff, as trustee for the stockholders, all paper belonging to the bank, which should be unpaid upon the 13th day of April, 1845." The notes and bills now in suit, were accordingly indorsed and assigned to the plaintiff by the cashier. The Legislative session for 1842, closed on the 18th March. The case was submitted for a legal decision.

Granger and *Dyer*, for the defendants, contended that the three years extension of the bank powers, had expired before the paper in suit was indorsed; that the act, being a private act, took effect from the day of its passage, and not from the end of thirty days after the recess of the Legislature.

They also contended that by the act, there was no authority in the directors to appoint or to have a cashier.

They also referred to the records of the bank, and pointed out many of the company proceedings, in which they insisted there were irregularities, such as invalidated the choice of the directors, and contended that, therefore, their appointment of a cashier, if such officer could exist, was void.

They contended that an assignment, such as to a trustee, of the corporation debts, was unauthorized and illegal; and that the bank, having ceased by lapse of time to have the power of bringing suits, could not confer such power upon another.

Downes and *Cooper*, for the plaintiff.

TENNEY, J. — By the Revised Statutes, c. 1, § 1, "every statute shall take effect in thirty days after the recess of the Legislature passing it, unless the provision of any statute shall otherwise prescribe." The Legislature of 1842, did not have a recess before March 18, of that year. The act accepting the surrender of the charter of the St. Croix Bank, not having any such provision, did not take effect earlier than the 17th day of the month of April following. By the second section of that act, the bank was to continue in its corporate capacity for and during the term of three years from the time the act was to take effect, for the sole purpose of collecting the debts due the corporation, selling and conveying the property and

estate thereof, and for choosing directors for the purposes aforesaid; and was to remain liable for all debts due from the same, and to be capable of prosecuting and defending suits at law.

For the purposes specified in the section referred to, the bank had as perfect existence for three years, after the surrender of its charter, as it had before. The mode of transacting the business authorized by the act was in no respect altered or qualified, in any provision in that statute; and it cannot be understood, that any restriction was intended beyond that expressed. To carry out the objects contemplated, by the continuance of the corporate capacity of the bank, it was expressly provided, that it should choose directors. It was proper, that they should appoint a cashier under the general banking law, which was in force for that purpose, as well as for all others, not prohibited by the act accepting the surrender of the charter.

It is part of the ordinary business of banking corporations, to negotiate bills of exchange and promissory notes. Under the authority to sell and convey the property of the bank, it could transfer negotiable paper in the mode usually practiced. The indorsement made by the cashier, acting in his official capacity for the bank, is sufficient evidence, that he acted by its authority. *Folger* v. *Chase*, 18 Pick. 63; *Burnham* v. *Webster*, 19 Maine, 232; *Farrar* v. *Gilman & al.* *Ib.* 440. A trustee, created by a bank, may maintain a suit on a note negotiated while the corporate capacity existed, though the action may not be commenced till afterwards. *Stevens* v. *Hill*, 29 Maine, 133.

Whether the directors were chosen strictly according to the provisions of the statute, or whether they complied in all respects with the law defining and regulating their duties in the appointment of the cashier, are questions, which we are not legally called upon to answer. If they were chosen and recognized by the proprietors of the bank, as the only board of directors, and they appointed the cashier, who acted under that appointment by their direction, it is not competent for

debtors of the bank to avoid their contracts, upon this ground. *Little* v. *O'Brien*, 9 Mass. 423.

The defendants do not deny their original indebtedness to the bank, upon good consideration; and do not pretend, that they have been discharged of their obligations by payment or otherwise; but defend solely upon the objection to the capacity of the plaintiff to sustain the action. The transfer was made, when the power existed under the statute to make it, and in the prosecution of an object provided for in the act, by the express direction of the directors, and under the hand of the constituted organ for such a purpose. The plaintiff has the legal possession of the notes, and can give the defendants an effectual discharge upon the receipt of payment; this is all which they can ask for their protection.

Defendants defaulted.

SAMUEL FURLONG *versus* JOHN POLLEYS *& al.*

Usually, the damages recoverable at law are limited to the natural and proximate consequences of the act complained of.

If the damages sustained are not the necessary consequence of such act, they can be recovered only when specially set forth in the declaration.

In the assessment of damage for the breach of a contract by the non-delivery of an article at the stipulated time and place, the essence of the legal rule is, to place the injured party in an equally favorable condition, by allowing him such compensation as would enable him to supply himself.

One sold a quantity of hay at an agreed price and received pay for it by a promissory note. It was for lumbering operations, and was to be furnished at a specified place in the forest, where no such article was for sale, and no market price existed. Hay was furnished, but it was deficient in quality and was not accepted. *Held*, the measure of damage recoverable by the vendee, was the difference between the price paid by the note, and the market price of the agreed sort of hay, at the nearest and most suitable place where it could be purchased, together with the necessary cost of transportation therefrom.

The same rule of computation is to be applied for ascertaining the deduction to which the vendee is entitled, if sued upon the note.

EXCEPTIONS. Assumpsit, on two notes of hand, each of

$120, given for 10 tons of merchantable meadow hay, and "a logging chance" in township No. 9. The hay was valued at $120; and the "chance" at the like sum.

WELLS, J. presided at the trial. It appeared that defendants went on and lumbered, and also took between three and four tons of the hay, but did not take the remainder, because they said it was not merchantable. There was a large quantity of hay belonging to the plaintiff, when the defendants took the three or four tons, but it did not appear to be any better than what was taken.

After using between three and four tons, the defendants went to Topsfield, and procured English hay for the teams, for the remainder of the season. There was no evidence that they could have procured hay from a nearer point.

The Judge instructed the jury that, if they found the hay not merchantable, and not in conformity to the contract, and that defendants suffered loss in consequence, whatever loss they sustained by the breach of the contract, as to the hay, should be deducted from the note for the hay, and they might allow the defendants, as a part of said damage, what it cost them to send to Topsfield to procure hay, if it could not be supplied from any nearer point.

F. A. Pike, for plaintiff.

Downes, *Cooper* and *Fuller*, for defendants.

SHEPLEY, C. J. — The defendants made with the plaintiff, a contract of purchase of "ten tons of merchantable meadow hay," and of a "logging chance," on township numbered nine, and gave their notes therefor, payable in boards. The suit is upon those notes.

The defendants offered in defence testimony to prove, that the hay was not of a merchantable quality, and that they therefore refused to receive more of it than between three and four tons, and that they obtained a supply of English hay in the town of Topsfield.

Exceptions are taken to the instructions respecting the meas-

ure of damages, which the defendants might recover, to be deducted from the notes.

The damages recoverable are limited to the natural and proximate consequences of the act. If they are not the necessary consequence of it, they can be recovered only when specially set forth in the declaration. 2 Greenl. Ev. § 254; *Dickinson* v. *Boyle*, 17 Pick. 78; *Stevens* v. *Lyford*, 7 N. H. 360; *Palmer* v. *York Bank*, 18 Maine, 166.

When the law has prescribed a rule for the assessment of damages, that must be applied, instead of the more general rule of indemnity, to determine the rights of the parties. The measure of damages for the neglect or refusal to deliver goods, purchased or agreed for, is determined by law to be the difference between the price paid or agreed to be paid, and the market price of the like goods at the time and place of delivery. *Leigh* v. *Paterson*, 8 Taunt. 540; *Gainsford* v. *Carroll*, 2 B. & C. 624; *Boorman* v. *Nash*, 9 B. & C. 145; *Shepherd* v. *Hampton*, 3 Wheat. 200; *Day* v. *Dox*, 9 Wend. 129; *Davis* v. *Shields*, 24 Wend. 322; *Shaw* v. *Nudd*, 8 Pick. 9; *Stevens* v. *Lyford*, 7 N. H. 360; *Smith* v. *Berry*, 18 Maine, 122.

In the case of *Miller* v. *The Mariner's Church*, 7 Greenl. 51, the contract was made for a supply of stone, wrought in a particular manner, for a particular building, to be delivered, as was contended, at a particular time. If such stone were not supplied, others of that description could not be expected to be found for sale, and the erection of the building might necessarily be delayed.

Should it appear, that goods of a kind like those sold could not be obtained at the time and place of delivery, and that no market price there existed, the party entitled to damages must upon principle, be allowed to ascertain the market price at the nearest and most suitable place, where the goods could have been purchased, and the difference between the market value there at the time, and the price paid, adding the necessary cost of their transportation to the place of delivery, would be the measure of damages. The essence of the rule being to place

the party injured in the same situation, by allowing him to supply himself, as he would have been, if the goods had been delivered. *Brandt* v. *Bowlby*, 2 B. & Ad. 932.

The jury under the instructions given in this case, must have found that hay could not have been purchased at any place nearer to the place of delivery than Topsfield. But the instructions permitted the jury to take as the measure of damges, what it cost the defendants to procure a supply of hay at Topsfield instead of the market value of the like kind of hay at that place, and the necessary expense of transporting it from there to the place of delivery. They might have paid for the English hay procured, more than the market price for merchantable meadow hay, and might have incurred more expense in the transportation of it than was necessary, and under the instructions may have recovered, what it cost them to procure the hay, which they did obtain, and what it cost them for its transportation. *Exceptions sustained, verdict set aside and new trial granted.*

GEORGE A. BUCKNAM *versus* HEIRS OF THOMAS F. BUCKNAM.

After a verdict in a writ of entry has been rendered, and the evidence of the title is reported, with the agreement that the verdict may be amended according to the evidence, and the evidence does not enable the Court satisfactorily to determine the exact proportion to which the plaintiff is entitled, the verdict will not be vacated or changed.

Where a person entered upon land by license of one of the owners in common, and erected and occupied a building upon it, he must be considered as holding in submission to the title of such owner, until the contrary is proved.

THIS was a writ of entry. The jury returned a verdict for the demandant for one sixth of the demanded premises. The facts necessary to an understanding of the case, sufficiently appear in the opinion of the Court.

Hobbs, for demandant.

Fuller, for tenants.

SHEPLEY, C. J. — Since the trial the demandant and tenant have both deceased; and their heirs at law, according to the provisions of the statute have been admitted as parties to prosecute and defend the action. The demandant in his writ claimed to recover one undivided fifth part of that tract of land, upon which the tenant had erected a dwellinghouse and out buildings occupied by him. By an amended declaration he claimed to recover the whole of the same tract, describing it by boundaries, and also a tract upon which a blacksmith's shop was standing. No question is presented respecting the amendment. A verdict for one undivided sixth part was found for the demandant.

The case is presented by a report of the testimony and documents with an agreement, that the verdict may be amended, so as to enable the demandant to recover for such proportion as he may be entitled to.

It appears from a division of the estate of John Bucknam, bearing date on December 22, 1795, but not accepted in the court of probate until June, 1799, that there was a tract of land situated in the town of Columbia, on both sides of Pleasant river, containing two acres and one hundred and nine square rods, laid out for the benefit of the mill owners, which had been reserved for that purpose from the time when mills were first erected in that place. It is admitted, that John Bucknam and his wife were the owners of all the mills and privileges. It would seem probable from the division of the estate of the husband, and from the conveyances made by the widow, that the husband owned two-thirds of the privilege and of the corn-mill, and the whole of a double saw-mill then upon the privilege, and that the wife owned one-third of the privilege and of the corn-mill, in her own right. Yet this is not made certain. The original demandant, by the division of his father's estate, acquired title to "two one and twentieth parts" of the whole tract reserved for the use of the mills.

After the decease of his mother and the decease of his brother John and sister Mary, both of whom are admitted to

have died without issue, another division was made among their heirs, in the year 1816, which was accepted in the court of probate in the month of June, 1818. By this he acquired title to one-sixth of that seventh part of the saw-mills and privileges assigned to his brother John in the former division, and also to the whole seventh of two-thirds of the corn-mill, which had been assigned to the same deceased brother. Mary Bucknam, his mother, conveyed, by deed bearing date on April 25, 1801, to Gowen Wilson, "the privilege of the one-third of the single saw-mill," with certain rights or privileges of enjoyment; and also, "one third of the corn-mill privilege for a corn-mill, where the said mill now stands, on Pleasant river," with certain rights of enjoyment. She also conveyed to Joseph Wilson by deed, bearing date on April 16, 1803, another like third of the privilege of the single saw-mill. The original demandant claimed, and probably may have secured to himself by mesne conveyances and by inheritance, the titles thus conveyed to the two Wilsons. It would seem, that the single saw-mill must have been erected after the decease of the first John Bucknam. By whom it was erected, and to what proportion the owner of it was entitled in the whole tract reserved for a privilege, does not appear. It may have been erected by or under the title of the widow to one-third of that tract. It will be perceived, therefore, that without other evidence it cannot with certainty be determined, what proportion of that tract was conveyed by the widow to the Wilsons. And what was intended to be conveyed by the use of the words, "one-third of the corn-mill privilege for a corn-mill, where the said mill now stands," may be uncertain without a more definite knowledge of the rights of the grantor and of the circumstances, under which the conveyance was made.

The counsel for the demandant contends, that he has exhibited a good title to twenty-seven and a half eighty-fourth parts of the whole tract. In this calculation, by the proportion of each mill conveyed, whether it be corn-mill, double saw-mill, or single saw-mill, the grantee is regarded as having acquired title to an equal proportion of the whole tract reserved for the

use of the mills. This may be so, but the testimony introduced in behalf of the demandant shows, that the tract demanded in this suit had been used by the owners of the saw-mills as a place for piling logs from thirty to fifty years. This, taken in connection with the phraseology used in the conveyance of a proportion of the corn-mill privilege, may be sufficient, if the whole facts were disclosed, to show that a conveyance of a portion of the corn-mill privilege or of the single mill might not convey an equal portion of the whole tract.

The counsel for the tenant's heirs contends, that the original demandant had not exhibited a good title to more than the one undivided sixth part found by the jury. This calculation is however founded upon a position apparently erroneous, that John Bucknam was the sole owner of all the mills and water power, and that his widow had no rights except those derived from him.

Considering that the testimony of the witnesses and the documents presented do not enable the Court satisfactorily to determine the exact proportion, to which the original demandant was entitled, it has been thought best not to amend the verdict of the jury, especially as a verdict in this case, and judgment upon it, would have no effect upon the title as it respects other parties, and the tenant does not appear to have had any legal title to any portion of the tract reserved for the use of the mills.

The tenant claimed to have the value of the improvements made by him upon the demanded premises assessed by the jury. The counsel for the heirs of the tenant does not contend, that the instructions on this point were erroneous, while he insists, that the verdict should be set aside, because the testimony tending to prove, that the tenant was not entitled to have the jury find in his favor, did not apply to the blacksmith's shop. This is found to rest principally upon a misapprehension of the counsel, that the shop was erected before the other buildings. Albert Keene, a witness introduced by the tenant, testified, that the house was built twelve or thirteen,

and the blacksmith's shop, nine years since. If the tenant entered by license of one of the tenants in common and built the building for a store, which has since been finished and occupied as a dwellinghouse, he must be considered in all his subsequent acts as performing them in submission to that title, until the contrary is established by proof.

There is moreover little occasion to set aside the verdict upon this point, as the heir of the demandant has given consent in writing, that the heirs of the tenant may remove all the buildings erected by their father.

Judgment on the verdict.

CHARLES PEAVEY *versus* THE CALAIS RAILROAD COMPANY.

Under a charter authorizing the construction of a railroad "to the place of shipping lumber," on a tide-water river, the right of location is not limited to the upland or to the shore, but the road may be extended across the flats and over tide-water, to a point, at which lumber may conveniently be shipped.

After the time has expired, within which a railroad company were, by their charter, to complete their road, they have no authority to take additional lands for the extension of their road, except by consent of the owner.

WRIT OF ENTRY. The tenants disclaimed a portion of the land. The part, not disclaimed, is a strip four rods wide, extending from the shore of the St. Croix river, one hundred and fifty-three feet upon the flats in tide-water. The first, or inner ninety-five feet from the shore, was taken by the tenants under claim of a right conferred by their railroad charter; and it is covered by a wharf which they erected. The remaining, or outer fifty-eight feet, is covered by a wharf which the St. Croix Manufacturing Company built for their own convenience, and which they sold to the tenants in 1842.

After the evidence was exhibited, the case was submitted to the Court for a decision on legal principles.

T. J. D. Fuller, for plaintiff.

1. The demandant is entitled to the whole of the one hun-

dred and fifty-three feet. The charter gave no authority to take land, covered by tide-water. The terminus, fixed in the charter, is "the place of shipping lumber on the St. Croix river." This excludes the flats. The Colonial ordinance does not reach this case. If the road could extend over any of the tide-water, it might, at the discretion of a private corporation, for their own use, be extended indefinitely, making no provision for the purposes of navigation.

2. In no event can the tenants hold the land, beyond the first ninety-five feet. That part was never taken or claimed as a railroad.

Downes and *Cooper*, for the tenants.

By the charter, the tenants were authorized to establish their road quite to low-water mark. But they have not extended it so far. The outer portion of the wharf has been, and yet is, occupied by the defendants, and, it being flats, they may hold it as incident to their rights in the inner portion of the wharf or in the upland itself.

WELLS, J. — The company disclaim the land demanded except a strip four rods wide, extending from the bank of the river into the same, and to the end of certain erections, claimed by them. This portion of the premises, they claim a right to hold, under their act of incorporation.

By the act of 1836, c. 204, and also by the Rev. Stat. chap. 80, railroad corporations have the right to take so much of the land, and other real estate of private persons, as may be necessary for the location, construction and convenient operation of their railroads. But the land so taken, shall not exceed four rods in width, except in certain cases.

The company by their charter were authorized to construct "a railway within the town of Calais, in the county of Washington, from the still water at Milltown, so called, to the place of shipping lumber on the St. Croix river."

The demandant contends, that the company have not the right, by their charter, to extend their road beyond the bank of the river and over the flats to its channel, and that the Legis-

lature have not granted authority to make the road over any portion of tide-waters.

The grant gives the power to make the road, to the place of shipping lumber on the river, in the town of Calais. The company were empowered to extend it to the place where their lumber could be shipped. The use to which the railroad was intended to be appropriated, was the transportation of lumber to a place of shipping.

The lumber was to be brought to the ships or the ships to the lumber. But the ships could not pass over the flats, and to effect the purpose contemplated by the charter, the road must be extended to the ships. The flats could then be taken by virtue of the rule, that a grant of a thing includes the means necessary to attain it. *Babcock* v. *W. R. Road Corporation*, 9 Metc. 553.

If the road were limited to the bank or shore of the river, it would fall short of the place of shipping, the place from which the lumber could be directly taken on board the ships.

The act does not indicate, that the lumber should be boated from the shore to the vessels. Nor to the company is the use of tide-waters forbidden. They may take flats as well as upland, unless the charter precludes them.

It is true, that highways cannot be located over tide waters, without the consent of the Legislature. But it is believed to be a fair construction of the charter, in the present case, that the road might be continued, as far as was necessary to reach the vessels, which were to receive the lumber, and that the corporation has obtained the consent of the Legislature for that purpose.

It is unnecessary to consider what would be the construction, if the language had been only that the road should be located on the river, for the import of that used is more comprehensive, although a grant of land bounded on a navigable river, embraces the flats as well as the upland. *Lapish* v. *Bangor Bank*, 8 Greenl. 85.

It is no uncommon event for railroads to run over tide-

waters, and where they lie within the line of the grant, such must be the case, unless words of limitation or exclusion are used.

By the act of Feb. 22, 1838, two years further were allowed to the company, to complete their road.

After the expiration of that period, they could not take the land of individuals, without their consent, for the extension of their road. They must act within the time given to them, by the Legislature.

It appears by the testimony, that in June, 1838, the wharf was finished, and the road completed, extending ninety-five feet from the shore, over the flats. And that subsequently the St. Croix Manufacturing Company continued the wharf fifty-eight feet further, for their own private accommodation.

The St. Croix company sold their erections to the tenants, in November, 1842.

The tenants not having authority to extend their road, after the expiration of the two years, limited for its completion, could not by law, under their charter, take the premises, upon which those erections had been made.

The St Croix company held the premises, occupied by them, under Isaac Clapp, who had mortgaged them to Joseph Whitney, in 1836.

The demandant's title is derived from Whitney, and the tenants cannot lawfully withhold from him that portion of the demanded premises, which extend from the termination of the ninety-five feet, before mentioned, towards the channel of the river. And judgment is to be rendered accordingly.

CHARLES HAPGOOD *versus* EBENEZER FISHER *& als.*

In an action upon a receipt to deliver property attached by a deputy sheriff, it is no defence, that subsequently to the expiration of the thirty days after judgment in the suit upon which the attachment was made, the original debtor died, unless, in the probate court, his estate was represented insolvent.

Although such receipt was taken by direction of the creditor, and the officer's liability in making the attachment is discharged, the creditor can still enforce the payment of such contract in the name of the officer.

ASSUMPSIT, upon a receipt for the delivery of property attached by the plaintiff as a deputy sheriff, on a writ in favor of *Charles Peavey* v. *David Fisher*, in which judgment was recovered by said Peavey in July, 1841.

The defendant contended that the property mentioned in the receipt, was not, at the time of the attachment, the property of David Fisher, but had been by him transferred to his son, David Fisher, Jr., and evidence was introduced to prove that state of facts.

The plaintiff denied the validity of the sale, and introduced testimony to show that the intention of the parties was to delay and defraud creditors.

The defendants also showed that David Fisher died in March, 1842, and it appeared from the probate records, that administration was taken out on his estate by Leonard Fisher, April 5, 1842; that an inventory was returned Jan. 18, 1843, of personal estate to the value of $83,00; that June 20, 1843, a decree was passed allowing $60 to the widow, and the administrator settled his final account Jan. 17, 1844.

The presiding Judge ruled that the action could not be maintained and ordered a nonsuit; to which ruling the plaintiff excepted.

D. T. Granger, for plaintiff.

T. J. D. Fuller, for defendant.

TENNEY, J. — The attachment of property upon mesne process is not dissolved by the death of the debtor, unless his estate shall be represented insolvent by the executor or ad-

ministrator, and a commission of insolvency shall issue within one year from his death. R. S. chap. 114, § 83. The provision of the statute of 1821, chap. 60, § 32, is substantially the same, excepting, that it is not necessary, that the commission of insolvency shall issue *within one year*, in order to prevent the seizure of the goods upon execution after such commission. The statute of Massachusetts of 1783, chap. 59, § 2, provides, that when any goods or estate are attached on a writ or process, which shall be pending, the same shall not be released or discharged by reason of the death of either party, but be held good to respond the judgment to be given on such suit or process, in the same manner as by law they would have been, if such deceased person had been living. *Provided always*, that when any estate attached as aforesaid, shall, by the executor or administrator of the same, be represented insolvent and a commission of insolvency shall thereupon issue, the attachment made as aforesaid shall have no force or efficacy after the death of the defendant.

If the funds belonging to the estate of a deceased person shall not be sufficient to extend beyond the allowance made to the widow and children, and the expenses of the funeral and the administrator, it shall not be necessary to appoint commissioners. R. S. chap. 109, § 4. By the preceding section, the commission of insolvency is to be issued only upon the representation of insolvency by the administrator or executor. When all the provisions, which have been referred to in the Revised Statutes, are taken together, the representation of insolvency is indispensable to prevent the seizure on execution of property attached upon a writ belonging to a person, who died after the attachment; but the commission of insolvency is unnecessary, when the estate is only sufficient to discharge certain preferred claims.

In the case of *Rockwood* v. *Allen*, 7 Mass. 254, the suit in which an attachment had been made was pending at the death of the defendant therein. The administrator took the defence of the suit without success. Upon the recovery of judgment and execution, the goods attached were holden,

because there was no representation of insolvency, although there was no other estate after paying the allowance made to the widow, and funeral charges.

Grosvenor v. *Gold*, 9 Mass. 209, was where the debtor died insolvent after the rendition of judgment and the issuing of execution; it was held that the goods could be lawfully sold after the decease. Judge SEDGWICK, in delivering the opinion of the Court, says, "This proviso does not touch such a case as the one under consideration, because during the thirty days, while the goods were holden, there was no representation or commission of insolvency, and the enacting clause is left to operate. The goods attached are not to be released." And afterwards, "It will then include only cases, where there has been a representation of insolvency, and a commission actually issued. Indeed any other construction would be not only embarrassing and mischievous, but absurd." "The act provides in the cases which it contemplates, in substance, that the goods attached shall not be released or discharged, but shall be held to respond the judgment; just as they would be, if the original defendant were alive, in all cases, except where there has been a representation of insolvency, and a commission upon it." "Leaving out of consideration any statute provision, the execution in this case issued regularly in the lifetime of the judgment debtor, and it did not abate by his death. Nothing can be more clearly settled than the principle, that if the defendant die after execution sued and before service, it is the duty of the sheriff to proceed to execute the writ, because the debtor's property in the goods was bound absolutely by the teste, before the statute of 23 Car. 2, chap. 3, sect. 16, and ever since that time, except so far as the rights of strangers are involved. And undoubtedly goods here, are as much bound by an attachment during the time they are holden, as goods in England are, by and from the teste of the writ." *Patterson* v. *Patten, ex'or*, 15 Mass. 473.

The contract upon which this action is brought, recites that the property described therein, was attached on a writ in favor of Charles Peavey against David Fisher, and also the estimated

value of the same; and those who executed the agreement, engage to keep the property safely, free from expense to the plaintiff or the creditor, in good order and condition; and that they will redeliver the same on demand; and also that they will redeliver it without demand to the plaintiff or the creditor within thirty days from the rendition of judgment in the action.

Under this attachment, the right of the plaintiff to the property so attached, might be defeated on several contingencies; and whatever would defeat his right to the property, would also be a defence to a suit upon the contract. If the plaintiff in the suit had failed therein, neither he, nor the officer for him, could have had any claim upon the defendants, by virtue of their agreement. If the defendant in that suit had died, and there had been administration on his estate, and the estate had been represented insolvent and a commission of insolvency had issued within one year after his decease, or without the issuing of the commission, if the estate was not sufficient to extend beyond the payment of the allowance to the widow and children, and the expenses of the funeral and the administration, before an execution could have issued and the property attached be seized thereon, the attachment would be dissolved. But neither of these events have happened.

The defendants are also released from their obligation in the contract, if the property attached was not that of the debtor, as between him and the creditor at the time of the attachment. This was a fact, the determination of which was prevented by the nonsuit. And to test the questions raised by the exceptions, it must be assumed, that this question of fact would have resulted in favor of the plaintiff.

If the defendants had delivered the property within thirty days after the rendition of judgment, it could have been taken thereon and sold. If instead of the property, they had paid the plaintiff or the creditor within the same period, the estimated value of the property by the contract, they might have been discharged; and the money could have been applied towards the payment of the execution. By the recovery of

the judgment, the taking out of the execution, the putting of it into the hands of the plaintiff, an officer authorized to seize the property and to make sale thereof, and the failure of the defendants to deliver the property or to pay its value, their liability, which was before contingent, became fixed. All that the contract itself and the law required to charge them absolutely had happened; they would have been liable to a suit, and to judgment upon their contract, for ought which has appeared to the contrary, immediately after, and seven months before the death of the debtor.

It is contended that the defence can be maintained, because the attachment was not dissolved by the failure of the defendants to deliver the property according to their contract, but was subsisting after the expiration of thirty days. It is true that an officer may seize property of certain description, after the expiration of thirty days from the time when judgment was rendered, if the receiptor has not delivered it upon legal demand. *Merrill* v. *Curtis*, 18 Maine, 272. But this principle cannot be invoked as an excuse by the receiptors for a wrongful omission to fulfil their contract. The time had expired, when they had the legal right to redeliver property attached and thereby relieve themselves from their liability. The plaintiff had the right to have seized the property, after the lapse of the thirty days, if he had chosen so to have done, but he was not bound to do this, even if it could have been found, which does not appear. He was entitled to the price of the property as estimated in the receipt. This might have been much more than could have beeen realised from a sale of the property. They had broken their engagement and could not be restored to their condition as it was before the breach. This suit is not to obtain the property attached. It is now too late to be available in consequence of the fault of the defendants. The only remedy left to the creditor, who stands in the place of the officer, is to obtain damage commensurate with the loss, which he has sustained by the failure of the defendants to redeliver the property as they had contracted to do.

It is again contended, that the action cannot be maintained, because the plaintiff is secure against any claim of the creditor by the equitable assignment of this receipt, and because there is no judgment and execution to which the amount received can be applied. It does not appear from the case, that any judgment has been obtained against the administrator, or that the execution on the judgment against the debtor has been renewed. But the debt, of which the judgment is evidence, has never been paid. The contract of the defendants, long before the death of the debtor, ceased to be security for the redelivery of the property attached in specie, but was like any other agreement collateral to the debt, and had become absolute. The creditor is the equitable owner of this contract and can enforce the payment in the name of the officer, the plaintiff in this action.

This case bears a striking analogy to the case of *Farnham* v. *Gilman*, 24 Maine, 250. There the debtor in the execution had been absolutely discharged under the bankrupt law of the United States. The judgment could not be revived. The officer, who took the receipt, was exonerated from liability because he acted therein in obedience to the direction of the creditor's attorney, and the suit was in the name of the officer, who took the receipt for the benefit of the creditor. In every respect the resemblance is perfect, excepting that in the case referred to, the debtor in the execution was discharged in bankruptcy and the receiptor became absolutely liable; and in this case the debtor died subsequent to the time when the defendants had by their neglects commmitted a breach of their agreement.

The case is also similar in principle to that of *Franklin Bank* v. *Bachelder*, 23 Maine, 60, which was *scire facias* against the defendant, who had on the original writ, that was against Elwell and Pray, as principals, and himself as trustee, been adjudged upon his own disclosure, trustee of the principal defendants. Judgment was rendered against Elwell and Pray; and execution issued against them, and against their goods, effects and credits in the hands of the trustee, and

seasonably put into the hands of an officer, who thereupon, and in proper time, made demand of the trustee of the goods, &c., disclosed by him, which he refused to deliver. The defence in the action was, that the debtors in the judgment and execution had become bankrupts, subsequent to the demand of the property and the defendant's refusal to deliver it. It was held, that by the refusal, the defendant had appropriated the property to his own use, and was bound to answer for the value, although the judgment and execution as such, could not be enforced against the debtors. In this case, the defendants, by failing to deliver the property as they had agreed to do, are to be considered as appropriating it to their own use, and they cannot avail themselves of events which occurred after their liability was fixed, in justification or excuse of the omission to redeliver the property, which was at the time unauthorized. *Exceptions sustained.*

MICHAEL MAGUIRE *versus* FREDERICK M. PINGREE *& al.*
JOHN MCGLINCHEY *versus* THE SAME.

While, between the joint owners of a vessel, no settlement has been made of her disbursements and earnings, and no balances have been ascertained and agreed upon, one part owner cannot sustain against another an action for his proportion of the net avails, although the vessel has been lost at sea.

The usual process for such an adjustment is at equity.

Where contracts are made and are to be performed in a foreign country, their legal effect must be determined according to the laws of that country.

ASSUMPSIT. The view, taken by the Court, dispenses with any thing further than the following mere outline of these cases, although quite a mass of facts are reported, from which it seems to have been supposed the balances between the parties could be ascertained.

The ownership of the brig Friends, of the Province of New Brunswick, was divided into thirty-two shares. Each of the plaintiffs owned one share. The business was conducted in the name of the St. Stephens Navigation Company. William

T. Rose was the secretary of the company. The concern became indebted and most of the owners were desirous of selling and settling up. The plaintiffs, with the owners of two other shares, declined to join in the sale. The other $\frac{28}{32}$, equal to $\frac{7}{8}$, were sold to the defendants, Pingree & Chipman, copartners in trade; who immediately bargained to sell to four persons, one-eighth each.

The legal ownership was continued in Pingree & Chipman, who acted as ship's husband in managing the vessel, till she was lost at sea. For the purpose of meeting bills against the concern, a debt of £160, was created, upon a note given to the St. Stephens' bank, signed by William T. Rose, secretary of the company, principal, and by Pingree & Chipman and by Maguire the plaintiff, and some other of the owners.

When the brig was lost, there was an insurance on the freight of $2000, which sum was received by Pingree and Chipman; also, $4000 on the brig, of which $2000 was received also by them, and the other $2000, equally by the four persons to whom they had bargained the four-eighths as above stated. An attempt was made between Pingree & Chipman and their vendees to settle the affairs. Pingree & Chipman presented an account, in which they debited themselves, $439,59, as a balance due to the owners. The account was unsatisfactory to others, and no settlement was effected.

These two actions are brought to recover the plaintiffs' respective proportions of the amount in the defendants' hands. At the trial, evidence was introduced to show the balances, upon which evidence, cases were submitted to the Court for legal decisions.

Granger and *Dyer*, for plaintiffs.

F. A. Pike, for defendants.

FREDERIC M. PINGREE *& al. versus* MICHAEL MAGUIRE.

THE plaintiffs assert that they paid, upon the above mentioned note to St. Stephens' bank, more than their just proportion, and bring this action against one of the co-promisors

thereon, for contribution. Much evidence was introduced to show how the proportions and the balances stood.

F. A. Pike, for plaintiffs.

Granger and *Dyer* for defendant.

WELLS, J. — In the first and second actions, above named, the plaintiffs claim to recover a portion of the earnings, and of the money received from the insurers for the loss of the brig Friends. The parties were part owners of the vessel. It appears by the statement of facts, that an attempt had been made to settle the accounts between them, in relation to the vessel, but owing to a disagreement, no settlement was made.

But in such cases one part owner cannot maintain an action at law against another, although their joint interest has terminated. The ordinary remedy for an adjustment of the accounts between themselves is in a court of equity. If the parties, in the statement of facts had agreed, that there was a balance due, and how much it was, and it had appeared that a judgment rendered for it would have closed all the transactions between the part owners, and no further cause of action could grow out of them, then the actions, by our law, might have been maintained. Abbot on Shipping, 80; *Williams* v. *Henshaw*, 11 Pick. 79; S. C. 12 Pick. 378; *Chase* v. *Garvin*, 19 Maine, 211.

But by the English law, in such case, an express promise to pay the balance is necessary. *Fanning* v. *Chadwick*, 3 Pick. 420; *Foster* v. *Allanson*, 2 T. R. 480; 1 Chitty's Pl. 26, 27. And it is also the law in New York. *Halsted & al.* v. *Schmelzel*, 17 Johns. 80.

The several contracts between the parties were made and to be performed in the province of New Brunswick, and their legal effect must be determined by the laws of England. Story's Conflict of Laws, 266; *Carnegie* v. *Morrison*, 2 Metc. 397.

It is very manifest, therefore, that these actions cannot be maintained.

The third action, above named, is brought to recover the defendant's proportion of a note given to the St. Stephens' Bank, and signed by him, the plaintiffs and other owners of the vessel, and paid by the plaintiffs. The money was obtained upon this note for the use of the brig, and was so appropriated, and what was paid by the plaintiffs would be a charge in the general account. It may be that they are already overpaid by the earnings of the brig and the money received by them from the insurers. But whether this be so or not, can be determined by an adjustment only of the dealings of the part owners. This action stands upon the same ground as the two other actions, and must share the same fate.

A nonsuit must be entered in each action.

INHABITANTS OF CALAIS *versus* INHABITANTS OF MARSHFIELD.

Where a pauper, belonging to another place, is supplied within and at the expense of the plaintiff town, under a contract made with an individual to support all such paupers as the town should be obliged to support, such supplies are held to be furnished by the town.

In such case the plaintiff town may maintain an action for such supplies, against the town of the pauper's settlement, although the recovery is for the benefit of the contractor.

A residence by a father, within the United States, and an adherence to its government, from the commencement of the Revolutionary war till after the definitive treaty of peace in 1783, conferred all the rights of citizenship, both upon himself and upon his minor child residing in his family.

By the common law, allegiance is not a matter of individual choice. It attaches at the time and on account of birth, under circumstances in which the family owes allegiance and is entitled to protection.

Although the child, whose citizenship is thus established, may have removed, immediately after coming of age to act for himself, into a British province, and adhered to its government, he is, on his return to the United States, entitled to the rights of citizenship.

By the act of 1826, dividing the town of Machias into several towns, a person, born within its territorial limits, though prior to its incorporation, and removed therefrom at the time of said division, is held to have a settlement

in that one of the towns, within the territorial limits of which he was born. And this rule applies to persons whose settlement there was merely derivative.

ASSUMPSIT, for the support of William B. Scott and his family, alleged to be paupers.

The case came before the Court upon the following facts.

Scott was born in 1774, in that part of the town of Machias, which, on the division of that town in 1826, was incorporated into the present town of East Machias. When he was seven years old, his father, John Scott, removed with his family, including the pauper, to the territory, (a part of the original town of Machias,) afterwards incorporated as Marshfield; and resided and paid taxes there until the year 1810, when he removed to the province of New Brunswick, where he died in 1824; William P. Scott resided in said part of Machias, now Marshfield, until he was between 21 and 22 years of age, when he removed to the province of New Brunswick, where he resided until the winter of 1846, when he removed to Calais, where he has since lived and been supported as a pauper. While in the province of New Brunswick, the pauper became the owner of the farm upon which he lived, and to which he still sets up a claim, which is in a course of litigation; he performed military duty there; and held once or more the office of surveyor of the highways; he also voted there, his right not having been questioned.

At the time of the support, furnished the pauper, the town of Calais was under a contract with Thomas Paine, for the support, at a fixed price, of such paupers as said town might be obliged to support, or whom the overseers should direct to be supported as paupers.

Due notice was given by the plaintiffs to the defendants, and a seasonable answer was returned denying the settlement of the paupers in Marshfield.

The case was submitted upon the legal rights of the parties.

The inhabitants of East Machias, being supposed to have a possible interest, in the subject matter of the suit, their counsel was admitted to argue the cause in their behalf.

G. F. Talbot, for East Machias.

1. The right to recover for the support of paupers, having settlements in other towns, is derived solely from the statute, and is based upon expenses, *actually incurred*. But the plaintiffs were indemnified by their contract with Paine.

2. The pauper is an alien, and has no settlement within the State. *Inglis* v. *The Trustees of the Sailor's Snug Harbor*, 3 Peters, 126. He was born under the allegiance of Great Britain, and on attaining his majority, he made his election to return to that allegiance.

3. If the pauper have a settlement within the State, it is not at East Machias, but at Marshfield, by the provisions of the statute of 1793, and by the provisions of that of 1821; and by those of the Revised Statutes.

4. In 1826, the original town of Machias was divided into three towns. The pauper had, through his father, gained a legal settlement in the original town.

When, in 1846, the town of Marshfield was incorporated out of Machias, the pauper's last dwelling place fell within the limits of Marshfield, and that town became chargeable with his support. Nor is the place of his legal settlement changed by the provisions of the 5th section of the act of 1826, dividing the old town of Machias, and incorporating the towns of West Machias, (now Machias,) East Machias and Machiasport. The provisions of that section apply only to those persons, who had "a settlement in Machias." The pauper in the present case had no such settlement, and could gain none in his own right; he could only gain one through his father. *Princeton* v. *West Boylston*, 15 Mass. 257; *Southbridge* v. *Charlton*, *ib.* 248; *Westboro'* v. *Franklin*, *ib.* 254.

The claim that W. P. Scott is settled in East Machias, is strongly resisted by the consideration, that it separates his settlement not only from that of his father, but also from that of his wife and children. But in any view there is no pretence that his daughters, (for whose support this action in part was brought,) can have any settlement in East Machias.

F. A. Pike, for plaintiffs.

One objection raised to the maintenance of this action is, that the pauper, W. P. Scott, is an alien.

The right of choice, in case of a revolution like that of 1776, is granted; but that right must be exercised during the pendency of the contest or immediately upon its conclusion. *Inglis* v. *Sailor's Snug Harbor*, 3 Peters, 199; *Killam* v. *Ward*, 2 Mass. 236; 2 Kent's Com. 60.

If, at the time the choice should have been made, W. P. Scott was incapacitated on account of minority, then his father had authority to choose for him.

But W. P. Scott did not *immediately* upon attaining his majority, go into the province. Nor does it appear what his *intentions* were at the time he went.

It is no consequence whether he is an alien or not. His father was a citizen, and that is sufficient to give his son a settlement here.

An alien is capable of acquiring a settlement in this State, under the provisions of statute 1821, chap. 122. *Knox* v. *Waldoboro'*, 3 Greenl. 455.

The next question is, whether Marshfield or East Machias is responsible for the support of the paupers.

When W. P. Scott, in 1795, removed from Machias, viz. that part of it now constituting the town of East Machias, the Massachusetts settlement act of 1794 was in force; and by the terms of that act, he had gained no settlement anywhere *in his own right.*

The only question then to be determined is, where his father's place of settlement was.

The father's settlement would be in Marshfield under two rules of the act of 1794.

1. He lived there in 1784 at the time of the incorporation of the town of Machias.

2. He lived there and paid taxes there for sixteen years after the passage of the settlement act of 1794.

By the act of 1846, dividing Machias into Machias and Marshfield, his settlement was thrown into Marshfield. And

Wm. P. Scott, having no settlement in his own right, and consequently following that of his father, has his settlement in Marshfield; unless the act of 1826, dividing the town of Machias, made a disposition of him other than that which the general law as above cited makes. Sect. 5 of that act is: — "All persons, now chargeable to said town of Machias, as paupers, and all persons, who having a settlement in Machias, but removed therefrom, and not having gained a settlement elsewhere, shall hereafter become chargeable as paupers, shall, *if born in Machias*, have their settlement in that town within the limits of which they were born, *and if not born in Machias, shall have their settlement in that town in which they have usually resided.*"

The several reasons why this section does not apply to the case at bar, are sufficiently stated in the argument of counsel for East Machias.

R. K. & C. W. Porter, for defendants.

Shepley, C. J. — The action appears to have been commenced to recover compensation for supplies furnished to William P. Scott, his wife, and two of his daughters, as paupers alleged to have a legal settlement in the town of Marshfield. The case is presented upon an agreed statement, which has no direct bearing upon the settlement of any of the paupers except that of William P. Scott, and his settlement alone will be examined.

The first objection made to the plaintiff's right to recover, is, that the supplies do not appear to have been furnished by the plaintiffs. It is admitted, that Scott has been supported in the town of Calais, as a pauper, since the winter of 1846. At the time, when the supplies were furnished, Thomas Paine was obliged by a written contract to support all the paupers of that town for an agreed compensation. It is not denied, that the supplies were necessary. Paine was to support all paupers "whom said inhabitants may be obliged to support, and whom the overseers of the town shall direct to be supported as paupers." Although it is not stated, that the overseers

ordered, that the supplies should be furnished or the paupers supported, yet such may be the correct inference from the facts agreed. The supplies in such case would not be the less furnished by the town, because they were paid for by it as included in a gross sum, paid for the support of all its paupers. It might be more difficult to ascertain the amount expended for a particular pauper, as it would also be in towns, in which the paupers are not supported by a contract, but in a workhouse, by a supply furnished for the whole number and not for each individual or family. Nor will the fact, that Paine may by his contract be entitled to the benefit of the amount, that may be recovered, preclude the plaintiffs from maintaining the action. They are not the less entitled to recover the amount expended, because they have agreed to pay it to another, who by an agreement made with them has furnished the supplies.

The second objection is, that the pauper can have no legal settlement in this State, because he is an alien. His father appears to have resided in the town of Machias from the year 1774 to the year 1810, when he removed to the province of New Brunswick. There can be no doubt, that he was a citizen of the United States. The pauper was born in the year 1774, and continued to reside in the family of his father until after he became of full age, and he soon after, in the year 1795, removed to the province of New Brunswick, where he continued to reside until the year 1846, when he removed to Calais. While residing in that province he became the owner of real estate there, performed military duty, held the office of surveyor of highways, and exercised the elective franchise.

Upon the separation of the United States from Great Britain, by revolution, those persons, who remained and adhered to the newly established government, are regarded as having renounced their allegiance to their former sovereign, and as having yielded it to the government of their choice; and to have done this not only for themselves but for their minor children, being then members of their family. Massachusetts, by the act against treason, passed in the year 1777, claimed

allegiance from all persons abiding within the State and deriving protection from its laws. In the United States it is the established doctrine, that those who remained in the country after the declaration of its independence, in 1776, and adhered to its government, became citizens of the United States. It is the established doctrine in Great Britain, that she relinquished by the treaty of peace of 1783, all claim to the allegiance of all her former subjects, who were at that time domiciled in and adhering to the government of the United States. *Thomas* v. *Acklam*, 2 B. & C. 779. The act of Congress, of the year 1802, c. 28, § 4, provides, that the children of persons, who then were citizens of the United States, should be considered citizens of the United States, although born out of their limits.

The allegiance of the pauper would seem, therefore, to have been relinquished by his former sovereign, and to have been claimed by the government of the State, in which he continued to reside in a family adhering to it. And his citizenship to have been subsequently admitted by an enactment of the United States.

But it is said, that soon after he became of an age to act for himself, he elected to continue to adhere to the government and allegiance, to which he was by birth entitled. By the common law, allegiance is not a matter of individual choice. It attaches at the time and on account of birth under circumstances, in which the family owes allegiance, and is entitled to protection. The parent has a right to determine, where his family shall reside, and his and its relations to the government, under which he lives. This is the foundation of the doctrine, that by a change of the father's allegiance by naturalization or otherwise, the allegiance and citizenship of his minor children, then members of his family, becomes changed. The rights and duties of such minor children are thus necessarily determined. If the father of the pauper had deceased, when the pauper was but twenty years of age, leaving an estate, can there be a doubt, that the pauper must have been regarded as a citizen, and as entitled to a share of that estate by inherit-

ance? If this must be conceded, then an election after he became of age to be a subject of Great Britain, could be no more than an election to renounce a citizenship admitted by our laws, and to adopt the allegiance due at the time of his birth. Admitting that the facts agreed would prove, that he made such an election, and that he was correctly regarded as a British subject, that would not necessarily make him an alien. The laws of the United States determine, what persons shall be regarded as citizens irrespective of such person's pleasure. Accordingly the act of Congress before named, has been considered as determining, that persons were entitled to be regarded as citizens, who were born and had ever continued to reside without the limits of the United States, being the children of citizens; and such persons might at the same time be the subjects owing allegiance to the government of the country, in which they were born. *Charles* v. *Monson and Brimfield Man. Co.* 17 Pick. 76. Mr. Justice STORY, in his elaborate opinion in the case of *Inglis* v. *The Trustees of the Sailor's Snug Harbor*, 3 Peters, 157, says, "it [the government] may give him the privileges of a subject, but it does not follow, that it can compulsively oblige him to renounce his former allegiance." He further says, on page 162, "the ground of this doctrine is, that each government had a right to decide for itself, who should be admitted or deemed citizens; that those, who adhered to the States and to Great Britain respectively, were by the respective governments, deemed members thereof; and that the treaty of peace acted by necessary implication upon the existing state of things, and fixed the final allegiance of the parties on each side, as it was then *de facto*. Hence the recognition on the part of Great Britain, of our independence, by the treaty of 1783, has always been held by us as a complete renunciation on her part, of the then members of the United States, whether natives, or British born." The opinion of a majority of the Court in the same case, as delivered by Mr. Justice THOMPSON, speaking of the demandant in that case, says, "and his election and character followed that of his father, subject to the right of disaffirmance in a reason-

able time after the termination of his minority." If the treaty of peace of 1783, be regarded by both countries as making by Great Britain a renunciation, and by the United States an acknowledgment of due allegiance of all the people, who then resided in the United States and adhered to its government, it is difficult to perceive how a minor, then and for a long number of years afterward, residing in the family of his father in this country, could by such an election, owe or be entitled to the benefits of an allegiance before renounced by that government without some new act of such government to recognize it. Mr. Justice STORY does not appear to have assented to the position, that a minor may make an election many years after the contest had been finally settled, and the rights of the respective adherents had been determined by their respective governments, and thereby determine, what shall be the rights and duties of those governments respecting his allegiance. He says on page 171, "that if the demandant's father was at that time so adhering, it was a final settlement of his allegiance on the British side." By the cession of a part of one country to another, obtained by purchase or by conquest, the allegiance of all the inhabitants residing upon it as citizens or subjects, is transferred from the ceding to the accepting government, except so far as the compact of session may otherwise provide. The allegiance of the adult and of the minor, is in such case alike transferred without its consent, and it may be much against his pleasure. Upon what principle is the treaty of peace of 1783 less operative and effectual, especially upon the views of right taken and held by Great Britain, in that controversy and in its settlement?

But it is not necessary for the decision of this case to determine, whether an election made by the pauper on his coming of age would secure to him all the rights of a liege subject of Great Britain, for if that be admitted, he must still be regarded as entitled by the laws of the United States, to the benefits of citizenship; because it could not have been the intention by the act of Congress of 1802, to admit the children of its citizens, which were born out of the limits of the government, to

be citizens, while children of the same parents born within its limits, were denied to be citizens.

Although the government of one country may grant to persons owing allegiance to that of another, the rights and privileges of citizenship, it is not intended to intimate, that the government making such grant would thereby and without their consent or change of domicile become entitled to their allegiance in respect to any of their political duties or relations.

An alien, according to the provisions of our statutes may gain a settlement in this State. *Knox* v. *Waldoboro'*, 3 Greenl. 455. And there is nothing found there to create a forfeiture of a legal settlement once gained, or to deprive the person of its benefit, while his domicile is established within the State, in consequence of his having become the citizen or subject of a foreign government.

If the pauper had the capacity to gain a legal settlement in this State, the question remains for consideration, whether he has such a settlement in Marshfield. His father had a legal settlement in the town of Machias before it was divided into three towns, in the year 1826. He had before that time removed from that town. His residence at the time of the pauper's birth was established in that part of the town, which upon the division was incorporated as East Machias. About the year 1781, he removed and established his residence in that part of the town, which was upon the division incorporated as West Machias; and into that part of it, which was in the year 1846, incorporated as Marshfield, where he continued to reside until the year 1810. While the father had a settlement in the town of Machias it was not confined to or fixed upon any particular part of it, by his residence in that part. Upon a division of the town some statute provision, either general or special, relating to the subject, must determine to which of the new towns his settlement should be attached. By the statute then in force, c. 122, § 2, provision was made, that upon division of towns a person having a legal settlement therein, but removed therefrom, " shall have

a legal settlement in that town, where his former dwelling-place or home shall happen to fall upon such division." By this provision the settlement of the father would become attached to West Machias. The act approved on June 30, 1846, dividing the town of Machias, formerly called West Machias, into the towns of Machias and Marshfield, provides, that Marshfield shall be liable for the support of all persons, "who, having gained a settlement in said Machias, have usually resided within the limits of Marshfield." This clause might be sufficient to transfer the settlement of the father to Marshfield. The pauper, by the provisions of the general statute, followed and had the settlement of his father in the town of Machias, and unless there be some special provision to determine otherwise, he will follow that settlement to the town to which it has become attached. But it is competent for the Legislature to make other and different provisions respecting the burdens to be imposed upon the respective towns incorporated on the division of a town. The fifth section of the act of 1826, dividing the town of Machias, provides, that "all persons, who having a legal settlement in Machias, but removed therefrom and not having gained a settlement elsewhere, shall thereafter become chargeable as paupers, shall if born in Machias have their settlement in that town, within the limits of which they were born; and if not born in Machias, shall have their settlement in the town, where they have usually resided." This determined the settlement of those, who were born in Machias and had removed, to be not in the town, where their former dwelling-place fell according to the provisions of the general act, but in the town, within the limits of which they were born. The pauper, it is said, was not born in Machias although born within the limits of that town before it was incorporated. Such a construction of the act cannot be admitted. The paupers were to "have their settlement in that town within the limits of which they were born;" and the phrase, "if born in Machias," had reference to the same class of persons. It clearly was not the intention to make the settlement depend upon the fact of their being

born in an incorporated town, but upon their being born within certain limits.

It is further insisted, that the provisions of that act "have no application to persons whose settlement is only derivative." The act in terms comprehends all persons "having a settlement in Machias, but removed therefrom," without making any distinction respecting the mode by which it had been gained. The pauper at that time had a legal settlement in Machias, and it was not the less his settlement, because it had been acquired by the provisions of the general law, that legitimate children should follow and have the settlement of their father. Having such a settlement, that, with the burden of his support in case of need, was, by the terms of the act, assigned to that one of the towns, within the limits of which he was born.

It is further insisted, that this effect cannot be given to the act, because thereby a minor child might have a settlement in one town and his parents in another, and that this would violate a well established rule, "that the wife cannot have a settlement separate from her husband, nor the minor children a settlement distinct from that of their father." That rule, as a general one, would be the necessary result of the general statute provisions, that married women shall follow and have the settlement of their husbands, and that legitimate children shall follow and have the settlement of their fathers. But when the Legislature by special enactments establishes rules respecting the settlement of a particular class of paupers, differing from those contained in the general statute provisions, the rules of construction applicable to those general provisions cannot be applied to such special enactments, when by doing so the Court must do violence to language clearly exhibiting the intention of the Legislature. The rule insisted upon does not always prevent minor children from having a settlement in a different town from that in which their parents have a legal settlement. It has been decided, that children, who during their minority had been emancipated, would not follow and have the settlement of the parent, acquired after

emancipation. *Springfield* v. *Willbraham*, 4 Mass. 493; *Charlestown* v. *Boston*, 13 Mass. 469; *Lubec* v. *Eastport*, 3 Greenl. 220.

If the Court could perceive, that a literal and fair construction of a special act would have the effect to break up a large number of families and to separate the minor children from their parents, when they were in need of supplies, there would be just reason to doubt, whether such could have been the intention, and whether a forced construction, should not rather be adopted. But when there is perceived to be only a possibility, that such a result may take place only in the few families, upon which the special enactments can operate, the Court would not be authorized to adopt a construction at variance with the literal import of the language. As the pauper does not appear to have a legal settlement in Marshfield, there must, according to the agreement of the parties, be an entry of *Plaintiffs nonsuit.*

Trustees of Putnam Free School *versus* Leonard Fisher.

In a suit, brought in the name of a corporation, the plea of general issue admits the existence of the corporation.

Where an estate is devised to executors *eo nomine*, in trust, the devise is made to the official, not to the individual persons, and the whole trust vests in those who accept the office and become executors of the will.

Where an estate is so devised, or where the executors have, by the will, a power to sell, coupled with an interest in trust, a conveyance by survivors or by those who alone accept the trust, will be good.

By a devise to the executor, of the testator's property, real and personal, in trust, for the purpose of creating a cash fund, he takes in the real estate a fee in trust. But if he did not take the fee, he would still have an implied power to execute the trust.

A conveyance by a devisee under a foreign will, made before the will is filed and recorded in this State, is nevertheless good, as his title commences upon the death of the testator.

Writ of entry. The demandants proved title in Oliver

Putnam, in the year 1820; also an authenticated copy of his will, allowed in Massachusetts, in 1826, and also recorded in the Probate Court of the county in 1844; by which Caleb Cushing and two other persons were appointed executors, and devising to them large real and personal estates in trust. Cushing alone accepted the appointment.

The character of the trust is given in the opinion of the Court.

The demandants then introduced a deed to themselves of the premises, from Cushing, as executor, and offered to prove an entry on the premises, under the deed in 1843. Whereupon, the Judge ordered a nonsuit, to which the demandants excepted.

Granger and *Dyer*, for demandants.

T. J. D. Fuller, for tenant.

Cushing's deed of 1841, did not convey Putnam's title, for Putnam's will had not been probated in this county, and was not, until 1844.

It was a quitclaim merely. The probate could not have a retrospective effect. It should have preceded the conveyance. Plaintiffs show no confirmation deed.

But Cushing's deed is inoperative, on other grounds.

The testator appointed three executors and then devised to them, and not to one of them, the residue of his estate in trust.

No express power is given to the executors, to sell the real estate. The power to sell is an implied one, if at all.

The will made no provision for the death, refusal to act, or incapacity of any one, or all, of the executors; no survivorship was created, yet, a very important trust, was committed to them, and one that would require a long time to execute it.

The creation of powers depends on the intention of the parties, and they are to be construed in reference to that intention.

The testator did not intend to rest the fee in his executors, but simply to confer a power of sale. No words of *inherit-*

ance or *succession*, are introduced, not even a life estate was given.

The executors should have given two separate bonds, one in the character of executors, and the other in the character of trustees. And among trustees there could be no survivorship and consequently one alone could not convey a title. 17 Maine, 137; *Massachusetts Hospital* v. *Amory*, 12 Pick. 445.

1. The trustees had but a naked power, not coupled with an interest. *Ramsdell* v. *Ramsdell*, 21 Maine, 21.

2. All three should have joined in the deed.

3. The sale should have been decreed, by the Judge of Probate, in furtherance of the trust. R. S. chap. 111, sect. 3, 4, 6, 7, 8, 9 and 12.

The trust attached to the estate, and the court of probate of this county, under the 12th sect. of chap. 111, could have enforced the trust and decreed the sale or conveyance. 12 Pick. 445.

If the executors had all died, before the execution of the trust, the fee would have vested, not in their heirs, but in the heirs of Putnam.

The persons named as executors, took under the *will*, in the double capacity of *executors* and *trustees*. As trustees, they either took, as joint tenants in fee, or a joint, naked *trust or power* to sell, and in either case, all should have joined in the conveyance, if they wished to act under the will independent of any aid of our statute.

This is a case therefore of one acting, not under a defective power, but without any power.

A stranger may well take advantage of this. *Jackson* v. *Sinclair*, 8 Cowen, 543.

In support of our positions we cite, Williams' Ex. 2d vol. chap. 2d. pt. 3d; Kent's Com. vol. 4, chap. 61; 1 Caines' Cases in Error, 16; *Franklin* v. *Osgood*, 14 Johns. 560; 6 Johns. 39; Co. Litt. a. sec. 169, and Hargrave's note; 3 D. & E. 595; 2d Dessaussure, 250, and note; 3 Bibb. 349; 2 Metc. 243.

SHEPLEY, C. J. — This writ of entry demands the northerly half of lot numbered seven, in the fourth range of lots in the town of Charlotte. The general issue was pleaded, which admitted the existence of the corporation. *Savage Man. Co.* v. *Armstrong*, 17 Maine, 34.

Oliver Putnam, deceased, appears to have been in possession of the lot by virtue of a judgment and writ of *habere facias* issued thereon in April, 1820. By his will executed on July 11, 1825, and approved by the court of probate for the county of Suffolk, and Commonwealth of Massachusetts, on August 14, 1826, Edward S. Rand, Aaron Baldwin, and Caleb Cushing were appointed executors. The two former declined the execution of the trust, in writing, and letters testamentary were granted to the latter.

Following several specific bequests and devises, the will contains this clause: — "To the said executors, I bequeath and devise in trust the residue of my property real and personal to accumulate by the addition of the interest or income as received to the principal, till my nephews arrive at age, and then to be disposed of as follows." The executors are then directed to pay his nephews, when they shall respectively arrive at twenty-one years of age certain specified sums of money. Then follows this clause: — "The residue of my property, I give and bequeath for the establishment of a free English school in Newburyport for the instruction of youth, wherever they may belong. If at the final payment of the foregoing legacies it should amount to fifty thousand dollars, the executors will then pay it over as hereafter provided, but if not, they will retain it to accumulate, until it amounts to that sum, and then pay it over to trustees, for that purpose, to be appointed by the selectmen of Newburyport."

1. When an estate, as in this will, is devised to executors *eo nominee* in trust, the devise is made to the official, not to the individual persons, and the whole trust vests in those who accept it and become executors of the will. *Townson* v. *Ticknell*, 3 B. & A. 31; *Stacey* v. *Elph*, 1 Myl. & Keene, 195; *Knight* v. *Gould*, 2 *ib.* 295.

2. When an estate is so devised, or when the executors have by the will a power to sell, coupled with an interest in trust, a conveyance by survivors, or by those who alone accept the trust, will be good. Co. Litt. 113, and note 146 by Hargrave; *Bonifant* v. *Greenfield*, Cro. Eliz. 80; *Zeback* v. *Smith*, 3 Binn. 69; *Taylor* v. *Galloway*, 1 Ham. 232; *Sharp* v. *Pratt*, 15 Wend. 610; *Leavens* v. *Butler*, 8 Port. 38.

A doubt has been expressed respecting the authority of the case of *Bonifant* v. *Greenfield*, but it was noticed with approbation in the case of *Townson* v. *Tickell.*

3. By the "devise in trust of the residue of my property real and personal" the executor took in the real estate a fee in trust. *Josselyn* v. *Hutchinson*, 21 Maine, 339; *Godfrey* v. *Humphrey*, 18 Pick. 537; *Kellogg* v. *Blain*, 6 Metc. 322; *Jackson* v. *Merrill*, 6 Johns. 185; *Fox* v. *Phelps*, 17 Wend. 393; *Morrison* v. *Semple*, 6 Binn. 94.

4. If the will could receive such a construction, that the real estate would not be devised to the executor, who accepted the trust, in fee, he would be authorized by the will to sell it, because he could not execute the will without converting the estate into money, and in such case the power to sell is necessarily implied. *Going* v. *Emery*, 16 Pick. 107; *Morton* v. *Barrett*, 22 Maine, 257.

The executor was required to pay the legacies in money. And when the residue amounted to fifty thousand dollars, to "pay it over to trustees." He could not ascertain its true amount or pay it over, until the whole estate had been converted into money.

5. Caleb Cushing, as executor, made a conveyance to the trustees of the lot demanded, on November 27, 1841. A copy of the will and probate thereof was not allowed, filed and recorded in any court of probate in this State until Oct. 1, 1844. The conveyance was nevertheless valid as made by Cushing.

It is objected, that the devisee could make no valid conveyance of real estate situated in this State, before the will had been allowed and recorded within the State. The answer is,

that when a foreign will has been allowed, filed and recorded within the State, the title of the devisee commences upon the death of the testator.

The former statute, chap. 51, § 17, provided that a foreign will, when allowed, filed and recorded, being presented by a copy of the will and of the probate thereof, "shall be of the same force and effect as the filing and recording of an original will proved and allowed in the same court of probate." Upon a revision of the statutes, chap. 106, § 16, the language used was, "and the will shall then have the same force and effect, as if it had been originally proved and allowed in the same court in the usual manner." Although there is a slight difference in the language, which declares the effect, it is obvious, that the construction must be the same.

Its legal effect was determined in the case of *Spring* v. *Parkman*, 3 Fairf. 127. The conveyance in that case was made by an executrix, who was devisee of the residue of the real and personal estate, and was clothed with an express authority to sell, on July 4, 1827. The will was filed by copy and allowed in this State on March 21, 1828. The decision was, that her title had relation back to the decease of the testator, and that the conveyance made by her, before the will was allowed in this State, was effectual.

The corporation appears to have exhibited proof of a *prima facie* title to the premises demanded.

Exceptions sustained,
and new trial granted.

JOSEPH WATKINS *& al. versus* JOSEPH E. EATON *& al.*

Land, owned in common by different proprietors, which has been taxed and sold at auction, *in solido*, for the payment of county taxes, may be redeemed by any one of the co-tenants.

The purchaser may refuse to receive any part, without the whole, of the amount for which he is entitled to hold the land.

When one of the proprietors has redeemed his own part and also the part of another co-tenant, and taken the purchaser's release thereof, a subsequent tender to the purchaser, by such co-tenant, of his proportion of the amount for which the land had been holden, though made within the time allowed by law for redeeming, is of no effect.

Such redemption of another's share, by one of the co-tenants, will transfer to him a lien thereon for a reimbursement, though it will give him no right of action to enforce it.

Until such reimbursement has been made or tendered to the co-tenant who redeemed, or to the owner holding under him, no action can be maintained, by the delinquent co-tenant, against either of them for the recovery of the land.

If, after the time allowed by law for redeeming has expired, the auction purchaser should *sell* and *convey* the land to one of the co-tenants, the other co-tenants could derive no rights therefrom. — Per SHEPLEY, C. J.

WRIT OF ENTRY. The case came up on an agreed statement. The facts are exhibited in the opinion of the Court.

Hobbs, for the demandants.

The estate derived by Longfellow from the tax sale, was a fee upon condition, liable to be defeated by payment to him of the amount and 20 per cent. interest, within three years, by those having the right to redeem.

Longfellow could not, by parting with the fee, compel the owners to redeem of any other person than himself.

The words of the statute are explicit. "The owners of lands sold in pursuance of the foregoing section shall have the right to redeem said lands by paying to the purchasers thereof, &c." Act of 1836, chap. 32, sect. 3.

Quincy, then, if to be viewed as a stranger, by the deed of Longfellow, acquired a fee, subject to be defeated by payment to Longfellow, by the demandants, within three years from the time of sale.

The tender was rightly made to Longfellow, within the three years.

The case of a mortgage is analogous to this; and a legal tender of a mortgage debt, before condition broken, discharges the land of the mortgage.

The tender made to Longfellow was a redemption of the land. By it the tax deed was avoided, and the demandants were restored to their former estate.

But Quincy was a tenant in common with the demandants, and the release of Longfellow enured to the demandants as well as to him.

A release of the whole to one of two, holding jointly or in common, is a confirmation of the title of both.

If a disseizor makes a feoffment to two, a release to one enures to both.

If a disseizee releases his right to the tenant for life, this enures to the benefit of him, in reversion or remainder.

The release in both the foregoing cases, operates as an *extinguishment*, for the benefit of those jointly interested.

The tax deed gave to Longfellow the legal seizin, and his deed to Quincy restored the seizin, not only to Quincy, but to the demandants; for the seizin of one tenant in common is the seizin of all.

And the entry and possession of one tenant is the entry and possession of all.

The payments by Quincy will be presumed to be for the benefit of his co-tenants, unless the contrary plainly appears. The evidence of Longfellow shows that a *redemption* of *all* was intended.

The case of *Williams* v. *Gray*, 3 Greenl. 207, was very similar to this. Although it was decided by the principles of estoppel, the Court say, that "in redeeming the lands, the defendant must be considered as the agent of the plaintiff, as far as his interest extended."

J. Granger, for the tenants.

The tender was ineffectual, being made to the wrong person. It should have been made to Quincy.

It is said that the statute required the payment to be made to the purchaser. But this, by legal implication, must include his heirs and assigns, otherwise there could be no redemption, in case of the decease or insanity of the purchaser. Purchasers, too, might remove from the country.

The doctrine contended for, would, in effect, make the purchase an inalienable estate, during the time allowed by law for the owners to redeem.

The position taken by the demandants' counsel, that Longfellow was not obliged to release to the respective owners in parcels, would, if correct, seem to be a sufficient answer to the tender, as the demandants tendered one eighth only of the amount of the tax and interest.

The demandants contend that the deed from Longfellow to Quincy was not an assignment, but an extinguishment of Longfellow's title. This I regard as the only question in the case.

If Longfellow could have transferred his title to a stranger without an extinguishment of it, why not to a person owning an undivided part?

If the title to the disputed eighth had become absolute in Longfellow, he certainly could have transferred a legal title to it, to Quincy. And yet the arguments urged by demandants' counsel, drawn from the common law in cases of disseizin, would, if applicable at all, apply as well to cases where the tax title had become absolute, as where it had not.

"The payments made by Quincy," says the demandants' counsel, "will be presumed to be for the benefit of his co-tenants unless the contrary appears." But the "*contrary*" does appear. Why else did Quincy take the deed of the *three* eighths to himself? If he intended to *redeem* for his co-tenants, why did he not take the deed to them, as well as to himself. He claimed to be the owner of *three* eighths. If he claimed as owner, how could he be regarded as acting in the capacity of agent of persons whose title he denied?

The *obiter dictum*, in *Williams* v. *Gray*, cited by demandants' counsel, was in a case unlike this. In the case of a

mortgage, where one of two grantees pays the mortgage debt, the Court would hold the mortgage as subsisting or extinguished according as the equities of the case might require. The right of redemption of mortgages is altogether an equitable right, and the rules appertaining thereto are peculiar, and no argument drawn therefrom would be applicable to the case at bar.

The opinion of the Court, was drawn up by

Shepley, C. J. — The County Commissioners of the several counties were authorized by the act approved on April 1, 1836, c. 242, to assess unincorporated townships of land for the repair of highways laid out and opened over them. It is admitted by the agreed statement, that township numbered three in the second range was legally assessed for that purpose. That the same was sold by the treasurer of the county of Washington to obtain payment of the amount thus assessed; and that it was legally conveyed to Jacob Longfellow on September 27, 1837; that the demandants then owned one eighth part and Charles E. Qunicy one fourth part of the township. That before the term of three years allowed by law for the redemption thereof had elapsed, Quincy, on May 25, 1840, paid to Longfellow the amount claimed to be due to him on those portions of the township owned by himself and by the demandants, and received a conveyance thereof from Longfellow, which was recorded on the same day. That the demandants, on September 19, 1840, tendered to Longfellow an amount of money sufficient to redeem their eighth part, which he refused to receive, because he had before that time conveyed the whole township to Quincy and to the other owners. The tenants derived their title to the one eighth part demanded, from Quincy.

The counsel for the demandants contends, that they are entitled to recover in the first place, on the ground that their land was redeemed from the sale by the tender made to Longfellow; and in the second place, that the payment made by

their co-tenant, Quincy, operated to extinguish the tax title, and that the conveyance made by Longfellow to him enured to their benefit.

1. The effect of the tender made to Longfellow will be first considered. It will not be necessary to consider or to decide, whether a tender made to such a purchaser after the land had been sold and conveyed by him in the usual course of business, and not because it had been redeemed by the owner of the whole or of a part of it, would be effectual to redeem it. A state of facts calling for such a decision is not presented in this case. Longfellow does not appear to have sold the land to a stranger to the title for its estimated value, but to have released his title to it to part owners, because they had claimed to redeem it, and had paid to him the whole amount, for which he was entitled to retain it. When such a purchaser has thus conveyed the title acquired by him, that title has been legally extinguished. A tender made to him after that time can have no effect upon the title. It cannot operate to produce a result, which had been accomplished before. The whole interest and title acquired by Longfellow had before been legally extinguished by payment, by those entitled to make it, of the amount required to redeem the land from that sale. Without deciding, whether a conveyance made by him to a stranger to the title, before the time allowed by law for a redemption, had expired, would convey any title or interest so as to affect the rights of the owners to redeem from the purchaser, there can be no doubt, that a conveyance made by the purchaser to a part owner, entitled to redeem all the shares, that he might relieve his own, would be effectual to transfer to such part owner an interest or lien upon the other shares for the reimbursement of his necessary expenditures. The reasons why it should have this effect will be more fully stated hereafter. The tender made to Longfellow must therefore be considered as wholly ineffectual to accomplish the purpose intended.

2. The effect of a payment made by the co-tenant, and of a conveyance of the land to him, remains to be considered.

The County Commissioners were authorized by the act to assess the amount required upon the whole township *in solido* without regard to the rights of separate owners. Neither the seller nor purchaser was required to notice or to decide upon the claims and proportions of different owners. The purchaser might refuse to receive the amount, which might appear to be equitably due from a part owner, and insist upon a payment of the whole amount due to him for the redemption of the township. And yet a part owner or one having a legal interest in the township would be entitled to redeem, and to redeem his own share he must be liable and might be compelled to redeem the share or shares of others. The purchaser or his heir might legally refuse to sell and convey to one part owner the shares of others, while he could not refuse to permit him to redeem the shares of others. When a part owner obtains a conveyance of his own share and the share or shares of co-tenants by payment of the precise amount required to redeem them, he must be presumed, in the absence of all rebutting testimony, to have done so in the exercise of a legal right. And in such case the whole so conveyed will be redeemed from the sale. This is apparent, because he cannot obtain a conveyance, except by a payment to redeem, without a special agreement with the purchaser, his heir or assignee, to obtain a transfer of his title. There is no proof in this case of an agreement made between Quincy and Longfellow, that the former should purchase of the latter the title acquired by the sale made by the county treasurer. And it is admitted, that Quincy paid only the proportion of taxes and interest due to redeem the shares conveyed to him. While the three eighth parts must be considered to have been redeemed by Quincy from the sale, it does not follow, that the demandants, without payment or tender to Quincy or his assignee, would become entitled to enter into possession or to recover their eighth part.

An owner, who pays the amount required to redeem his own share and the share of a co-tenant, cannot be entitled to recover of that co-tenant the amount equitably chargeable to

his share without other proof, for he may not have paid by his consent or at his request. Such co-tenant may have concluded, that the land was not of such value, that it would be beneficial to him to have it redeemed. He could not be compelled to redeem, but might, if he pleased, abandon his title to the purchaser and refuse to pay to him or to any other person the amount, which would be required to redeem it. If one, who may be obliged to redeem the share of a co-tenant to relieve his own share from incumbrance, could have no right to retain the share of such co-tenant as security and to obtain a reimbursement of the amount equitably chargeable to it, he might utterly fail to obtain compensation; and yet his co-tenant without making any payment might be entitled to the full possession and benefit of his share of the land, discharged from the incumbrance.

The law cannot be justly chargeable with such results, as produced by conformity to its provisions. The principle is well established and is of frequent application in the redemption of mortgages, that one having a legal interest in an estate under incumbrance, may redeem the whole estate when necessary, to enable him to redeem his own share or to relieve his own title from incumbrance, even against the pleasure of a co-tenant or other owner, and may be regarded as the assignee of the incumbrance upon the other shares or interests, and may retain possession of them to secure a reimbursement of the amount equitably chargeable to them. *Gibson* v. *Crehore*, 5 Pick. 146; *Jenness* v. *Robinson*, 10 N. H. 215; *Wilkins* v. *French*, 20 Maine, 111.

A sale made for the payment of taxes is but an incumbrance upon the estate, so long as the right to redeem exists. The purchaser receives and holds the title as security for money paid; and such a title is in principle a mortgage, although it does not exist in a form to be included by our statute provisions respecting mortgages. By the application of this principle to cases of this kind, complete justice may be done to all interested in the land, and without it such a result would fail to be accomplished.

The case of *Williams* v. *Gray*, 3 Greenl. 207, will not be in conflict with it. The parties in that case had severed the common estate, by making conveyances to each other; and the case was decided upon the doctrine of estoppel supposed to arise out of the covenants contained in those conveyances.

The principle applied in this case will not be applicable, should one tenant in common purchase the whole estate from the purchaser at a sale made for the payment of taxes after the right to redeem had expired. In such case one of the co-tenants could derive no benefit from the purchase made by another co-tenant. *Kirkpatrick* v. *Mathiot*, 4 Watts & Sergt. 251.

The demandants will not be entitled to recover without proof, that they have paid or tendered to the holders of the legal title the amount equitably due upon their share.

Demandants nonsuit.

HORATIO G. LEBARRON *versus* TRISTRAM REDMAN.

The interest of a witness may be shown from his own examination, or by evidence *aliunde*; but the adoption of either of these modes, precludes a resort to the other, for the same purpose, and upon the same ground.

After an unsuccessful attempt to exclude a witness by his own examination, his testimony in chief may be stricken out upon a discovery of his interest.

REPLEVIN for lumber, which the defendant had attached as an officer. The defendant offered as a witness one Lippencott, who was the agent of the attaching creditors, and who, to inquiries made by the plaintiff, replied, on the *voir dire*, that he did not recollect having promised the defendant to save him harmless for taking the lumber, and from his habit, should think he did not so promise; and that he had no knowledge of holding himself for costs. The plaintiff then offered to prove by another witness, that the defendant had admitted that Lippencott had promised to save him harmless for taking the lumber. The Court ruled that such offer was too late to

show an interest in the witness, and was inadmissible for that purpose, but was admissible to contradict the witness and impair his credibility, but not sufficient to authorize his rejection." Lippencott then testified for the defendant, in whose favor the verdict was rendered ; and the plaintiff excepted to the rulings.

C. Burbank, for plaintiff.

Moulton, for defendant.

HOWARD, J. — The interest of a witness may be proved by his own examination, or by evidence *aliunde;* but the adoption of either mode of proof, by the party objecting to the competency of the witness, precludes a resort to the other for a like purpose, upon the same ground.

This doctrine, though not clearly settled by the authorities, has been a rule of practice in our own courts; and it is believed to be consistent with a due observance of other settled principles of evidence and practice. A party is not permitted to trifle with the conscience of a witness, when he has other proof that would exclude him, or after having resorted to evidence, to impeach or disqualify him ; nor can he raise collateral issues for that purpose.

The examination of a witness, in respect to his interest, may be either upon the *voir dire*, or after he has been sworn in chief. But after an unsuccessful attempt to exclude the witness, on this account, his testimony in chief may be stricken out of the case, upon a discovery of his interest. 1 Greenl. Ev. § 423, 424 ; 1 Stark. Ev. 135, 136, and notes.

The instructions to which the exceptions were urged, were correct upon the principles stated. The witness having been examined upon the *voir dire*, the subsequent offer to prove his interest, *aliunde*, was properly rejected.

Exceptions overruled.

Ross Leighton *versus* Obed Chapman, *adm'r, appellant from a decree of the Judge of Probate.*

A decree of the Judge of Probate, granting leave to a creditor of an insolvent estate, to institute a suit at common law, is subject to the right of appeal.

But such leave cannot lawfully be given after four years from the time administration on the estate was granted.

Appeal, from a decree of the Judge of Probate, authorizing the plaintiff to commence a suit at law for the recovery of his claim against the estate represented by the defendant, and which claim had been rejected by the commissioners of insolvency.

Before the commissioners the plaintiff's claim was presented, and by them rejected, and an appeal was filed in the probate court, after the commissioners had made their report and returned a list of claims.

Before the *acceptance* of the report, the plaintiff commenced his suit at law, and a nonsuit was ordered by the presiding Judge, and that order as sustained by the full Court.

The plaintiff then, within the two years allowed him for that purpose, applied to the Judge of Probate, for leave to prosecute his claim at common law. The case was continued from term to term in the probate court, when, after a full hearing, on the seventh day of June, 1848, and more than four years after administration on the estate was granted, the said probate court decreed that the plaintiff should have leave to institute a suit at law, to recover his claim.

From this decree the administrator appealed to this Court, and filed certain reasons therefor.

Moulton, for the administrator.

Freeman, for the plaintiff.

Howard, J. — A decree of the Judge of Probate, granting leave to a creditor of an insolvent estate, to institute a suit at common law, under the provisions of the Revised Statutes, c. 123, § 9, is subject to the right of appeal, provided by the Rev. Stat. c. 105, § 25. *Cooper, petitioner*, 19 Maine, 260.

But the right and power to give such leave, is limited to four years, from the time administration was granted on the estate. The decree, from which this appeal has been taken, was made after the time limited by statute had elapsed, and it cannot be affirmed. *The appeal is sustained, the decree reversed, and the petition dismissed.*

WILLIAM PIKE *versus* THOMAS G. GALVIN.

[This is one of the Washington county cases, and was published, vol. 29, page 183. The dissenting opinion of JUDGE WELLS, was then mislaid. The profession will, no doubt, take pleasure in its present publication.]

WELLS, J. — Theodore Jellison, on the 26th of October, 1820, entered into a contract with the agent of Artemas Ward, for the purchase of the demanded premises. July 7, 1823, this contract was assigned by Jellison to the demandant, for a consideration, expressed in the assignment, of one hundred and fifty dollars. And on the same day, Jellison by his deed released and quitclaimed to the demandant for a consideration of the same amount, as mentioned in the assignment, the demanded premises. The habendum in the deed was in the usual form, but contained the following covenant. "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 their appurtenances, or to any part or parcel thereof forever." Jellison was in possession of the premises, when the deed was made.

The conditions of the contract do not appear to have been performed, and Ward, on the 27th of October, 1825, conveyed the premises to Jones Dyer, who on the 11th of July, 1829, conveyed the same to said Jellison. Jellison subsequently conveyed them to Stephen Emerson, under the grantees of whom, by several mesne conveyances, the tenant holds.

The demandant contends, that when Dyer made the con-

veyance to Jellison, the title to the premises enured to him, by virtue of the covenant in Jellison's deed to him. And if this position is correct, the demandant is entitled to recover.

If that covenant could be construed as meaning that, the grantor had done nothing to encumber the premises, then an after acquired title would not be affected by it. But the language is too broad, to entitle it to a construction so limited. It is not confined to the past; it does not barely say, I have done nothing to impair or encumber the title, but it extends to the future; the grantor says, that neither he nor his heirs *shall or will* claim any right or title to the premises forever. The terms used so clearly and positively indicate the future, that they cannot properly receive any other interpretation.

The tenant and those under whom he claims are privy in estate with Jellison, whose deed to the demandant having been recorded, they took their deeds, in presumption of law, with a full knowledge of the covenant contained in Jellison's deed to the demandant. The case then is to be viewed in the same manner as if Jellison himself were the tenant, and those, claiming under him, can stand in no better position, than he would occupy.

And what could he say, if he were called upon in this action, to surrender the premises to the demandant? He certainly could not hold them against his express covenant; an estoppel would arise, for one is not allowed in law to claim a thing, where he has covenanted he would not; and when he has declared, that he will not claim any right or title to the premises forever, he cannot do so in opposition to his deed.

If, instead of claiming the land, the demandant had brought an action for breach of covenant against Jellison, after he had acquired a title and conveyed to another, could it not have been maintained? Such a result must have followed, unless the passing of the fee to the demandant, by the estoppel, would have prevented it. If the language contained in Jellison's deed does not create a covenant, which would be broken by a subsequent acquisition and withholding of the

premises, it is difficult to conceive what language would have that effect. And here lies the foundation of the estoppel, to avoid circuity of action. Instead of putting the grantee to an action to recover damages, which might not furnish an adequate remedy, the law allows the title to pass by a silent but effectual operation to him. If it were not so, and the demandant had entered into possession when Jellison gave the deed to him, then upon the subsequent acquisition of the title by Jellison, he could have maintained a writ of entry against the demandant, and recovered the premises, and the demandant would have been put to his action for covenant broken. But the estoppel avoids this circuity, and transfers directly the title to the person to whom by the covenant it belongs.

No one doubts where there is a general warranty, that such is the effect of the estoppel, when the warrantor is seized, but of a defeasible estate, the perfect title to which, he acquires subsequently to the warranty. He covenants to warrant and defend, and upon that the estoppel arises. He is not permitted to act in opposition to it, and to claim the estate against the covenant, and his deed, after the acquisition, confers no greater right than he possessed. The instant he acquires the title, it passes to the warrantee. Is not Jellison's covenant, in this respect, equally potent and binding? He says he will not claim the estate, and to do so, is an act more palpably in violation of it, than if he had said he would warrant and defend it. Not that the covenant in Jellison's deed is as broad and comprehensive, as that of a general warranty, for he does not make himself liable for any defect of title, not arising from his own act; but he does covenant that he will not claim the premises. For the acts of third persons, who do not derive their authority from him, he is in no wise responsible. The covenant is therefore a restricted one, but so far as it is positive and affirmative, it is obligatory, and the covenantor, by the principles of the common law, is not permitted to deny or disregard it. It is true, that in a common warranty deed, containing a covenant of seizin, and the

grantor not being seized, and damages having been recovered for the breach of the covenant of seizin, no other claim can be made upon the other covenants. But if a deed contains no other covenant, than that to warrant and defend the premises, against the lawful claims of all persons, and the grantor had no seizin and no title at the time of making the deed, but should subsequently acquire a title, would it not enure to his grantee, so that he would be estopped to claim the premises? If so, the objection, that the covenant did not run with the land, on account of the disseizin, would be unavailing.

Although Jellison was in possession, when he conveyed to the demandant, yet he was probably holding in submission to Ward, and it does not appear that the demandant ever entered, or that he took an actual seizin by virtue of his deed, or a constructive one, unless the deed of Jellison operated as such, by a disseizin of Ward. But it is unnecessary to consider this point, for it is not apparent how Jellison or those claiming under him can interpose the objection of a want of seizin in him, or that the covenant did not run with the land; he has said that he will not claim the land, and must be bound by his declaration, and the tenant can stand in no better situation, holding under him.

But the question of estoppel, involved in this case, is not now an open one.

In *Fairbanks & al.* v. *Williamson*, 7 Greenl. 96, a covenant, similar to that contained in Jellison's deed, was held to operate as an estoppel, and that a title, subsequently acquired, would enure to a prior grantee. And although the grantor was not seized and had no legal title, at the time of the conveyance, yet it was decided, that such covenant, though not technically a warranty, is a covenant real, which runs with the land, and estops the grantor and those claiming under him. The same principle was adopted in *White* v. *Erskine*, 1 Fairf. 306. The case of *Kimball* v. *Blaisdell*, 5 N. H. 533, is a direct authority in support of the same doctrine. In *Trull* v. *Eastman*, 3 Metc. 121, the demandant, an heir apparent, released the interest which he had or might have in the real

estate of his father, and his deed contained a covenant precisely like that in the deed of Jellison. Upon the death of his father, it was decided, that the estate enured to the grantee and that the demandant was barred by his covenant, from claiming the estate, and the case of *Fairbanks & al.* v. *Williamson*, was cited as an authority, in support of that decision.

The deed being a release only, does not alter the result, but it is the covenant which effects it. For although a release only bars the right, which the releasor has, yet the warranty will rebut and bar the heir and his heirs of a future right, which was not in him at that time. Co. Lit. 265, a. And the reason given, by Lord Coke, for the rule is, to avoid circuity of action, for if he, who made the warranty, should recover the land against the ter-tenant, the latter, by force of the warranty, would have as much in value against the same person. And the estoppel arises although the grantor had neither title nor possession at the time of making the release, in the case put in Co. Lit. The substance of the rule, extracted from the cases, is, that one shall not recover against his own covenant. Not the form of the words, but the meaning is to be regarded, and though the covenant in Jellison's deed is not co-extensive with one of general warranty, yet it is express, that neither he, nor his heirs, nor any person claiming under him or them, shall forever claim the premises. Therefore when the title came to him, by conveyance from Dyer, he was rebutted and barred from claiming it, and it passed directly from him to the demandant. Nothing was then remaining in him to convey to Emerson.

It may be that grantors do not always examine carefully the covenants, which they make, and sometimes they contain a broader meaning than was intended. But the remedy consists in a more circumspect, and vigilant attention to them. The law imparts a liberty to parties to make such covenants, as their rights require, but when made, it enjoins the performance of them, according to the obvious import of the language in which they are clothed.

In the case of *Allen* v. *Sayward*, 5 Greenl. 227, the defendant and a co-executor had conveyed to the plaintiff certain real estate, as executors under the will of the testator. They covenanted that they had good right and lawful authority under the will, as executors, to sell and convey the premises. The Court doubted whether any thing more was intended than that they were duly qualified as executors, and that they derived from the will sufficient authority to sell the real estate of their testator. But taking the covenant in its utmost latitude, it was construed to mean that the testator died seized, and that it was not necessarily inconsistent with an after acquired title by the defendant. The testator might have been seized and the grantor have entered and taken the seizin. The covenant then was not broken, but was performed; a subsequent eviction by an older and better title, which afterwards came to the defendant, would create no estoppel, for there was no covenant in opposition to what was done by the defendant.

The case of *Ham* v. *Ham*, 14 Maine, 351, was an action of dower. The tenant had taken a deed from the husband of the demandant, with no other covenant, than one like that in Jellison's deed, but he exhibited a good title derived from another source.

The whole question turned upon the seizin of the husband, and the evidence shows that he was not seized in fact, and the demandant could not recover, unless the tenant was estopped by the deed of the husband to him, to deny his seizin. There was no covenant of seizin, nor any declaration in the deed, that the husband was seized, or that he had any title, and for that reason it was decided, that the tenant by taking the deed did not admit the seizin, because no such fact was affirmed in the deed.

These cases do not appear to conflict in any manner, with that of *Fairbanks & al.* v. *Williamson.* In *Comstock* v. *Smith*, 13 Pick. 117, the tenant conveyed to the demandant all his right, title, &c. with a covenant to warrant and defend against all persons claiming under him, and subsequently ac-

quired the title from a third person, he having possession, but no title, at the time of his conveyance. The Court construed the tenant's deed as conveying his then existing interest, and that the covenant could only operate on that and refer to existing claims and incumbrances, and that the tenant would not be estopped to set up a title subsequently acquired.

It will be seen, that the covenant in that case is very materially different from the one in Jellison's deed. It is much more limited, and may be fairly interpreted as a warranty only against claims and incumbrances created by the grantor, and then existing.

That such difference exists, is apparent from the case of *Trull* v. *Eastman*, for there a covenant, such as Jellison made, was decided to create an estoppel in relation to an after acquired title.

But if, by the cases of *Comstock* v. *Smith* and *Trull* v. *Eastman*, a distinction is intended to be drawn, between a release of one's *right, title and interest* and a release of the *land*, and that the covenants are to be enlarged or restricted accordingly, they would still be in harmony with *Fairbanks & al.* v. *Williamson*, and with the right of the demandant, in the present case, to recover, for in both instances, there was a release of the *land*, and not the mere right, &c., and the premises themselves were conveyed for a valuable consideration. No such distinction, as that adverted to, is necessary to sustain those cases, for the covenants mentioned in them are so widely different, as justly to produce different results.

In *Blanchard* v. *Brooks*, 12 Pick. 47, one of the questions raised related to the *quantum* of the estate conveyed by Soley to Gassner, whether a vested interest alone, or a contingent one, to which the grantor was entitled. It was held the conveyance did not embrace the contingent interest, and that the grantor, with general warranty, was not estopped to claim it after the happening of the contingency, and that the warranty was only co-extensive with the grant.

Jellison releases the premises, describing them by metes and

bounds. The *quantum* of the estate is free from any question, and his covenant applies to it, and is co-extensive with it.

But if the rule, laid down in *Fairbanks & al.* v. *Williamson*, were clearly incorrect, in my judgment it would be unwise to change it without the action of the Legislature. It has now remained for nineteen years, many decisions have been made in conformity to it, and many titles have been acquired under it. The overruling it will not only be introducing a new rule, in relation to future conveyancing, but produce a retrospective action, upon deeds already made. A judicial decision by the power of construction, looks to the past as well as to the future, and embraces all cases that are in existence, or that may arise hereafter.

The stability of legal decisions affords a security which ought not to be impaired, unless upon the most pressing necessity.

It is my opinion the demandant is entitled to recover.

CASES

IN THE

SUPREME JUDICIAL COURT,

IN THE

COUNTY OF HANCOCK,

1849.

MEM. — HOWARD, J. was attending jury trials at Washington county, and was not present at this term.

SOUTH BAY MEADOW DAM COMPANY *versus* THOMAS J. GRAY.

In a suit brought in the name by which certain persons were incorporated into a company, the defendant may be estopped, by acts of his own performance, to deny the legal existence of the company.

It is not essential to the existence of a corporation, or to its right to maintain suits at law, that its clerk should have been sworn, or that he should have filed in the office of the register of deeds a certificate of his appointment.

Where there is nothing in the laws of the State or in the by-laws of the corporation, to limit the continuance in office of its clerk, the one properly chosen remains in office until another is chosen.

A corporation, authorized to hold real and personal estate, each to a limited amount, may lawfully make assessments upon its members to an amount exceeding the personal estate it was authorized to hold.

Where a corporation at its first meeting, voted the amount of each share in its stock, and that one of its members should solicit subscriptions, and the defendant subscribed for stock the same day, and there appeared to be no other subscription paper; it was held to be a proper authorization of the subscription.

A member of such a corporation cannot object to the payment of his subscription, on the ground that the Legislature, after he had subscribed, altered the act of its incorporation.

Although the share of a member may be liable to be sold by the Company, for the non-payment of assessments due upon it, yet an action may be maintained where there is an express promise to pay.

ASSUMPSIT, upon an instrument signed by the defendant, of the following tenor: — "We, the subscribers, severally promise the South Bay Meadow Dam Company, the sum of twenty-five dollars, for every share of stock set against our respective names, in such manner and proportions and at such times, as the directors thereof shall order, pursuant to an act entitled an act to incorporate the South Bay Meadow Dam Company, and the by-laws of said company." Against the name of defendant was written one share.

The case came before the Court upon an agreed statement of facts. The act incorporating the company was passed July 31, 1846. Among other things, it authorized the company to take, hold and possess any personal property, to an amount not exceeding three thousand dollars, and any real estate to an amount not exceeding fifty thousand dollars. The by-laws, and the records of the directors of said company, and the subscription paper were submitted to the Court.

The suit is brought to recover two assessments, one of $10, and the other of $15, made on the defendant's share.

The clerk of the company did not file in the office of the register of deeds for said county a certificate of his appointment, as required by chap. 76, § 3, R. S.

The assessments sued for were made known to the defendant, and demanded of him before the commencement of the suit.

The company had expended large sums in the erection of the dam, before the writ was sued out, and the defendant had on several occasions, signed memorials to the directors.

B. W. Hinckley, for plaintiffs.

H. Williams, for defendant.

SHEPLEY, C. J. — This action has been commenced to recover the amount of two assessments made upon one share of the capital stock of a company.

The case is presented upon an agreed statement. It does not appear, that there are any pleadings in the case. If there have been, the parties may agree to present matters pleadable only in abatement, as objections to the plaintiff's right to recover. The rule is not therefore applicable, that the existence of the corporation is admitted by a plea to the merits.

Several objections to a recovery have been made. They are in substance: —

1. That there is no satisfactory proof of the existence of the corporation.

A charter was granted by an act of the Legislature, on July 31, 1846, to certain persons named. Any two of them were authorized to call the first meeting in the manner prescribed.

The certificate made by two of them, upon the back of a paper containing a notice, does not show that notice was given according to the provisions of the act. It appears, however, that there was in fact a meeting of members at the time and place designated in the notice, and that they chose a moderator and clerk, and voted to accept the act of incorporation. A paper for subscriptions to the stock appears to have been drawn, and the defendant subscribed it for one share. At an adjourned meeting he was chosen one of a committee of five to report by-laws for the corporation, and appears to have acted. He, with others representing themselves to be members of the corporation, subscribed four petitions or memorials addressed "to the directors of the South Bay Meadow Dam Company."

It is not necessary that the records of a corporation should exhibit a legal organization and acceptance of the act of incorporation. The existence of the corporation may be inferred from the exercise of its corporate powers. *Trott* v. *Warren*, 2 Fairf. 227; *Penobscot Boom Corporation* v. *Lamson*, 16 Maine, 224; *State* v. *Carr*, 5 N. H. 367; *Ameriscoggin Bridge* v. *Bragg*, 11 N. H. 102; *Middlesex Husbandmen* v. *Davis*, 3 Metc. 133.

It has been decided, that one, who makes a promissory note

or other engagement to a corporation, thereby admits its corporate existence. *Con. Society* v. *Perry*, 6 N. H. 164; *Williams* v. *Bank of Michigan*, 7 Wend. 540; *All Saints Church* v. *Lovett*, 1 Hall, 191; *Den* v. *Van Hauten*, 5 Halst. 270; *John* v. *Farmer's and Mechanic's Bank of Indiana*, 2 Blackf. 367.

The defendant in this case, by making a promise in writing to the corporation to pay for one share, by addressing to its directors four petitions, and by acting as one of committee to report by-laws for the corporation, has admitted its existence.

2. The second objection is, that the clerk of the corporation was not sworn, and that he did not file in the office of the register of deeds a certificate of his appointment required by statute, c. 76, § 3. Neither that statute, nor the act of incorporation requires, that the clerk should be sworn. His omission to file the certificate required, cannot affect the existence of the corporation, or its right to maintain this suit.

3. That there were no officers of the corporation except directors, when the assessments were made.

The statutes before noticed do not prescribe, what officers shall be chosen by the corporation. It is provided by statute, c. 76, § 1, that corporations shall have capacity "to elect in such manner, as they shall determine to be proper, a clerk and all other necessary officers." By the sixth article of the by-laws, the directors are authorized to appoint a secretary and treasurer, and to elect one of their number to act as president. The corporation having power to prescribe the manner, in which its officers shall be elected, may determine, that they shall be elected or appointed by its directors. At their meeting, holden on March 30, 1847, the directors made choice of a clerk and secretary, who are in their records stated to have been duly sworn. The corporation had also chosen a clerk, at its meeting holden on March 17, 1847. If by a correct construction of the by-laws, the directors were only authorized to choose a secretary for their own board, the clerk chosen by the corporation would continue in office, until another was appointed, there being no provision in the stat-

utes or by-laws to determine how long he should continue in office. *The Queen* v. *Corporation of Durham*, 10 Mod. 146; *People* v. *Runkel*, 9 Johns. 147; *McCall* v. *Byram*, 6 Conn. 428. The directors, at a meeting holden on March 17, 1848, chose a secretary of the company and a clerk of the directors, who are stated to have been duly sworn. The record of the proceedings of the directors in making the assessments, was made by their clerk, and the directors by the by-laws were authorized to make assessments.

4. That the amount of the assessments exceeded the amount of personal property, which the corporation was authorized to hold. It was authorized to hold real estate to an amount not exceeding fifty thousand dollars. It could not have been expected to obtain that amount of real estate without collecting from its members the means to acquire it. The act was not intended to prevent the assessment and collection of an amount exceeding three thousand dollars to be expended, but to prevent the corporation from retaining as capital more than that amount.

5. That the corporation has not authorized or ratified the subscription made to its stock.

At the first meeting, votes were passed, that twenty-five dollars be the amount of a share, and "that the moderator present the subscription paper to the owners of flats above Davis's narrows." The paper subscribed by the defendant bears date on the same day. There is no proof that any other subscription has existed. The subscription appears, therefore, to have been authorized by the corporation.

6. That the additional act, approved on August 10, 1848, increased the liability of the stockholders, and thereby relieved the defendant from the performance of his contract.

The act of incorporation was accepted, and the subscription was made, with a provision in the act, that it should be subject to all the duties and liabilities imposed upon corporations by the seventy-sixth chapter of the Revised Statutes. The twenty-third section of that chapter provides, that all acts of incorporation thereafter granted, shall at all times be liable to be

amended, altered or repealed at the pleasure of the Legislature. The defendant cannot therefore correctly allege, that his liability has been increased without his consent. He consented to such action of the Legislature by becoming a member of the corporation.

It is well settled, that an action can be maintained on an express promise to pay for a share or to pay an assessment upon it, although the share may be liable to be sold, to obtain such payment. *Turnpike Corporation* v. *Adams*, 8 Mass. 138; *Turnpike Co.* v. *Thorp*, 13 Conn. 173; *Glover* v. *Tuck*, 24 Wend. 153; *Herkimer Co.* v. *Small*, 21 *ib.* 273; 2 Hill, 127; *Selma and Tennessee Railroad* v. *Tipton*, 5 Ala. 787.

According to the agreement of the parties, the defendant is to be defaulted.

ESTHER KNOWLTON *versus* JOHN C. HOMER.

Where two arbitrators are selected, who are to choose an umpire in case of disagreement, and such umpire is selected, but not in writing, and the parties acquiesce by submitting questions to the three, it is too late afterwards, to object to the competency of such umpire.

If it appear by the submission to have been the intention of the parties that a decision by a majority of the referees shall be binding, it is not necessary that the three shall sign the award.

Where two referees, after hearing the evidence, are unable to agree, and according to the submission, select a third person, who expresses no desire to hear the witnesses, but takes the testimony from the other referees, and neither of the parties express a wish that such third referee should hear the witnesses, an objection that he did not hear the testimony, cannot be taken to the award.

Where notice is given to the party against whom the award is made, and request for payment, this is a sufficient publication.

THIS was an action upon an award made under a common law submission.

T. C. Woodman, for defendant.

Kent, for plaintiff.

TENNEY, J. — On the disagreement of the two referees named in the submission, they were authorized to make selection of a third, and the three were to finally determine the suit. The evidence of both parties shows that the two appointed by the submission failed to make a decision, by reason of a disagreement, and they made choice of John Grant, Jr., as the third referee or umpire, but they made no writing as evidence of the selection. Grant entered upon his duties as a referee with the other two, both parties having knowledge thereof and interposing no objection to the choice made. The defendant acknowledged his authority to act under that appointment, by submitting questions to the three arbitrators afterwards. The appointment of Grant was acquiesced in by the defendant, and it is too late to object to the sufficiency or the competency of the evidence of his qualification to act. *Norton* v. *Savage*, 1 Fairf. 455.

It is insisted, that this suit cannot be maintained, because there was no such award as was required by the submission, it having been signed only by two of the three referees, and also because there was no hearing of the evidence from witnesses before the three. An agreement to submit a controversy to arbitration, must have effect according to the intention of the parties, exhibited in the submission, like any other contract. When it is agreed, that the decision of the arbitrators named shall be conclusive, it must be understood that unanimity was intended. But the parties may adopt their own form of contract, unless where they design to conform to the requirements of the statute, and to obtain an execution directly upon the award, by a submission before a justice of the peace. And if they intend that a concurrence in opinion of all the referees is not necessary to constitute a binding award, and that intention is apparent upon the submission, the decision of a majority is valid. This intention may be expressed in direct terms; but if it is not so expressed, but is clearly inferable, from the whole instrument, it is equally obligatory. It was agreed in this case to refer the suit between the parties and its cause, to Snowman and Curtis, "to hear and finally determine the same

if they can agree;" and if not, they were authorized to select another referee, "and the three are to finally determine said suit." If from the words, "and the three are to finally determine said suit," alone, the question was to be settled, whether a majority could make an effectual award, the answer must be in the negative. But other parts of the contract qualify the meaning. The third referee was to be selected, and to act only in the event of a disagreement of the others; and it cannot be regarded as the expectation of the parties, that if there was an insuperable difficulty in the way of an agreement by the two, who had heard all the evidence, seen the witnesses, heard the arguments of parties or their counsel, the third referee should be able so to overcome the objection of either of the others, as to remove entirely the occasion of making the choice of the third. The fair construction is, that after the board should, under the contract of submission, consist of three persons, that the award of a majority was such an award as the parties contemplated, and hence it is binding between them. *Batley* v. *Button*, 13 Johns. 187.

The submission provided, that the two referees chosen by the parties should "hear" and determine, &c. and if the selection of a third became necessary, the three "are finally to determine," &c. The contract does not make it the imperative duty of the three to hear the evidence, and it does not in express terms, dispense with the hearing. In this respect it is not perceived that there is any more or less occasion for a person brought in as a third referee to hear the whole case, as it was before presented, than if he were selected an umpire, with the peculiar duties appertaining to that appointment. In the case of the latter, it was held to be no good cause to set aside the award, that the umpire took the evidence from the arbitrators, instead of hearing the witnesses, there being no application, that the witnesses should be re-examined. *Hall* v. *Lawrence*, 4 T. R. 589. The case of *Falcony* v. *Montgomery*, 4 Dal. 232, is supposed to be at variance with the principle of that of *Hall* v. *Lawrence*. When the umpire or third referee is desirous of hearing the witnesses, it would per-

haps be unreasonable that it should not be done, unless the contrary was specially provided in the contract. And if both parties or one party was desirous that the third referee should hear the evidence as the others had done, such a course would be by no means improper. Much may be gained on seeing a witness, hearing his statements, and having opportunity to notice his manner of giving his testimony, and judging from his appearance, the degree of confidence, which his statements should reasonably produce in the mind. But if the new referee has no desire to hear the testimony from the witnesses, and neither of the parties express a wish that it should be done, but consent that the referee shall take the evidence from those who heard it, the right to make this objection by the losing party, is inadmissible; he must be considered as having waived that privilege, if under the submission he was entitled to its exercise, or was not precluded thereby. It is one of the plainest principles of law and of common sense, that when a party has voluntarily surrendered a right, which he could have asserted, he shall not avail himself of it afterwards, to the prejudice of his adversary.

There is evidence, which is not contradicted, that there was a full hearing before the two referees first selected; and that the parties said they had no further testimony to offer. After the choice of the third, he possessed himself of the facts, which had been before introduced from the report of the evidence of the other two referees, they not differing in regard to the facts stated by witnesses. It appears that the defendant was fully apprised of this course, and made no objection thereto, but after an adjournment of the meeting of the three, and at a subsequent meeting, the defendant expressed a desire to introduce further testimony, from a witness, whom he named. And two of the referees testified, that on inquiry why he had not introduced that witness at the trial, he replied, he supposed he would swear for the plaintiff, as he had pledged himself to do so, but afterwards he went and settled a difficulty between the witness and himself, and he expected he would swear for him. By the testimony of the other referee, called

by the defendant, after the third had been chosen and had examined the report of the evidence taken by the others without objection, the defendant wished the opportunity of introducing further testimony, without the witness stating what the evidence was expected to be. It is very apparent that the parties, by their conduct, had no expectation or desire that the witnesses who had been examined should themselves re-state their testimony. And the objection comes too late to be valid. The defendant had opportunity to introduce all testimony, which the two referees thought competent; when the board consisted of the three, he waived the right, if he had it, to have the witnesses re-examined. He was no more entitled after this waiver to the opportunity of having the case opened for the introduction of new evidence, than in an ordinary case before referees, all selected by the parties, when the evidence is closed, and the matter is postponed for advisement. The evidence which the defendant wished to introduce, was not newly discovered in the legal sense of the term, but was that which was expected to be obtained from one, who had been hostile to the defendant, and who was expected by him to be ready to testify against him, but on a reconciliation, after the evidence was closed, he was supposed to be ready to give testimony favorable to him.

The case shows nothing indicative of a prejudice in the minds of the referees, who sign the award, against the defendant, or of an unwillingness to give him every reasonable means to make his defence.

It is objected, that the award was not published. In *Musselbrook* v. *Dunkin*, 9 Bing. 605, the Court say, that the word "published," when applied to an award of arbitrators, "is satisfied by the award's having been made, and notice having been given to the parties, that it is within their reach on payment of just and reasonable expenses." And in *McArthur* v. *Campbell*, 5 Barn. & Adol. 518, it was held, that an award is published, when the arbitrator gives the parties notice that it may be had on the payment of his charges, whether they be reasonable or not.

In June, 1846, the award was made, and delivered to the

plaintiff; the same was carried by her agent for that purpose, to the defendant, who was notified thereof, and requested to make payment of the amount, which he declined to do, saying he had not been fairly dealt by, and should have a re-hearing. This was all the publication which was useful to the defendant, or which was required by law.

According to the agreement of the parties, the defendant is to be defaulted.

Damages, the amount of the award, and interest from the time of the demand of its payment.

GEORGE A. WHITNEY *& al. versus* JOHN P. BROWN *& al.*

Where an action is entered at the proper term, and the defendant appears by his attorney, and enters his appearance upon the docket, the court cannot take away the defendant's right to costs, by ordering a mis-entry on the motion of the plaintiff.

EXCEPTIONS, from the District Court.

Herbert, for plaintiffs.

Wiswell, for defendants.

TENNEY, J. — "When the plaintiff in any stage of the cause shall become nonsuit, or discontinue his suit, the defendant shall recover his costs." R. S. chap. 115, § 56. This statute is similar to that of 1784, chap. 28, § 9. In the case of *Gilbreth* v. *Brown & al.* 15 Mass. 178, where the writ having been legally served, the action entered and continued several terms, the plaintiff could not proceed in the action, on account of the omission of the sheriff to return the writ, and moved for permission to withdraw the action from the docket, which was granted. The Court held, that by the statute of Massachusetts, the defendant was entitled to his costs on a discontinuance of the suit; nor was it, in their opinion, within the discretion of the Court to disallow a motion to that effect. They further held, that the withdrawal of the

action from the docket was a discontinuance within the true meaning of the statute; that if the plaintiff, after entering his action, refuses to prosecute it, and this appears on record, it will amount to a discontinuance, according to the intendment of the statute.

In *Reynolds* v. *Plummer & al.* 19 Maine, 22, the action was brought in the wrong county, and upon motion of the plaintiff, the Court ordered the writ to abate, and allowed the defendant his costs; and the Court say, it would be against all precedent, as well as the manifest justice of the case, to permit the plaintiff in that stage of the case, to avoid the payment of costs, to move to discontinue his own writ.

In the case referred to in the county of Washington, not reported, it appears that an action was entered on the second day of the term, when the writ was indorsed, and that a previous entry, made before the writ was indorsed, was allowed to be withdrawn. It does not appear, that any costs were claimed, or that any appearance was entered for the defendant.

The action in this case was entered at the time when the statute requires it should have been done, and before any motion was presented in behalf of the plaintiff, the defendants appeared by their attorney, who entered his name upon the docket. The Court on motion could allow a discontinuance, or order the writ to abate for want of an indorser on the plaintiff's motion, but could not take away the right of the defendants thereupon, to have their costs according to the provision of the statute.

Exceptions sustained, and
cost allowed to the defendants.

A TABLE

OF THE

PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.

ACTION.

ADMINISTRATOR.

AGENCY.

to the time or the amount of the payment, the presumption is, that it was made at the payday of the note, and that the interest was paid annually. *Greenleaf* v. *Hill*, 165.

2. An agent who draws a bill in his own name is personally bound. *Hancock* v. *Fairfield*, 299.

3. Where the defendant was employed by the plaintiff to purchase a certain horse, and was limited in the price; *held*, that he could not make a profit to himself out of the transaction, and that whatever money remained in his hands after paying the price of the horse, and deducting his stipulated pay for his services, might be recovered in an action for money had and received. *Bunker* v. *Miles*, 431.

AMENDMENT.

1. If, in a writ of entry, the declaration omit to allege that the demandant had been seized and that the defendant had disseized, an amendment may be allowed to supply the defect. *Rowell* v. *Small*, 30.

2. If a Judge rule that, *as matter of law*, a specified amendment cannot be allowed, exceptions may be taken to such ruling. *Ib.*

3. An amendment having been allowed in the District Court, exceptions were taken, and, before any further proceedings were had in the District Court, the exceptions were entered here. *Held*, the exceptions must be dismissed. *Witherel* v. *Randall*, 168.

4. The want of the seal of the proper court, to an original writ, is an unamendable defect. *Ib.*

5. If, pending a writ of entry by several demandants, the tenant purchase the share of one of them, the writ may be amended by striking out that one's name. *Chadbourne* v. *Rackliff*, 354.

See FLOWAGE, 5.

APPEAL.

In a justice's court, an appeal can be taken only from such judgments as make a final disposition of the case in that court. It cannot be taken from any interlocutory order or judgment. It cannot be taken from a judgment of *respondeat ouster*, upon a demurrer to a plea in abatement. *Waterville* v. *Howard*, 103.

See ACTION, 11. COUNTY COMMISSIONERS. EVIDENCE, 2. PROBATE, 2.

ARBITRATION.

1. If a submission before a justice be made of all demands arising between the parties after a specified day, a specification of the claims must be annexed to the submission. *Pierce* v. *Pierce*, 113.

2. Such specification is dispensed with only when *all* demands are submitted. *Ib.*

3. Where two arbitrators are selected, who are to choose an umpire in case of disagreement, and such umpire is selected, but not in writing, and the

parties acquiesce by submitting questions to the three, it is too late afterwards, to object to the competency of such umpire.

Knowlton v. *Homer*, 552.

4. If it appear by the submission to have been the intention of the parties that a decision by a majority of the referees shall be binding, it is not necessary that the three shall sign the award. *Ib.*

5. Where two referees, after hearing the evidence, are unable to agree, and according to the submission select a third person, who expresses no desire to hear the witnesses, but takes the testimony from the other referees, and neither of the parties express a wish that such third referee should hear the witnesses, an objection that he did not hear the testimony, cannot be taken to the award. *Ib.*

6. When notice is given to the party against whom an award is made, and request for payment, this is a sufficient publication. *Ib.*

ASSIGNMENT.

See CONTRACT, 6. EQUITY, 8.

ATTACHMENT.

1. After the attachment of an equity of redeeming mortgaged land, no conveyance made by the debtor can lessen the creditor's rights.

Abbott v. *Sturtevant*, 40.

2. By an officer's sale of such an equity, the purchaser takes a right to the immediate possession of the land, (except as against the mortgagee,) and may maintain trespass *quære clausum* against one exercising ownership under any conveyance made by the debtor after the attachment. *Ib.*

3. Persons claiming under such a conveyance do not hold by a seizin adverse to that of the debtor. *Ib.*

4. It is not indispensable that the officer's deed should be made on the day of the sale. If made so soon afterward, that it may be regarded as a part of the sale-transaction, the deed and the purchaser's right under it will have relation back and take effect from the time of the sale. *Ib.*

See ACTION, 1. MORTGAGE, 5.

ATTORNEY.

1. For the fees and disbursements of an attorney in obtaining a judgment for his client, he has a lien upon it; and that lien cannot be defeated by a discharge given by the client. *Gammon* v. *Chandler*, 152.

2. Such lien is effectual, though the judgment debtor had no notice that the attorney relies upon it, or even that an attorney had been employed. *Ib.*

BANK.

1. Where the charter of a bank is surrendered and accepted, but its power is continued in existence for a limited time, for the purpose of closing its affairs, it is legal that the directors should appoint a cashier under the general banking law. *Cooper* v. *Curtis*, 488.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. Promissory notes, made payable at a time and place certain, are not affected by the statute of 1846, chap. 218. *Stow* v. *Colburn*, 32.

2. That enactment applies only to notes payable at a place certain, on *demand* at or after the expiration of a time specified. *Ib.*

3. Upon a witnessed note, on which a partial payment has been made within twenty years, there arises no presumption of payment, from mere lapse of time. *Estes* v. *Blake*, 164.

4. The remedy of the holder is upon the note itself, and not upon any implied promise, supposed to arise from such payment. *Ib.*

5. In a suit upon a note which was given by the defendant for land, and which was transferred by the payee to the plaintiff, after it was overdue, evidence is admissible to show a partial failure of consideration, growing out of the fraudulent representations of the payee, as to the value of the land and the quantity of its timber. *Coburn* v. *Ware*, 202.

6. Ordinarily, a promissory note, given for a mere quitclaim deed of land, cannot be avoided, though, by means of a defect in the grantor's title, nothing passed to the grantee. *Bean* v. *Flint*, 224.

7. But that rule will not apply, where the parties have stipulated in writing, that the note is not to be paid, unless a title was conveyed. *Ib.*

8. Such a note, though purchased before the payday, by one having knowledge of such a stipulation, is open, in a suit by him, to the same defence as if sued by the payee. *Ib.*

9. A minute upon the margin of an indorsed negotiable note, representing the note to be the "property of A. B." is not, of itself, proof that A. B. *at the time of the trial*, in a suit upon the note, had any interest in it. *Sibley* v. *Lumbert*, 253.

10. Such a minute, of itself alone, will not preclude A. B. from testifying for the indorsee, in a suit upon the note against the maker. *Ib.*

11. A discharge in bankruptcy, operates not to *suspend* but to *annul* the validity of a note, due from the bankrupt. *White* v. *Cushing*, 267.

12. The indorsement of such a note, after such discharge, is of no effect. It cannot enable the indorsee to recover against the bankrupt; and a new promise by the bankrupt to the payee, after the discharge and after the indorsement, cannot aid the indorsee. *Ib.*

13. Parol evidence is not admissible to control the legal effect of bills of exchange. *Hancock* v. *Fairfield*, 299.

14. An agent who draws a bill in his own name is personally bound. *Ib.*

15. Where a person, not the payee, writes his name in blank upon the back of a negotiable promissory note, at the time of its inception, it is to be regarded as done for the same consideration with the expressed contract, and he will be holden as an original promisor. *Colburn* v. *Averill*, 310.

16. If the indorsement be made subsequent to the date of the note, and without a prior indorsement by the payee, it is presumed to have been made for a different consideration, and the party will be regarded as a guarantor. But

if affixed after an indorsement by the payee, the party will be treated as a subsequent indorser. *Ib.*

17. If made without date, it is presumed to have been made at the inception of the note. *Ib.*

18. Though, in a suit by the indorsee of a note against the maker, the policy of the law may preclude the payee from testifying, as a witness for the defendant, that the note was invalid in its inception; yet, as to subsequent occurrences, he may give testimony of such facts as would defeat the note, or constitute a part of a chain of facts which would establish a defence. *Davis* v. *Sawtelle*, 389.

19. Therefore, in such a suit, the Court will examine the deposition of such a witness, to find whether the facts, therein stated, are such as he could be allowed to testify. *Ib.*

20. In a suit by the indorsee, against the maker, upon a note, indorsed by the payee "without recourse," the payee is a competent witness for the defendant, to prove any facts which do not impeach the original validity of the note, and which do not impair the credit and character which, by his indorsement, he has given to it. *Ib.*

21. To discharge a note for merchantable boards and clapboards, the articles set out and tendered must be of such quality and condition, as, under the statute, might lawfully be "offered" or "exposed for sale," or "delivered on sale." *Jones* v. *Knowles*, 402.

22. The burden of proving such quality and condition is upon the maker of the note. *Ib.*

23. Acts, intended for a performance, if they involve a violation of law, are void. *Ib.*

24. Where a note is made payable at any bank in a specified city or town, a demand at either bank is sufficient to charge the indorser. No previous notice need be given to him, at what bank the holder will make the demand. *Langley* v. *Palmer*, 467.

See AGENCY, 1, 2. LIMITATIONS. USURY.

BOND.

1. The obligor in a bond for the conveyance of real estate, after demand for a deed, is entitled to a reasonable time to prepare it. *Russell* v. *Copeland*, 332.

2. And where the note, on the payment of which the conveyance is to be made, is paid to an indorsee, the obligor is entitled to reasonable notice that the condition is fulfilled before he makes his deed; but it is not necessary that the note should be exhibited to him. *Ib.*

3. Where a bond for the conveyance of land, after reciting the conditions upon which the conveyance should be made, stipulates that the obligee shall pay all taxes upon the land; *held*, that the payment of the taxes was not a condition precedent to the conveyance. *Ib.*

4. Nor can the obligor set up in defence, that the obligee had not in readiness a

same, if by the first day of January, 1845, arrangements should be made for purchasing it at a stipulated price. The plaintiff made a contract in writing to surrender his claim, "in case the property is redeemed of the mortgagee, the refusal of which is given till the first of January." The property was redeemed, but not until after said day. *Held*, the plaintiff's contract was upon a condition, that the property should be redeemed *by said day*, and that it is not a bar to his demand.

Patterson v. *Augusta Water Power Co.* 91.

3. Where a purchase has been made of a commodity, to be received at a future day, at a fixed price, payable at a specified time, the seller may rescind the contract, after a failure by the purchaser to pay the full purchase money at the stipulated time. *Dwinel* v. *Howard*, 258.

4. Where, under such a contract, the purchaser receives a part of the commodity, and pays to the seller a greater sum than that part, at the agreed rates, would amount to; yet, if he fail to pay the residue at the stipulated time, the seller may, for such failure, rescind the contract as to the residue, and without liability to pay back any part of the amount which he had received. *Ib.*

5. Where one owed the plaintiff upon a written contract; and a guaranty that he should perform was indorsed on it by the defendant, the law presumes the plaintiff to have been the party, to whom the guaranty was made, though not named in it. *Jenness* v. *True*, 438.

6. Plaintiff held a lien contract for the delivery of lumber. He assigned it to A, to secure him for signing an accommodation note, of $1000, which the plaintiff negotiated and sold. In the assignment, he authorized A to use the contract, for making the money to pay the note, if he, the plaintiff, should not, from other sources, supply funds for the purpose. Afterwards the defendant purchased the plaintiff's remaining rights in the contract, subject to that lien; and gave the plaintiff an obligation that, from the proceeds of the lumber, then in A's hands, the amount of the note should be deducted, for the payment of the note, and for that purpose the defendant supplied some funds to A, which A paid to the holder of the note. A afterwards failed, and the defendant paid to his assignees the amount of the balance, on the note, but they did not pay it over on the note; and the plaintiff was obliged, upon his indorsement, to pay that balance, for which this suit is brought. *Held*, that the defendant, by furnishing the funds to A's assignees, had fulfilled his contract, and was not bound to see to the appropriation of the money. *Ib.*

See ACTION, 8. BILLS AND NOTES, 23. BOND. CONSIDERATION. PARTNERSHIP, 6. SHIPPING, 3.

CONVEYANCE.

See ATTACHMENT. DEED.

CORPORATION.

1. There is a breach of covenant, when a stockholder sells shares in a manufacturing corporation, and covenants that they were free from all incum-

COUNTY COMMISSIONERS.

1. On an appeal to the county commissioners to locate and cause a town way to be recorded, if their adjudication does not contain a description of the road, its courses, distances and admeasurements, so that it may be ascertained from the record, a writ of *certiorari* will be granted.

Lewiston v. *Lincoln County Commissioners*, 19.

2. How far the introduction of one statute remedy is the exclusion of another; Where a city charter gives an appeal to the *District* Court, to persons aggrieved by the doings of the city authorities as to damages done by the location of streets and ways, the appellate jurisdiction, given by the general law to county commissioners, upon that subject, is taken away.

Bangor v. *County Commissioners*, 270.

3. Where the county commissioners have rendered a judgment in a matter, of which they had no jurisdiction, this Court cannot refuse to grant a *certiorari*. Proofs that no injustice was done, cannot be received. *Ib.*

4. The authority given to county commissioners by R. S. chap. 25, sect. 31, relative to the assessment of damages created by the location of roads, is limited to roads established under the provisions of that chapter. *Ib.*

5. The County Commissioners, when giving notice of the time and place appointed for viewing the route, in relation to the locating, altering or discontinuing a highway, are not bound to fix on the time and place for hearing the parties. The appointment for that purpose may be conveniently made at the close of the view.

Orono v. *County Commissioners*, 302.

6. Where it is stated in the record of the Commissioners, of their December term, 1844, that the petition for the road was presented at the preceding August term, 1844, and the survey and location of the road made in November; it is sufficiently plain, that the location was made in November, 1844. *Ib.*

7. In their return of the laying out of a road, the Commissioners are not bound to adopt the language of the petition; and where the courses and distances are given from one known terminus in the petition, though the boundary at the other may not have the description given it in the petition, still, if the record does not show any want of identity, it is sufficient. *Ib.*

8. Where a highway is located by the Commissioners, and there are no applications for damages, though the Commissioners continue the petition to the then third regular session after their report or return was made, accepted and recorded, this does not impair the legality of their proceedings. *Ib.*

9. The expense of making highways through unincorporated tracts of land, is to be borne wholly by the proprietors; or wholly by the county; or by both jointly, in such proportions as the County Commissioners shall adjudge. *Pingree* v. *County Commissioners*, 351.

10. In locating such a highway, it is indispensable to the validity of their doings, that the Commissioners decide at whose expense, in whole or in part, the highway shall be made; and also whether the tract or any part

DAMAGES.

1. Usually, the damages recoverable at law are limited to the natural and proximate consequences of the act complained of.

Furlong v. *Polleys*, 491.

2. If the damages sustained are not the necessary consequence of such act, they can be recovered only when specially set forth in the declaration.

Ib.

3. In the assessment of damage for the breach of a contract by the non-delivery of an article at the stipulated time and place, the essence of the legal rule is, to place the injured party in an equally favorable condition, by allowing him such compensation as would enable him to supply himself.

Ib.

4. One sold a quantity of hay at an agreed price and received pay for it by a promissory note. It was for lumbering operations, and was to be furnished at a specified place in the forest, where no such article was for sale, and no market price existed. Hay was furnished, but it was deficient in quality and was not accepted. *Held*, the measure of damage recoverable by the vendee, was the difference between the price paid by the note, and the market price of the agreed sort of hay, at the nearest and most suitable place where it could be purchased, together with the necessary cost of transportation therefrom. *Ib.*

5. The same rule of computation is to be applied for ascertaining the deduction to which the vendee is entitled, if sued upon the note. *Ib.*

See Bond, 5. Covenant, 8. Easement, 4. Flowage, 7.

DEED.

1. A farm was a little wider at that end which was bounded on the river, than at the other end. The north half was conveyed to the plaintiff, separated from the other part by a line beginning at the river, and running back the length of the farm, "holding its width equally alike," the whole length of the farm : — *Held*, the plaintiff was entitled to a strip of equal width throughout, and that its width at the river must be so much less than one-half the width at that end as to give to the parties each an equal number of acres. *Patterson* v. *Trask*, 28.

2. In a conveyance of land, bounded on a fresh water pond, which had been permanently enlarged by means of a dam at its mouth, the title extends to the low-water mark of the pond, in its enlarged state.

Wood v. *Kelley*, 47.

3. A conveyance of land upon a condition that, unless the grantee should make certain payments, the deed shall be "void, so far as to make good any non-fulfilment of said conditions," will, after a breach of the condition, entitle the grantor to recover possession, and to hold the property as a pledge or mortgage, till the condition be performed. *Fisk* v. *Chandler*, 79.

4. If the lands lying between known monuments or boundaries, be conveyed at the same time by distances, whether in equal or unequal proportions, to different grantees in severalty, there being no intermediate monuments or

DOWER.

EASEMENT.

EQUITY.

ERROR.

action might have been maintained, though there is error in the proceedings, the judgment must be reversed, but a new trial will be ordered.
Crawford v. *Howard*, 422.

ESTOPPEL.

See CORPORATION, 2. PAUPER, 2.

EVIDENCE.

1. The declarations of a party, made in conversation with a third person, and not appearing to be a part of any business transaction, cannot be introduced by him as testimony in his own favor. *Handly* v. *Call*, 9.

2. Whether a judgment, rendered by a justice of the peace, has been appealed from, must be determined from the record. Parol evidence is not admissible upon that question. *Gammon* v. *Chandler*, 152.

3. Conversation by the moderator and others, in town meeting, relating to a subject legally under its consideration, cannot be proved, as evidence against the town. *Morrell* v. *Dixfield*, 157.

4. Parol evidence is admissible to prove that, at time of making a mortgage of personal property, the parties agreed that the possession should remain with the mortgagor. Such evidence does not contradict the mortgage.
Pierce v. *Stevens*, 184.

5. In a suit upon a note which was given by the defendant for land, and which was transferred by the payee to the plaintiff, after it was overdue, evidence is admissible to show a partial failure of consideration, growing out of the fraudulent representations of the payee, as to the value of the land and the quantity of its timber. *Coburn* v. *Ware*, 202.

6. The interest of a witness is not removed by a receipt, unsealed, in full of all demands made by the party calling him. *Dennett* v. *Lamson*, 223.

7. A written statement, made and signed by the justices before whom a poor debtor disclosed, not purporting to be a record of their proceedings, is not admissible as evidence. *Randall* v. *Bradbury*, 256.

8. Parol evidence is not admissible to control the legal effect of bills of exchange. *Hancock* v. *Fairfield*, 299.

9. A certified copy by a justice of the peace, of a record of a judgment rendered by him, is the proper evidence, on a plea of *nul tiel record*, to support an action of debt upon such judgment.
Wentworth v. *Keazer*, 336.

10. But it is competent for the defendants to prove, by parol, that what purports to be such a certified copy is not authentic. *Ib.*

11. Where evidence was admitted for the defendant, upon condition that he would prove another material and connected fact, which he was unable to prove, *it was held*, that the jury should disregard the evidence so admitted. *Bangor* v. *Brunswick*, 398.

12. Though the jury were not *expressly instructed*, to disregard the testimony, so admitted, yet, as the proceedings were had in their presence, the Court

will presume, that the jury understood the matter, and that they accordingly did disregard the evidence. *Ib.*

See BILLS AND NOTES, 9, 10, 18, 19, 20, 22. EQUITY, 3. FLOWAGE, 3. INDICTMENT, 1, 13, 14. LIMITATIONS, 8. MALICIOUS MISCHIEF, 1, 4, 8. PAUPER, 7. PARTNERSHIP, 1, 2, 5. POOR DEBTORS, 8, 9, 10, 11, 12. PUBLIC LOTS, 6. REPLEVIN, 3, 4. TOWN, 2. TRUST, 2, 4. WITNESS.

EXCEPTIONS.

1. If a Judge rule that, *as matter of law*, a specified amendment cannot be allowed, exceptions may be taken to such ruling. *Rowell* v. *Small*, 30.

2. A witness testified to a conversation of the defendant; and parts of it were relevant and parts were irrelevant to the present suit; — *Held*, that, though the evidence of the irrelevant declarations was seasonably objected to, exceptions to the admission of it could not be sustained.
Whitney v. *Cottle*, 31.

3. Exceptions from the District Court will be dismissed, if introduced into this Court before the action shall have been prepared by nonsuit, default, verdict or otherwise, for its final disposition in the District Court.
Witherel v. *Randall*, 168.

4. Thus, an amendment having been allowed in the District Court, exceptions were taken, and, before any further proceedings were had in the District Court, the exceptions were entered here. *Held*, the exceptions must be dismissed. *Ib.*

5. Exceptions from the District Court cannot be sustained, if no recognizance was entered into, in that Court. *Hilton* v. *Longley*, 220.

6. This rule is not varied by an agreement that *sureties be waived*. *Ib.*

7. Instructions to the jury cannot be excepted to by the party, in whose favor they were given. *Rice* v. *Wallace*, 252.

8. Exceptions from the District Court, upon proceedings under a petition by the County Commissioners, for the location of public lots, cannot be sustained. The mode of correcting errors, if any, in such cases, is by *certiorari*. *County Commissioners* v. *Spofford*, 456.

See PAUPER, 3. PRACTICE.

EXECUTION.

1. After the attachment of an equity of redeeming mortgaged land, no conveyance made by the debtor can lessen the creditor's rights.
Abbott v. *Sturtevant*, 40.

2. By an officer's sale of such an equity, the purchaser takes a right to the immediate possession of the land, (except as against the mortgagee,) and may maintain trespass *quare clausum* against one exercising ownership under any conveyance made by the debtor after the attachment. *Ib.*

3. Persons claiming under such a conveyance, do not hold by a seizin adverse to that of the debtor. *Ib.*

4. It is not indispensable that the officer's deed should be made on the day of the sale. If made so soon afterward, that it may be regarded as a part of the sale-transaction, the deed and the purchaser's right under it will have relation back and take effect from the time of the sale. *Ib.*

5. If an execution has been returned satisfied by a levy upon property, and the property did not belong to the debtor, the creditor's remedy may be by action of debt upon the judgment. *Parlin* v. *Churchill*, 187.

6. Where a judgment in a writ of entry had been recovered, and the demandant had elected to pay the betterments, allowed to the defendant by the jury, if *after* such proceedings, an execution against said defendant in favor of a third person be levied by a sale of his right in the same land in virtue of possession and improvement thereof, the sale conveys no rights in the land, nor any right in the money to be lodged with the clerk, by the demandant in the writ of entry, for the betterments. *Ib.*

7. Though the avails of such sale have been indorsed in satisfaction of the execution, such indorsement is not a bar to an action of debt upon the judgment. *Ib.*

8. The right to redeem real estate, levied on execution, is limited to one year from the levy. *Boothby* v. *Bangor Commercial Bank*, 361.

9. This principle is not altered by the 28th sect. of Rev. Stat. chap. 94. That section merely provides an additional mode of ascertaining the amount to be paid. That mode is by bill in equity. But such process must be commenced in season to have the amount ascertained and brought into Court, before the year, allowed for the redemption, has expired. *Ib.*

10. A return of satisfaction, made upon an execution by an officer, will not bar an action of debt on the judgment, if it be proved that, in fact, no such satisfaction was made. *Hutchinson* v. *Greenbush*, 450.

11. A levy of an execution upon real estate is void, if it embrace more of the debtor's land than was sufficient, at the appraisal, to satisfy the execution and the officer's charges for his fees and the expenses of the levy. *Boyd* v. *Page*, 460.

EXECUTORS AND ADMINISTRATORS.

1. Where an administrator, *de bonis non cum testamento annexo*, is appointed upon the death of an executor, who was also appointed by the will the trustee of a fund arising out of the estate of the testator, such administrator does not succeed to the rights or duties of trustee of such fund. *Knight* v. *Loomis*, 204.

2. A testator, among other dispositions of his property, bequeathed to S. W. $1700, in trust, to be put out at interest, and to collect and pay over to the plaintiff the interest on said sum yearly; and required, that said S. W. should give a "special bond for the discharge of the trust." S. W. was also appointed executor of the will, and gave bond as executor, but gave no "special bond" as to the trust fund. He settled all the estate except the $1700, and during his lifetime he paid the interest of that sum annually, as required by the will. At his decease, the defendant was appointed administrator *de bonis non cum testamento annexo*, and gave the bond ap-

FLOWAGE.

in their verdict, to include compensation for the injury done to the plaintiff's fences, and for the annual expense of maintaining fences for the future. *Jones* v. *Phillips*, 455.

FORCIBLE ENTRY AND DETAINER.

A process of forcible entry and detainer, cannot be sustained, under chap. 128, of the Revised Statutes, unless the complaint *allege* that the relation of landlord and tenant had subsisted between the parties; or unless either the entry or detainer was forcible. *Woodman* v. *Ranger*, 180.

FRAUD.

See ACTION, 1, 2. BILLS AND NOTES, 5.

GUARANTY.

See CONTRACT, 5.

HUSBAND AND WIFE.

See DOWER. INFANCY.

INDICTMENT.

1. Where an indictment for larceny contains any particulars descriptive of the property stolen, though not necessary to be inserted, they must be proved on trial. *State* v. *Jackson*, 29.

2. In a criminal prosecution, the Judge is not bound to quash the indictment on motion. The defendant should take the advantage by demurrer or in arrest of judgment. *State* v. *Haines*, 65.

3. Upon a motion in arrest, a common law indictment is good, which alleges that defendant "with force and arms, near the dwelling-houses of divers citizens and near divers streets and common highways, did unlawfully erect, continue and use a certain building as a place for bowling, with a bowling alley therein, to which divers persons have been, and now are, accustomed to resort for the purpose of bowling, and, being so there, to play at bowls in the day time and also in the night time, thereby occasioning great noises, damage and other annoyances, and becoming injurious and dangerous to the comfort of divers individuals and the public, and to the common nuisance," &c. *Ib.*

4. *It seems, also*, that upon such a motion, an indictment would be good, which charges that the defendant did unlawfully keep and maintain, for his own lucre, a common and disorderly room, called a bowling alley, and did unlawfully procure and permit divers persons to frequent and come together at said alley for the purpose of bowling, and being so together, there to play at bowls in the day time and in the night time, to the great annoyance, damage and common nuisance of all the citizens of the State. *Ib.*

5. Upon conviction of a nuisance, the Court may punish by a fine only. Or they may also cause the nuisance to be abated. But such abatement will not be required when strangers to the proceedings might be improperly affected. *Ib.*

See CONSIDERATION. MALICIOUS MISCHIEF.

INFANCY.

INJURY TO OTHERS' PROPERTY.

3. What would, under such circumstances, be ordinary care, might differ from that degree of caution and prudence, which would be required when no immediate danger was impending. *Ib.*

4. If one, in attempting to rescue his own property from such imminent danger, shall do injury to another's property, he is not protected from liability, by the absence of all malicious or evil design, and of all such gross carelessness as would authorize an inference of bad intention. *Ib.*

INSURANCE.

1. The description of property insured in the body of the policy, when the rate of premium is thereby affected, operates as a warranty that the property is of the class described, and is in the nature of a condition precedent, and performance of it must be shown by the insured, before he can recover upon the policy. *Richards* v. *Protection Ins. Co.* 273.

2. Where the conditions annexed to a policy of insurance of goods against fire, and referred to in the body of it, divided insurable articles into several classes, some as being more hazardous, and therefore requiring a higher rate of premium than others, the parties are considered as agreeing to the rightfulness of the classification, and cannot be permitted to prove it inaccurate. *Ib.*

3. Thus, where the conditions exhibited one sort of goods as not hazardous and another as hazardous, the insured cannot offer proof that no greater risk attached to the insurance of the latter than the former; nor that a particular article, asserted in the conditions to belong to one of the classes, did in reality belong to another class. *Ib.*

4. A representation by the insured, that the goods insured belong to the former description, is a warranty of that fact. It is in the nature of a condition precedent, and must be proved, before the insured can recover on the policy for a loss. *Ib.*

5. Such a representation extends not merely to the time of taking the policy but it warrants that the goods shall continue to be of that description. during the whole continuance of the policy; and that not merely a part of the goods, but all of them are, and shall be of that description. *Ib.*

6. The violation of such a warranty by the insured, will defeat the policy. *Ib.*

7. Thus, where a policy was taken upon "a stock in trade, consisting of not hazardous merchandise," and the insured kept, among other goods, for sale, the articles of oil and glass, which in the "conditions," were denominated "hazardous," the policy was thereby vacated. *Ib.*

8. A *feme covert* was tenant for life in one third of a lot of land, and tenant for years of the other two thirds. Her husband erected a house on the land, and caused it to be insured as his property, by the defendants, for four years. One article of the defendants' by-laws was, that the policy should be void, if the assured should sell or alienate the property in whole or in part, without their consent. During the life of the policy, the plaintiff and his wife conveyed to the reversioner her life estate, on condition that

the grantee should pay her a fixed sum annually, during her life. The plaintiff at the same time, conveyed to said reversioner all his interest in the other two-thirds, and took back a mortgage upon the whole estate to secure the payment of several sums in yearly instalments. The mortgager entered into possession. The house was afterwards destroyed by fire before any of the abovementioned sums had become payable by him. *Held*, that the plaintiff at the date of the policy, had an insurable interest in the house; *held also*, that by said conveyances, the house became a part of the realty; *held also*, that said conveyances constituted such an alienation as defeated the policy. *Abbott* v. *Hampden M. F. Ins. Co.* 414.

9. To constitute such an alienation it is not necessary that there should be an absolute tranfer of the whole or of any distinct portion of the property If there has been such disposition of it, that any property has been passed to another, the alienation has occurred. *Ib.*

INTOXICATING DRINKS.

1. The act of 1846, c. 205, was designed to restrict the sale of wine, brandy, rum or other spirituous liquors, or liquors a part of which is spirituous, whether manufactured in *this* or in any *other* country.

State v. *Crowell*, 115.

2. With *two* exceptions, it *prohibits* absolutely the sale of *any* and *all* of such liquors, for *any* and *every purpose*, and in *any* and *every quantity*, great or small. *Ib.*

3. One of the exceptions authorizes sales by certain persons, appointed therefor, and placed under bonds and penalties for their faithfulness. *Ib.*

4. The other exception authorizes sales of liquors, imported from any foreign port or place, but *only* by quantities, as large or larger than the quantities which revenue laws allow to be imported. *Ib.*

5. This exception, therefore, does not authorize any sale of *domestic* liquor, in *any quantity whatever*. And it authorizes the sale of *foreign* liquor only in *prescribed quantities*. *Ib.*

6. If, therefore, a complaint allege a sale to have been made in a *less* quantity, it need not specify whether the liquor *was* or *was not* imported. For such sale of either would be an offence; and the penalty for each is the same. *Ib.*

JUROR.

See MALICIOUS MISCHIEF, 6. NEW TRIAL, 4. VERDICT.

JUSTICE OF THE PEACE.

1. In a justice's court, an appeal can be taken only from such judgments as make a final disposition of the case in that court. It cannot be taken from any interlocutory order or judgment. It cannot be taken from a judgment of *respondeat ouster*, upon a demurrer to a plea in abatement.

Waterville v. Howard, 103.

2. Whether a judgment, rendered by a justice of the peace, has been ap-

pealed from, must be determined from the record. Parol evidence is not admissible upon that question. *Gammon* v. *Chandler*, 152.

3. One who has been a justice of the peace, has no authority to certify copies after two years from the expiration of his commission. Authentications made by him after that term are merely void. *Wentworth* v. *Keazer*, 336.

See Evidence, 9, 10.

LANDLORD AND TENANT.

1. In a lease of real estate for a stipulated time, a covenant, that the lessee shall pay the rent and peaceably give up the possession at the end of the term, "and for such further time as the lessees may hold the same," is a security both for the surrender of the estate and for rent *during the occupation*. In such a case the holding over beyond the term, is a tenancy at will. *Kendall* v. *Moore*, 327.

2. Lessees for a time fixed, who hold over, are not liable for rent longer than for the time of their occupation. *Ib.*

3. Where a person entered upon land by license of one of the owners in common, and erected and occupied a building upon it, he must be considered as holding in submission to the title of such owner, until the contrary is proved. *Bucknam* v. *Heirs of Bucknam*, 494.

See Forcible Entry and Detainer.

LARCENY.

See Indictment, 1.

LEGACY.

1. After the lapse of a year, an action for a legacy may, *under some circumstances*, be maintained by a residuary legatee against the executor, before a final settlement of the estate. *Smith* v. *Lambert*, 137.

2. To maintain such action, it must appear that there are assets in the hands of the executor; but if it also appear that there are other and superior claims upon the assets, to their full amount, the residuary legatee must be postponed. *Ib.*

3. For the maintenance of such an action, it is not essential that the probate records should show assets, liable to a residuary legatee; though such records would be evidence which the executor could not controvert. After the lapse of a year, there is a *presumption* that the debts due from the estate, have all been paid. *Ib.*

4. It is not within the jurisdiction of the probate court to decide *who* are entitled, as legatees, under the will; or to decree *to whom* or at *what time* legacies or distributive shares shall be paid. Such a decree would be merely void. The allowance by the probate court to an executor for money paid to a legatee, beyond his just proportion, furnishes no protection to the executor for making such payment. *Ib.*

See Will.

LIBEL.

In actions of libel, the question of malice is to be determined by the jury. *Lancey* v. *Bryant*, 466.

LICENSE.

See INTOXICATING DRINKS. LANDLORD AND TENANT.

LIEN.

See ATTORNEY. TENANCY IN COMMON, 4, 5.

LIMITATIONS.

1. The statute of limitations does not bar a witnessed note, sued in the name of an indorsee, though the indorsement were made more than six years after the payday of the note. *Stanley* v. *Kempton*, 118.
2. Upon a witnessed note, on which a partial payment has been made within twenty years, there arises no presumption of payment, from mere lapse of time. *Estes* v. *Blake*, 164.
3. The payment is an acknowledgment that it is an existing note, and gives it new life for twenty years commencing at the time of the payment. *Ib.*
4. The remedy of the holder is upon the note itself, and not upon any implied promise, supposed to arise from such payment. *Ib.*
5. The statute of limitations does not apply to claims for flowage, under a judgment. *Knapp* v. *Clark*, 244.
6. Since the Revised Statutes, as well as before, a new promise may be implied from a partial payment upon a note. *Sibley* v. *Lambert*, 253.
7. Such a payment, within six years before the commencement of the suit will avoid the statute bar of limitations. *Ib.*
8. Such payment may be proved by parol. *Ib.*
9. In a suit upon a *joint* note, made by the defendants, *in their individual capacities*, prior to the Revised Statutes, the right of one of the defendants to rely upon the statute of limitations is not impaired by any payment or written acknowledgment made by the other since the Revised Statutes, though within six years before the suit. *Wellman* v. *Southard*, 425.
10. Neither will the statute bar be any the less applicable, though in fact the makers of such note, at the time of its date, were *copartners* in business, and it was given for a copartnership debt. *Ib.*
11. Neither will the statute bar be dislodged by proof, that the defendant, within the last six years included the note in an unsigned schedule of his indebtednesses, made by himself for his own use. *Ib.*
12. While E. & S. were copartners, they gave a joint note in their *individual capacities*, for a partnership debt. E. sold all his interest in the concern to N. who was to pay E's half of the debts. Within the last six years, S. notified N. that the note now in suit was justly due, and N. consented that it should be paid, and S. afterwards collected sufficient of the com-

pany claims to pay the note and all other company debts. *Held*, these facts did not remove the bar created by the statute of limitations. *Ib.*

See EXECUTORS, 4.

LUMBER.

1. The doctrine of "confusion of goods," may apply to mill logs and other lumber. *Hesseltine* v. *Stockwell*, 237.

2. Confusion of goods has occurred when the intermixture is such that each one's property can no longer be distinguished. — Per SHEPLEY, C. J. *Ib.*

3. When there has been a confusion of goods, the common law assigns the whole property to the innocent party, without liability to account, except in certain cases or conditions of the property. *Ib.*

4. There is no forfeiture, if the goods have been intermixed without fraud. *Ib.*

5. And, even in cases of fraudulent intermixture, there is no forfeiture, if the goods be of equal value. Each owner is entitled to his proportion of the whole. *Ib.*

6. If logs belonging to the plaintiff have been wrongfully intermixed with those belonging to another person, so as to form an aggregate lot, in which the logs of the plaintiff cannot be distinguished from the others; and if a detached parcel of such aggregate lot, have afterwards come into the hands of a third person, it cannot be laid down, *as matter of law*, that a confusion of goods has not occurred, or that the plaintiff, in order to recover in an action of trover against such third person, is bound to prove his original ownership in any of the logs constituting such detached parcel. *Ib.*

7. A trespasser acquires no title to the goods taken, and can convey none. The original owner may follow his property and reclaim it from the trespasser, or any other person claiming through him. *Bryant* v. *Ware*, 295.

8. Confusion of goods may occur by the intermixture of timber, shingles, rails or ship knees. *Ib.*

9. Where lumber was cut upon two tracts of adjoining lands of different owners, by a trespasser, and the whole was so intermixed by him or persons claiming under him, that the part belonging to each owner could not be distinguished and the owner of one tract seized and took possession of the whole; *it was held*, that one claiming under the wrongdoer, could no maintain an action of *trespass* against him for such taking. *Ib.*

See CONTRACT, 6.

MALICIOUS MISCHIEF.

1. An indictment for maliciously breaking down a dam, belonging to a person named, cannot be sustained except on proof that such person had some interest in the dam. *State* v. *Weeks*, 182.

2. An indictment on the statute "of malicious mischief," &c. chap. 162, may be maintained, although the facts proved might have supported an indictment, under the statute, chap. 155, for arson. *Thayer* v. *Boyle*, 475.

MILITIA.

MILLS AND MILL-DAMS.

OFFER TO BE DEFAULTED.

An offer to be defaulted is not an admission of a cause of action in the plaintiff. In this respect, the law was the same prior to the act of 1847, chap. 31. *Avery* v. *Straw*, 458.

OFFICER.

See ACTION, 10. ATTACHMENT. ERROR, 6. RECEIPTER.

PARTITION.

1. If a proprietor in a tract of undivided land, convey any number of acres thereof in common and undivided, the grantee is entitled to that number of acres of average quality and value with the rest of the tract.
Dyer v. *Lowell*, 217.

2. If there be error in the proceedings of commissioners, in setting off lands under a petition for partition, the remedy for the party injured is, not by writ of error, but by writ of *certiorari*. *Ib.*

3. A co-tenant, thus injured, is not precluded from a remedy by *certiorari*, merely because he was not named in the petition for partition. *Ib.*

4. It is beyond the power of such commissioners to assign to a petitioner a right of hauling lumber across the land assigned to his co-tenant; or of driving lumber on the stream through such land; or to prescribe in what proportions, among the parties, the expense of maintaining the dam, shall be paid, or that a dam shall be maintained at all. *Ib.*

5. If the estate be incapable of partition, the whole should be assigned to one of the co-tenants, upon payment of money, as provided in R. S. chap. 121, sect. 25. *Ib.*

6. The proceedings of such commissioners are erroneous if they show, merely that they assigned to the petitioner, the number of acres he was entitled to, without showing, in substance, that they were of average quality and value with the residue of the tract. *Ib.*

PARTNERSHIP.

1. A conveyance of land, belonging to a copartnership firm, in which all the copartners join, carries with it a presumption, in the absence of any proof that the consideration money went to the benefit of the firm.
Lincoln v. *White*, 291.

2. *Whether a partnership existed, is an inference of law from the facts* shown to have existed. A mere participation in profit and loss, in the transactions of business, does *not necessarily constitute a partnership*.
Dwinel v. *Stone*, 384.

3. It is essential to a copartnership, that there be a community of interest in the *subject matter* of it. *Ib.*

4. It is essential to a copartnership, that upon its dissolution by the death of one of the partners, the survivors become entitled to retain and dispose of the company effects for a settlement of its affairs. *Ib.*

PLEADING.

PAUPER.

5. In an action for the support of a pauper, wherein it becomes necessary to show that he was resident in the defendant town, upon the day of its incorporation, the plaintiffs do not make out a *prima facie* case, by merely proving that he was residing there a few months before, and a few months after that day. *Kirkland* v. *Bradford*, 452.

6. A mother, who has entered into a second marriage, has power with the consent of her husband, to emancipate a minor child of her first marriage. *Dennysville* v. *Trescott*, 470.

7. Such an emancipation may be inferred from the conduct of the parties. *Ib.*

8. A minor child who has been emancipated gains no settlement through that of its mother, acquired after such emancipation. *Ib.*

9. Where a pauper, belonging to another place, is supplied within and at the expense of the plaintiff town, under a contract made with an individual to support all such paupers as the town should be obliged to support, such supplies are held to be furnished by the town. *Calais* v. *Marshfield*, 511.

10. In such case the plaintiff town may maintain an action for such supplies, against the town of the pauper's settlement, although the recovery is for the benefit of the contractor. *Ib.*

11. A residence by a father, within the United States, and an adherence to its government, from the commencement of the Revolutionary war till after the definitive treaty of peace in 1783, conferred all the rights of citizenship, both upon himself and upon his minor child residing in his family. *Ib.*

12. By the common law, allegiance is not a matter of individual choice. It attaches at the time and on account of birth, under circumstances in which the family owes allegiance and is entitled to protection. *Ib.*

13. Although the child, whose citizenship is thus established, may have removed, immediately after coming of age to act for himself, into a British province, and adhered to its government, he is, on his return to the United States, entitled to the rights of citizenship. *Ib.*

14. By the act of 1826, dividing the town of Machias into several towns, a person, born within its territorial limits, though prior to its incorporation, and removed therefrom at the time of said division, is held to have a settlement in that one of the towns, within the territorial limits of which he was born. And this rule applies to persons whose settlement there was merely derivative. *Ib.*

POOR DEBTORS.

1. Upon a poor debtor's disclosure, to obtain his release from arrest upon an execution in a personal action, wherein the damages recovered are less than $100, if the creditor neglect to appoint one of the justices, an appointment may be made for him by a constable of the town in which the disclosure is to be made, and in which the debtor is present, although it be a town in which neither of the parties reside, and although the execution be not directed to any constable. *Worthen* v. *Hanson*, 101.

2. Under our system of statute pleading, the plea of *non cepit* in replevin does not admit the property to be in the plaintiff, *when the plea is accompanied by a brief statement denying that fact.*

Dillingham v. *Smith*, 370.

3. Unless the pleading admits the property to be in the plaintiff, replevin cannot be maintained except upon proof of such ownership. *Ib.*

4. So also the plaintiff must prove his ownership, when the pleadings are such as not to present *merely* an issue upon the property being in the defendant. *Ib.*

5. Where the defendant had a pile of mill logs of a particular mark on the landing, and the plaintiff voluntarily drew other logs into the same pile, and put upon them the same mark, and the defendant took them all into possession, *it was held*, the plaintiff could not maintain replevin for his *proportion* of the logs, but only for *such* of them as he could *identify* to be his own. *Ib.*

6. In replevin, if neither of the parties request instruction that the jury should find the value of the articles, they are presumed to have acquiesced in the valuation contained in the writ. *Heald* v. *Cushman*, 461.

RETAILER.

See INTOXICATING DRINKS.

SALE.

1. An affirmation or representation of the quality of an article, at the time of selling it, is held to be a warranty, if so intended by the parties to the sale, and not intended merely as the expression of an opinion.

Hillman v. *Wilcox*, 170.

2. If the seller represent the article to be sound, when he in fact knows that it is not sound, and if the purchaser relies on that representation as a warranty, the seller is liable. And the purchaser may elect to pursue his remedy, either by action of tort or of assumpsit. *Ib.*

See CONTRACT. EXECUTION, 4. TAX.

SEIZIN AND DISSEIZIN.

See ATTACHMENT.

SET-OFF.

Where the plaintiff becomes nonsuit, no judgment can be rendered against him upon an account in set-off. *Sewall* v. *Tarbox*, 27.

SHERIFF.

See ACTION, 10. ERROR, 6. RECEIPTER.

SHIPPING.

1. While, between the joint owners of a vessel, no settlement has been made of her disbursements and earnings, and no balances have been ascertained

and agreed upon, one part owner cannot sustain against another an action for his proportion of the net avails, although the vessel has been lost at sea.
Maguire v. *Pingree*, 508.

2. The usual process for such an adjustment is at equity. *Ib.*

3. Where contracts are made and are to be performed in a foreign country, their legal effect must be determined according to the laws of that country.
Ib.

STATUTE.

1. The Revised Statutes, chap. 1, sect. 1, provide that every statute shall take effect in thirty days from the recess of the Legislature passing the same, unless the provisions of any statute shall otherwise prescribe.
Cooper v. *Curtis*, 488.

2. That section applies, and is in force, as to private as well as public statutes. *Ib.*

See BANKRUPTCY, 7.

STATUTES CITED, EXPOUNDED, &c.

STATUTES OF THE UNITED STATES.

1799, c. 128, Importation of spirits, 118
1802, " 28, Citizenship, 517
1841, Aug. 19, Bankrupt Act, [63, 190, 269
1843, Repealing Act, 62

PROVINCIAL STATUTE.

5 W. & M. c. 3, Legacy, 142

STATUTES OF MASSACHUSETTS.

1783, c. 59, Attachment, 503
1784, " 24, Legacy, 142
" " 57, Execution, 41
1798, c. 77, Execution, 42
1806, March 13, Sheriffs, 202

STATUTES OF MAINE PRIOR TO REVISED STATUTES.

1821, c. 45, Flowage, 250
" 51, Probate, 142, 528
" 52, Administration, 359
" 60, Execution, 42, 154, 503
" 92, Sheriffs, 201
" 116, Collection of taxes, 326
" 118, Ways, 159
" 122, Pauper, 472, 520
" 137, Corporations, 150
1824, c. 254, Ministerial Lands, 234
1828, c. 393, Public Lands, 377, 379
1831, c. 501, Collection of taxes, 325
" 514, Pleading, 189
1834, c. 135, Public Acts, 150
1835, c. 170, Public Lots, 381
" 183, Judicial Process, 346
1836, c. 200, Corporations, 150
" 242, Ways, 532
1837, c. 276, Courts Martial, 424
1838, c. 343, Limitations, 121

REVISED STATUTES.

SUBSEQUENT STATUTES.

SPECIAL STATUTES.

TAX.

1. The title arising to a town by a forfeiture of non-resident lands for the non-payment of town taxes, is not perfected, unless nine months fully expire after the date of the assessment, and before the collector makes to the treasurer a certificate of the delinquency, to pay the tax; nor unless the treasurer *authenticate as true*, the copy of his printed advertisement, lodged with the clerk; nor unless it appear that the collector had a warrant from the assessors to collect the tax. *Flint* v. *Sawyer*, 226.

2. To the validity of a sale of real estate, made by a collector, for the non-payment of taxes, it is indispensable that he take the oath of his office before acting therein. *Payson* v. *Hall*, 319.

3. To maintain title under such a sale, it is not sufficient to show that the person making the sale had been chosen as collector and acted therein. *Ib.*

TENANCY IN COMMON.

See PARTITION.

TENDER.

See BOND, 6.

TOWN.

1. A surveyor of highways, who, after expending the assessments committed to him for the repair of the road, and finding the same to be insufficient, is directed by the selectmen to proceed in the work, and thereupon expends a further sum, has no remedy against the town for remuneration *unless* such direction was in *writing*. *Morrell* v. *Dixfield*, 157.

2. Conversation by the moderator and others, in town meeting, relating to a subject legally under its consideration, cannot be proved, as evidence against the town. *Ib.*

3. The plaintiff and another person made separate claims against a town, growing out of some connected transactions. The town voted to allow the plaintiff 700 dollars, provided the other person would accept $200 for his claim, which he refused to do. *Held*, the town had the right to affix the condition; that it was not of that class which is void because impossible to be performed; and that it would not support an action for the plaintiff. *Ib.*

4. In drawing an order upon the treasurer, in payment of a debt due from the town, the selectmen have authority to make it negotiable in its form. *Willey* v. *Greenfield*, 452.

5. The receiving of a town order by the collector in payment of taxes, is not, of itself, a payment of the order. *Ib.*

6. There is no law, requiring city or town officers to know the contents of all the corporation records. *Lancey* v. *Bryant*, 466.

7. Diligence and care, in ascertaining the contents of corporation records upon a specific subject, cannot be required of the corporation officers, while it is not shown, that they knew of the existence of such records. *Ib.*

See ACTION, 7, 11, 12. TAX.

TRESPASS.

1. A trespasser acquires no title to the goods taken, and can convey none. The original owner may follow his property and reclaim it from the trespasser, or any other person claiming through him. *Bryant* v. *Ware*, 295.

2. Confusion of goods may occur by the intermixture of timber, shingles, rails or ship knees. *Ib.*

3. Where lumber was cut upon two tracts of adjoining lands of different owners, by a trespasser, and the whole was so intermixed by him or persons claiming under him, that the part belonging to each owner could not be distinguished and the owner of one tract seized and took possession of the whole; *it was held*, that one claiming under the wrongdoer, could not maintain an action of *trespass* against him for such taking. *Ib.*

See MORTGAGE, 10.

TROVER.

See LUMBER, 6.

TRUST.

1. It is a settled rule, that if one purchases an estate with his own money, and the deed be taken in the name of another, a trust results, by presumption of law, in favor of the one, who pays the money.

Baker v. *Vining*, 121.

2. By force of authorities, the Court has been constrained, though reluctantly, to adopt the rule, that such payment may be proved by parol, but they will require the proof to be full, clear and convincing. *Ib.*

3. It has been said that, if the money were paid by two or more persons, and it clearly appeared how much each one paid, a trust in the estate would arise to them, respectively, *pro tanto*. But no case has been found to uphold a trust, where the proportions paid were uncertain. In such a case no trust can be established. *Ib.*

4. The presumption of a resulting trust may be rebutted by parol testimony. *Ib.*

5. Where an administrator, *de bonis non cum testamento annexo*, is appointed upon the death of an executor, who was also appointed by the will the trustee of a fund arising out of the estate of the testator, such administrator does not succeed to the rights or duties of trustee of such fund.

Knight v. *Loomis*, 204.

6. A testator, among other dispositions of his property, bequeathed to S. W. $1700, in trust, to be put out at interest, and to collect and pay over to the plaintiff the interest on said sum yearly; and required, that said S. W. should give a "special bond for the discharge of the trust." S. W. was also appointed executor of the will, and gave bond as executor, but gave no "special bond" as to the trust fund. He settled all the estate except the $1700, and during his lifetime he paid the interest of that sum annually, as required by the will. At his decease, the defendant was appointed administrator *de bonis non cum testamento annexo*, and gave the bond appropriate to that appointment, and charged himself with the $1700, in his probate account, as having been received of the estate of S. W. *Held*, that the defendant did not become *trustee* of the fund, that he had no right to invest the money at interest, and that the plaintiff could not recover of him the yearly interest provided for in the will. *Ib.*

7. Where an estate is devised to executors *eo nomine*, in trust, the devise is made to the official, not to the individual persons, and the whole trust vests in those who accept the office and become executors of the will.

Putnam Free School v. *Fisher*, 523.

8. Where an estate is so devised, or where the executors have, by the will, a power to sell, coupled with an interest in trust, a conveyance by survivors or by those who alone accept the trust, will be good. *Ib.*

9. By a devise to the executor, of the testator's property, real and personal, in trust, for the purpose of creating a cash fund, he takes in the real estate a fee in trust. But if he did not take the fee, he would still have an implied power to execute the trust. *Ib.*

10. A conveyance by a devisee under a foreign will, made before the will is filed and recorded in this State, is nevertheless good, as his title commences upon the death of the testator. *Ib.*

See BANK, 3. EXECUTORS, 1, 2.

TRUSTEE PROCESS.

1. The contingency which, by the statute, exonerates one from being held as trustee, is not a mere uncertainty how the balance may stand between the principal and the supposed trustee: — *Dwinel* v. *Stone*, 384.

2. But it is such a contingency as may preclude the principal from any right to call the supposed trustee to settle or to account. *Ib.*

USURY.

1. A note given in *payment* of usurious paper, held by the promisee against a third person, cannot be avoided for want of consideration.

Stanley v. *Kempton*, 118.

2. If the maker of a usurious note procure a third person, having no connection with it, to give his note for the amount, *in payment* of such usurious note, such third person cannot avoid his note, on account of the usury between the former parties. *Ib.*

3. But, *it seems*, he might avoid it, if it had been given, not *in payment*, but in renewal or substitution, of the original usurious note. *Ib.*

VERDICT.

1. When a verdict has been returned, affirmed and constructively recorded, the duties of the jury in relation to it, have been fully performed, and their power exhausted. *Snell* v. *Bangor Steam Navigation Co.* 337.

2. Any reconsideration by the jury, of such a verdict, though by order of the Court, is inoperative; and any alteration in it, made upon such reconsideration, is invalid. *Ib.*

3. After a verdict in a writ of entry has been rendered, and the evidence of the title is reported, with the agreement that the verdict may be amended according to the evidence, and the evidence does not enable the Court satisfactorily to determine the exact proportion to which the plaintiff is entitled, the verdict will not be vacated or changed.

Bucknam v. *Heirs of Bucknam*, 494.

WAYS.

1. On an appeal to the county commissioners to locate and cause a town way to be recorded, if their adjudication does not contain a description of the road, its courses, distances and admeasurements, so that it may be ascertained from the record, a writ of *certiorari* will be granted.

Lewiston v. *Lincoln Co. Commissioners*, 19.

2. A town cannot be adjudged to have delayed or refused to approve and allow a supposed way, where there had been no proper return or report of the laying of such way by the selectmen. *Ib.*

3. A surveyor of highways, who, after expending the assessments committed to him for the repair of the road, and finding the same to be insufficient, is directed by the selectmen to proceed in the work, and thereupon expends a further sum, has no remedy against the town for remuneration, *unless* such direction was in *writing*. *Morrell* v. *Dixfield*, 157.

See Action, 13. 14. County Commissioners. Indictment, 11, 12.

WILL.

There were annuitants and also residuary legatees under a will. One of the legatees, being indebted to the estate, gave his note therefor to the executor, and afterwards transferred all his interest in the estate to one of the annuitants, who soon afterwards purchased in all the rights of the other annuitants and of the other residuary legatees. In an action upon the note by the administrator *de bonis non*, for the use of such purchaser; *held*, that said purchases were no defence. *Wilkins* v. *Patten*, 429.

See Executors. Legacy. Trust.

WITNESS.

1. The interest of a witness is not removed by a receipt, unsealed, in full of all demands made by the party calling him. *Dennett* v. *Lamson*, 223.

2. When the immediate effect of a judgment in favor of one of the parties is to confirm a third person, in the enjoyment of an interest in possession, such third person is not competent as a witness for that party. *Atkinson* v. *Snow*, 364.

3. Thus, in a writ of entry, if the defeat of the action would leave a third person in the further occupation and use of the land, of which he claimed to be in possession, such third person cannot be a witness for the defendant. *Ib.*

4. D. had been in possession of a lot of land. The defendant was afterwards found to be in occupation of it, and he refused, on request, to surrender the possession to the demandant. In a suit for the land, he set up in defence, that in occupying it, he was acting merely as the servant of D. to whom the possession belonged.

Held, that D. was not competent as a witness for the defendant. *Ib.*

5. Though, in a suit by the indorsee of a note against the maker, the policy of the law may preclude the payee from testifying, as a witness for the defendant, that the note was invalid in its inception; yet, as to subsequent occurrences, he may give testimony of such facts as would defeat the note, or constitute a part of a chain of facts which would establish a defence. *Davis* v. *Sawtelle*, 389.

6. Therefore, in such a suit, the Court will examine the deposition of such a witness, to find whether the facts, therein stated, are such as he could be allowed to testify. *Ib.*

7. In a suit by the indorsee, against the maker, upon a note, indorsed by the payee "without recourse," the payee is a competent witness, for the defendant, to prove any facts which do not impeach the original validity of the note, and which do not impair the credit and character which, by his indorsement he has given to it. *Ib.*

8. The interest of a witness may be shown from his own examination, or by evidence *aliunde;* but the adoption of either of these modes, precludes a resort to the other, for the same purpose, and upon the same ground. *LeBarron* v. *Redman*, 536.

9. After an unsuccessful attempt to exclude a witness by his own examination, his testimony in chief may be stricken out upon a discovery of his interest. *Ib.*

WRIT OF ENTRY.

1. If, pending a writ of entry by several demandants, the tenant purchase the share of one of them, the writ may be amended by striking out that one's name. *Chadbourne* v. *Rackliff*, 354.

2. A writ of entry by heirs, to recover land which belonged to their ancestor, is not barred by the pendency, in the court of probate, of a petition by the administrator, for license to sell the same for the payment of debts. Such license, if obtained, will not be defeated by a judgment in favor of the heirs. *Ib.*

See AMENDMENT, 5. VERDICT, 3. WITNESS, 3, 4.