REPORTS

OF

CASES IN LAW AND EQUITY,

DETERMINED

BY THE

SUPREME JUDICIAL COURT

OF

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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.
HON. SAMUEL WELLS,
HON. JOSEPH HOWARD,
} ASSOCIATE JUSTICES.
HON. HENRY TALLMAN, ATTORNEY GENERAL.

JUDGES OF THE DISTRICT COURT.

HON. E. G. COLE, *Western District.*
HON. RICHARD D. RICE, *Middle District.*
HON. JOSHUA HATHAWAY, *Eastern District.*

JUDGES OF PROBATE.

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CUMBERLAND,	JOSIAH PIERCE,
LINCOLN,	ARNOLD BLANEY,
KENNEBEC,	DANIEL WILLIAMS,
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FRANKLIN,	MOSES SHERBURNE,
SOMERSET,	CHARLES GREEN,
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PENOBSCOT,	E. G. RAWSON,
WASHINGTON,	JOHN C. TALBOT,
HANCOCK,	PARKER TUCK,
WALDO,	JOSEPH MILLER,
AROOSTOOK,	SAMUEL G. TUCK.

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CASES

REPORTED IN THIS VOLUME.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTIES OF WASHINGTON AND AROOSTOOK,

1849.

BROWN *versus* CHADBOURNE.

The rule of the common law, that riparian proprietors own to the thread of fresh water rivers, has been adopted in this State.

A stream, which, in its natural condition, is capable of being commonly and generally useful for floating boats, rafts or logs, for any useful purpose of agriculture or trade, though it be private property, and though it be not strictly navigable, is subject to the public use, as a passage way.

Though the adaptation of the stream *to such use* may not be continuous at all seasons, and in all its conditions, yet the public right attaches, and may be exercised whenever opportunities occur.

When a stream is inherently, and in its nature, capable of being used for the purposes of commerce, for the floating of vessels, boats, rafts or logs, the public easement exists.

In such a stream, the right in the public exists, notwithstanding it may be necessary for persons floating logs thereon, to use its banks.

Where the proprietor of such a stream, by means of a dam and of an accumulation of his logs above the dam, has, under claim of a right to control the stream, designedly obstructed the running of the plaintiff's logs, and refused to make any provision for the passage of them, the plaintiff is justified in repairing and opening the proprietor's sluices around the dam, for that purpose; provided that that be the mode of effecting the object, least detrimental to the proprietor.

In such a case, in a suit against the proprietor for such injury, the plaintiff may recover for the damage, and, among the items recovered, may be the expenses of booming the defendant's logs, and of repairing his sluices.

CASE for maintaining a dam across Little river, and thereby obstructing the passage of the plaintiff's logs. It is a fresh water river, three miles long, flowing from Boyden's lake to tide water. Its width varies from seven or eight feet to three or four rods. The defendant owns land on both sides of the river, and has a dam and mills there, and a large quantity of his logs were resting upon the dam. The plaintiff had a quantity of logs in the river, for the purpose of being driven to *his* mill, below the defendant's dam. But they were prevented from passing, by means of the mass of the defendant's logs above his dam. The defendant was requested to remove the obstruction, or provide some passage way for the plaintiff's logs, but declined to do so, insisting that the plaintiff had no right to drive logs on that part of the stream, and forbidding him to drive them. The plaintiff thereupon boomed the defendant's logs, and opened and repaired some old sluice ways, belonging to the defendant, around the dam, and drove his logs through the same.

To recover for the hindrances and expenses in getting his logs by the dam, the plaintiff brings this suit.

The defendant contended that, at the place where his lands lay, the river is wholly his property; that the public have no right of passing upon or using it, and that the plaintiff had no right to run logs there.

Before the case was committed to the jury, the plaintiff disclaimed any right arising from prescription or user by himself or others. But he insisted throughout, that, from the intrinsic capabilities of the river, any citizen had the right to use it for running logs.

Upon the question as to the character and capabilities of the river, much testimony was introduced by both parties.

It appeared from the evidence that, in order to drive logs on the river, the banks were commonly entered upon and used by the persons employed, and that, in some states of the stream, dams are necessary, in order to obtain sufficient water for floating the lumber.

At the trial before WELLS, J., among other requests, (which had become immaterial, by reason of the plaintiffs disclaiming any rights from user or prescription,) the defendant requested the following instructions to be given to the jury.

1. That this being a fresh water stream, the presumption is, that it is private property, and that the burden is on the plaintiff to establish the contrary, by satisfactory proof that it is a navigable or floatable river.

2. To constitute Little river a navigable or floatable stream, it must be shown to be capable, in its *ordinary* and *natural* state, of floating logs, boats and rafts; and it is not enough to prove that logs *may* be carried down at *certain seasons* of the year, when the stream is raised by a *freshet.*

3. If it appears that dams or artificial means are necessary, in order to float down logs, or that it was necessary to clear the stream of natural obstructions, before logs could be driven, the jury are not at liberty to find that the plaintiff had a right to use the river.

4. The plaintiff has no right to use the *banks* of this stream for driving logs, and therefore, if such use is necessary for driving logs, the plaintiff has no right to drive the stream.

5. If it should be held, that this stream is a navigable one in time of freshet, and thus, at such times, a common highway; but not capable, in its ordinary state, of floating logs, the plaintiff would have no right to use it as a highway, except in times of freshet; and if, at the time alleged in plaintiff's writ, the stream was in its ordinary condition, and not capable of floating logs, he cannot recover.

6. The defendant's prohibition to pass his dam, having been disregarded by plaintiff, is no ground for the recovery of damages, nor is the fact that defendant's sluices were out of repair; and if it is found that the plaintiff took the power into his own hands, and by forcible means carried his logs by the defendant's dams, he cannot recover in this action.

7. The plaintiff cannot, in this action, recover for money expended in booming the defendant's logs or repairing his

sluices, nor for any other obstruction than that, occasioned by defendant's dams.

8. The plaintiff cannot recover for any obstructions occasioned by defendant's logs, unless he shows that defendant had a reasonable time after they were driven to his pond, to boom or remove them, and that he refused to do it.

The second, fourth and fifth requested instructions were refused, the first and third were given. The first clause of the sixth was given, and the residue of it refused. The seventh and eighth were given with the qualification that, if Little river was found to be a public stream, each one must use it so as not wilfully and intentionally to obstruct it; that if the defendant filled the stream for the purpose of preventing the plaintiff's passage with his logs, and there was no way of getting by, but by removing the defendant's logs, the plaintiff might, under the declaration in this writ, recover the expense of removing them.

In relation to damages, the jury were instructed, that if Little river was a public stream, no one, but by authority of law, could obstruct it, and plaintiff would have had a right to cut away the defendant's dam, if he could not otherwise run his logs; but if it was the best and cheapest mode of getting by the dam, and less damage to defendant would be done by repairing defendant's sluices and using them, the plaintiff might make repairs on them and recover the expense in this action; that the defendant had an equal right with the plaintiff to put his logs into this stream, and plaintiff could not recover for the detention, occasioned by defendant's logs, if both parties acted fairly, and in that case, plaintiff could not recover for removing the logs of the defendant; but if the defendant insisted upon a right to control the stream, and filled the stream with his logs, to obstruct the plaintiff's logs, then the plaintiff might, in this action, recover for his expenditures in the booming of defendant's logs; that the declaration in the writ was sufficient to authorize the recovery of such damage.

The Judge further instructed the jury that it was unallow-

able to hold that streams, merely because capable of being used only in times of freshet, are therefore private streams; that though the jury were satisfied that Little river was capable of being used for running logs in times of freshet only, that circumstance would not prevent it from being a public stream, although in the ordinary state of water, it was not sufficient for such purposes; that, if it was necessary to go on the banks more or less for the purpose of driving logs in Little river, that fact would not take from the stream its public character, if they found it capable in other respects of being used as a public stream; that, with regard to the removal of obstructions from this stream, it must appear that the stream in its natural condition was capable of being used for running logs; and that if what had been done in removing obstructions had only *improved*, but did not *create* the capability, the public right would not be impaired by such improvements.

The verdict was for the plaintiff for $350, and the defendant excepted.

D. T. Granger, for defendant.

The *fresh water* rivers in this State, that are of public use, owe that character to prescription. *Spring* v. *Chase & al.*, 2 Dane's Abr. 696, chap. 68, a. 4, § 2.

But if in some countries, the public right be original and inherent in such rivers as are of sufficient volume to be, *in fact, navigable;* such right has been modified in this State and Massachusetts.

The right of erecting dams and mills, and thereby obstructing such fresh water rivers, has been long recognized, and has become a common law right.

Of such public importance is the milling interest regarded, that it has always been the policy of the law to favor and protect it, as only great public interests have been. Ancient Charters, p. 388, chap. 98, p. 404, chap. 111. PARKER, J. in *Edson* v. *McMaster*, 1 Kerr. 501; Massachusetts Acts of 1796 and 8, vol. 2, p. 729 and 814; Acts of Maine, chap. 45, 261

and 437 ; Rev. Stat. chap. 126 ; Shepley, in argument in *Berry* v. *Carle*, 3 Greenl. 269 ; Sullivan's Land Titles, p. 276.

The evidence shows that Little river is of importance for milling purposes, but of none or of very trifling value as a way.

The law recognizes a class of rivers, which are private, the property of individuals, and not subject to public use. The doctrine contended for by plaintiff, annihilates such a class.

The declaration claims for obstructions by dams and not by logs.

S. Greenleaf, of Massachusetts, on the same side.

By common law, the entire property in Little river, its banks and bed, is in the riparian proprietors. They are entitled to control its use at their pleasure. If the public have any easement or service therein, the burden of proof is in the plaintiff to establish it. *Hale de jure Maris*, chap. 1 ; 6 Cow. 537 ; Angell on Water Courses, chap. 7, § 1, p. 201, 202 ; Schutts on Aquatic Rights, p. [136] ; *Wadsworth* v. *Smith*, 2 Fairf. 281.

It is not a navigable river ; this term is applicable only to tide waters, and it is such rivers only, that are public rivers. Angell on Tide Waters, p. 73—79, 2d ed. and cases.

The public right to the use or service of fresh water rivers, depends on their general character and fitness, *at all seasons* of the year, in their natural state, for the passage of boats and the transportation of property.

Small streams not answering this description, are exclusively and entirely private property.

To hold that a river or stream becomes public during a freshet, is to admit that it is private while there is no freshet, a doctrine both dangerous and unsound : — dangerous, because it leaves the rights of parties in confusion and uncertainty : — unsound, because it gives to one, a way over another's land, whenever it is highly for his advantage ; and because of the unlimited and mischievous extent to which it goes in its application.

In order to make even tide waters navigable, so as to entitle the public to use them freely, they must be navigable to some useful purpose of trade or agriculture; not only at times of extraordinary flood, but at all times of the year, and in the ordinary state of the water.

The known differences of opinion, as to the extent of the term navigable, and whether it applies to fresh water rivers, relates only to the ownership of the bed of the river, or to the exclusive right of fishing, and not to the point now in issue. But even in this respect, the weight of authority is with the defendant.

But the right of the public to use navigable waters, does not give them any right to travel on the banks; this right must result from grant or prescription. The right of the State is restricted to the shore; that is, the land that is usually overflowed at ordinary tides. *Ball* v. *Herbert*, 3 T. R. 253; *Bird* v. *Smith*, 8 Watts, 234; *Morgan* v. *Reading*, 3; *Smead* v. *Marsh*, 366; also *Scott* v. *Wilson*, 3 N. H. 324, 325.

The same doctrine applies to public fresh water streams. Rivers and streams, therefore, which cannot be used for boating and for floating lumber, without traveling upon the banks, are not among public rivers or ways.

To give them this character, they must be capable of being used for valuable purposes of trade or agriculture, at all times and without any aid or appliances from the bank. *Berry* v. *Carle*, 3 Greenl. 269; *Wadsworth* v. *Smith*, 2 Fairf. 280, 281, *quod nota; French* v. *Camp*, 6 Shepl. 434.

Whether this public right in fresh water rivers, is original and inherent, or dependent on long usage, is a question not settled, but involved in no little uncertainty. In the New England States, the chief stress is laid on usage and custom, as its sole foundation. 3 Greenl. 273; 3 N. Hamp. 325.

Little river, then, is only one of those little streams, mentioned by PARRIS, J. in *Wadsworth* v. *Smith*, 2 Fairf. 281, which are not floatable, &c.

It is also respectfully insisted that there was error in the refusal of the Judge to instruct the jury that, to constitute it a public river, it must be capable to float logs and to be used for purposes of boating, and in its ordinary and natural state, and not in times of freshet alone; that the plaintiff had no right to use the banks of the stream, and that if such use was necessary to the use of the water, the plaintiff had no title to it as a public river; and that, if the river at the time alleged, was in its ordinary state, and not capable of floating logs, the plaintiff could not recover.

Our view is, that the jury should be instructed to inquire whether the river, in its natural state, was capable of being used for the passage of boats, rafts and logs, *at all* seasons, and all states of the water, and this without the necessity of any resort to the banks, either for towing paths or other purposes; in which case only would it be, in its character, a public river.

The jury were instructed, that, if the passage of the plaintiff's logs was unlawfully obstructed in the river by the defendant, then the plaintiff had a right to convey them, over the defendant's land, and through his sluices, which were confessedly his private property, and might recover the expense of putting the sluices in order for that purpose.

But this, it is conceived, is not quite correct. For, to justify going over private property, in order to avoid an obstruction in a public highway, it must appear to be insurmountable.

If the defendant's dam unlawfully obstructed the river, and the river was public, the plaintiff should have cut away the dam. It is not for the plaintiff to say, that the course he took was less expensive to defendant.

T. J. D. Fuller, for plaintiff.

1. The rights of private property, in fresh water rivers, above the tide, is held in servitude to the *jus publicum*.

If Little river was naturally of sufficient size, to float boats or mill logs, the public have a right to its free use, for that purpose, unincumbered with dams, sluices, or tolls.

The law nowhere defines the character of a stream, by admeasurement of its volume. The true inquiry is, can the stream be used, for floating logs, boats and rafts on its surface? That Little river is of this description, is settled by the verdict.

The position, that a stream, in order to be subject to the *jus publicum*, must, at its ordinary and natural pitch of water, independent of spring freshets, be of sufficient magnitude, to float boats and logs, is not sound.

The quantity of water flowing in a stream, is ever varying, dependent on atmospherical influences. The spring freshets on our streams, come as regular as the budding of the trees, only varying in degree. Many of the great rivers of the *West*, upon which float hundreds of steamboats, are said to be fordable by footmen at certain seasons of the year.

This great common law right, of using as a public highway, all the streams in this State, susceptible of floating a log to market, lies at the bottom of the public prosperity. The hundreds of small streams, which our lumbermen annually ascend, for winter operations, and which in the freshet season, bear back to market the fruits of their industry, ought to be public highways.

It may be difficult, in some instances, perhaps, to define the precise points, on the streams, which converge into rivers, where this public highway ceases.

But we contend for the broad common law doctrine, that any stream, which at any season of swollen floods, can be practically and profitably used, in floating logs to market, is a public highway. 21 Pick. 344.

But this case is relieved from any question of this sort. The source of Little river is not from small springs. It is the natural outlet of Boyden's lake.

2. The defendant's position, that the public have no right to drive logs upon the stream, if in doing it, there is a necessity to use the banks, is unsound. It proves too much, for in our largest rivers, logs are lodged upon the banks.

To use the banks, and to go upon the banks, for the purpose of removing lumber, lodged there, is a right incident to the way. 5 Pick. 199, see p. 202.

Our statute, chap. 67, fully recognizes this right, and by highly penal provisions, protects the owner of such property, thus situated, against trespassers upon it, "lying and being, in any river, pond, bay, stream or inlet, or on, or near, the bank, or shore thereof."

Here is no distinction, as to the size of the stream or inlet. This statute is a legislative sanction, to the right of using, as common highways, all streams or bodies of water, which may be used for floating logs.

3. Damages.

If a party abate a nuisance himself, he shall not have his action of damage, for that is his remedy. Chap. 13, 3 Black. p. 220.

But the party injured, may have his remedy, for his damage, before abating it.

The defendant's dam constituted the nuisance. The plaintiff did not abate it. 21 Pick. 344.

It is alleged in the declaration, and the evidence tended to prove, that defendant acted maliciously, that is, he did more than the obstructions in and of themselves would do, to injure the plaintiff, by oppressively and wantonly hoisting his gates, to draw off the water, and thereby preventing the plaintiff from sluicing his logs.

Defendant ought not to complain of the plaintiff, for sluicing the logs, which was a course least hurtful to the defendant.

WELLS, J. — This is an action on the case for erecting and maintaining a dam across a stream, called Little river, and obstructing the passage of the water, and the plaintiff's logs.

The river is about three miles in length and runs from Boyden's lake to the tide waters. It varies in its width, from seven or eight feet, to three or four rods, and it has been used

many years for floating logs and rafts, and sometimes boats. Within twenty years, several dams and mills have been erected upon it.

The plaintiff disclaimed the right to recover, upon the ground of prescription or user, but claimed it because the stream was a public one in its natural state.

The jury were instructed, that it being a fresh water stream, the presumption is, that it is private property, and the burden is on the plaintiff to establish the contrary, by satisfactory proof, that it is a navigable or floatable river, and in its natural condition, capable of being used for running logs.

The rule of the common law, that riparian proprietors own to the thread of fresh water rivers, has been adopted in this and many other States of the Union. *Berry* v. *Carle*, 3 Greenl. 269 ; *Spring* v. *Russell & al.* 7 Greenl. 273.

The first question that arises is, it being conceded that the bed of the river belongs to the owners of the land on either side, can a right to the use of its waters be obtained, unless that use has been continued twenty years, the ordinary length of time for the acquisition of an easement ?

In *Berry* v. *Carle*, *Shaw* v. *Crawford*, 10 Johns. R. 236, *Scott* v. *Wilson*, 3 N. H. 321, the right is considered as dependent on long usage.

Lord Hale, in his celebrated treatise, *De jure Maris*, chap. 2, says, "for, as the common highways upon the land are for the common land passage, so these kind of rivers, whether fresh or salt, that bear boats or barges, are highways by water, and as the highways by land are called *altæ viæ regiæ*, so these public rivers, for public passage, are called *fluvii regales*, and *haut streames le Roy ;* not in reference to the propriety of the river, but to the public use."

Again he says, in chap. 3, "there be some streams or rivers, that are private, not only in propriety or ownership, but in use, as little streams and rivers, that are not of common passage for the king's people. Again, there be other rivers, as well fresh as salt, that are of common or public use, for carriage of

boats and lighters. And these, whether they are fresh or salt, whether they flow and reflow or not, are *prima facie publici juris*, common highways for man or goods, or both, from one inland town to another. Thus the rivers of Wey, of Severn, of Thames and divers others, as well above the bridges and ports as below, as well above the flowings of the sea as below, and as well where they have come to be of private propriety, as in what part they are of the king's propriety, are public rivers, *juris publici*."

He makes no mention of prescription or length of time, by which the right is obtained, but of the actual use in fact, as indicating public rivers.

In *Wadsworth* v. *Smith*, 2 Fairf. 278, the doctrine is stated by PARRIS, J. that where a stream is naturally of sufficient size to float boats or mill logs, the public have a right to its free use for that purpose. But such little streams or rivers as are not floatable, that cannot, in their natural state, be used for the carriage of boats, rafts, or other property, are wholly and absolutely private; not subject to the servitude of the public interest, nor to be regarded as public highways, by water, because they are not susceptible of use, as a common passage for the public.

The same principle was stated by MELLEN, C. J. in *Spring* v. *Russell & al.* And is also recognized in Angell on Tide Waters, 75. *Palmer* v. *Mulligan*, 3 Caines, 307.

The distinguishing test between those rivers which are entirely private property, and those which are private property subject to the public use and enjoyment, consists in the fact, whether they are susceptible, or not, of use as a common passage for the public. Per SPENCER, C. J. in *The People* v. *Platt*, 17 Johns. R. 211; *Hooker* v. *Cummings*, 20 Johns. R. 90.

The right of passage and of transportation upon rivers not strictly navigable, belongs to the public, by the principles of the common law. Per PARKER, C. J. in *Com.* v. *Chapin*, 5 Pick. 199.

This subject was very fully considered and with great abil-

ity, in *Ersing* v. *McMaster*, in the Province of New Brunswick, 1 Kerr, 501, deciding the rule of law, as it is stated to be in *Wadsworth* v. *Smith*. The case of *Rowe* v. *Titus*, 1 Allen, 326, in that Province, was decided upon the same principle.

It is said, in *Adams* v. *Pease*, 2 Conn. 481, that the public have an easement in Connecticut river, above the flowing of the tides, for passing and repassing with every kind of craft, and that all rivers, above the tides, in reference to the use of them, are public, and of consequence subservient to public accommodation. Hence fisheries, ferries, bridges, and inland navigation are subject to the regulation of the government.

In Pennsylvania it is held, that the large fresh water rivers, in that State, are altogether public ; not only their waters, but their beds. This conclusion is drawn from the inapplicability of the rule of common law, to large rivers ; also from the fact that neither the original proprietors, nor the government have ever granted them to individuals. *Carson* v. *Blaney*, 2 Binney, 475 ; *Shrunk* v. *Schuylkill, Nav. Com.* 14 S. & R. 71.

If a stream could be subject to public servitude, by long use only, many large rivers in newly settled States, and some in the interior of this State, would be altogether under the control and dominion of the owners of their beds, and the community would be deprived of the use of those rivers, which nature has plainly declared to be public highways. The true test, therefore, to be applied in such cases, is, whether a stream is inherently and in its nature, capable of being used for the purposes of commerce, for the floating of vessels, boats, rafts or logs. When a stream possesses such a character, then the easement exists, leaving to the owners of the bed, all other modes of use, not inconsistent with it. For in this State, the rights of public use have never been carried so far, as to place fresh water streams on the same ground as those in which the tide ebbs and flows, and which alone are considered strictly navigable at common law, and to exclude the owners

of the banks and beds from all property in them. In some of the States of the Union such a rule has been established by judicial decisions, and in others by legislative acts.

It is contended, that to show Little river is public, it is not enough to prove that logs may be floated down at certain seasons of the year, when it is affected by a freshet, but that it should have that capacity in its natural and ordinary state, at all seasons of the year.

In the test, which has been mentioned, to determine whether a stream should be considered public, none of the authorities, from which it is derived, requires the stream to possess the quality of being capable of use, during the whole year. A distinguishing criterion consists in its fitness to answer the wants of those, whose business require its use. Its perfect adaptation to such use may not exist at all times, although the right to it may continue, and be exercised whenever an opportunity occurs. In many rivers, where the tide ebbs and flows, the public are deprived of their use for navigation during the reflux of their waters. A way, over which one has a right to pass, may be periodically covered with water. In high northern latitudes, most fresh water rivers are frozen over during several months of the year. Even some tide waters are incapable of any beneficial use for purposes of commerce in the season of winter, owing to the accumulation of ice.

Every creek or river, into which the tide flows, it has been held in England, is not on that account necessarily, a public navigable river. If it is navigable only at certain periods of the tide, and then only for a very short time, it is not to be supposed to be a navigable channel. Angell on Tide Waters, 89. Nor, as said by SHAW, C. J. in *Rowe* v. *Granite Bridge Corporation*, 21 Pick. 344, is it every small creek, in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed navigable. But in order to have this character, it must be navigable to some purpose, useful to trade or agriculture. It is not a mere possibility of being used under some circumstances, as at extraordinary high tides, which

will give it the character of a public stream, but it must be generally and commonly useful to some purpose of trade or agriculture.

But those authorities, upon which reliance is placed, show nothing more than that small creeks or inlets, penetrating into marshes, and which can only be used at certain periods of the tide, and then only for a short time, or in which there is only a possibility of use, under some circumstances, at extraordinary high tides, are not navigable rivers. Such streams are incapable of any practical, general use for the purposes of navigation, and they are dissimilar to the river under consideration.

Most of the great rivers of this State, in some portions of their passage, are so much impeded by rocks, falls and other obstructions, that logs cannot be floated in them, any great distance, at what might be called an ordinary state of water. It is only in the spring and fall, and occasionally at other times, when their channels are filled with water, that they are capable of floating timber to market. They generally remain in this condition, a sufficient length of time to answer the purposes of a common highway, and their fitness and character as such cannot be destroyed, because they cannot be used in their ordinary state.

A test so rigid and severe, as that required by the instruction requested, would annihilate the public character of all our fresh rivers, for many miles in their course, from their sources towards the ocean. The timber floated upon our waters to market is of great value, and neither the law nor public policy requires the adoption of a rule, which would so greatly limit their use, for that purpose.

The right to the use of the stream in question, must prevail, whenever it may be exercised, at any state of the water.

Another instruction requested to be given was, that "the plaintiff has no right to use the banks of this stream for driving logs, and if such use is necessary for driving logs, the plaintiff has no right to drive this stream."

This request is manifestly too broad, and could not, with

propriety, be given. When the stream overflows its banks, it carries some of the timber with it, and when it subsides, the timber is left upon the uplands. But in such cases, the timber is not lost to its owners, who have a right by our law to enter upon the uplands and remove it. This subject has been regulated by statute, c. 67, § 11, by which the owners of timber may enter upon the land and remove it, within a certain time, by tendering to the owner or occupier of the land, a reasonable compensation for his damages. The banks of the stream may therefore be used for driving logs.

No request was made to instruct the jury, that if the stream was incapable of being used, without traveling upon its banks to propel the logs, there could be no public servitude in it.

The instruction given to the jury was, "that if it was necessary to go on the banks more or less, for the purpose of driving logs in Little river, that fact would not take from the stream its public character, if they found it capable in other respects, of being used as a public stream." It belonged to the jury to determine, whether the river possessed those requisites, which would give it the character of a public stream, and if they found it to be so, it could not be deprived of that character by the acts of those, who might use it. In narrow places, it might at times be blocked up, or it might, as has been stated, overflow. The necessity of going upon the banks in such instances to effect a floating of the logs, would not prevent the river from being public. The inquiry related to the capacity of the river, and that could not be altogether decided, by what those using it, might find necessary at times to do. Some might find it absolutely necessary in their mode of driving logs, to commit trespasses on the adjoining lands, but their unlawful acts could not affect the stream, if it was really and intrinsically capable of public use.

If the plaintiff and others were in the habit of going upon the banks of Little river to drive their logs, it does not appear but that they might have confined themselves to its waters, though it might be more inconvenient for them so to have

done. Their want of care in the use of the river, creating a necessity to commit trespasses, to relieve their property, would not prevent it from being public, nor justify the defendant in obstructing it. They would be responsible in damages for any trespasses committed.

The public are not entitled to tow on the banks of ancient navigable rivers, at common law. *Ball* v. *Herbert*, 3 T. R. 253. And where a river cannot be used without towing, or going upon its banks to propel what is floating, such fact would evince its want of capacity, in itself, for public use.

Sometimes the flow of rivers is broken by cataracts and falls, while in most of their course there is a smooth current, and they are of great utility in the transportation of property. Where such obstructions exist to so great extent, as to require the use of the shores, to carry property by them, though in those places they might not have a public character, yet for many miles above and below them, they might be capable of a beneficial use for trade and commerce, and thereby be public. These obstructions may occur at long or short intervals, leaving other portions of the streams clearly public.

It is further contended by the defendant, that if the dam was an unlawful obstruction, the plaintiff had no right to run his logs through the defendant's sluice, built on his land, and recover damages for repairing it, although such course would be less detrimental than the destruction of the dam, but that he should have cut away the defendant's dam.

If a man has a right of way over another's land, unless the owner of the land is bound by prescription or his own grant to repair the way, he cannot justify going over the adjoining land, when the way is impassable by the overflowing of a river, but if public highways are out of repair or impassable, as by a flood, there is a temporary right of way over the adjoining land. 2 Black. Com. 36; 3 Kent's Com. 424.

Those obstructions, which prevent a passage, while they remain, are insurmountable.

It is said by BULLER, J. in *Ball* v. *Herbert*, "that if a river

should happen to be choked up by mud, that would not give the public a right to cut another passage through the adjoining lands." The right of way is in the waters, and the defendant had no authority to prevent its exercise. He could, by law, erect and continue his dam and mills, but was bound to provide a way of passage for the plaintiff's logs. He obstructed the river improperly by his dam and logs. The plaintiff must either have left his property and lost its whole value, carried it by the dam, repaired the sluice and run the logs through it, or have removed such portion of the dam, as would have afforded a passage. He adopted that course, which was least injurious to the defendant.

The plaintiff would have had the right to enter upon the defendant's land to remove the obstruction. *Colburn* v. *Richards*, 13 Mass. 420; *Inhabitants of Arundel* v. *McCulloch*, 10 Mass. 70.

The plaintiff might not be bound to repair the sluice, but having done so to obviate the difficulty created by the defendant, there does not appear to be any reason, why he should be held to have taken that course, which would have produced a greater injury to the defendant. *Miller* v. *Mariner's Church*, 7 Greenl. 51.

The argument, that damages cannot be recovered for removing the logs, because the dam is alleged in the declaration to have caused the obstruction, cannot prevail, even if such construction should be given to it. For the dam stopped the water and retained the defendant's logs in his mill pond. The removal of it would have allowed a free passage to the logs in the pond, as well as those of the plaintiff. The dam was the cause of the injury; its direct result was the detention of the water above it, and whatever might be in it. The necessity of a removal of the logs was a damage caused by the dam.

The defendant had a concurrent right with others in the use of the stream, but it appears that he transcended that right by filling his pond with logs, and refused to remove them upon request.

It may be difficult, in some cases, to draw the line between public and private streams. The jury have decided that Little river belongs to the former class, upon the exhibition to them of much testimony, by both parties. And there does not appear to be any sufficient reason why the verdict should be disturbed.

Both the motion for a new trial and the exceptions are overruled, and there must be judgment on the verdict.

See 6 Barbour's N. Y. Rep. 265.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF HANCOCK,

1849.

JOHNSON, *in equity, versus* CANDAGE AND HINCKLEY.

Where an assignment of real estate has been made for the benefit of creditors, it is not requisite, in a bill in equity against the assignee relative to the property assigned, that the creditors should be made parties. The assignee is supposed to represent and protect their interest.

Mortgagees of real estate, or their assignees, hold the mortgaged property, for the benefit of the owners of the debts secured by the mortgage.

Where the several debts, secured by such a mortgage, have become the property of different persons, and the assignee of the mortgage has foreclosed; he holds the property, with the rents and profits thereof, in trust for the holders of the debts, according to their respective amounts.

Such a mortgage, and a part of the notes secured by it, were assigned to the defendant, who perfected a foreclosure. When taking the assignment, he had knowledge that one of the notes was in the hands of another owner. It was *Held*, that such owner was entitled, at equity, to recover his proportionate part of the mortgaged property, and of its rents and profits.

The execution of such a mortgage, and of the notes secured by it, is a sufficient compliance with the statute provision, (chap. 91, § 31,) that trusts concerning lands shall be created and manifested in writing.

BILL IN EQUITY. The case was heard on bill, answer and proofs. The facts are sufficiently presented in the opinion of the Court.

Kent, for defendants.

The claim of the plaintiff is, that the defendants are trustees, and that a trust is raised in his favor. Suppose such to be the case, on general equity principles, the statute, chap. 91, § 31, prevents any such equitable trust from being recognized by our Courts.

There is no pretence of any writing, creating and manifesting this alleged trust. *Northampton Bank* v. *Whiting*, 12 Mass. 108; *Goodwin* v. *Hubbard*, 15 Mass. 218.

Chap. 91, § 31, R. S. has materially changed the law. Formerly it was not necessary that the trust should be created in writing; but it must now be both created and manifested in writing. This alleged trust is neither created nor manifested in writing.

Nor is this a resulting trust, or one that arises from implication of law. If it be, then every case of assumed equitable interest can be.

The creditors of Wood, whom the defendant, Hinckley, represents, ought to have been made parties to the bill.

The prayer of the bill cannot be sustained, for no money has been received; if there had been any, and if the plaintiff be entitled to it, he has a plain and adequate remedy at law.

He has nothing in trust, for he parted with all interest long ago.

Herbert & Drinkwater, for plaintiff.

The proper parties are before the Court. If not, yet, there being no objection taken by demurrer or plea, the merits are open. A trust was raised first in Parker Wood, the mortgagee, and that follows the mortgage. 18 Maine, 224; 9 Cowen, 34; 4 Johns. Ch. R. 41; 5 Johns. Ch. R. 570; 4 Kent's Com. 194.

A foreclosure pays all the mortgage notes, if the estate is of sufficient value. In this case, Parker Wood, by negotiating the note, and retaining the mortgage, became, by operation of law, a trustee, holding the land and mortgage in trust for the

benefit of the holder of the note. 4 Kent's Com. 310, 311, note b, and cases cited; *Crane* v. *March*, 4 Pick. 136.

The defendant, Hinckley, took the mortgage as a mere volunteer, and not for valuable consideration, and therefore he takes it subject to all equities in favor of the holder of the note, to which it was subject in the hands of the mortgagee. 17 Ves. 433; 5 Johns. Ch. R. 231; 24 Pick. 226; 11 Maine, 24; 15 Mass. 156.

The opinion of the Court, HOWARD, J. taking no part in the decision, was drawn up by

WELLS, J. — On the eleventh of October, 1838, Edwin O. Shorey conveyed, in mortgage, a parcel of land to Parker Wood, to secure the payment of five notes of one hundred dollars each, payable in five annual payments. In 1842, Shorey filed his petition in bankruptcy, under the law of the United States. Mr. Hinckley, one of the defendants, was appointed his assignee, and subsequently he obtained his discharge. On the first day of January, 1844, an entry was made by Parker Wood, by the written consent of Hinckley, as the assignee of Shorey, to foreclose the mortgage, and the other proceedings requisite to effect the foreclosure, were taken.

On the thirty-first of March, 1845, Parker Wood being insolvent, made an assignment to Hinckley under the assignment law of this State, of all his property. Prior to this assignment, Parker Wood indorsed the note payable in two years, to Allen Wood, and by subsequent negotiations, it became the property of the plaintiff. One of the notes, and a portion of the three, which passed to Hinckley, was paid by Shorey.

On the twenty-third of October, 1845, Hinckley assigned the mortgage to the defendant, Candage, and agreed in writing, to save him harmless, from any legal claim against him, by virtue of the note, which had been sold by Parker Wood, and which is alleged in the agreement to be, at that time, the property of Simeon Parker.

It is contended that the creditors of Parker Wood should be made parties to this bill. Hinckley held the mortgage for the benefit of the creditors of Parker Wood.

Where persons are make trustees for the payment of debts and legacies, they may sustain a suit, either as plaintiffs or defendants, without bringing before the Court the creditors or legatees. In such cases the trustees, like executors, are supposed to represent the interests of all persons, creditors or legatees. Story's Eq. Plead. § 150.

By the lapse of time, the foreclosure has become perfected, and the estate is now absolute in Candage. The plaintiff contends, that the defendant should pay his note, or convey to him his proportion of the land, and account for the rents and profits.

In the case of *Parsons* v. *Welles & al.* 17 Mass. 425, it is said by WILDE, Justice, that in a court of equity the debt is the principal, and the mortgage is the accessory. And as it is there held that, as the mortgagee holds the estate in trust for the mortgagor ; so when the debt is assigned, he becomes a trustee for the benefit of the person having an interest in the debt. *Omne principale trahit ad se accessorium.*

So, an assignment of the debt is said to draw the land after it as a consequence, and as being appurtenant to the debt. 4 Kent's Com. 194. Story's Eq. § 1016.

Where there is a separation of the note from the mortgage, the latter continues in force ; and by the principles of a court of equity, the mortgagee becomes trustee for the holder of the note. *Crane* v. *March*, 4 Pick. 131.

If the mortgagee assign the mortgage with one of two notes, to secure which the mortgage was given, and retain the other note, both notes are paid, by a foreclosure, if the premises are of sufficient value for the payment of them. *Haynes* v. *Wellington*, 25 Maine, 458.

The deduction, from these authorities and the relation subsisting between mortgagor and mortgagee, is, that mortgaged premises cannot be redeemed without the payment of the en-

tire debt, secured by the mortgage, although the debt, or a part of it, is separated from it, and that upon a foreclosure, the whole debt is paid, if the premises are of sufficient value, for that purpose.

Mortgagees or assignees must therefore hold the premises mortgaged for the benefit of the owners of the debts; for if it were otherwise, their debts would be discharged upon a foreclosure, so far as the value of the land might extend, while nothing would be paid to them, and the mortgagee or assignee would obtain a title to the premises, without having paid a consideration for them.

It results, that the defendant Candage, must be considered as holding the premises assigned to him, in trust for the plaintiff, in proportion as the amount due on his note bears to the whole sum, due on the mortgage.

But it is objected, that by R. S. chap. 91, § 31, all trusts concerning lands, excepting those which arise or result by implication of law, must be created and manifested by some writing, signed by the party creating and declaring it, or by his attorney.

As the mortgagee holds the estate in trust, it is a trust created and manifested by the deed and notes, signed by the mortgagor creating and declaring it. The trust imposed is, that the estate shall be reconveyed, or the mortgage discharged upon the payment of the debt, and upon a foreclosure the debt shall be deemed paid, if the estate is of sufficient value, or *pro tanto*. If the debt should be separated from the mortgage, and the estate held by the mortgagee, and the mortgagor be compelled to pay the debt, this would be a plain violation of the trust.

By a sale of the debt or a portion of it without the mortgage, the purchaser acquires an equitable interest, while the holder of the mortgage, by our law, has the legal estate, which, in equity, he holds for the beneficiary. Story's Eq. § 964.

These consequences flow from the nature of the contract; the mortgagee, and whoever succeeds to him, as the owner of the land or the debt, is bound by them.

Both of the defendants had knowledge of the mortgage. Hinckley held the right of redemption as assignee in bankruptcy of the mortgagor, and the mortgage, as assignee of the mortgagee, an insolvent debtor. He cannot therefore sustain any loss. He and Candage had knowledge of the existence of the note, at the time of the conveyance to Candage, as appears by the agreement between them. They therefore had notice of the trust. R. S. c. 91, § 32.

The price, paid for the note by the plaintiff, cannot affect the defendants. It is the lawful title to it, not the amount paid for it, which establishes his right.

There does not appear to be any just ground for requiring the defendants, or either of them, to pay the plaintiff's note. For the entry to foreclose and the consummation of the foreclosure was beneficial to the plaintiff.

The holders of the respective notes have an equitable interest in the land, in proportion to the amount due upon them. The plaintiff can equitably claim that part of the land, which is in proportion to his debt, and he is entitled to the rents and profits, exceeding the disbursements, which the defendants have obtained from the mortgaged premises in the same proportion.

The case must be submitted to a master, to ascertain the amount due upon the notes, and the rents and profits and disbursements.

Upon the reception of his report, a decree will be rendered, according to the principles before stated.

Buck *versus* Spofford.

Where one tenant in common has received the rents and profits of the common property, he is accountable, in assumpsit, to a co-tenant for his share.

In such an action, to recover the plaintiff's share of the avails received by the defendant, for the use of a grist-mill, in which both parties, and a third person were co-tenants, it is no defence, in whole or part, that the defendant has incurred expense in repairs upon the mill, unless such repairs were made pursuant to the provisions of the Revised Statute, chap. 86.

When the notice, calling a meeting of mill owners to decide upon the subject of repairs, is given by a copy served upon each one, the statute has not prescribed what length of time, previous to the meeting, the notice should be given. It is therefore to be a reasonable time.

At such meeting, it is not necessary that the decision of the mill owners should be taken by a vote, or that any record or other writing should be made concerning it.

The law will justify no repair, whereby to charge one of the part owners against his consent, except so far as to make the property serviceable.

But if, after pursuing the mode of procedure, prescribed by the statute, a part owner has made repairs beyond what was necessary to render the property serviceable, his lien will be good for such part of them as were necessary for that purpose.

If he has been reimbursed to that extent out of the joint profits, he will be accountable in assumpsit to his co-tenant for his share of the surplus, if any.

In such an action by one of the co-tenants against the other, the defendant, in order to prove the legality of the mill-owners' meeting, may use another of the co-tenants as a witness.

Assumpsit.

Kent, for plaintiff.

Appleton & Hathaway, for defendant.

Wells, J. — It is now well settled law, that where one tenant in common has received, from others, rents and profits, of the common property, he is accountable in an action of assumpsit, to his co-tenant for his share. *Brigham* v. *Eveleth*, 9 Mass. 538; *Munroe* v. *Lake*, 1 Metc. 459.

The parties to this suit and one Daniel Spofford owned the grist-mill, as tenants in common, having each an equal interest.

The defendant took possession of the mill, and his servant or tenant delivered a portion of the grain, which had been received for toll, by direction of the defendant, to those persons, to whom the defendant had sold it, and the servant had sold other portions of the toll for cash, which was paid to the defendant. He is therefore accountable for the plaintiff's portion of what he has received, unless he has otherwise a defence to the action.

The defendant contends, that he has made repairs upon the mill, for which he has not been reimbursed, and has a right to take the rents and profits in satisfaction for the repairs.

No tenant in common of a mill has a right to the exclusive use of the common property, for the payment of repairs, unless they have been made in conformity to the statute, chap. 86. And the plaintiff contends, that the defendant has not conformed to the requirements of the statute.

The notice, for calling the meeting of the owners, was served, as the case states, on the plaintiff more than thirty days, before the time fixed for the meeting.

The first section of the statute provides that the application and warrant "shall be published in some newspaper, if there be any printed in said county, three weeks successively, the last publication to be not less than ten nor more than thirty days before the meeting; or a true copy of such notification may be delivered to each of said owners, or left at his last and usual place of abode; either of which kinds of notice shall be binding on all the owners."

No time is prescribed, in which the notice must be delivered to the owner, or left at his last and usual place of abode.

By the act of 1821, chap. 45, § 12, no mode of publication in a newspaper was provided, but the notice was required to be given not more than thirty, nor less than ten days, before the meeting.

The § 12 of that act was repealed by the act of March 3, 1829, and provision was made for a publication of the notice in the same manner as is directed in § 1 of the Revised Stat-

utes, and it was also further provided that the notice, when delivered to the owners or left at the last and usual place of abode, must be so done, not more than thirty, or less than ten days before the meeting. It thus appears, that the present existing law differs from the former statutes, and omits to provide any time, in which the notice shall be given, when not published in a newspaper.

It may be urged, that the Legislature having determined the time in which the notice should be published, the same time should be adopted, when it is otherwise given. But the statute does not say so, and it is not certain, that the Legislature so intended.

When a statute is revised, and a provision, contained in it, is omitted in the new statute, the inference to be drawn from such a course of legislation, would be, that a change in the law was intended to be made. If the omission was by accident, it belongs to the Legislature to supply it.

But where the law allows an act to be done, and does not prescribe the time for doing it, it is to be done in a reasonable time.

How much longer than thirty days before the meeting, the notice was given, the case does not state; it cannot therefore be known whether it was so long before, as to be unreasonable. But the time can be shown, at the future trial.

The defendant, to prove the proceedings at the meeting, introduced the deposition of Daniel Spofford, one of the tenants in common. It is alleged that he is interested in favor of the defendant.

The advancements for the repairs of the mill were made by the defendant, and by the third section of chap. 86, he is to be paid for them beyond his proportion, "out of said mill or the profits."

If the plaintiff recovers, the defendant has no claim for contribution against the witness. The defendant stands altogether upon the statute, and if he has not complied with it, he is liable to the plaintiff. And in such event, the mill would be

exonerated from any claim arising from the repairs made by the defendant. The share of the witness, as well as the share of the plaintiff, would be relieved from the lien.

If then, there is any interest, in the witness, it is in favor of the plaintiff and adverse to the defendant, who calls him. He is therefore competent.

The deponent states, that at the meeting, he and the plaintiff were present, and that it was voted to repair the mill. But it does not appear that there was any record of the proceedings or vote.

The statute, § 3, does not require the choice of any officers, at said meeting, nor does it speak of any vote. The language of it is as follows. "At such meeting, whether all the owners shall attend or not, the owners in interest of at least one-half of such mill or dam, may rebuild or repair the mill or dam or both, so far as to make them serviceable," &c.

The determination to be made by the owners, in interest of at least one half, was simply whether they would repair or rebuild the mill or dam or both. The extent of the expenditures was comprised in general terms, "so far as to make them serviceable."

It is true, that a corporation generally expresses its doings, by written votes, because it is an artificial person, and cannot ordinarily manifest its will in any other manner. But mill owners act as individuals, not in a corporate capacity. And the act does not require any of their proceedings to be reduced to writing. The principal thing to be accomplished is the repairing or rebuilding, and the works themselves would indicate what was done, and their previous condition what was required to be done.

The simplicity and brevity of what the statute indicates should be done, at the meeting, may have been the reason for not requiring its action to be evidenced by records. The statute does not require the proceedings to be shown by written evidence, and we cannot require it.

But it does not appear by the deposition, when the meeting

was held. By the notice it was to have been holden on the twenty-seventh of March, 1845. The action of the meeting could not bind the plaintiff, unless it was holden at the time of which he had notice, and this fact must be proved to sustain the defence.

Nor is it shown, that the owners in interest of at least one-half of the mill, determined to make repairs. The question, put to the deponent, required him to state, whether it was voted by the owners present to repair the mill. The answer is not entirely responsive to the question. It is this, "according to my best recollection it was voted to repair the mill." Now a vote by the defendant alone would be a vote to repair the mill, but not a vote by the owners of one-half. The evidence does not disclose clearly, as it should do, that the vote to repair was the action of one-half, at least, in interest of the mill.

It is objected by the plaintiff, that the repairs were more extensive than they should be, and of a different character from what the law would justify. The only rule laid down in the statute in relation to the extent and kind of repairs "is so far as to make them serviceable," that is, so far as to make the mill or dam serviceable. The statute does not make the decision of the owners, as to the extent or kind of repairs, conclusive; it does not allow them to make such repairs as they please, but limits them to such only as will make the mill or dam serviceable. If it had been intended that no limit, to the nature and value of the repairs should be fixed, except their own judgment, it would have been so declared.

Although the defendant may have made repairs beyond what the law will allow, yet he will retain his lien upon the mill for such of them, as have been properly expended to make the mill serviceable. And if he has not been reimbursed for such as he had a right to make, then he is not accountable to the plaintiff. But if he has been paid out of the profits of the mill, for all the repairs, which he had a right to make,

then he is accountable to the plaintiff for his share of the balance, remaining in his hands, received from those profits.

The Court having ruled that the deposition of Spofford was sufficient to show, that the vote to repair was legal and binding on all the owners, and that the decision of a major part of the owners as to the extent or nature of the repairs was conclusive, the nonsuit to which the plaintiff submitted, and which was to be taken off if any of the rulings were erroneous, is taken off, and a new trial granted.

NOTE. — HOWARD, J. took no part in this decision.

BARNARD *& al. versus* SPOFFORD.

A referee, appointed under the statute, chap. 138, may, by an alternative award, present legal questions for the consideration of the Court.

Such an award must report, not the *testimony* from which the facts are to be found, but the *facts themselves*, as the referee has found them.

A referee is not a mere instrument to hear and report testimony, often voluminous and contradictory, for the adjudication of the Court thereon, without the aid of a jury.

Such right of adjudication has not been given to the Court by the law, neither can it be conferred by consent of parties.

When, in such a submission, the parties have inserted a condition that the referee should report the *facts* for the consideration of the Court, that condition is not fulfilled by his reporting the *evidence* only.

If such a condition be not fulfilled, the award is to be taken, as if no condition had been inserted.

EXCEPTIONS from the District Court, ALLEN, J.

A referee, appointed under the statute, chap. 138, presented his award. It was resisted, but accepted. To that ruling, the plaintiff excepted. Accompanying the award, was a voluminous report of the evidence before the referee. The arguments of counsel were in writing, occupying on one side sixty, and on the other one hundred and twenty pages, and were devoted chiefly to a discussion of the reported evidence. The view, taken by the Court, renders even an abstract of the evidence unnecessary.

Herbert, for plaintiff.

C. J. Abbott, for defendant.

SHEPLEY, C. J. — The parties entered into a reference according to the provisions of the statute, chap. 138. An additional agreement provides, that "either party may call for a state of the facts in regard to the loss of the Pomfret and her non-employment, provided they shall desire to take the opinion of the Supreme Court, and it is agreed that the state of facts may be filed at any time before the next term of the Supreme Court for Hancock county."

The referee made a report, bearing date on April 14, 1847, in favor of the respondent, unless the complainants should call for "a statement of facts as proved before said referee, according to the agreement of the parties annexed to this report," and in such case, he makes an alternative award in favor of the complainants, "if upon the said statement of facts, the Court shall be of opinion, that Barnard and Cunningham have maintained their claim against said Spofford for damages."

A document is also presented, signed by the referee, which appears to be correctly described by him in the concluding lines of it. "The above report contains the *evidence* material as to the loss of the Pomfret, her tackle and apparel, as to the negligence in not keeping the vessel employed in the summer of 1837, and not procuring the Pomfret to be insured, which is embraced in forty-four pages." A voluminous file of original papers is also presented.

These documents and papers are accompanied by written arguments containing elaborate discussions of the testimony to show, what facts should be considered as proved by it. The opposite counsel arrive at entirely different conclusions respecting the facts, which are proved.

The right of a referee deriving his power from the statute to present legal questions for the consideration of the Court, by an alternative report, is not denied. The attempt here made, is to present the testimony that the *Court* may *decide*

what *facts* are proved by it, or rather whether it proves certain *facts* designated by the referee.

The court is expected to assume the duty of the referee, subject to certain limitations by him imposed, and to ascertain from the testimony, not only, whether certain facts are proved by it, but whether the complainants have, by the testimony, established a case coming within the alternative award; or in other words, to become the referee by the agreement of the parties, and to make its own decision accordingly. To the adoption of this course, there are insuperable objections.

The provisions of the statute, chap. 138, do not authorize such a course of proceeding, as will make the referee or referees instruments to hear the testimony of witnesses, and to report *that testimony* to the court, that it may assume the duty entrusted by the statute to the referees, and make them the channel of communication, by which the court is to be called upon to decide on all existing claims between parties, presented by voluminous and contradictory testimony without the assistance of a jury. The agreement of the parties can neither convert the referees into such instruments, nor authorize the court thus to act.

If that agreement were to be regarded as effectual, it only authorized the referee to report a state or statement of *facts*. Did not authorize a report of the *testimony* without any finding of the *facts* proved by it.

The alternative report of the referee, upon which alone the court is authorized to act, is made subject only to the opinion of the court on "a statement of *facts* as proved before said referee;" and no such statement of *facts* has been presented, as authorizes the court to act upon that alternative finding. The report of the referee must therefore be considered as of the same effect, as it would have been if no attempt had been made to comply with the condition, on which the alternative award is founded. For there has been no compliance with the agreement of the parties, or with the terms, upon which the alternative award was made.

A motion has been made to have the report recommitted,

that newly discovered testimony may be introduced. To have the testimony introduced without a finding of the facts would be of no use. There can now be no finding of the facts, for the referee is known to have deceased.

The result is, that the exceptions and motion must be overruled.

GINN *& al. versus* HANCOCK.

The covenant of seizin, in a deed of conveyance, is not broken, if the grantor's lessee has had exclusive occupation of the land for the next preceding thirty-one years.

Where the charter of an incorporated company gave them authority to erect dams, sluices and locks at different places on a stream, and made provision for compensating the owners of land taken therefor; which dams, sluices and locks they proceeded to erect, and for the location of one of the dams, with its sluice and lock, they took a lease of the land and occupied under it for thirty-one years; (no compensation therefor, *under the provisions of the charter*, having been claimed or made,) it is to be considered, that the works upon the land leased, were erected in virtue of the right given by the charter, and not under the authority of the lease; and that, therefore, at the end of the leasehold, they belong, not to the lessor, but to the company, with a right to be parmanently maintained by them.

Such a right, in the company, is an incumbrance upon the land of the lessor, within the import of a warranty against incumbrances, in his deed of conveyance to a third person.

The right, so acquired by the company, extends no further than to maintain their works, and give them the exclusive right of so much of the water as is necessary for the sluice way. The residue of the water, belongs in equal parts, to the riparian proprietor on each side of the stream.

COVENANT BROKEN.

The Eastern River Lock and Sluice Company was incorporated in 1816, with power to erect dams, locks and sluice ways for the passage of rafts and boats, at a stipulated rate of tolls, with all the powers usual and incident to such corporations, and with a provision for the recovery, by land owners, of such damages as they should sustain by the taking of their lands.

They erected two dams, with sluices, upon the stream near

the outlet of the pond above. They wished to build another dam and sluice two miles lower down, at a place where they themselves owned the land on the west side of the stream, and the defendant claimed to own it on the east side. They therefore took a lease from the defendant for twenty-five years of a strip of land, twelve rods in width up and down the stream, and extending from the middle of the channel eastwardly to a line several rods above and beyond the shore.

They there erected a dam across the stream, the western portion of it being on their own land, and the eastern portion on the land thus leased from the defendant. At the centre of the channel of the stream and a little on each side of the centre, they inserted in the dam a sluice way and lock.

The sluice way extended down the stream to a point a little below the lower line of the leased land.

Adjoining to and west of the sluice way, the company erected on their own land and have ever since maintained there, a double saw-mill, a grist-mill and some other machinery.

No damage, by means of such erections, was ever claimed by the defendant or assessed for him under the provisions, made for such cases, in the charter.

It is agreed that "the company entered and occupied the premises under that lease during the term," and continued to occupy it, paying rent therefor to the defendant, until February, 1848. The defendant then conveyed to the plaintiffs the land to the middle of the bed of the stream, with the water privileges thereof, by deed with all the usual covenants of warranty.

It is for the breach of the covenant of seizin and of freedom from incumbrance, in that deed, that this suit is brought. The works, erected by the company, have none of them been removed, but they all continue as before the expiration of the lease.

The company claim the right to use all the water of the stream for their said sluice, mills and machinery, and it is agreed, for the purposes of this trial, that they have prevented

and kept out the plaintiffs from all beneficial use of the dam and of the water.

The case was submitted by the parties for a decision of their legal rights, with a stipulation, however, that if the company have an exclusive and prior right to use said water only for the necessary purposes of said lock and sluice, and if the plaintiffs have an equal right with said company in the remaining water and to the use thereof, the plaintiffs are to be nonsuit.

The parties also submitted to the court the question of the right of said company, since the termination of said lease, to maintain their said dam even for the purposes of the lock and sluice, and all the rights of the parties growing out of the case stated; and also, if said company may legally maintain said dam, what are the rights and the mode of obtaining and enjoying them, of the plaintiffs to their share of the remaining water after the lock and sluice are supplied.

Woodman, for plaintiffs, submitted the case without argument.

Cutting, for defendant, after examining and vindicating the defendant's title to the centre of the stream, in virtue of several ancient conveyances, contended also that, if that title should be held insufficient, yet the long occupation by the company, as lessees and tenants *under him*, gave a title not to be controverted.

The counsel then urged the following positions: —

The plaintiffs contend that the covenants in their deed from defendant have been broken, because the company have interfered with, and now claim to maintain and hold exclusively, that part of their dam, which is situated between the middle of the bed of the stream and the eastern shore, all of which is embraced in plaintiff's deed from defendant.

A question then arises as to what rights the corporation acquired by force of their charter, and their proceedings under it.

The company had authority to erect, and did erect their dam, a portion on the conveyed premises; to wit, on the east-

ern side of the river. If the defendant at that time "suffered any damage" and the parties could not agree, the act pointed out the mode of obtaining it. But the parties did agree on the amount of damages "for and during the period of *twenty-five years*" from February 28, 1817.

Ordinarily, permanent fixtures revert with the land.

The company did not take the defendant's land by virtue of their charter, but by force of the lease, and they are estopped from setting up any other relation, than that of tenant. Thus it follows that, at the termination of the lease, the land and dam reverted to the defendant. R. S. chap. 126, § 3.

But assuming that the rights of the parties were only suspended during the lease; then the plaintiffs, the grantees of the defendant, have the defendant's right to petition, and may recover for their damages under the act.

The company has not "the right to the use of all the water." They can claim only by force of their charter, since the expiration of their lease. Such claim only extends to the use of water sufficient for "*a sluice and lock or locks.*" Any other use beyond that, is a trespass on the proprietors of the eastern shore. No provision is inserted in the charter for recovery of damages, other than for such use. That use would not interfere with proprietor's right, on the eastern side, to occupy their mill privilege. They have as legal a right to erect mills on the eastern shore as the company had on the western, and as equal a right to the water, except for the purpose of supplying the sluice and lock. *Bliss* v. *Rice*, 17 Pick. 23, and the authorities there cited.

The riparian proprietors on the eastern shore would have the right to draw water from that part of the dam, and share the *surplus water* with the owners of the mills on the western shore. Besides, for any detriment to the *original* privilege by the company after the termination of the lease, they might petition for damages under the act; *provided*, the dam does not revert as I first contended.

Supposing mills to be erected on the eastern shore, equiva-

lent to those on the western shore, by whom and how should the dam be kept in repair?

This I suppose, would be regulated by R. S. chap. 86, since the dam would be used by the owners of mills on each side, embracing also the right of the corporation, under the charter, which, so far as it extends, would have priority to both, since the former only would be entitled to the surplus water.

The parties respectfully request the court, to settle this question, as it may save the necessity of further litigation.

Shepley, C. J. — The action is covenant broken, founded upon the covenants contained in a deed, executed by the defendant on December 6, 1847, by which he conveyed to the plaintiffs a tract of land situated on the easterly side of Eastern river, bounded twelve rods by the river and extending easterly from it, four rods, and westerly to the middle of the bed of the river.

The first inquiry is, whether the defendant at the time of the conveyance was the owner in fee of the land conveyed. He executed a lease of the premises, extending to the middle of the channel of the river, to the Eastern River Lock and Sluice Company, on February 28, 1817, to hold for the term of twenty-five years. It is agreed, that the company entered and occupied the premises under that lease during the term, and continued to occupy after its termination, paying rent therefor to the defendant, until February 28, 1848. This is satisfactory proof of an exclusive occupation of the defendant, by his tenant, under claim of title, for thirty-one years. He appears, therefore, to have been the owner of land in fee, at the time of the conveyance. The fact, that another person may have been entitled to an easement upon some portion of the premises, would not disable him to convey the fee. The covenant of seizin, does not appear to have been broken.

The next inquiry is, whether his title at the time of the conveyance, was free from incumbrance. It appears, that the company by its act of incorporation, approved on December 13, 1816, was authorized "to make a sluice and lock or locks

from the outlet of Eastern River Great Pond, so called, to the water below the falls, at the head of the tide, in the town of Orland, in the most suitable place for making the same, and to erect such dam or dams as may be necessary for the safety and convenience thereof." Provision was made for compensation to persons, who might thereby suffer damage. The company, while it occupied the premises, under lease from the defendant, built a sluice and locks in "about the centre of the stream, and partly on each side of the centre," and erected a "dam across the stream, which runs on the premises in question from the centre of the stream to, and on to, the eastern bank." The dam appears to have been built across the river, extending from land owned by the company on the west side, to the land occupied by it, under the lease on the east side. The company has since erected on its own land, on the west side of the river and near to the dam, "a double saw-mill, a grist-mill, and a lath machine, and has used the water of the stream for the same, at all times, and claims the right to use all the water of said stream."

The counsel for the defendant contends, that his land was not taken by the company for the erection of the dam and sluice, by virtue of the act of the Legislature, but under and by virtue of the lease, and that being permanent fixtures, so much of them as were on the defendant's land, were, at the termination of the lease, part of his estate. There were other dams erected in other places, and the sluice was extended over lands, which do not appear to have been owned or occupied by the company. The former flow of the waters of the river was obstructed and its mode of navigation was varied by the authorized improvements. The acts performed would have been unlawful, if they had not been done by virtue of the act. The presumption is, that they acted lawfully. The company must be considered as acting by virtue of the same authority, in all parts of the river, while constructing connected works of improvement; and not as erecting one portion of such works, by virtue of the act, and another portion by a different right or authority, merely because it was

erected on land owned or occupied by it. The works must therefore be considered as erected and maintained by the company, by virtue of the act, and as rightfully existing there as its property, at the time of the conveyance. It is agreed, that "no damages for the premises in question were ever claimed or assessed under the act, and as there provided." This fact does not deprive the company of the right to maintain those works. The defendant might have applied and have had any damages occasioned thereby, to his reversionary interest assessed according to the provisions of the act. His neglect to do so, cannot diminish the rights of the company. The land must therefore be considered as subjected to that servitude and as thereby incumbered at the time of the conveyance.

The inquiry then arises, respecting the extent of that incumbrance. Whether it embraced the whole water power, and appropriated it to the use of the company, or only such an appropriation and use of the water, as might be necessary for the full and convenient operation of the works. The rights of the company are derived from and limited by its charter. That only can be considered as granted, which is necessary for such use, and operation. If there remained a surplus of water in the river, which might be useful for other purposes, that would not be granted, nor could it be appropriated by virtue of the act. No riparian proprietor could have damages assessed for an injury not occasioned by an erection of the dams, sluice and locks, and by the appropriation of so much water as would be necessary for the full and convenient operation of the works. In all other respects, the rights of the riparian proprietors would remain unaffected. Every such proprietor has an equal right with the owner of the opposite shore to the flow and use of the water, while it flows upon his land, so far as he has not been deprived of it, by grant, license, prescription or by the exercise of the right of eminent domain. The fact, that the company is the owner of the whole of the dam, will not deprive the owner of the eastern shore of the right to use the surplus water. To hold, that it would do so, would be to appropriate the whole water power

to the use of the company. If it be found to be necessary to the use of the surplus water, that it should be drawn through the easterly end of the dam, and that can be done without injuring it, for the accomplishment of all the purposes of the works authorized to be erected, the owner will be entitled to use it in that manner. The right of private property in works erected for public improvements by the exercise of the right of eminent domain, is not such as to exclude all others from a use of it necessary to the enjoyment of their own property, and not inconsistent with the full and convenient use of it for the purposes of the improvement, and not injurious to the works erected.

The company cannot establish any claim to the use of the whole of the surplus water by an adverse use of it, for although it may have had the use of it for more than twenty years, yet it has enjoyed such use by virtue of a lease of the land on the eastern side of the river, extending to the middle of the channel, which precludes the assertion of an adverse enjoyment.

The parties have agreed, "if the court should be of opinion, that said company has an exclusive and prior right to use said water only for the necessary purposes of said lock and sluice, and that the plaintiffs have an equal right with said company in the remaining water and to the use thereof, then the plaintiffs to be nonsuit."

Although the premises at the time of the conveyance were subject to an easement and incumbrance, yet, according to the agreement of the parties, a nonsuit must be entered.

NOTE. — HOWARD, J. took no part in this decision.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF WALDO,

1849.

CLEMENT *& al. versus* WYMAN *& als.*

A certificate of the oath administered to a poor debtor by two justices of the peace and quorum, stating that the service of the citation was made upon the attorney of record of the creditors, is not invalidated by another statement therein, reciting that I. S. was one of the creditors, when in fact, I. S. was not a creditor.

Such certificate of notice is considered conclusive, unless its effect be destroyed by an agreed statement of facts, or by a voluntary admission of testimony, which might have been excluded.

The provisions of § 27, chap. 148, R. S. are merely directory, and a compliance with them, need not appear of record.

The provision of § 29, chap. 148, R. S., requiring property disclosed to be "set off," is required, only when the debtor discloses more than enough to satisfy the creditor.

The provision of § 33 of same chapter, requiring the justices to give a certificate of the real estate disclosed, applies only when there is some person present at the hearing, authorized to receive it, or application is subsequently made for it.

DEBT upon a poor debtor's six months bond. Defence, performance of one of its conditions, by taking the oath, on the 28th day of June, 1848. Upon so much of the evidence introduced, as was admissible, the court were to render judgment, as the law should require.

The creditors were Cyrus Clement and *Isaacus C. Smith* of Boston. The document, on which the defendants rely, as a citation to the plaintiff, giving notice of the debtor's desire to take the oath, and of the time and place appointed for taking the same, was directed "to Cyrus Clement and *Isaacus Smith*, of Boston in the Commonwealth of Massachusetts, or to George W. Wilcox of Dixmont, their attorney of record." It was served upon said Wilcox.

The certificate of the two justices of the peace and quorum, dated June 28, 1848, alleges that the debtor had caused Cyrus Clement and *Isaacus Smith* of Boston, the creditors, by George W. Wilcox, of Dixmont, their attorney of record, to be notified according to law, &c., and was in the form prescribed by the statute, chapter 148, § 31.

The debtor, in 1846, had lodged with Samuel McLellan some demands, to be collected and the proceeds appropriated to pay debts due from him to certain creditors; and the surplus, if any, to be repaid to said debtor.

The debtor had, also, on the 18th April, 1848, lodged with George H. Gates, a list of accounts for collection, and taken his receipt therefor, with an obligation to pay to said debtor or his order the avails of said accounts, when collected; and on the 18th and 19th of April, had also lodged with Gates, five small notes, taking certificate that they were to be collected for the debtor or returned to him.

The debtor had also, on the 26th June, 1848, assigned to Nathan Wyman, all the debtor's interest in a list of demands, including "a receipt for demands, signed by George H. Gates, hereto annexed," taking from said Nathan Wyman his receipt therefor, stipulating that he would collect and pay the avails of the same to certain specified creditors of said debtor, then to indemnify himself on his liability, as surety for said debtor; then to pay certain other debts of said debtor, according to certain specified priorities; and the surplus, if any, to be refunded to said debtor; with a stipulation that, whenever said debtor should pay and discharge all of said debts and liabilities, the said demands were to be re-assigned to him.

Besides the certificate aforesaid of the administration of the oath to the debtor, the further record of the justices was as follows: —

"Penobscot, ss. June 28, 1848.— At a court holden at Bangor, in said county, by John E. Godfrey and Asa Waterhouse, two justices of the peace and quorum, residing in the city of Bangor, on the day and year above written, appeared Ebenezer Wyman, of Dexter, in said county, and submitted himself to examination under the provisions of the one hundred and forty-eighth chapter of the Revised Statutes of Maine, and the twenty-fourth and other sections of said chapter, said Wyman having previously given legal notice of his desire to have the privilege and benefit of the oath authorized by the twenty-eighth section of said chapter, to George W. Wilcox, of Dixmont, in said county, the attorney of record of Cyrus Clement and Isaacus Smith of Boston, in the Commonwealth of Massachusetts, (as it appears by the citation and return thereon,) the creditors in an execution issued by the Justices of the District Court on the twentieth day of November, A. D. 1847, on a judgment recovered before said Justices, at a court holden at Bangor, in said county, on the first Tuesday of October, A. D. 1847, for five hundred and twenty-seven dollars and fourteen cents, damage, and seven dollars and four cents costs of suit, in favor of said Clement and Smith. And from the disclosure of said Wyman, it appeared that he was the owner of three swarms of bees and certain equities of redemption, as appears by the records of Penobscot, Somerset and Piscataquis counties, and that he possessed or had under his control, an interest in certain notes and accounts, schedules of which notes and accounts were filed with the justices and are a part of this record. And said notes on the twenty-sixth day of June, A. D. 1848, appear to have been assigned to Nathan Wyman and Samuel McLellan, by the disclosure of said Ebenezer, and by the receipt of said Nathan, for a valuable consideration. And the creditors not being present to agree to apply said choses in action, or the debtor's interest therein, in whole or in part, towards the discharge of the debt, the

debtor chose Abner Knowles, a disinterested person, the justices, Joel Hills, a second, and, the creditors being absent, the same justices, H. Chadbourne, a third, who, under oath, appraised such property; and they appraised the interest of the said debtor in said property, at one dollar and no more; whereupon, the creditors being still absent, the debtor deposited with said justices, an assignment in writing to the creditors, of all the property thus appraised, as provided by, and for the purposes set forth in said one hundred and forty-eighth chapter, and the thirtieth section thereof; and thereupon, the justices being satisfied that the debtor had made full disclosure of his business affairs and property, administered to him the oath contained in the twenty-eighth section of said chapter.

"And the justices aforesaid were selected as follows; John E. Godfrey, by the debtor; and Asa Waterhouse, by a deputy sheriff, who might legally serve the precept upon which the debtor was arrested, on the part of the creditors, who declined to select a justice, being absent."

The record further shows, that the appraisers, on the same day, estimated all the debtor's "interest in certain choses in action and notes and accounts assigned to Samuel McLellan and Nathan Wyman, at the sum of one dollar; and that, on the same day, the debtor assigned and transferred to "Cyrus Clement and *Isaacus Smith*, composing the firm of Clement & Smith, doing business in Boston," all his right and interest to the appraised property.

Josiah Crosby, for defendants.

C. P. Brown, for plaintiffs.

The certificate and record of the justices state, that all the proceedings had in the premises, were had in a case wherein Cyrus Clement and *Isaacus Smith* were creditors. These are not the names of the creditors in the bond, nor of the plaintiffs in this suit, consequently no citation has been served and no valid disclosure has been made upon the bond. *Fales & al.* v. *Dow & al.* 24 Maine, 211; *Slasson* v. *Brown & al.* 20 Pick. 436; *Boyden* v. *Hastings*, 17 Pick. 200.

The certificate is conclusive, as to the service of the citation on the persons named. But the creditors may go behind these proceedings, and show an informality in their proceeding on the notice, prior to the administration of the oath. 11 Pick. 489; 15 Maine, 337; 3 Fairf. 415.

Besides, the choses in action were not lawfully appraised before the oath was administered. This vitiates the doings. *Harding* v. *Butler*, 21 Maine, 191; 26 Maine, 200.

The demands appraised were not set off. The justices did not give to the creditors the lien upon the interest in the disclosed real estate, as contemplated by § 33 of chap. 148, R. S.

SHEPLEY, C. J. — The suit is upon a poor debtor's bond, made on December 31, 1847.

Judgment was recovered and execution issued thereon in favor of Cyrus Clement and Isaacus C. Smith, and the bond was made to them.

In defence, a certificate of two justices of the peace and of the quorum, made substantially in conformity to the form prescribed by the statute, was introduced, stating, that the debtor took the oath on May 28, 1848. That certificate recites correctly the date and amount of the execution and the court before which the judgment was recovered, and that the debtor "hath caused Cyrus Clement and Isaac Smith of Boston, Commonwealth of Massachusetts, the creditors, by George W. Wilcox of Dixmont, in said county, their attorney of record, to be notified according to law."

1. The first objection made by the plaintiff's counsel is in substance, that there is no satisfactory proof, that the creditors were legally notified; and he refers to the case of *Fales* v. *Dow*, 24 Maine, 211, as a decision to that effect. That case was presented upon an agreed statement of facts. This is presented upon such proof as may be legal. In that case the notice by the certificate appeared to have been served upon certain persons named as creditors. In this, it appears to have been served upon the attorney of record of the creditors. In that, it appeared to have been served upon the wrong person.

In this, it appears to have been served upon the right one. The certificate in this case states, that service of the citation was made upon the attorney of record of the creditors. Such a service was authorized by the twenty-third section of the statute. Is the statement, that it was thus correctly served, disproved or vitiated by another statement contained in the certificate, that Isaac Smith was one of the creditors? It may be true, that Isaac Smith was not one of the creditors, and the statement, that he was, be wholly incorrect, and yet be true, that George W. Wilcox was the attorney of record of the creditors. The erroneous statement of the one fact is not inconsistent with a true statement of the other. There is therefore nothing in the certificate to destroy the effect of the statement, that the attorney of record of the creditors was notified according to law. In the case of *Fales* v. *Dow*, the service appearing to have been made upon a person named, it did not appear to have been made upon a creditor, and the statement, that he was a creditor, could not make him one; and the service could not be legal in that case, unless it had been made upon a creditor. So in this case the statement, that Isaac Smith was a creditor, does not make him one, but no service was made upon him or upon any improper person. On the contrary it was made as stated in the certificate upon the person, on whom the law authorized it to be made. It has often been decided in this State, that the certificate of the justices respecting the notice is conclusive, unless its effect be destroyed by an agreed statement of facts, or by a voluntary admission of illegal testimony. In the case of *Slasson* v. *Brown*, 20 Pick. 436, it was held not to be conclusive. And the court came to its conclusion by an examination of the preliminary proceedings. In that case, if the certificate had been regarded as conclusive, the court would have come to a different conclusion. The case can therefore be no authority in this State, where a different effect is given to the certificate of the justices.

2. The second objection is, that the certificate and record of the proceedings of the justices do not exhibit a compliance

with the requirements of the twenty-seventh section of the statute. The provisions of that section are directory. The justices are not required to make a record of their compliance with its provisions; and the form of their certificate is prescribed by the thirty-first section, and its effect by the thirty-second.

3. The third objection is, that all the choses in action were not appraised. And the demands left with George H. Gates for collection, and the contracts of Nathan Wyman and of Samuel McLellan to account to the debtor for the demands assigned to them are designated as those not appraised.

It appears, that the debtor's interest in the demands left with Gates had been before assigned to Nathan Wyman; and the appraisal included all the debtor's "interest in certain choses in action and notes and accounts assigned to Nathan Wyman and Samuel McLellan." The debtor's interest in the demands left with Gates was therefore appraised.

The accountable receipts or contracts given to the debtor by Wyman and McLellan, determined the extent of the debtor's interest in the demands assigned to them, and his right to recover it. The appraisal of the debtor's interest, as thus exhibited, necessarily carried with it his interest in those receipts or contracts; for by them alone would the interest of the creditors, as assignees, and their right to recover of the first assignees, be determined. The debtor could have no further or separate interest in them, after his interest in the demands had been appraised and assigned to the creditors.

The appraisal does therefore appear to have included all the debtor's interest in the choses in action disclosed.

4. The fourth objection is, that the choses in action, which were appraised, were not set off to the creditors.

The persons selected to make the appraisement are required by the twenty-ninth section to "appraise and set off such property, or enough of the same, to satisfy the amount of the debt, costs and charges." If the creditor be absent, the debtor is required by the thirtieth section to "deposit with the justices an assignment in writing to the creditor, of all the

property thus appraised and set off." It does not appear to have been intended, that the debtor's interest should be transferred to the creditor by a set-off made by the appraisers, for he is in all cases required to assign his interest. The only purpose of the set-off appears to be to designate the property to be assigned, when the debtor discloses more than sufficient to pay the creditor. When the whole of such property, as in the present case, is assigned, a formal set-off, made by the appraisers, could be of no importance. Its omission does not infringe upon the rights of the creditor, or prevent the administration of the oath.

5. The fifth objection is, that the justices did not "give the creditor a certificate" of the real estate disclosed. The creditors in this case were not present, nor were they represented before the justices. It was not the intention of the Legislature to require them, by the provisions of the thirty-third section, to give such a certificate, unless some person authorized to receive it was present, or unless application was subsequently made for it. *Plaintiffs nonsuit.*

MERRILL *versus* PRESIDENT, DIRECTORS AND COMPANY OF THE SUFFOLK BANK.

The dissolution of a corporation, by act of the Legislature, deprives it of its corporate existence.

A judgment rendered against a corporation, after such dissolution, is erroneous.

If such a judgment has been satisfied out of the estate of one who had been a stockholder in the corporation, he is a privy in law to the judgment, and may, in his own name, without joining the co-stockholders, bring a writ of error to reverse it.

ERROR, to reverse a judgment of this court, rendered at the July term, 1841, in favor of the President, Directors and Company of the Suffolk Bank, against the President, Directors and Company of the Frankfort Bank. Plea, *in nullo est erratum.*

The writ, in the original action, was sued out and the said judgment was recovered thereon, after the charter of the Frankfort Bank had been revoked by act of the Legislature. The plaintiff was a stockholder in the Frankfort Bank, and his estate had been levied upon and taken to satisfy said judgment.

A. Merrill, for plaintiff in error.

Appletons, for defendants in error.

1. The plaintiff cannot maintain this process, because he was not a *party* to the judgment sought to be reversed. *Whitman* v. *Cox*, 26 Maine, 335.

2. The plaintiff was not *privy* to the judgment, *Suffolk Bank* v. *Frankfort Bank*. A stockholder cannot, in any known meaning of the word privy, be considered as *privy* to the judgments which may be recovered against the bank in which he owns stock.

3. The plaintiff is not a *cestui que trust*. The relation of *trustee* and *cestui que trust* does not exist between a stockholder and the bank.

The proposition to that effect, in *Oldtown Bank* v. *Houlton*, is a mere hasty remark and at variance with well settled law.

4. The plaintiff is not a *stockholder*. In the assignment of errors he alleges a *repeal of the charter*, &c., all which, as a comparison of dates will show, was before the action, *Suffolk Bank* v. *Frankfort Bank*, was brought. Of course, *if there was no bank, there was no stock*, and if no stock, there could be *no stockholder*.

The writ alleges he is and was a stockholder; but if there was no bank in which to hold stock, he disproves his own allegation.

Nor was he a stockholder *in fact*, having, April 13, 1840, transferred his shares to B. Shaw, which was long before the original suit.

5. The rule is well settled, that *all parties* to a judgment must join in its reversal. The plaintiff in error is but one of many stockholders. If the judgment be valid, it might equally

have been levied on other stockholders' real estate, and they are all liable for contribution. All should have joined in this writ with him. If any refuse, they should be summoned and severed. *Andrews* v. *Bosworth*, 3 Mass. 253; *Gay* v. *Richardson*, 18 Pick. 417; *Tolleal* v. *Floyd*, 6 S. & R. 315; *Jaques* v. *Cisan*, 2 Saund. 101, d; *Cromwell* v. *Andrews*, Yelv. R. 4.

6. The judgment being against a non-existent corporation is a *mere nullity*, and there is no need of reversing it. *Whitman* v. *Cox*, 26 Maine, 335; *Hildreth* v. *Thompson*, 16 Mass. 191.

7. A stranger to a judgment cannot sue out a writ of error. *Stul* v. *Budenbach*, 7 Watts & Ley. 150.

The plaintiff is a stranger to the judgments. 2 Saund. 46, n. 6.

SHEPLEY, C. J. — This is a writ of error brought by the plaintiff to reverse a judgment recovered by the Suffolk Bank against the Frankfort Bank. The writ alleges, that the plaintiff is a stockholder of the Frankfort Bank and that an execution issued on that judgment has been levied upon his estate.

The error assigned is, that the writ was sued out and the judgment rendered after the charter of the bank had been revoked by an act of the Legislature, and that there was no such corporation in existence as the Frankfort Bank at the time, when the judgment was recovered.

The plea *in nullo est erratum* operates as a demurrer and admits the facts stated and assigned for error.

The principal question presented is, whether the plaintiff is entitled to sue out a writ of error.

The act of March 29, 1836, c. 233, made the private property of the stockholders of a bank, liable to be attached and taken in a suit commenced against the bank by a holder of its bills, which had been presented and payment thereof delayed for more than fifteen days. The property of the plaintiff appears to have been taken by virtue of this provision, in sat-

isfaction of the execution issued on the judgment, which he seeks to reverse.

The rule, by which the court is to determine, who may sue out a writ of error, is stated to be, "the writ of error shall be brought by him, who should have the thing, for which the judgment is erroneously given, if the judgment had not been given." Viner's Ab. Error, k. pl. 1. No person can bring a writ of error, who is not a party or privy to the record or is prejudiced by the judgment. 2 Saund. 46, a. note 6; idem 101, e. note 1. The books do not all agree respecting the classes of persons, who may be comprehended under the term privies. They all admit, that there are privies in law as well as in blood and in estate. The examples of privity in law are those of a personal representative of a deceased person, and those holding estates by escheat. There are, however, others named as authorized to sue out writs of error in that character. "A writ of error may be brought by him that is made party by law, though he was not originally party." Viner's Ab. Error, k. pl. 5. Vouchees are of this class. So "if the conusor of a statute aliens the land and execution is issued against the alienee, he may have a writ of error upon the execution." Viner's Ab. Error, k. pl. 17. But a quere is put in Viner, whether he could, "for he is not privy thereto, for the execution goes of the land of the conusor." Authority is then cited, sustaining the first position, "because he is ousted by the execution." This in principle, is closely analogous to the present case. The land was in that case taken by an execution issued on a judgment for the collection of a debt, and the land of one not a party to the judgment or execution was taken in satisfaction of the execution, the law authorizing it. Such is the position of the plaintiff.

Privies by law, having an interest in the judgment or in the property affected by it, were recognized as entitled to the writ in the case of *Porter* v. *Rumery*, 10 Mass. 68. In the case of *Shirley* v. *Lunenburgh*, 11 Mass. 384, a pauper not a party to the judgment, and whose rights were affected by it, was regarded as so connected with it, that he could main-

tain a writ of error. Those, who must be regarded as privies in law to a judgment can never be certainly determined by the law, as it was at any particular time; for the law by legislative enactment may be often changed, making those privies in law to a judgment, who were not so before the enactment. When a statute makes provision, that the estate of a person not named as a party to the judgment may be taken to satisfy that judgment, and the estate is accordingly taken, it makes him a privy in law to that judgment. So the party in interest, not named in a suit commenced on a chose in action, in the name of the assignor, is a privy in law to the judgment rendered; and it has been decided, that he may maintain a writ of error to reverse a judgment rendered against the nominal plaintiff. *Marr* v. *Hanna*, 7 J. J. Marshall, 642. The question now before the court was not presented or decided in the case of *Whitman* v. *Cox*, 26 Maine, 335, although there is a *dictum arguendo*, that one so situated could not maintain a writ of error.

It is insisted, that the plaintiff alone cannot maintain the writ. That all the other stockholders should be joined. But those cannot be regarded as entitled to the writ, who are not prejudiced by the judgment, and who would receive no advantage from its reversal; and it does not appear, that there are other persons of that description.

It is true, that there can be no corporators without a corporation. The plaintiff's estate, however, has been taken by the defendants in error, on the ground, that he was a stockholder, and they cannot object, that he did not sustain that character. He is entitled to present himself in the character, in which he has been deprived of his estate. It is alleged in argument, that he had transferred his shares to another person, but there is no proof of it presented. A more satisfactory answer to the objection may be, that the act of March 29, 1841, revoking the charter, recognizes the continued existence of the stockholders and provides, that nothing therein shall be construed to absolve any of those, who are or have been corporators or members thereof from any existing liabilities, and

that any balance remaining, after the liabilities of the corporation have been discharged, shall be divided among the stockholders.

Error may be assigned on the death of a party before judgment. *Wilks* v. *Jordan*, Hob. 5.

The death of a defendant is not assignable for error, if the record states, that he appeared, for nothing can be assigned as error, which contradicts the record. *Plommer* v. *Webb*, 2 Ld. Raym. 1415. The statute of 17 Car. 2, chap. 8, provided that death between the verdict and judgment, should not be assigned as error. The counsel for the plaintiff speaks of an agreement to be defaulted in the original action, but the record does not exhibit any such agreement.

The dissolution of a corporation by act of the Legislature, deprives it of its corporate existence, and no legal judgment can be rendered against it. *Judgment reversed.*

THE STATE *versus* WORTHING.

Where several defendants are jointly indicted for a misdemeanor, and one is put on trial alone, he may introduce, as a witness, the wife of a co-defendant, who stands defaulted on his recognizance.

EXCEPTIONS, from the District Court, RICE, J.

The defendant, and one Charles Worthing, were jointly indicted for an assault and battery, and had recognized to appear, &c. Charles Worthing did not appear, and was defaulted on his recognizance. The defendant went to trial alone. In his defence, he offered as a witness, the wife of said Charles, and she was rejected by the court, as being incompetent. To that rejection, the defendant, after verdict against him, filed exceptions.

Heath and *Davis*, for defendant.

1. The wife was admissible. The case as to her husband was terminated. 1 Greenl. Ev. § 357. The doctrine laid down in the case of *King* v. *Lafone*, 5 Esp. 154, is not cor-

rect. 1 Greenl. Ev. § 363 and note. *King* v. *Fletcher*, 1 Strange, 633.

2. The general rule is, that the wife is not admissible as a witness, where her husband is a party, at least against his interest and consent. 1 Greenl. Ev. § 334, 335. But where the husband is no longer a party to the issue, that rule does not apply, and his wife is admissible, when called by a co-defendant. 1 Phil. & Am. Ev. 160.

C. J. TINDAL has ruled, that where several are joined in one indictment, the wife of one is admissible for the others, even when all are on trial. *Queen* v. *Sills & als.* 1 Car. & Kirwan, 494.

3. In this case, the wife was no party to the record, and there can be no objection to her competency.

Codman, County Attorney, for the State.

1. A separate trial, where several are indicted, is not a matter of right, but is within the discretion of the court. 16 Maine, 293.

2. Husband and wife are not admissible for or against each other, where either is directly interested in the proceedings, whether civil or criminal. *State* v. *Welch*, 26 Maine, 30.

WELLS, J. — The defendant was indicted, with one Charles Worthing, for an assault. Charles was defaulted upon his recognizance, and did not appear at the trial, which proceeded against the defendant alone, who was found guilty.

The defendant offered the wife of Charles Worthing, as a witness, but she was rejected, by the Judge of the District Court.

A wife is not a witness for a co-defendant in case of an assault, where the interests of all the defendants are inseparable. Yet where the grounds of defence are several and distinct, and in no manner dependent on each other, no reason is perceived, why the wife of one defendant should not be admitted as a witness for another. 1 Greenl. Ev. § 335.

In *Com.* v. *Easland & al.* 1 Mass. 15, five defendants were indicted, and the wife of one was offered as a witness for the

other four. She was rejected, but the court remarked, that to have had the benefit of her testimony, they should have moved to be tried separately from the husband, and for such reason, the motion would have been granted.

A verdict in favor of the defendant could not have been given in evidence for the husband. It does not appear in what manner, her testimony could have affected the interests of her husband. If it had that effect, it would not be admissible. *State* v. *Burlingham & al.* 15 Maine, 104; *Griffin* v. *Brown*, 2 Pick. 304. Even in a collateral proceeding, if her testimony would be the means of discord and contention between her and her husband, it would be rejected. *State* v. *Welch*, 26 Maine, 30.

It is not stated to what she would testify, and we cannot assume, that it would involve the interests of the husband.

It is a general rule of evidence, that a party to the record cannot be a witness, but after acquittal or conviction, if not rendered incompetent, he is admissible. *The People* v. *Bill*, 10 Johns. 94; *Gilmore* v. *Bowden & al.* 3 Fair. 412; *Commonwealth* v. *Marsh & al.* 10 Pick. 57.

But the wife is not a party to the record, and therefore does not fall within the rule. When called as a witness in a case, in which she and her husband have no interest, and where her testimony would not produce discord between them, she is competent. In such position, she is regarded by the law, as any other witness would be, and both may be witnesses, although their testimony should be contradictory. 2 Russ. on Crimes, 605. A difference in their knowledge or recollection of facts, is not considered, as justly tending to disturb the harmony existing between them. Her competency as a witness is only partially limited by the marriage contract. In the present case, her husband was not on trial, nor could he be defaulted upon the indictment. He could not be allowed to testify. And the reason given for such exclusion is the temptation to commit perjury, and if co-defendants were allowed to testify for each other, they might evade the ends of justice.

It is true, the husband might influence the wife to practice the same turpitude. But the mere danger of such result, would not seem to be a sufficient reason to exclude a witness in other respects entirely competent. She is not a party to the indictment, her husband was not on trial, and it does not appear, that she or her husband would be benefited by her testimony, or that it would create discord between them. The mere possibility, that she might commit perjury, and thereby procure the acquittal of the defendant, and that he would afterwards, when her husband should be put on trial, commit the same crime in favor of the husband, is too remote, and shadowy, to form the basis of a legal rule, excluding her testimony. The verdict must be set aside, and a new trial granted.

BROWN *& al. appellants, versus* HODGDON, *guardian.*

Where a widow waives the provision made for her by her husband's will, and claims dower, she is entitled to the same allowance out of the personal estate as if he had died intestate.

This right is not impaired by the circumstance, that all the personal estate was specifically bequeathed.

If an insane widow waives a provision made for her in her husband's will, and at no lucid interval evinces a disposition to avoid the waiver, and if the waiver is confirmed by her guardian, it cannot be objected that the waiver was inoperative.

APPEAL, from a decree of the Judge of Probate, allowing the widow of the late Paoli Hewes the sum of $500, out of the personal estate.

The following reasons were assigned for the appeal.

1. That the Judge has no authority by law to make the allowance, nor is said widow by law entitled to any allowance out of the personal estate.

2. Because said Paoli, by his will, made ample and proper provision for her support, and charged the same upon ample and sufficient real estate, which said provision she has not

legally waived; because, for a long time before the decease of her said husband, she was, and ever since has been, insane, and wholly incompetent to make such a waiver, or to do any legal act, whatever, and that said provision in said will was made with special reference to that fact.

The provision made in the will was by a charge on certain real estate, that she should be suitably supported during her life.

After the said widow had waived this provision, application was made to the Judge of Probate by the selectmen of the town to which she belonged, to have a guardian appointed, on account of her insanity, and a guardian was appointed, who subsequently claimed dower for her, and presented a petition for an allowance to her out of the personal estate.

Upon that petition, the Judge of Probate decreed that she should have allowed her $500, out of the personal estate. It is from that decree that this appeal is taken.

White and *Palmer*, for appellants, to the first point, cited 8 Metc. 424; 3 Metc. 187; 10 Pick. 462; 5 Pick. 528; 14 Pick. 352.

To the second point, they cited 11 Pick. 304; 5 Pick. 431.

Abbott and *Howes*, for appellee.

WELLS, J. — The will of Paoli Hewes, was approved in August, 1848. In it he made provision for the support of his widow, but she waived the provision, and within six months from the probate of the will, filed the waiver in writing, in the probate office.

Upon an application to the Judge of Probate, by the guardian, reciting among other allegations, the waiver of her rights under the will, and the claim of dower, an allowance of five hundred dollars was made to her, out of the personal estate of her husband, in such articles as she might choose to that amount, according to the appraisement in the inventory.

The decree of the allowance refers to the petition, which is thereby made a part of it, and is sufficiently formal and accurate.

It is contended by the appellants, that the widow was in-

sane at the time of making the waiver, and had no legal capacity to perform that act. But the contracts of insane persons are not void but voidable. They remain valid and binding, until they are avoided. If the insane person, during lucid intervals, ratifies them, they are then afterwards binding, in the same manner, as if made when perfectly sane. *Allis* v. *Billings*, 6 Metc. 415.

Nothing has been done by the widow, evincing a disposition to avoid the waiver, nor by the guardian since his appointment. But he is now asking for a confirmation of the decree granting the allowance, seeking a benefit for her, growing out of the waiver. He represents her interests and is acting for her, and she is bound by his legal acts as guardian. By receiving the benefit of the decree, he would adopt and ratify the waiver, and it would be no longer revocable by him, or by his ward.

It therefore becomes unnecessary to decide upon the evidence, whether she was insane at the time of making the waiver.

This court has no power to circumscribe her acts, or to determine whether it was better for her, to receive or reject the provisions made for her in the will. She has a right to avail herself of the election given her by law.

It is also contended, that the testator having disposed of his real and personal property by will, the Judge of Probate had no power to make the allowance.

By statute of 1821, chap. 51, § 39, the Judge of Probate was authorized to make an allowance to the widow out of the personal estate of the husband when he died intestate, whether solvent or insolvent. And he had the same authority, whenever a testate estate should prove insolvent.

But the power was enlarged by the act of March 23, 1835, chap. 180, which provided, "that whenever a widow shall relinquish the provision made for her in the will of her deceased husband, and claim her dower, she shall be entitled to the same allowance out of the personal estate by the Judge of Probate, as if her husband had died intestate.

The substance of these provisions was incorporated into the eighteenth section of chapter 108, R. S. "In the settlement of any intestate estate, or of any insolvent estate, testate, or in which the widow shall have duly waived the provisions, made for her in the will of her husband, and claimed her dower, the widow, besides her apparel and ornaments, shall be entitled," &c.

The widow, in the present case, has the same right to an allowance, as if her husband had died intestate. *Crane* v. *Crane*, 17 Pick. 422.

That part of the fifteenth section of chap. 93 of the Revised Statutes, which relates to the rejection of the provision made for her in her husband's will, was not intended to be operative in creating the power to make the allowance, for that was given by the eighteenth section before mentioned, of chap. 108.

The object and purpose of the fifteenth section of chap. 93, was to provide for the distribution of personal property, not disposed of by will, after all claims upon it had been satisfied. Its provisions relate principally to intestate estates, corresponding to those contained in stat. 1821, chap. 38, § 19. But the Legislature having provided for a waiver of the provisions in a will in favor of the widow, might suppose that she would sometimes waive personal property, which would not be disposed of by will, in consequence of such waiver, and therefore it should be disposed of in the same manner, as if her husband had died intestate.

If there is property in the hands of the executor or administrator, not needed for debts or expenses, and not disposed of by will, then it must be distributed according to the provisions of chapter ninety-three. R. S. chap. 108, § 22.

But whatever the intention might have been, the provision in § 15, chap. 93, does not impair the force and effect of the eighteenth section of chap. 108; it recognizes the right of the widow to the allowance, when she has made a waiver of what is given to her in the will.

The statute having provided for the allowance, the Judge

of Probate has the power to grant it, notwithstanding all the personal property may have been specifically or generally bequeathed. It has a priority over all other claims, except those arising from the expenses of the funeral and of administration, and may be taken out of any of the personal property. If the rights of legatees are disturbed, they must adjust them among themselves. Unless such power existed, in cases where the personal property was specifically or generally bequeathed, and the widow waived the provisions made for her in the will, there would be no way of supplying her immediate necessities out of her husband's property, although he might have left a large estate. It might be some time before she could realize any thing from her dower, and in the mean time would be compelled to subsist on charity.

Where there is sufficient personal property, not bequeathed, and not wanted for the payment of debts and expenses of administration, it would be reasonable and proper, that the allowance should be taken out of that, and full effect given to the will of the testator, whenever it can be so done.

A disposition is made of all the personal property to other persons than the widow, by specific and general bequests, the latter being made subject to the debts and expenses. And so far as we can judge, a portion of the property given specifically will be required to meet the allowance.

The decree, for the amount allowed, cannot be carried into effect in any mode, without interfering with the legacies. It is not perceived, therefore, that the election given to her by the decree is unreasonable.

It is further objected, that the allowance is too large, under the circumstances in which the property is placed by the will.

The widow is entitled, besides her apparel and ornaments, to so much of the personal estate, as the Judge shall determine to be necessary, according to the degree and estate of her husband, regard being had to the state of the family under her care.

The widow has no children dependent on her for support.

The real estate is inventoried at the sum of two thousand dollars, and the personal estate at the sum of twelve hundred and thirty-four dollars. No exhibit is made of the amount of debts, but the executor, in a petition for a license to sell real estate, represents that the personal property, not specifically devised, is insufficient to pay the debts and charges, by the sum of seven hundred dollars, and the license was given by the probate court. The testator was a packet-master, sailing between Belfast and Eastport, but discontinued the business several years before his death. It is manifest, that the amount of dower, which the widow will receive, though it does not appear, that she has yet obtained any thing from it, will be inadequate to her support. She is about eighty years of age, and quite feeble, and incapable of taking care of herself. And if still insane, the infirmities of age and sickness are aggravated by the disorder of her mind.

In the case of *Washburn* v. *Washburn*, 10 Pick. 374, an allowance was made, more liberal than that granted in this case.

The statute does not define or limit the length of time in which she shall be supported by the allowance, whether it shall be a temporary or permanent relief. It is to be according to the degree and estate of the husband, that is, according to the style and mode of living to which she had been accustomed during coverture, and the condition of the estate. Each case must depend very much upon its own circumstances, no inflexible rule can be applied to the subject.

Where the wife, by her industry and prudence, has contributed to the acquisition of the estate, and there is sufficient property to pay all the debts and to support her, and she is old, sick and insane, a larger allowance should be granted than would be justifiable, if the facts where otherwise. It is apparent from the will, that the husband intended she should have a support out of the property during her life, but she did not like the mode in which it was provided. Whether she has acted wisely or not, in making the waiver, she has exercised the right, which the law has given to her. And taking

into the estimate the small amount, which she will probably receive from her dower, we do not think the sum allowed, is too large.

The decree of the probate court is affirmed, and the case remitted to that court for further proceedings.

HARDY *versus* SPROULE.

If one part owner of a vessel, in the port where all the owners reside, repair the vessel, or pay out money to purchase materials for making repairs, or for labor upon it, without the consent of the other part owner, he cannot maintain an action against such other part owner, for his share of the expenditure.

ASSUMPSIT to recover three-eighths of certain expenditures made by the plaintiff for repair of the schooner Tamerlane of Frankfort. The plaintiff was owner of five-eighths of said schooner, and the defendant was owner of three-eighths. The action was tried before TENNEY, J. It appeared *that* certain repairs were made upon the schooner in the latter part of Dec. 1846, and early part of January, 1847, at Frankfort; *that* the workmen were employed by plaintiff, and *that* said repairs were necessary.

The Judge, among other things, instructed the jury *that*, "with regard to the necessary repairs of a vessel, one part owner may, by ordering them on credit, render his companions liable to be sued for the price of them, unless their liability be expressly provided against; *that* generally the law holds all the part owners liable for repairs, notwithstanding they were ordered by the ship's husband, or the owner having charge of the vessel at the time, but an exception arises where the credit is given exclusively to some other person than the owners generally; *that* if, however, a part owner is unwilling that repairs should be made at his expense, and he causes notice of that unwillingness, to be given to the one who proposes to make the repairs, or if that unwillingness became known to the latter, he is not liable to the one causing

or making them, for any expense subsequently made; *that* the jury would judge, from all the evidence in the case, whether or not it was proved to their satisfaction, or whether they could or not infer that the unwillingness of the defendant, (if he were unwilling,) was made known to the plaintiff, and if so at what time. If it were *before* repairs were made or expenses incurred therefor, the plaintiff could not recover; if *after*, he could recover for only such as were made prior to his knowledge of defendant's unwillingness; *that* a liability, incurred for repairs, though not actually put upon the vessel, before such knowledge, would make the defendant liable in the same manner as though put upon the vessel, if they were afterwards put upon her.

The jury found a verdict for the plaintiff, and exceptions were filed.

Ruggles and *Dickerson*, for defendant.

Abbott and *Hubbard*, for plaintiff.

Wells, J. — This is an action to recover three eighths of certain alleged expenditures for repair of the schooner Tamerlane, made by the plaintiff as owner of five eighths.

One part owner of a vessel, merely as such, is not liable to another part owner, for repairs made by him, at the home port, unless they are made with the knowledge and consent of the one sought to be charged. Vessels, in this respect, are viewed in the same light as other chattels owned in common. *Benson* v. *Thompson*, 27 Maine, 470.

The jury were in substance instructed, that the defendant would be liable to the claim of the plaintiff, unless he had expressed or manifested his dissent or unwillingness to the making of the repairs, before they were made, or before expenditures were incurred.

But before the plaintiff could recover he should be held to prove a consent, on the part of the defendant, that the repairs and expenditures should be made.

And this rule must apply not only to labor performed by him, but to money paid by him, to purchase materials for making the repairs, and for the labor.

If the plaintiff, without the knowledge and consent of the defendant, purchased materials for the repairs, upon the credit of both, and subsequently paid for them himself, he would have no better right of action than if he had purchased them on his own credit, or paid for them without credit. He cannot be allowed to do indirectly what he has no right to do directly.

There is not here presented for consideration, such a case as is referred to in Abbott on Ship. 77, where one part owner orders repairs or necessaries for the employment of the ship, on the credit of all, and they are furnished by third persons, without any dissent of a part owner, made known to them, and an action is brought for the price, by such third persons against all the owners.

The plaintiff's case depends on different principles.

The exceptions are sustained,
and a new trial granted.

NOTE. — HOWARD, J. took no part in this decision.

HOLMES *versus* SPROWL.

If a town clerk omit to make notings of the time, at which he received a mortgage of personal property to be registered, the mortgage will, nevertheless, take effect from the time when it is *actually* recorded.

If, in tort, the plaintiff be but a tenant in common with others, of the property taken or injured, the objection is available only in abatement, or by an apportionment of damage.

The right to the possession of personal property mortgaged, is presumed to be in the mortgagee, unless it appear that the mortgager retained the right.

TRESPASS for taking one third of a schooner. The plaintiff relied upon a mortgage to him, by Joseph P. Hardy, made and recorded March 13, 1846. The defence set up was, that the taking by the defendant, was in his office of a deputy sheriff on a writ of attachment against Hardy.

The attachment was made September 22, 1846.

In a custom house register of July 4, 1846, and in an enrollment of October 4, 1846, said Hardy and two other persons, are named as the only owners.

N. H. Hubbard, for plaintiff.

Dickerson, for defendant.

1. Tenants in common must join in actions for injuries done to the common property.

2. The mortgage to the plaintiff was not recorded conformably to the requisitions of the statute. It does not appear, that the clerk noted the time, when the mortgage was received, either on the mortgage, or on the book kept for that purpose. Both notings are required by the statute.

3. The plaintiff waived his right of action, if any he had, by receipting for the vessel.

4. By receipting for the property, without disclosing his claim as mortgagee, the plaintiff practised such fraud and concealment as to preclude him from maintaining this action.

5. There was no demand. Where there is an intermingling or confusion of goods, a demand, previous to the suit, is necessary.

WELLS, J. — 1. The plaintiff claims to maintain this action of trespass as mortgagee of one third part of a schooner taken and carried away by the defendant. The mortgage was made on the thirteenth of March, 1846, and recorded on the same day. The defendant, as a deputy sheriff, attached one third of the schooner, on the twenty-second day of September, 1846, as the property of the mortgagor. By the Revised Statutes, c. 125, § 32, no mortgage of personal property shall be valid, except between the parties, unless possession is given and retained, or unless it is recorded by the clerk of the town, where the mortgager resides.

Section 33 provides, that "the clerk, on payment of his fees, shall record all such mortgages, that shall be delivered to him, in a book kept for that purpose, noting in the book, and on the mortgage, the time when the same was received, and

it shall be considered as recorded when left, as aforesaid, with the clerk."

The object to be accomplished was the recording of the mortgage, to give notoriety to the transaction. By the noting in the book, and on the mortgage, the time when the mortgage was received, it was to be considered as if it was recorded when left with the clerk. The subsequent recording had relation back to the time of noting, and the mortgage was to be considered as recorded at the time stated in the noting. The phrase "and it shall be considered *as recorded* when left, as aforesaid, with the clerk," must mean, that the reception of it and the noting by the clerk should be considered as having the same effect as if the recording took place at the time of the delivery, and that it would be valid, although it was not recorded until a subsequent time. If it is recorded, that is a compliance with the law, and if it is wholly extended upon the record, and the time stated, before third persons acquire any right to the property, the interest of the mortgagee is secured. If a mortgagee would go back to an earlier time, than that stated upon the record when his mortgage was recorded, and claim from the time when his mortgage was first left, he can only do so, by showing the time noted in the book and upon the mortgage.

In *Handly* v. *Howe*, 22 Maine, 560, the attachment was made before the mortgage was recorded. There was no noting, except upon the back of the mortgage, of the time when it was delivered to the town clerk. The noting in the book not having taken place, it was decided that the deed could not be considered as recorded when left.

The plaintiff's mortgage having been duly recorded, and the time when entered upon the record, his right under the mortgage was then protected from the attachment made afterwards by the defendant.

The title of the plaintiff cannot be affected by the enrollment and registry of the schooner in the name of the debtor and the other part owners. Those acts do not appear to have

been done by the plaintiff, or by his procurement or with his knowledge.

2. If the interest of the plaintiff and the other part owners should be considered joint, so that they ought to have united with him, in the action, that is an objection which should have been taken in abatement. In an action of tort, brought by one tenant in common of personal property, when the injury is joint, unless the non-joinder of the other co-tenants is pleaded in abatement, the objection can only be taken by way of an apportionment of damages. *Lathrop* v. *Arnold*, 25 Maine, 136; 1 Chit. Plead. 53.

3. It does not appear by any evidence in the case, that the mortgager retained the right of possession in the property mortgaged, and was entitled to it when this action was brought. No copy of the mortgage has been furnished to us. We presume then, that the mortgagee had the right of possession, and if so, he can maintain trespass for the taking of the property. *Woodruff* v. *Halsey*, 8 Pick. 333; *Paul* v. *Hayford*, 22 Maine, 234; *Welch* v. *Whittemore*, 25 Maine, 86.

4. It is stated in argument, that the plaintiff receipted for the property attached, as the property of the debtor, and it is contended, that he is estopped to set up property in himself.

But the receipt is lost, and no evidence is produced of its contents. We are therefore unable to determine whether its terms would create any estoppel against the plaintiff.

According to the agreement of the parties, the action is to be defaulted.

NOTE. — HOWARD, J. took no part in this decision.

ABBOTT *versus* KNOWLTON.

To an order of *respondeat ouster*, in the District Court, upon a plea in abatement, exceptions cannot be taken, until further proceedings shall have been had to prepare the case for its final disposal in that court.

Exceptions, so taken, will be dismissed in this court.

The act, conferring upon the justices of the town courts in the county of Waldo, *original* jurisdiction of all civil suits, where the debt or other matter in demand does not exceed fifty dollars, and *concurrent* jurisdiction with the District Court in suits from fifty to one hundred dollars, did not impair or diminish any of the existing powers of the District Court.

After that act, as well as before, the District Court had *original* jurisdiction of all civil suits, wherein the sum in demand was between twenty and two hundred dollars.

EXCEPTIONS, from the District Court, RICE, J.

This was an action of the case, brought to the District Court, wherein the sum demanded was over twenty but did not exceed fifty dollars. The defendant filed a plea in abatement, alleging that the parties were resident, one in Belfast, and the other in Liberty, in the county of Waldo, and that the District Court had no jurisdiction of the suit, but that the jurisdiction pertained to some justice of trials for one of said towns. To that plea there was no demurrer or replication.

The Judge being of opinion that the action was within the jurisdiction of the District Court, ordered the defendant to answer over. To that opinion and order, the defendant excepted.

J. W. Knowlton, for defendant.

H. O. Alden, for plaintiff.

WELLS, J. — The defendant filed a plea in abatement, to the jurisdiction of the District Court, to which there was neither replication nor demurrer. But the court ordered the defendant to answer over, and to this order, exceptions were filed.

Such order of the Judge was not a final disposition of the action. The defendant should have obeyed the order. A verdict might have been rendered in his favor, superseding the

necessity of any exceptions to preserve his rights. If a verdict had been rendered against him, he could then have excepted to the order. The proceeding was interlocutory, like the admission or rejection of testimony, which is no cause for suspending the trial, but it is to proceed till a verdict is rendered, or some order is made effecting a final disposition of it.

The exceptions were not therefore taken in accordance with R. S. chap. 97, § 18, and must be dismissed, as irregularly before us.

But as the question, raised and argued by the parties, is one of considerable practical importance in the county of Waldo, where the law establishing town courts, has been accepted, we have concluded to express an opinion upon it.

By chap. 116, § 1, R. S., justices of the peace have original and exclusive jurisdiction of all civil actions, wherein the debt or damages demanded do not exceed twenty dollars, with certain exceptions, not necessary to be named.

By chap. 97, § 6, R. S., the District Court has original and exclusive jurisdiction of all civil actions where the debt or damages demanded, does not exceed two hundred dollars: excepting actions, in which municipal or police courts, or justices of the peace have original jurisdiction, &c.

The act of March 22, 1844, gives to a justice of a town court all the powers of a justice of the peace, and original jurisdiction of all suits of a civil nature, where the debt or demand does not exceed twenty dollars, and concurrent jurisdiction with the District Courts in suits from twenty to one hundred dollars. If no further provision had been made by this act, the jurisdiction of justices of the peace would not have been taken away. Both justices of the town courts and justices of the peace, would have had original jurisdiction of cases where the damages demanded did not exceed twenty dollars. Actions of that class could have been originated before either tribunal, at the election of those, who should commence them.

The phrase, original jurisdiction, does not mean exclusive jurisdiction; two or more courts may have original jurisdic-

tion of the same actions. A court of original jurisdiction is that, in which an action has its first source or existence, and which does not take jurisdiction of it by appeal. But instead of saying that justices of the town courts should have jurisdiction exclusive of justices of the peace, that object is effected by the thirtieth section of the same act, which prohibits the latter from exercising any jurisdiction in the trial of civil causes, and thus in the most explicit terms, transfers the whole of it to the justices of the town courts. The first section further provides that the town court shall have "concurrent jurisdiction with the district courts in suits from twenty to one hundred dollars," &c.

This concurrent jurisdiction was also original, so that both the district and the town courts had by this act, and by chap. 97, § 6, original jurisdiction in all cases between twenty and one hundred dollars; and the District Court, exclusive jurisdiction to a larger extent.

The act of August 10, 1846, amendatory of the act establishing town courts, in the first section, provides, "that the first section of the act to which this is additional is hereby so amended as to give the justices appointed in pursuance of said act, original jurisdiction of all suits of a civil nature, where the debt or other matter in demand, does not exceed fifty dollars; and concurrent jurisdiction with the District Courts, in suits from fifty to one hundred dollars, &c.

This act does not give any new jurisdiction to the town courts, or take away any from the District Courts. It is a mere affirmance of the jurisdiction then belonging to the two courts. To say that the town court shall have original jurisdiction, to the extent of fifty dollars, and concurrent, to the extent of one hundred dollars, is the same thing as if original jurisdiction was given to it, to the extent of one hundred dollars, that of the District Court, already existing, not being excluded. For where two courts have the same jurisdiction, not appellate, it is both original and concurrent. And a new enactment, giving to either, original or concurrent jurisdiction, within the limits previously possessed, adds no new power.

Suppose, that after the law establishing town courts, when the two courts had concurrent and original jurisdiction from twenty to one hundred dollars, a subsequent act had given to the District Courts original jurisdiction to the same extent, or concurrent to the amount of fifty dollars, and original to the amount of one hundred dollars. Would those provisions have taken away or altered the jurisdiction of the town courts? It is very evident they would not, because no new power would be given to the District Courts, and none taken from the town courts.

The act of 1846, does not change the jurisdiction, previously existing, of either courts. But it is manifest, that the Legislature did intend to make a change in the law, and equally manifest that the contemplated change was not perfected. By omitting to use the phrase exclusive jurisdiction, it may be inferred, that the intention was, to have added a prohibition against the exercise of jurisdiction, by the District Courts, in those cases where the damages demanded, were over twenty and under fifty dollars, but that it was omitted by inadvertence. This conclusion is strengthened by the fact, of the passage of the thirtieth section of the act of 1844, which denied to justices of the peace the exercise of jurisdiction, with which the town courts were clothed. But there is no such denial to the District Courts in the act of 1846.

Because the act of 1846 professes to amend that of 1844, in certain respects, but does not do it, it is not within the province of this court to make the amendment. Such proceeding would be an act of legislation.

Exceptions dismissed.

Note. — Howard, J. took no part in this decision.

Foss *& al. in equity, versus* Haynes *& al.*

A bill in equity is not rendered multifarious, by joining two good causes of complaint, growing out of the same transaction, when all the defendants are interested in the same claim of right, and when the relief asked for, in relation to each, is of the same general character.

A compensation in damages, for the breach of an agreement to convey real estate, is not regarded as adequate relief.

In such a case, the jurisdiction of a court of equity, to decree a specific performance, is universally maintained.

If one purchases land, *having knowledge* of a previous contract by the grantor, to convey the same land to another, the purchaser may be compelled, in equity, to convey the land in the same manner as would be required of his grantor.

If the design of such purchase was, to place the land beyond the reach of the person entitled to a conveyance, and thereby to defeat his just rights, a court of equity has jurisdiction on the ground of fraud.

Though a defendant in equity is not bound to criminate himself, or furnish evidence, by which a criminal accusation can be sustained; he may be compelled to make discovery of any act, which does not amount to a public offence, or an indictable crime, although it may be one of great moral turpitude.

Bill in equity. It was heard upon demurrer. The facts sufficiently appear in the opinion.

Abbott and *Howes*, for the plaintiffs.

Heath and *Davis*, for the defendants.

1. The bill is multifarious. It claims the performance of a contract to convey real estate made by *one* only of the respondents; also the return of money alleged to have been obtained by *one* only of them, in a transaction with which the other had no connection, and the refunding of money, paid as extra interest to *neither* of them. Such diverse claims cannot be united in one bill. Story's Eq. Pl. § 271; 1 Daniell's Ch. Pr. 384, note. "A bill is bad for multifariousness, when it is brought against *several defendants*, seeking redress for injuries arising out of transactions with them *separately*, at *different times*, and relating to different subjects. *Coe* v. *Turner*, 5 Conn. 86; *Marselis* v. *Morris Canal*, 1 Saxton, (N. J.) 31; 1 Daniell's Ch. Pr. 386, note.

2. The bill alleges a *contract, fraud,* and an *award,* and claims upon each of these grounds. Each is an essential part of the bill. It is therefore uncertain and equivocal. 1 Daniell's Ch. Pr. 435.

3. It does not appear but that there is an adequate remedy at law. There may be for the fraud alleged, as no discovery is prayed for, nor is a knowledge of it alleged to be confined to the defendants. *Dwinal* v. *Smith,* 25 Maine, 382. Or there may be on the agreement in writing to abide by the decision of the referees. *Brown* v. *Leavitt,* 26 Maine, 251.

4. If the allegations of fraud are well laid, the respondents ought not to be held to answer, for they might criminate themselves. Rev. Stat. chap. 161, § 2; 1 Greenl. Ev. § 451; 1 Daniell's Ch. Pr. 627, notes. Nor is the offence barred by the statute of limitations. *Dwinal* v. *Smith,* 25 Maine, 382.

5. The bill presents no case for the equity jurisdiction of this court.

1. It cannot be sustained for a *specific performance of the contract,* made in 1832, for that was made by *Haines* alone; the plaintiffs did not pay their notes according to the terms of the bond; and though the time was extended on *some* of the notes, the plaintiffs have not, even to this day, tendered to *Haines,* the amount they admit to be due.

2. It cannot be sustained on the *ground of fraud.* For it will be observed that all the allegations of fraud are based upon the acts of the respondents in taking hay and lumber, obtaining the cow, and conveying the premises to Tripp, in 1845. But not one of these acts was fraudulent, unless the plaintiffs had *before that time* paid up all their notes so as to acquire an *equitable* title to the premises. Until that was done, the respondents were owners both in law and in equity, and had a right to the possession, rents, and profits of the place. It appears from the bill itself, that, in October of that year, the plaintiffs tendered to one of these respondents, 260 dollars, as still due and unpaid on said notes. That being the case, none of the alleged acts were fraudulent. Our demurrer only admits the *facts* as alleged. A fraudulent *intention,* is an

inference of law, which a demurrer does not admit. Story's Eq. Pl. § 452; especially as the facts alleged *rebut* the inference of fraud, and take from this court all jurisdiction on that ground.

3. The only remaining ground on which it will be contended that the bill can be sustained, is for *the specific performance of the award.* This court, without question, has power to make such a decree. *Jones* v. *Boston Mill Cor.* 4 Pick. 507. But it will never use this power except in cases where it is satisfied, "that the award is in all points, exactly in pursuance of the agreement to refer." *Bubier* v. *Bubier*, 24 Maine, 42, 49. The rule thus laid down by this court is of great importance. For the *power* of referees depends altogether upon the *terms* of the submission. 2 Greenl. Ev. § 71, 72, 74, and notes. But this bill does not tell us any thing of the *terms* of this agreement to refer, nor give any reason for not doing it, nor ask any discovery of its contents. And as "nothing in a bill in equity can be supplied by inference," *Wright* v. *Dame*, 22 Pick. 55, there is no right to *infer* that the referees had authority to award the conveyance of real estate. All that is alleged of their powers is the fact that a former bill in equity was referred to them, not by rule of court, but in vacation. It was a reference at common law. Whether that bill would have been sustained by the court is of course uncertain. It must therefore be still more uncertain whether the referees to whom it was left, had greater powers than those possessed by this court. The plaintiffs are entitled to nothing, until it be shown that the award was such an one as the referees had authority to make.

TENNEY, J. — The bill alleges substantially, that Hiram Haynes, one of the defendants, on Aug. 25, 1832, made a contract in writing with John Foss and Jonathan Foss, on condition that they should pay according to their tenor, six notes of hand for one hundred dollars each, and another for thirty dollars, all bearing interest, he would convey to them, their heirs and assigns, a part of a tract of land, which was

conveyed to him by Alfred Johnson, on June 26, 1832, and which he conveyed back in mortgage, for the security of the purchase money; that by the consent of said Haynes, the said John and Jonathan went into the possession of the land, which they had so contracted to purchase; and on the same day John Foss verbally sold his part of the contract to Josiah Chase, who engaged to assume his liabilities, and went into possession of the land with said Jonathan. On August 27, 1845, in pursuance of such verbal agreement, John Foss assigned in writing to Josiah Chase, his part of the contract with Haynes; that the two notes to Haynes, which first became due, were paid and taken up soon after their maturity; and Haynes, not having paid Johnson for the land, assigned to him as collateral security for his indebtedness, three of the outstanding notes against John and Jonathan Foss, each being for $100, one of which was paid by the plaintiffs to Johnson, and another paid partly to Johnson and partly to Haynes, and both taken up prior to March 9, 1841; that on March 9, 1841, Haynes conveyed to one Steel all the interest which he had in the land, that was purchased of Johnson, and Steel substituted his note, for the one against John and Jonathan Foss, remaining in the hands of Johnson not taken up, and the mortgage was thereupon discharged; that at the time of the conveyance to Steel, the latter agreed in writing to re-convey upon the terms mentioned in their agreement; and the former agreed with the plaintiffs that when they should pay the balance on the notes outstanding against the Fosses to Steel or Haynes, or both, to procure them a deed from Steel, of the land referred to in the contract; that afterwards a payment of fifty dollars was made upon the note of $100, which continued in the hands of Haynes, that was agreed to be indorsed, and on a settlement of accounts between Jonathan Foss and Haynes, there was found due to the former a sum equal to the balance of that note, which it was agreed should be applied thereto, but was omitted to be taken up, although it was understood by them as canceled; that prior to the first day of June, 1845, the plaintiffs paid to Steel the full amount of the note, which

he had received from Johnson; and in April, 1844, paid to Haynes the amount of the note of $30, and took up the same; that the plaintiffs paid to Haynes and Johnson, the sum of seventy-five dollars as extra interest, for an extension of the time of payment of the notes, and by an agreement with Haynes, he waived the payment thereof at the time they became payable; that on June 4, 1845, Haynes being deeply insolvent, of which he was well aware, and Tripp, the other defendant, well knowing the same, and also that the contract for the conveyance of the land was outstanding, and that John Foss had assigned his interest therein to Josiah Chase, and that the notes given therefor were all paid by the plaintiffs; and that plaintiffs claimed and were entitled to a conveyance according to the contract, the defendants, designing to defraud the plaintiffs of their just rights under the contract, and to put it out of the power of the plaintiffs to obtain a deed, did fraudulently induce Steel to convey the premises to Tripp, who did on the same day, without the knowledge and consent of the plaintiffs so convey, and in consideration thereof, Tripp took up the note given by Steel to Johnson, and delivered the same to Steel, and instead thereof gave his own note to Johnson, which said Haynes at the same time agreed with Tripp that he would pay; and Tripp agreed to hold the premises in his own name for the benefit of Haynes, and gave to him the note of $100, given by John and Jonathan Foss, and which he received from Steel, and which Steel took from Johnson as aforesaid, and said note is now in the hands of Haynes; that on Oct. 3, 1845, the plaintiffs tendered to Tripp the sum of $268, lawful currency, and demanded of him a deed of the land; which money he refused to receive and also refused to give the deed as requested; and they have at diverse times after the payment of the notes, and before the 21st day of April, 1846, requested Haynes to give them a deed of the premises according to his contract; and that since that time the defendants have cut and carried away from the land, hay, wood and timber of great value; that on the 23d day of April, 1846, the plaintiffs commenced their bill in equity against

these defendants, setting forth the foregoing facts, and praying for relief, which bill was duly served and entered in court, which was pending till May 22, 1847, when the parties entered into a valid agreement in writing, to refer all matters set forth in said bill, together with costs arising thereon and costs of reference, to Isaac Abbott, Charles Gordon and Mark L. Stiles, their award to be made and set down in writing, under their hands, and ready to be delivered to the parties on or before the first day of July, 1847; and the parties bound themselves in said writing, to perform the award of the arbitrators or a majority of them; that the written agreement of submission, was by mistake, delivered by the arbitrators to the defendants, who on being called upon to produce the same, refused to do so; that after the submission was executed and put into the hands of the arbitrators, and due notice to the parties, a full hearing took place in the presence of them, and by the verbal consent of the parties, and the written consent of their counsel, the matter was continued till the tenth day of July within which time, the arbitrators duly made and published their award; that they determined that the plaintiffs should pay to the arbitrators their fees, and should, on the first day of March, then next, pay to the defendants the sum of $127,32, and that the defendants on the payment of the sums awarded, should make, execute and deliver to the plaintiffs, a good and sufficient deed or deeds of the land; that the plaintiffs paid the fees of the referees, and on Oct. 22, 1847, tendered to said Tripp, at his dwellinghouse, the sum of $127,32, lawful currency, in payment of the sum awarded to the defendants, and that said Tripp refused to receive the same, which sum has ever since been ready for him, and is deposited in court ready for him, and on the same day afterwards, the plaintiffs demanded of him a deed of the land, which he refused to deliver, and afterwards on the same day, they caused a deed to be made, and requested Tripp, to execute and deliver the same, which he also refused to do; that the defendants have occupied the land since April, 1846, receiving the rents and profits thereof, and have cut and carried away hay, wood

and timber from the same; and they pray that the defendants may be decreed to make, execute and deliver to them, a deed or deeds of the land, and that Haynes be compelled to surrender to them the notes, in his hands, which have been paid, to pay the extra interest, which they have received, and for the hay, wood and timber so cut, and for detention of the same.

A demurrer was filed to the bill and several grounds therefor specified and relied upon.

1. It is contended that the bill is multifarious, inasmuch as reliance is placed on a contract made by one of the defendants on August 25, 1832, and upon an award purporting to have been made in July, 1847. A bill is not multifarious because it joins two good causes of complaint growing out of the same transaction, when all the defendants are interested in the same claim of right, and when the relief asked for in relation to each, is of the same general character. Story's Eq. Pl. sect. 284, and note. So far as the bill seeks a conveyance of the land, it is single, and its object is to establish and obtain the relief sought. The bill charges the original contract with one of the defendants only; but that after the plaintiffs were entitled to a conveyance by virtue of that contract, the apparent legal title of the land was caused by the defendants to be put into the hands of Tripp, not only with notice of the contract, but with the fraudulent purpose, that it should be held by him for the benefit of the other defendant, and to prevent the plaintiffs from acquiring their just rights under the contract; and that the whole matter was the subject of arbitration, and an award made in favor of the plaintiffs upon the performance of certain conditions on their part.

It is contended that the bill is subject to a similar objection, because it asks relief on account of money paid to Johnson as extra interest. The bill alleges that extra interest was paid to Johnson and to Haynes, but it seeks only a decree for the restoration of the latter.

2. Another ground of demurrer is, that the bill is uncertain and equivocal, not showing whether the plaintiffs seek to have executed a supposed award of referees or a contract set forth

in the bill. The great object of the suit is to obtain a conveyance of the land described in the contract. For that purpose, a previous suit in equity was instituted and afterwards made the subject of arbitration, which resulted in an award, that conveyance should be made, on the performance of certain duties, imposed by the arbitrators upon the plaintiffs. It was necessary in order to obtain a decree, to enforce specific performance of the award on the part of the defendants, that it should appear from the bill to have been a decision of the matter submitted; this could be done by reference to the previous bill, which should make a part of the present bill, or by an incorporation into the latter, of all the material allegations of the former; the latter mode has been with propriety pursued, and after stating in detail, the subject of the former bill, it charges the reference, the award, publication, and the offer to perform by the plaintiffs, whatever was required of them, and asks that the defendant Tripp be compelled to convey the land. If it was the design of the plaintiffs to institute a suit in all respects like the former, and with a view to obtain a specific performance of the contract, and to disregard the submission and the award, the allegations touching the submission, award and subsequent proceedings, were entirely unnecessary. It is manifest further from the fact of the plaintiffs having caused to be brought into court, the sum required to be paid by the plaintiffs by the award, ready for the defendants, that the relief sought is a decree to enforce the fulfilment of the award.

3. It is further insisted, that the bill to compel specific performance of the award, cannot be sustained, because the plaintiffs have not set forth in detail, the agreement to refer the former suit, and the subject of it. The plaintiffs do not profess to recite in the bill the precise terms of the agreement, and they allege that it was delivered to the defendants by mistake, and that they refused to produce it on demand, before the bill was brought; but the bill does set out substantially, what is alleged therein to be that agreement. For the present inquiry, these facts must be treated as admitted by the defend-

ants, and it is not competent for them to make this objection.

4. Another reason assigned for the demurrer is, that the plaintiffs have a plain and adequate remedy at law. A compensation in damages for the breach of an agreement to convey real estate, is not regarded as adequate relief. It is not possible that the damages awarded, can place the purchaser in all respects in the same situation contemplated by the contract. The locality, the character, vicinity, and accommodation of the land generally, are supposed to give it a special and peculiar value in the estimation of the one, who has paid money therefor, especially if he has long been in the occupation, and has materially improved it according to his own taste. If he should be deprived of it, it might defeat important plans, which he may have formed in connection therewith. "And it is a general principle that the jurisdiction of a court of equity to decree specific performance in cases of contracts respecting lands is universally maintained." 2 Story's Eq. sect. 746; *Jones* v. *Boston Mill Corp.* 4 Pick. 507.

It is also a settled principle in equity, that if one person contracts in writing, to sell land to another, and afterwards refuses to fulfil his contract, and transfers his interest in the land to one having knowledge of the contract, the latter stands upon the same equity. He is not liable in a suit at law upon the agreement, not being a party to it, but in equity he will be compelled to convey the land in the same manner as would be required of his grantor, he being treated as the trustee of the latter. 2 Story's Eq. sect. 784. If the transfer is not *bona fide*, but was intended to deprive the party entitled to a conveyance under the contract, of his just rights, by an attempt to put the land out of his reach, the court have jurisdiction on the ground of fraud. R. S. chap. 96, § 10.

5. Another ground of objection is, that the bill does not present such a case as to entitle the plaintiffs to relief from the defendants, by a court of equity. It is admitted, that it is competent for this court as a court of equity, to enforce the specific performance of an award made in pursuance of the sub-

mission. *Jones* v. *Boston Mill Corp.* 4 Pick. 507. The bill alleges that the matters involved in the former suit were submitted, and recites particularly the whole subject of the bill therein. The arbitrators must have found the allegations in that bill substantially true, and that the contract which was the basis of the suit, subsisting and not forfeited on the part of the plaintiffs, and awarded specific performance by the defendants, on the payment of certain sums awarded to be paid by the plaintiffs, which payments are alleged to have been made, excepting so far as they have been prevented by the defendants. The award is stated in the bill to be a final award in the premises, made in pursuance of the submission. In the present state of the pleadings, the parties having submitted to a tribunal of their own selection, are bound by the decision as part of their own written agreement. It is not competent to contest the award, merely on account of any supposed error of judgment of the arbitrators touching the fraudulent acts of the defendants, as alleged in the former bill, or to institute an inquiry in respect to the evidence of their intentions, or other facts, which were deemed material in making up their award.

It is further contended that the defendants are not bound to answer to the bill because they may criminate themselves, if the allegations in the bill are well laid. It is a settled rule, that no person is bound to criminate himself, or to furnish evidence for any step in the process by which a criminal accusation or punishment can be sustained. Story's Eq. Pl. sect. 591. But it is equally clear, that a defendant may be compelled to make discovery of any act in a suit in equity, which does not amount to a public offence or an indictable crime, although it may be one of great moral turpitude. Nothing is more common than to bring bills for discovery and relief, founded exclusively on charges of fraud. *Ibid.* sect. 596.

Demurrer overruled.

THORNDIKE *versus* SPEAR.

In an action of dower, the seizin of the demandant's husband is established by proof, that he conveyed the premises by a warranty deed, and that his grantee conveyed the same by warranty deed to the tenant.

The effect of such proof is not repelled by showing that the husband, at the time of his conveyance, had, in a writ of entry upon his own seizin, recovered judgment against a third person for the land, but had not paid to the tenant the amount assessed by the jury for betterments, but did pay the same within the year allowed by law for that purpose.

N. T. Talbot, for demandant.

W. H. Codman, for defendant.

SHEPLEY, C. J. — This is an action of dower. The marriage, the death of the husband, Paul Thorndike, and a demand of dower, are admitted. The seizin of the husband is denied.

The demandant introduced a deed made on September 11, 1818, from Mary Molineaux as administratrix of William Molineaux, to Paul Thorndike. A deed made on September 27, 1825, from Paul Thorndike to Thomas Spear, containing covenants of general warranty. A deed made on October 8, 1827, from Thomas Spear to Thomas Spear, Jr. the tenant, containing covenants of general warranty. The premises, in which dower is demanded, were included in these conveyances.

The demandant might have rested her case upon this proof. She also introduced a copy of the record of an action, and of a judgment recovered, in favor of Paul Thorndike against Daniel Barrett. The action was commenced on August 11, 1821. An issue was framed upon the seizin of the demandant; and the tenant presented a claim for improvements. A verdict was found upon the issue on the seizin, in favor of the demandant, and the jury found, that the tenant was entitled to his improvements; and the value of them and of the land, was found, at the session of this court holden in this county in September, 1824. Judgment was rendered upon that verdict on September 20, 1825. The demandant did not abandon the premises to the tenant, but paid the value of the improvements to the clerk of the court, on April 28, 1826.

It is insisted, that the tenant is not estopped to deny the seizin of the husband by the conveyances containing covenants of general warranty, because the demandant has introduced proof, that her husband was not seized, and that when such proof has been regularly presented to the court, the truth must prevail.

Admitting that the record presents evidence, that the husband had been disseized during the existence of his title, until he recovered judgment on September 20, 1825, the effect of that judgment was to purge the disseizin and to establish the seizin of the demandant. It is however, alleged, that the statute of 1821, c. 47, § 1, deprived it of that effect. It has been decided, that the judgment must be considered ineffectual, if the demandant does not, in a case like the present, pay the value of the premises within the time prescribed. *Gilman* v. *Stetson*, 16 Maine, 124; S. C. 18 Maine, 428; *Phillips* v. *Sinclair*, 20 Maine, 264. It is said, that the judgment by the provisions of the statute, takes effect only upon payment. Its effect, according to the rules of the common law, is only destroyed by neglect to make the required payment. A writ of possession could not issue before payment had been made, but that would not alter the effect of the judgment. After payment has been made, the judgment becomes conclusive and effectual, from the time of its entry. The seizin is then established in the demandant from that time, and he becomes entitled to the actual possession. The husband was therefore seized, when he conveyed the premises to Thomas Spear, after the recovery of judgment, and before he had paid for the improvements. There is nothing to prevent the operation of that deed, as a conveyance; nor any thing to prevent the conveyances containing covenants of general warranty, from operating to estop the tenant to deny the seizin of the husband.

The fact, that the tenant has recently obtained a title by release, from the heirs of William Molineaux, cannot alter the rights of the parties. *Tenants defaulted.*

JAMES HARTSHORN *& al. in Eq., versus* JACOB F. EAMES *& al.*

MEM. — Pending this suit, the judgment, named in the bill, was assigned by the plaintiffs. The assignee was allowed, after the arguments to come in, upon terms, as the party plaintiff. He, however, introduced no new evidence or argument.

The court has jurisdiction, in equity, of a bill, brought by a judgment creditor, which charges that the judgment debtor, one of the defendants, had fraudulently, and without a valuable consideration, transferred his property to the other, under an agreed purpose between them to defraud the plaintiff.

In such a case, the plaintiff may find it indispensable to rely upon disclosures, to be made in the defendant's answers, and therefore the bill is not demurrable.

Although one of the defendants, when purchasing the property, was a *bona fide* creditor of the other defendant, from whom he purchased it, yet, if his real object was, not to obtain payment of his debt, but merely to give the colorable appearance of a sale, when no real sale was intended, the purchase would be fraudulent as against the creditors of the vendor.

If personal property has been conveyed for the purpose, concurred in by the vendee, of deterring creditors of the vendor from attaching it, such conveyance is a fraud, the remedy for which may be sought in equity.

Where real estate, to which the fraudulent debtor had no other than an equitable title, is transferred by his procurement to another, cognizant of the design to secure it from creditors, it cannot be levied by a creditor upon execution. But, if a creditor's execution is returned *nulla bona*, the institution, by him, of a suit in equity against the fraudulent grantee, gives him a lien upon the avails of it.

Where a fraudulent transfer of property is alleged in a bill to have taken place at a particular time, it is unnecessary to aver that the fraud continued and existed at the time of filing the bill; but if the property did, subsequently to the fraud, go into the hands of *bona fide* creditors, that must appear in defence.

Whether a fraud can in that way be so purged, as to deprive a creditor of his remedy; *quære.*

BILL IN EQUITY, to which a demurrer was filed and answers were made. The case was heard on the demurrer, answers and proofs.

The facts, so far as necessary to an understanding of the case, appear in the arguments and opinion.

W. G. Crosby, for plaintiffs.

Heath, for defendants.

This bill is dated January 31, 1845, and alleges two matters of fraud, the one pertaining to personal property of the value of $300, the other to real property of like value, and both alleged to have been sold fraudulently by the judgment debtor on June 26, 1843, the said debtor continuing the beneficial owner and in possession of the same.

The personal property is specified, and the charge is, that the judgment debtor conveyed and transferred it to the other defendant without consideration, the judgment debtor retaining the possession. In the bill, no transfer, such as to give a colorable title by law, is alleged. The property never changed possession, nor is there any allegation of delivery. Possession is the usual evidence of ownership, of which the debtor never divested himself.

The judgment creditor has no other interest than to satisfy his execution. Suppose this personal property was the only subject of complaint in the bill, and the debtor never had abandoned the possession, nor given a mortgage, would the fact that he had made a sham sale, give the court jurisdiction? Does the charge of fraud, without putting the property beyond the reach of the officer or creditor, give the court equity powers as to personal property? A party must be put into a more hopeless case, before it can be said he has no adequate remedy at law. The property is all the creditor has a right to ask for, and that he has a right to take.

Not only was there no change of possession, the common and lawful evidence of ownership, but no legal impediment is charged to exist. This court is only to give a man his legal rights, not to obtain a greater benefit than the law has given him. *Neale* v. *Duke of Marlborough*, 14 Eng. C. R. 417.

The bill alleging no fraudulent mortgage or change of possession, a decree of this court cannot benefit the plaintiffs, more than their remedy at law would.

Again, it does not appear from the bill, that this property was in existence, or that the fraudulent grantee had, or was deriving any benefit, or pretending to hold it, *at the time of commencing this suit.* There is no such allegation. For

aught appears, every dollar of it has rightfully gone to pay other creditors, or may have been seized by them, and, either by levy or sale, been taken from both of the defendants.

The court does not derive its equity jurisdiction, from the fact that a fraud was once perpetrated; it can only interfere, where there is an actual locking up of property, at the time of the commencement of the process.

Besides, in this case, according to the allegation of the bill, the plaintiffs have a remedy at law under ch. 148, § 34, R. S.

As to the real property described in the bill, that can not come under equity proceedings, for the plaintiffs allege no interest in it, by way of *lien*. That property is subject to sale or levy, and consequently there must be a *lien* thereon, before this process can be sustained. This principle is recognized in *Beck* v. *Burdit*, 9 Cowen, 732.

A lien upon the estate, from which the fraudulent conveyance is sought to be removed, must be shown to exist at the time of the commencement of the bill. *Dodge* v. *Griswold*, 8 N. H. 428.

If aid of a court of equity is sought as to real estate, the creditor must show a judgment creating a lien upon the estate. *Reed* v. *Cross*, 14 Maine, 261.

The same principle is asserted in 15 Maine, 85, where the creditor had a deed from the very man, who had fraudulently conveyed away the land, and this deed was held to be equivalent to a levy.

The return of *nulla bona*, is not the true foundation of equity proceedings, but only evidence that the remedy at law is exhausted. But if the plaintiff, in his bill, sets forth facts contradicting his return, it then amounts to nothing. The law, that it is necessary for the creditor to have a lien, is well settled. What that lien, in our State, is, is not so well established.

In New York and England, the sources of most of the cases in equity, the obtaining a judgment and execution, and *elegit*, effect a lien upon the property of the debtor; but in New Hampshire, the doctrine is doubted.

But there is another objection, that the bill does not allege that the conveyance was ever *recorded*, or that it was a legal conveyance. To prevent or hinder an attaching creditor, the fraudulent deed must be recorded, and herein the plaintiffs have set forth no obstructions whatever, to hinder them from satisfying their judgment.

There is another objection to this bill, disclosed by the testimony, which is, that proper party plaintiffs are wanting. It appears, that the judgment, which is in the name of the plaintiffs, has been by them assigned, and the assignees should be parties to the proceedings.

WHITMAN, C. J. — The plaintiffs in their bill allege, that they recovered judgment against the defendant, Jacob F. Eames, for $195,42, debt, and $10,72 costs; and that execution had been issued thereon, which had been returned unsatisfied, for want of property to be found, appearing to be owned by him; and that, on the 26th of June, 1843, after the above sum of $195,42 had been awarded to them, but before judgment had been entered up upon said award, the said Jacob for the purpose of defrauding the plaintiffs of their said demand, and without any valuable consideration therefor, conveyed to the other defendant, who was his father, all his real and personal estate, amounting in value to six or eight hundred dollars; and that the defendants in so doing confederated together for the purpose above mentioned; and it is claimed that, by reason thereof, they should both be held to be responsible to the plaintiffs for the amount of their demand, for which judgment had been so obtained.

To these allegations the defendants, in the first instance, interpose a demurrer, upon the alleged ground, that the plaintiffs have exhibited no good cause in equity; and, secondly, that the plaintiffs have an adequate and complete remedy at law. But it would seem to be too clear at this day to need argument to show, that the demurrer is not well taken. The allegation of fraud brings the case within one of the specifications in the statute, conferring equity jurisdiction upon this

court; and, in such case, the plaintiff may find it indispensable to rely upon matter to be disclosed by the defendants, to substantiate their charges. Besides; "cases of fraud are, least of all, those in which the complete exercise of the jurisdiction of a court of equity, in granting relief, ought to be questioned or controlled, since, in addition to all other reasons, fraud constitutes the most ancient foundation of its power; and it sifts the conscience of the party, not only by his own answer, under oath, but, by subjecting it to the severe scrutiny of comparison of other competent testimony." Story on Equity, § 68. Hence the remedy at law could not be adequate and complete.

But, as to the matter in equity, if the allegations of the plaintiffs are substantiated by their proof in the case, there would seem to be no reason why they should not prevail. They would, in such case, appear to have sustained an injury; and by the misconduct of the defendants; and such as would entitle them to relief. The demurrer, therefore, must be overruled.

The defendants, under a rule of this court, that a demurrer and answer shall not be considered as overruling each other, have, also, answered fully to the merits of the bill; and have denied the fraud set up therein; but admit the existence of the plaintiff's debt; and that conveyances of Jacob's property had been made to Samuel, at the time alleged, averring that the sale was *bona fide*, and for a valuable and adequate consideration, viz. the prior indebtment, of long standing, of the said Jacob to the said Samuel, to the amount of the value of the property transferred, the evidence of which indebtment was thereupon canceled.

Here, then, the parties are at issue, the one alleging that the transfer was not for a valuable consideration, and not *bona fide*, and the other that it was. And evidence has been taken, at considerable length, pro and con, in reference to such issue.

It is not questioned, but that the transfer from Jacob to Samuel, was of all the attachable property, which Jacob had visibly, leaving the debt to the plaintiffs unprovided for.

Jacob, therefore, may well be believed to have been insolvent. The property, though transferred in part, absolutely, and in part by way of mortgage, is abundantly proved to have remained, as before, in Jacob's possession and occupation; and the vendee was the father of the vendor. Hence there were the *indicia* of a fraudulent sale; such as, at the suit of the plaintiffs, who were *bona fide* creditors of Jacob, would make it necessary for the vendee to show the payment of an adequate consideration for the purchase, and that the transaction was in good faith. Without both, the sale must be deemed fraudulent.

A distinction exists, however, between a sale made to one in payment of a precedent debt, and to one, who might, at the time of sale, pay an adequate consideration therefor. In the latter case, if done with an understanding between the parties, that it was to enable the vendor to defeat the claims of his creditors, it would, against them, be void, but not so in the former. A debtor has a right to prefer one creditor to another; and may make a valid transfer to such creditor, of property fairly sufficient to pay him, although it may be known to such creditor, that one object in view by the debtor was to avoid the payment of the debt of another creditor. *Holbird* v. *Anderson*, 5 T. R. 235; *Pickstock* v. *Lyster*, 3 M. & Selw. 371.

In this case both defendants, in their answers, aver, that the sale in question was but an adequate payment of a precedent debt; and they aver further, that it was done in good faith; which must mean, that it was not colorably done, merely to give the semblance of a sale, when none in fact was intended. The answers, being responsive to the charges contained in the bill, must be taken to be true, unless evidence is to be found in the case, overcoming their weight, when taken in connection with evidence in corroboration of the same.

We must now examine the evidence, adduced on the part of the plaintiffs, and determine whether it can fairly be deemed sufficient for the purpose. It must ordinarily be expected to be circumstantial. If any thing improper in a negotiation

be intended, it will seldom, if ever, be avowed; but every thing, of a tendency to render it apparent, will be studiously concealed; and circumstantial, or what perhaps with more propriety may be called presumptive evidence, may be, and often is, very cogent, and even conclusive. There are, in this case, quite a number of circumstances, well authenticated, which have heretofore been allowed great weight in determining a sale to be fraudulent, as against the rights of creditors.

Although the defendant, Samuel Eames, should be deemed to have been a *bona fide* creditor, yet, if the real object of his purchase was not payment of his debt, but merely to give a colorable appearance of a sale, when in fact none was intended, it would be fraudulent, as against the creditors of Jacob. *Twine's case*, 3 Coke, 80, was one of preference of one creditor for another; and held void, because the conveyance was of all the property the debtor had, liable to seizure for debt, and was made, pending a suit against him by the creditor, seeking to avoid the sale, and because there was manifested a trust between the parties; the donor still continuing in possession, and using the goods as his own; and in that case it was said to be a circumstance of a similar tendency, that the conveyance recited, that the gift was made honestly, truly and *bona fide;* such clause creating suspicion, it being unusual, and indicating, that the donor was aware that it might be deemed otherwise. This case has been referred to, times almost without number, as containing a notice of the badges, affording a clear presumption of a fraudulent intent, in regard to other creditors. In the case at bar, all these *indicia* may be said to concur. The conveyance was confessedly a sweeping one, of all the debtor's attachable property; it was made while a reference was pending between the debtor and the plaintiffs, when he had reason to presume that an award had been made, and that it might be against him. The evidence shows, that he was allowed to use and deal with the property, after the conveyance, the same as before; and that he sold a great proportion of the personal property; and there is no

evidence that the vendee ever interfered to prevent it, or that he ever received or exacted any portion of the proceeds of what was sold; nor that he has, to this day, given himself the least concern with the management and disposition of the property. And as to what transpired at the time of the sale, it was not seemingly, in accordance, so far as we can gather from the evidence, with the prior and subsequent transactions between the parties. There is no indication of great formality, in transacting business between them, except on the occasion in question. On that occasion great precision was resorted to. An accurate calculation and valuation was gone into; and the claim of the grantee was made to overbalance the valuation, as one witness says, three or thirteen dollars, which he consented to relinquish or disregard; and he took his conveyance, in the form of a mortgage, professedly to secure, it would seem, the precise amount of the value of the property mortgaged; and although the sum secured was to bear interest, the mortgager was to have the use of it for at least one year; and in fact, so far as appears, has kept it ever since. After being so precise in making the sum due to be exactly in conformity to that of the valuation, no care is taken to prevent the interest from running and accumulating beyond the valuation, to any amount. This is not what should have been expected, in a *bona fide* transaction; but is much more like what should be looked for, when something more resembling a farce was in view.

But we have in this case, not only these recognized badges of fraud, but the often expressed declarations of Jacob, showing his determination, by the conveyance in question, and other subsequent conveyances, to avoid the payment of the plaintiff's debt; and Samuel's statements also to the same effect; and also that the design was to secure the property, not for his own use, but for the use of Jacob. He said to the witness, James Tyler, who bought of Jacob one yoke of the oxen, contained in the conveyance, upon inquiry of him, whether there would be any trouble about it, that there would not, if Jacob got his pay; and added that "it was not

worth while to say much about business done in that way." And in the spring of 1844, in conversation with A. T. Nickerson, about a debt of $180,00 due to him from Jacob, Samuel said to him, that with Jacob's consent, he would convey to him all the property, which Jacob had conveyed to him, and that, in making the conveyance to him, Jacob had no intention to prevent him, Nickerson, from getting his pay; that they did not consider the debt to the plaintiffs to be just. The inference, from these two conversations, would seem to be none other than that the design of the transfer to Samuel was merely to prevent the plaintiffs from securing their demand, without depriving Jacob of the use and disposition of the property conveyed, at his pleasure.

Again; in May, 1844, Jacob became the owner of another yoke of oxen, and immediately transferred them to Samuel; and in October following, he became the owner of a horse, two wagons and a harness, which he also transferred in the form of a mortgage to Samuel. The object of these transfers is unexplained, and cannot well be regarded as otherwise than in furtherance of the main design in reference to the plaintiffs. And, moreover, it appears that, at the time the property in the bill and answers was transferred, a deed was made, reciting a consideration as received of two hundred dollars by Jacob of Samuel; and transferring from the former to the latter a parcel of real estate. This does not appear to have been done in payment of any debt to Samuel. His alleged debt was paid, as the answers pretend, by the other property. This conveyance is not alluded to in the bill, but is properly introduced by way of leading to an understanding of the true nature of the whole negotiation. Why was not this sum of two hundred dollars allowed to reduce the amount for which the mortgage was taken of the personal property? It would seem that such should have been the case, unless the whole affair was designed to be merely fictitious.

Quite a number of other circumstances, pointed out in the proofs, by the counsel for the plaintiffs, may well be regarded

as tending in a greater or less degree to the conclusion indicated by those already enumerated. And on the whole we are brought to the conclusion, notwithstanding the averments in the answers to the contrary, that the defendants must be believed to have conspired and confederated together, with a deliberate design to prevent the plaintiffs from recovering their debt, by placing the property in question in a situation such as would allow Jacob to use it as he might think proper, and, at the same time, to hinder the plaintiffs from availing themselves of it in order to the satisfaction of their demand.

Many plausible objections have been made, and ingeniously urged by the counsel for the defendants, to the right of the plaintiffs to recover. One is, that the property conveyed has always been in Jacob's possession; and that Samuel never had the actual possession of it, or derived any benefit from it; so that it might always have been attached as Jacob's. This may be true, and probably is. But if Samuel had combined with Jacob, as it seems to us was evidently the case, colorably to have the right of property appear to be in Samuel, with a view to aid Jacob, in deterring his creditors from attaching it, a fraud clearly within the statutes of Elizabeth, was perpetrated, of which the plaintiffs have a right, in this mode of proceeding, to avail themselves.

Again; that the part of the property conveyed to Samuel was real estate, and that the plaintiffs might have levied upon it, until which no lien was created in their favor.

To this two answers may be given. One is, that the title to the real estate, designated in the bill and answers, was never otherwise than equitably in Jacob; and that was transferred to Samuel by procurement of Jacob, so that it never could have been levied upon as a legal estate in Jacob; nor after the plaintiffs obtained their judgment as an equitable estate, under the statutes of this State. All the plaintiffs, in such case, could do, was to sue out their execution; and, upon its being returned *nulla bona*, on the institution of this suit, an equitable lien in preference to other creditors, would be created in favor of the plaintiffs on any fund which might

be found to arise from the fraudulent purchase, by Samuel, without adequate consideration paid therefor, of any interest his son had in any real or other estate. *Gordon* v. *Lowell & al.* 21 Maine, 257. But, leaving the real estate out of the question, there was personal estate, which we must deem to have been colorably transferred, more than sufficient, as the same was estimated, to have paid the debt to the plaintiffs; so that it may be quite unimportant to consider of the real estate, further than the transactions in connection with it, may furnish elucidation in reference to the character of the whole negotiation. And it may be noted, that the two parcels of real estate, which appear to have been transferred at the same time with the chattels, as the one was sold by Samuel, and as the other was estimated in the deed of conveyance, would not have fallen much, if any, short of paying the debt supposed to be due to Samuel.

Again; it is urged that, to entitle the plaintiffs to prevail, the fraud should exist at the time of the filing of the bill; that it does not appear but what, at that time, the property pretended to be conveyed had gone to satisfy the other creditors of Jacob; and so that the alleged fraud may then have been purged. But, if such were the case, it was matter properly in defence, which should have been averred in the answers, and substantiated by proof; until which the presumption should be that it remained, as at the time of the alleged nefarious transfer, and operated, therefore, as a continuing fraud. But, whether so or not, it is far from being clear, that the cause of complaint on the part of the plaintiffs, could have been so annulled; and, whether it could be admitted even in mitigation of the damages to be recovered, it is unnecessary to inquire.

It will therefore be equitable and just, and according to the course of equity proceedings, and within the jurisdiction of this court, that a decree should be entered against the defendants, to pay to the plaintiffs the amount of their debt, with interest thereon from the time of the rendition of judgment therefor, with costs of this suit.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF YORK,

1850.

COVELL *& als. versus* DOLLOFF.

By R. S. ch. 125, the mortgager of personal property is allowed sixty days, in which to redeem the same, after condition broken.

Although the mortgagee may have taken possession for condition broken, the law does not appropriate the property to the payment of the debt, until the end of the sixty days.

The mortgagee in possession, after condition broken, and while the right of redemption exists, is bound only to ordinary diligence for the preservation of the property.

If the property be destroyed, without fault on his part, while thus holding it for the security of his debt, he is not bound to account for its value.

ASSUMPSIT. In security for the debt due to the plaintiffs, one Jesse Dolloff, a brother of the defendant, had mortgaged to them an undivided part of a store, standing upon land of a third person.

The debt was payable on demand. In the mortgage, no time was limited for the payment. This action was commenced on the 5th of December, 1848, and the plaintiffs took possession of the store, under the mortgage, on the 19th of the same month. And on the 21st, the store was consumed by fire, without the fault of the plaintiffs or of the defendant.

The defendant claims to have the value of the store deducted from the amount, due from him upon the mortgage-debt; and that claim is resisted by the plaintiffs.

Upon this point, the case was submitted for the decision of the court.

Eastman, for the plaintiffs.

Wilkinson and *Tapley*, for the defendant.

1. The mortgage, having been made to the plaintiffs by one person, to secure a debt due to them from another, they are to be considered as stipulating to accept the property toward the payment, subject to the right of redemption.

2. The suit brought for the recovery of the debt, on the 5th of December, 1848, was a very significant demand, and the failure at that time to pay the debt, was a breach of the condition of the mortgage.

3. Upon that breach of the condition, the property was, at law, forfeited to the plaintiffs. The right of redemption is but a personal privilege, secured to the mortgager. It is optional with him whether to redeem or not. He is not compellable to do it. If the debt be paid before a breach, the property reverts by operation of law. But if not paid before a breach, the property cannot be revested in the mortgager, except by a re-conveyance or by judgment of court upon an appropriate process. In this case, he elected not to redeem. The property therefore passed to the plaintiffs, and it must be appropriated toward payment of the mortgage-debt. *Green* v. *Dingley*, 24 Maine, 138; *Flanders* v. *Barstow*, 18 Maine, 357; 4 Kent's Com. 138, 6th edition.

4. The destruction of the property by fire cannot relieve the plaintiffs from their accountability. It takes away their power to reconvey, and precludes the mortgager from any recovery of it by process of law. Reading of Judge Trowbridge on mortgages; 8 Mass. 557.

5. The right of redemption expired before the plaintiff's action was entered in court.

Howard, J. — The plaintiffs, as creditors of the defendant,

took a mortgage of personal property, being "parts of a building," from Jesse Dolloff, to secure the payment of the debt. The mortgage was to be void upon the payment of the debt by the defendant, or by the mortgager.

The indebtment of the defendant continuing, this suit was commenced on December 5, 1848; on the 19th of the same month, the plaintiffs took possession of the property mortgaged, for condition broken, and on the 21st, two days afterward, "the building was totally destroyed by a fire which originated in, and was communicated from, another building in the vicinity, and without any fault on the part of the plaintiffs, or of the defendant."

The question for consideration, by the agreed statement is, whether the plaintiffs are legally responsible for the value of the property thus destroyed, as a payment, or in set-off, *pro tanto*.

By the Revised Statutes, chap. 125, § 30, the mortgager of personal property has sixty days in which he can redeem the property, after condition broken. By the mortgage the plaintiffs acquired a conditional title, only, to the property; and by taking possession, for condition broken, their title was not perfected; for the debt remained due, and the mortgager could redeem within the time prescribed by the statute. So long as the right of redemption existed, the title to the property could not become absolute in the plaintiffs, nor could they appropriate it in payment of their debt; and, until their title was perfected, the law would not thus appropriate the property. *Portland Bank* v. *Fox*, 19 Maine, 99; *West* v. *Chamberlain*, 8 Pick. 336; *Greene* v. *Dingley*, 24 Maine, 131.

The mortgagee of personal property, in possession after condition broken, and while the right of redemption exists, is responsible for ordinary diligence in the management and preservation of the property, and is liable for ordinary neglect. In this respect his duties and responsibilities are similar to those of a pawnee. If the property be destroyed without fault on his part, he cannot, while thus holding it as security for his debt, be held to account for it. But for the net proceeds of

the income or profits, accruing to him before the destruction, he would be accountable. 1 Pothier on Obligations, 142, P. 1, c. 2, art. 1; Story on Bailments, § 286, 287, 332, 351; 2 Kent's Com. 578; 4 Kent's Com. 138, 139.

The cases of *Flanders* v. *Barstow*, 18 Maine, 357, and *Bank* v. *Fox*, 19 Maine, 99, were decided before August 1, 1841, when the statute giving the mortgager of personal property a right of redemption, took effect.

Upon the principles stated, the defendant is not entitled to the set-off claimed, and according to the agreement, he is to be defaulted, and judgment must be entered for the plaintiffs, for the amount of their demand, with interest from the date of the writ.

DEAN *versus* HOOPER.

By the statute of 1821, ch. 51, the Court of Probate was empowered, through the agency of commissioners, to divide the estate of an intestate among his heirs at law.

If the estate were held as a tenancy in common with any other person, the commissioners were to be authorized to make partition between the heirs and such co-tenant.

To the validity of such a partition, as against the co-tenant, it was requisite that he should have had notice of the proceedings, *prior* to the decree of partition, in order that he might be heard for the protection of his rights.

The omission to give such notice, was not cured by the attendance of the co-tenant, before the commissioners, at the making of the partition.

WRIT OF ENTRY. Plea, that the tenant was seized in fee of an undivided half of a small lot numbered nine, of which the demanded premises are a part.

Lot numbered nine was owned in common by Obed Hooper and the tenant. On the death of Obed Hooper, commissioners were appointed by the Court of Probate to make division of his land among his heirs at law; with direction, in their warrant, that if the estate or any part thereof lay in common and undivided with that of any other person or per-

sons, they should sever and divide the same from that of such co-tenants, giving them due notice.

According to their warrant, the commissioners made partition of lot numbered nine between the tenant and the heirs of Obed Hooper, having first notified the tenant to be present, and he attended. After making such partition, they assigned the demanded premises, being a part of No. nine, by metes and bounds, to Obed Hooper, the second, one of the sons of said Obed Hooper. The demanded premises are a part, by metes and bounds, of that part. The title, thus acquired by said Obed Hooper, the second, is now in the demandant.

The case was submitted to the court, with power to draw inferences of fact.

Eastman, for the demandant, contended that the partition, made by the commissioners, between the tenant and the heirs of Obed Hooper, was justified and valid in law.

The commissioners to make partition of Obed Hooper's estate, had authority to sever his interest from that of Daniel S. Hooper. See Provincial Law of 1760; appendix to Laws of Mass. vol. 2, p. 970; Laws of Mass. 1783, c. 36, § 11, vol. 1, p. 129; Laws of Maine, 1821, c. 51, § 32—3, p. 208.

J. Shepley, for the tenant.

The pretended partition, produced by the demandant at the trial, is illegal and void; and therefore the deed from Obed Hooper, the younger, under which the plaintiff claims, conveys nothing, as it respects the tenant.

1. There is no legal partition, because no proceedings whatever were had before the Probate Court, relative to the partition of the estate held in common by the heirs of Obed Hooper and Daniel S. Hooper. Stat. 1821, c. 51, § 32, 33; Rev. Stat. on same subject, c. 108, § 11, 12, 15, 16; State Const. Art. 1, § 20.

2. But if the commissioners, under such an authority only, have the power to decide what land is held by the heirs in common with others; and what proportion of it the heirs own; still they have not so discharged their duty, as to

make a legal partition. It was requisite that such other co-tenants should have had notice of the proceedings prior to the decree of partition, in order that they might show what was their proportion of the land, and make objection to the persons proposed for commissioners to make the division. Acquiescence in an illegal division does not cure the difficulty. *Cogswell* v. *Reed*, 3 Fairf. 198.

SHEPLEY, C. J. — By a partition of the estate of Obed Emery, deceased, accepted in the Court of Probate, on April 22, 1806, a lot of land numbered nine was assigned to Sarah Hooper, who, on April 11, 1816, conveyed the same to Obed Hooper and Daniel S. Hooper.

It is admitted, that the premises demanded were included in that lot.

The demandant alleges, that a partition of that lot was legally made, when a partition of the estate of Obed Hooper, deceased, was made among his heirs at law, and accepted in the Probate Court on June 11, 1832.

The commissioners appointed to make partition of that estate were by their warrant authorized to divide any part of the estate of Obed Hooper, from that of any other person, with which it might lie in common, and they made return of a partition of lot numbered nine, and the premises demanded were assigned to one of the heirs of Obed Hooper.

The tenant in his brief statement alleges, that he is seized in fee of one undivided half of that lot.

It appears, that the tenant had received notice of the proceedings of the commissioners, and that he had been present, when partition of that lot was made by them. It does not appear, that he received any notice before the warrant was issued, that he might appear and make objection before the Probate Court to the proposed partition. On the contrary, it may be inferred, that he had no such notice, for the record states, that the several persons interested in the estate of the deceased had been notified, without stating that notice had been given to any other person.

The question, thus presented is, whether partition of an estate held in common between the heirs of one deceased and another person, made in a Probate Court having jurisdiction, can be legal and effectual without any notice given of the proposed proceedings, before the warrant issues.

The power to make such a partition appears to have been first conferred upon Courts of Probate, by the Provincial Statute of 1760, which provided "that before the order for such division issue, it be made appear to the respective Judges of Probate, that the several persons interested in such estate, if living within the Province, or the attorneys of such as are absent and have attorneys residing within this Province, have been duly notified of such petition, and have had opportunity to make their exceptions to the same." The same provision, without any important change of language, was re-enacted in the eleventh section of the act of March 9, 1784. On revision of the statutes, with some change of language, the provision was retained in the act of March 20, 1821, c. 51, § 33. After the word partition, which had been used in the act of 1784, instead of the word petition found in the provincial act, the following words were introduced into the act of 1821, "as the said Judge shall have ordered." These words would indicate that the notice required to be given, was that of a past transaction; but this would be entirely inconsistent with the provision, that "it shall be made to appear to the said Judge of Probate that the several persons interested in such estate" "have had due notice of such partition" "before an order for such division shall issue" "and have had opportunity to make their objections to the same." The same section required, that guardians for minors, and some suitable person for others interested in the common estate and absent from the State, should be appointed by the Judge of Probate to act for them in the making of such partition, and those thus appointed to act for absent persons, were to be notified, that they might appear and make objections in the Probate Court, before an order for the division should issue. The section cannot receive such a construction, as would dispense with notice to all interested in

the common estate, that they might have opportunity to appear in the Probate Court, and to be heard there before an order for partition was issued.

A construction requiring such previous notice, receives support from the re-enactment of the same provisions in the Rev. Statutes of 1841, chap. 108, § 11 to 16, inclusive. In the latter section is declared, that "the court in such case shall order notice of the intended partition or assignment of dower to be given to the co-tenant," and provision is made, what information such notice shall contain.

It is not perceived how a partition conclusive upon the rights of a co-tenant, could be legally made without affording to him an opportunity to appear and to exhibit his title to any proportion of the estate held in common, before a partition of it was made.

The partition presented in this case, having been made by virtue of the statute of 1821, can only be conclusive according to its provisions; and that statute does not make the proceedings conclusive or effectual, unless made after notice had been given, before the order for partition was issued.

If such must be the construction of the statute, it is insisted that the tenant has submitted to the partition, and has occupied the portion assigned to him, for a long time, without asserting any right as a tenant in common. So far as it respects the small tract demanded, there does not appear to have been a relinquishment of the entire possession. It was decided in the case of *Cogswell* v. *Reed*, 3 Fairf. 198, that a co-tenant would not be estopped to assert the tenancy in common by the occupation for a number of years of the share assigned to him by proceedings in partition, which were of no validity. If the proceedings in the Probate Court must be regarded as invalid, a tenant in common could be deprived of his rights only by proof of disseizin, continued for such length of time, as would preclude him from asserting them.

Demandant nonsuit.

HAYES, *Administrator, versus* FORSKOLL.

In a submission, by parties who had been co-partners, of all demands of every description, whether arising out of their business as partners or out of any other transactions, it does not belong to the referees to adjudicate upon the property belonging to the firm, or the debts due from the firm.

The interest, which the members of the company have in such matters, is not a demand by one of them, against the other.

Upon the party, who alleges that some of the matters in controversy, have not been decided, rests the burden of proving that such matters were made known to the referees, and that they were not decided.

ERROR to the District Court.

The original parties had been co-partners in business. The company affairs had not been fully settled. Some disagreement having arisen, they entered into a submission, under the statute, referring "all demands of every name and description, whether arising out of their business as partners, since the year 1816, or out of any other transactions between them."

The referees made an award in favor of Forskoll, stating, as a part of their award, that they had not taken into consideration the stock, tools and other property belonging to the late firm, nor the debts due to or from the firm, but had left the company property and debts to be adjusted and divided between the parties at a future time.

The award was accepted and judgment rendered thereon.

This process is brought to reverse that judgment for error in law, upon the following assignment of causes.

1. In the award, existing demands and subjects of controversy, which were submitted by the parties, and made known to the referees at the hearing, are expressly omitted and left undecided.

2. The referees did not determine upon all matters and demands submitted, but expressly left some of the matters and demands, to be adjusted between the parties thereafter.

Hayes, for plaintiff in error.

An award must accord to the submission, and comprehend every thing submitted. The phrase, "all demands," is the

statute formula for all controversies. It extends to every matter which either party has a right to exact from the other. *Knight* v. *Burton*, 6 Mod. 5th ed. 232 and 340; *Byers* v. *VanDeusen*, 5 Wend. 268; 15 Johns. 199.

Submissions are to be expounded according to the intent of the parties. *Gordon* v. *Tucker*, 6 Greenl. 247.

The language is sufficiently broad to require an adjustment and division of the partnership property and liabilities. 7 Mass. 416; *Green* v. *Waring*, 2 Wm. Blackstone, 475; 5 Wend. 268. It expressly embraced all matters arising out of their partnership business. This indicates the intent of the parties, that the partnership affairs should all be settled by the referees. The interest of parties in partnership property may often be a subject of controversy between them. Collyer on Partnership, 1834, b. 2, § 2, p. 82.

The very exception, stated in the award, shows that the excepted matters were in dispute and were known by the referees to be so. The excepted matters were so connected with those adjudicated upon, that great injustice was done by the omission to include them.

No one partner has any right or share in partnership property, except in the *residuum*, after all debts and liabilities of the firm have been discharged. Each partner has a right to have partnership property, including balances due to the firm from any of the members, applied to the due discharge and payment of all such debts and liabilities, before any one of the partners can have any right or title thereto. *Douglass* v. *Winslow*, 20 Maine, 29; Story on Partnership, 1841, p. 135, 136, and note.

One partner cannot maintain an action at law against his copartner, for any claim or demand on account of the partnership, except to recover a final balance of a partnership account; and when the judgment will be an entire termination of the partnership transactions, so that no further cause of action can grow out of them. Collyer on Partnership, Am. Ed. 1834, b. 2, chap. 3, § 2, p. 143; Story on Partnership, 1841, p.

319—325; *Fanning* v. *Chadwick*, 3 Pick. 420; *Haskell* v. *Adams*, 7 Pick. 59; *Williams* v. *Henshaw*, 11 Pick. 79.

Partners can enforce demands against co-partners, originating on partnership account, only by application to a court of equity, upon a bill filed for an account. Collyer on Partnership, 1834, b. 2, chap. 3, § 2, p. 143, *et seq.*; Story on Partnership, p. 326; Revised Statutes, chap. 96, § 10, p. 396.

In taking partnership accounts, in a court of equity, it is mainly to be considered what was the value of the joint property, and what the amount of the joint debts at the time of the dissolution, &c. Collyer on Partnership, 1834, b. 2, chap. 3, § 4, p. 171, 172.

In this case, the referees did not even consider what courts of equity say are "mainly to be considered," in taking partnership accounts, to wit: — partnership property and debts. *Bean* v. *Farnam & al.* 6 Pick. 269.

If it be objected, that this was a submission under the statute, and that the referees had no authority to adjust and divide partnership property and debts, but only to award the recovery of money, I reply, —

1st. That the referees were bound to follow the submission, and they had no right, in order to make a valid statute award, on which a judgment could be rendered, to select and separate from the matters submitted, such as would authorize, if considered alone, an award for the payment of money, and to omit other matters intimately connected with those decided. Notwithstanding this was in form a statute submission, the referees should have awarded upon all the matters submitted, and although, by a possibility, their award might not have been a good statute award, upon which a valid judgment could be rendered and an execution issued, it might still have been binding upon the parties.

2ndly. That the submission in this case, although in form under the statute, did authorize the division and adjustment, by the referees, of the partnership property and debts.

It has been held that, where all matters in difference between partners are referred to arbitrators, they may even

award a dissolution of the partnership. *Green* v. *Waring*, 1 Wm. Blackstone, 475.

Eastman, for the defendant in error.

SHEPLEY, C. J. — The judgment presented by this writ of error was rendered upon a report of referees acting under a submission in the form prescribed by statute, c. 138, which states, that the parties "have agreed to submit all demands of every name and description, whether arising out of their business as partners under the firm of Buckminster & Forskoll, since June, 1816, or out of any other transactions between them." The report states, that the referees "do award and determine in relation to all the matters submitted to us as aforesaid;" and that "we have not taken into consideration the stock, tools and other property, belonging to the late firm of Buckminster & Forskoll, nor the debts due from other persons to the said late firm, nor the debts due from the said late firm, to other persons; but we leave the said partnership stock, tools, property and outstanding demands and debts, to be adjusted and divided between them hereafter."

One of the partners might have collected debts due to the partnership and have appropriated the money to his own use, without making any charge of it against himself on the books of the partnership. Or he might have disposed of the property, or have used the funds of the partnership for his private purposes, without making any such charge. Or he might have created debts against the partnership for like purposes. In these or in other modes one of the partners might have had causes of complaint against the other partner, "arising out of their business as partners," and these would have been embraced by the submission. The referees would not have been authorized to make a division or other disposition of the property or of the debts due to the partnership; or to have determined in what manner the debts due from it should be paid. Under a submission of "all their unsettled accounts," it has been decided, that referees would not be authorized to make an award upon such matters. *Shearer* v. *Handy*, 22

Pick. 417. The terms of the submission in the present case are more comprehensive, but are not suited to present a case differing in principle.

The one, who alleges, that all matters in controversy have not been decided, must make it appear, that such matters were made known to the referees, and that they have not been decided. The presumption of law is, that there were no demands, claims or controversies arising out of their partnership business, which have not been decided. *Karthaus* v. *Ferrer*, 1 Peters, 222. It does not appear, that all matters submitted were not determined, unless it can be ascertained from the statement of what the referees have not considered or determined; and that does not show, that any matters in controversy, existing and embraced in the submission, were not determined.

The argument showing, that controversies might be expected to have arisen, fails to show, that any had then arisen. The adjustment of the concerns of the partnership, the disposal of its property, the payment and collection of its debts, might or might not occasion them. This, however, would furnish no proof, that they had arisen, and had been made known to the referees, and that they remained undecided. Nor does it appear, that any matters not submitted, were embraced in the award.

The matters not considered, not being embraced by the submission, and there not appearing to have been any existing controversies made known to the referees, and not determined, the record does not exhibit any error of judgment.

Judgment affirmed.

Pease *versus* Whitten.

A judgment rendered upon a report of referees, who have adjudicated matters legally submitted to their determination, is equally valid as when founded upon a verdict.

The merits of a judgment can never be impeached in a counter action by the judgment debtor, either directly or collaterally.

Where it was submitted to referees to determine the validity of a title to real estate which the defendant was to make to the plaintiff, and that, if they should adjudge the title to be perfect, they should award a just compensation therefor, and theyadjudged the title good, and awarded the compensation for it, no action lies by the grantee against the grantor to recover for money afterwards paid by him to extinguish an outstanding incumbrance, not known to the referees.

Assumpsit for money paid and for money had.

The case came from the District Court upon a report of several legal questions.

The argument, which was by

Jameson, for the plaintiff, and by

McIntyre, for the defendant, is omitted, as it was devoted principally to points which the court did not find it necessary to decide.

Tenney, J. — The parties to this suit entered into a written agreement, in Sept. 1846, to refer to certain persons an action pending between them in the Supreme Judicial Court in this county, and all claims and demands between them in law or in equity; and it was agreed that the defendant should perfect the title to the plaintiff in the late homestead and upper farms of the defendant in Parsonsfield, a part of which he had conveyed to the plaintiff, so that the plaintiff should have a good title to the whole of said farms, free from attachments and other incumbrances, to the satisfaction of the referees. And they were to allow to the defendant a suitable consideration therefor, in their award upon that and other matters in the submission specified; and to adjudicate upon all conveyances between the parties, and any mortgages of the defendant, purchased by and assigned to the plaintiff, and the consid-

eration expressed therein and paid for the same, so as to do substantial justice and equity.

The parties were heard by the referees, who made their report, stating therein, "and after the said Whitten had perfected the title of said Pease, as provided in said rule, we have agreed to report and do report that the said Whitten shall recover of said Pease the sum of thirteen hundred dollars and eighty-four cents, debt or damage, and costs of court and of reference, &c., and this is in full of all matters and things referred to us by the annexed rule." This report was accepted and judgment entered thereon. Subsequently, on March 25, 1848, the plaintiff paid certain taxes assessed against the defendant in the town of Parsonsfield, in the years 1842 and 1843, upon the land where he lived, under the impression that said taxes were an incumbrance; which taxes were not known to the referees at the time of the hearing before them, and consequently, not considered in making up the award.

The first question submitted to us, is whether this action, which is assumpsit for money had and received, and for money paid, laid out and expended, can be sustained under the agreement between the parties, to refer the suit pending in this court, in September, 1846.

The merits of a judgment can never be impeached or questioned in a counter action, by the judgment debtor, either directly or collaterally. *Whitcomb* v. *Williams*, 4 Pick. 228; *Weeks* v. *Thomas*, 21 Maine, 465.

A judgment upon a report of referees, who adjudicated matters legally submitted to their determination, is equally valid as when founded upon a verdict of a jury.

By the contract of submission, in the case at bar, the defendant was bound to make a perfect title to the plaintiff in the estate referred to therein. The referees were empowered by the parties in that contract to determine, whether that title was made perfect. After this should be shown to their satisfaction, they were authorized, by the submission, to consider and adjudicate upon other matters between the parties. To

entitle the defendant to an award in his favor, for claims preferred by him against the plaintiff within the scope of their agreement, it was required that the title of the plaintiff should be perfect, in the judgment of the referees. Upon this point, the defendant would be expected to adduce the evidence of title to the referees. At the same time, the plaintiff had an opportunity of showing the existence of attachments and other incumbrances; and generally any defect of title in himself. Whether the title of the plaintiff was defective or otherwise, was an issue distinctly and fully raised by the submission. It was before that tribunal alone, mutually chosen by the parties, that the question of title was to be submitted. In pursuance of the agreement, that question was heard by the referees, and their judgment was, that the defendant had perfected that title in the plaintiff as provided in the rule; they made report accordingly and judgment was rendered thereon. In the judgment, the finding the title perfect in the plaintiff was an essential element. It was the basis of the award of a sum in damages in favor of the defendant. If evidence had been offered before the referees, that the taxes against the defendant were outstanding and unpaid, it was for them to determine whether or not, under all the facts they constituted an incumbrance; if they should consider that it was an incumbrance, the defendant might have removed it by discharging the taxes in season for the referees to proceed further under the submission. How far the discharge of them would affect the damages to be awarded to the defendant, cannot now be known, and it is entirely unimportant that the inquiry should now be made.

The present action can be maintained only upon the ground, that the judgment of the referees was erroneous on the issue of title; not upon the facts as they were exhibited in evidence before them, but as actually existing. If the title was really perfect, as the referees found, the plaintiff does not contend that he has a valid claim against the defendant. If the unpaid taxes were in fact an incumbrance upon the land, the case shows, that this was not made known to the referees. It

might have been material evidence for the plaintiff upon that point, and he could have presented it. It was omitted, and the referees decided the point upon such proof as was offered. The judgment was rendered upon a report when all matters submitted were heard; and determined by the evidence which the parties chose to introduce. The most that can be said for the plaintiff is, that in the report, which was the foundation of the judgment, a sum of money was awarded to the defendant, larger than it would have been, if the plaintiff had presented the same evidence, which he now relies upon in support of the present action. The judgment is conclusive as long as it remains. It cannot be affected in any manner, by the evidence relied upon by the plaintiff. To give it effect in the mode attempted, would be a substantial impeachment of this judgment, although the evidence is offered in support of another action.

The question which we have examined has been considered upon the hypothesis, that the taxes paid by the plaintiff were legally assessed and constituted an incumbrance upon the land; and that this incumbrance was not made known to the referees at any time before they made their report. Whether the taxes were an incumbrance or not, no opinion is given.

Judgment for the defendant.

MORRELL *versus* COOK.

By R. S. ch. 104, a constable is authorized to serve "writs and precepts," in personal actions, wherein the sum demanded does not exceed one hundred dollars.

That authority includes the service of executions recovered in such actions.

In the service of such a writ, he may attach, and in the service of the execution he may levy real estate.

The District Court has authority to correct mistakes in its records and processes.

In a personal action, the writ was directed to the constable, who attached real estate thereon. The execution, which issued thereon, from the District Court, was not so directed, but the constable served it by levying the real

estate, within thirty days from the judgment; *Held*, that the District Court had authority to allow the omission to be supplied, by inserting in the execution a direction to the constable; although the levy had been previously recorded, and, *as it seems*, although the land had been conveyed by the debtor to a third person after the attachment and before the levy.

TRESPASS QUARE CLAUSUM. The controversy was confined to the title of the land. The plaintiff, in 1845, sued a personal action against one Whitten, wherein the damage demanded did not exceed $100. The writ was directed to, and served by a constable, who thereon attached the land. In October, 1847, the plaintiff recovered judgment in that action, in the District Court. The amount was less than $100. The execution was directed only to the sheriff or his deputy; but it was placed in the hands of the constable, by whom a levy of the land was made, on the 20th of Nov. 1847, being within thirty days from the recovery of the judgment. The levy was recorded on the 25th of January, 1848. On the 18th of February, 1848, the District Court, on motion of the plaintiff, permitted the execution to be amended by inserting therein a direction to the constable, which was accordingly done by the clerk. A nonsuit was entered by consent, to be taken off, if said levy could lawfully be made by a constable, and if said amendment was legal.

Appleton and *Blazo*, for plaintiff.

McIntire, for defendant.

The levy was ineffectual.

1. Constables have no authority to levy lands. R. S. c. 104, § 34 and 35; 5 Mass. 260. Not being authorized to serve writs in real actions or in actions where title to real estate may be in controversy, it cannot be consistent with the intention of the statute that they should make title by levy. This has been the practical view of the profession for fifty years. This is believed to be the first attempt to invade that construction.

2. The execution, when levied, was not directed to the constable. This defect must be fatal, unless cured by the amendment. There was no error in the execution, calling for the interposition of the court. It might have been duly exe-

cuted by the officers to whom it was directed. The counsel then proceeded to argue that such amendments are never allowable, where they would injuriously affect the rights of third persons, and spoke of a sale to the defendant made before the levy. But the "case" makes no mention of such a sale. That branch of the argument is therefore omitted.

HOWARD, J. — A constable is authorized "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 shall not exceed one hundred dollars." R. S. chap. 104, § 34. It is evident that the term "precept," as used in this, and other sections of the same chapter, was designed to include executions. By section 19, sheriffs, and their deputies, are required to serve and execute, within their counties, "all writs and precepts;" and the same terms are used in conferring and regulating the authority of those officers, and of coroners, in sections 20, 21, 22, 60, 61. In section 35, the word "execution" is employed, showing that the authority conferred by section 34, was manifestly intended to embrace executions issued in personal actions, when the amount demanded in the execution did not exceed $100. So, in section 27, as amended. Act of amendment, 1841, chap. 1, sect. 14.

Being authorized to serve such executions, a constable must obey the legal mandate of the precepts in making the services. His power or authority, in this respect, is not diminished or varied, by being restricted to precepts in personal actions. The levy on real estate does not constitute a service of the process in a real action; nor does the form of proceeding change the character of the process, although it may affect the title to real estate. The duty and authority of constables in levying executions, within their jurisdiction, upon real estate, are coextensive with those of sheriffs, and their deputies, in executing such precepts, in like manner. As the Legislature has made no distinction in this respect, there is none which we can make.

The original writ, on which the attachment of the real es-

tate, taken by the levy, was made, was directed to, and served by a constable of Parsonsfield ; but the execution, when levied by a constable of that town, was not directed to that officer. About three months afterward, the District Court, on application, ordered an amendment to be made in the execution, by inserting a direction to any constable of Parsonsfield, which was accordingly done by its clerk. It is contended that the District Court had no power to amend its record, so as to affect the rights acquired by the defendant, a stranger to that record.

That court had authority to correct mistakes in its records, and errors in its processes. It could readily determine whether there was an omission in the direction of the execution, from its own records and files, and could supply the defect, when discovered. But the *legal effect* of the amendment is a proper subject for consideration in this case. The constable had official power to serve the execution, if it had been directed to him, and he made the levy as the case assumes, in conformity with the forms and requirements of law. The omission to direct the process to him, as it appears, was an error of the court, or of its clerk, and was, in fact, a judicial error. Such errors are never suffered to operate to the prejudice of a party, when they can, properly, be corrected by an amendment. The defendant purchased the land subject to the attachment, and the rights that might flow from it. He might have known from the record, and the proceedings, that the title acquired by the plaintiff, under the levy, would be complete, when the omission in the direction of the execution should be supplied, and that, as a judicial error, it would be corrected by the court, in furtherance of justice. Under such circumstances, he acquired no rights by his purchase, which were injuriously affected by correcting the direction of the execution ; and the amendment was, in our opinion, competent and sufficient to sustain the levy, upon the facts presented. R. S. chap. 115, sect. 9, 10 ; *Sawyer* v. *Baker*, 3 Greenl. 29 ; *Colby* v. *Moody*, 19 Maine, 111 ; *Rollins* v. *Rich*, 27 Maine, 557 ; *Hearsay* v. *Bradbury*, 9 Mass. 95 ; *Holmes* v. *Williams*, 3 Caines, 98 ; *Phelps* v. *Ball*, 1 Johns. 31 ; *McIntyre*

v. *Rowan*, 3 Johns. 144; *Cramer* v. *VanAlstyne*, 9 Johns. 386, n. a; *Laroche* v. *Wasbrough*, 2 Term Rep. 737; *Newnham* v. *Law*, 5 Term Rep. 577; *Atkinson* v. *Newton*, 2 Bos. and Pul. 336.

According to the agreement, the nonsuit is to be taken off, and the cause is to stand for trial.

INHABITANTS OF SANFORD *versus* INHABITANTS OF LEBANON.

In an action by one town against another for pauper supplies, furnished to a married woman, it is no defence that the notice, given to the overseers of the defendant town, alleged merely that the *wife* of A. B., had become chargeable, without stating that *A. B.* had become chargeable.

A notice, valid as to one pauper, is not rendered invalid by being united with a defective notice respecting other paupers.

When minor children are separated from their father and maintained by the town of their legal settlement, by reason of his inability to support them, such separation is not to be considered as an abandonment by him of his children, or an abandonment by them of their father. Such support of his children is to be considered as supplies indirectly furnished to him within the import of the sixth clause of the first section of Rev. Stat. chap. 32.

ASSUMPSIT, for pauper supplies, furnished to the wife and children of Ivory Hersom. The settlement of Hersom had been in Lebanon. While his settlement was there, he became, through poverty, unable to support his family, and some of his children were taken from his custody by the overseers of the poor, and maintained at the expense of that town. While the children were so supported, he removed to Sanford, soon after September, 1835, and resided there with his wife and some of his children, until May, 1845; but the other children still remained in Lebanon, supported there by that town, during all or very nearly all the time of his residence in Sanford.

The notice, given by the plaintiffs to the defendants, stated that the *wife and children of Ivory Hersom*, had become chargeable as paupers in Sanford, and that their settlement was in Lebanon. The answer denied such settlement.

The verdict was for the plaintiffs, for the amount furnished to the wife.

N. D. Appleton and *Eastman*, for defendants.

The notice to the overseers of the defendant town was insufficient, inasmuch as it did not allege, that the husband had become chargeable. If such a notice is sufficient, one settlement may be established for the wife, and another for the husband; and as each may be removed to the place of his or her settlement, they may be separated for life, merely because of their poverty.

The defendants also moved for a new trial, because the settlement of Ivory Hersom, and consequently that of his wife, was established in Sanford, by five years residence there.

This motion was resisted by the plaintiffs, upon the ground that during all the time of his residence in Sanford, he was, though indirectly, receiving supplies as a pauper from the town of Lebanon, which supplies consisted in the support furnished there to some of his children.

The defendants' counsel argued, that, as the children who were maintained by Lebanon, were separated from their father's family, and the charge of them had been taken from him by the lawful acts of the overseers, they are to be considered emancipated; and, therefore, the supplies furnished to them were not, (even indirectly,) received by the father. *Green* v. *Buckfield*, 3 Greenl. 136; *Dixmont* v. *Biddeford*, 3 Greenl. 205; *Poland* v. *Wilton*, 15 Maine, 365; *Raymond* v. *Harrison*, 2 Fairf. 190.

I. S. Kimball, for plaintiffs.

Shepley, C. J. — The case is presented by a report signed by the Judge, who presided during the trial, containing the testimony introduced, a request for instructions, which were refused, and certain instructions, which were given. No exceptions appear to have been taken to the instructions given, or to the refusal to instruct as requested. Nor is any question of law reserved by the report, for the decision of the full court.

It is stated, and admitted by the written arguments presented, that "the defendants have moved for a new trial, because the verdict of the jury was against the evidence, the weight of evidence, and the law applicable to the facts in the case." A copy of the motion is not presented.

Questions of law arising during a trial, may in this State, by the provisions of our statute, be reserved by a bill of exceptions in a summary mode, as well as by a report of the presiding Judge. Ch. 96, § 19. When the latter mode is adopted, it must appear by the report, that certain questions of law were expressly reserved, to be decided by the full court. A mere statement, that certain instructions were given or refused, does not constitute a reservation of them for future decision. No rule of practice or correct administration of law, can permit questions of law to be presented for decision, which, from examination of the testimony reported, can be conceived to have arisen in the case. This would deprive the opposite party of all opportunity to obviate them, by proof or explanation, during the trial, and it would occupy the court in the decision of imaginary questions.

A motion to have a verdict set aside, because it is against "the law applicable to the facts in the case," does not present any question of law, which the court can properly entertain and decide. It can only present a question, whether a verdict has been found against the law appearing, or presumed to have been correctly stated.

As there may be doubts, whether the present case has not been imperfectly presented on account of the decease of an eminent counsellor, an opinion upon the questions of law presented by the arguments will not be withheld.

The notice, that "the wife and children of Ivory Hersom," had become chargeable as paupers, it is insisted, was insufficient to entitle the plaintiffs to recover for expenses incurred, for the relief of the wife. To allow this, it is said, would authorize the removal of the wife, and thus separate husband and wife. Such a result would not necessarily follow. If they were found residing together, and the wife to have been

properly supplied as a pauper, the husband would thereby become a pauper, and liable to be removed with his wife. If supplies were furnished to her under such circumstances, that the husband would not thereby become a pauper, the separation must have been already made. The effect of the notice respecting the wife, will not be prevented by its being united with a defective notice respecting other persons.

The request for instructions, that the notice would be "bad as to all," if the jury could not distinguish between "supplies furnished the wife, and those, which went for the benefit of the children and the father," were properly refused. The notice could not be made good or otherwise by the action of the jury. Its sufficiency was a question of law, to be decided by the court.

If the jury were unable to ascertain from the testimony, that supplies had been furnished and used for the relief of the wife, the plaintiffs would not have been entitled to recover any thing, not for want of notice but for want of proof.

The defendants could not have been aggrieved by the instructions, which were given. A correct rule for their guidance respecting the amount was presented to them.

The motion is to be considered.

Ivory Hersom appears to have had a legal settlement in Lebanon. It is contended, that he had subsequently gained a settlement in Sanford, by residing in that town five years together without directly or indirectly receiving supplies or support as a pauper.

He and his wife and children were removed as paupers from the town of Rome to the town of Lebanon in the month of July, 1833. His wife appears to have died at another place soon after, and he married again on September 9, 1835, and soon afterward established his residence in the town of Sanford, where he continued to reside, as defendants contend, until May, 1845, when his second wife died. His minor children by his former wife, did not reside in his family after his second marriage, but one or more of them were supported as paupers by the town of Lebanon, after they were removed from Rome,

and during most, if not all, of the time during his residence in Sanford. If he had been of sufficient ability, he might have been required to support them, or to pay the expenses incurred for their support. While thus supported, they were taken from his care and custody by operation of law, not because they had abandoned him, or because he had abandoned them. They were thus separated from him before any pretence of abandonment appears. He could have resumed the exercise of all his parental rights, whenever he could have supported them, and they might have claimed the performance of parental duties. The parental and filial relations were not broken up, but suspended during the subjection of the children to the care of the overseers of the poor for their support. Their father testifies that he never had any care or control of any of his children by his first wife, after his second marriage, except for a short time, when one of them was sick. And that none of them were at his house during that time except for very short seasons, stated by him. This testimony is entirely consistent with the facts before stated, and when taken in connexion with them, does not prove a destruction of the parental and filial relations. The origin and cause of the separation is still perceived to have been the operation of law, upon his inability to support his children.

He also states that it was not his intention to have his children in his family, or to have the care and control of them. Whether a child has or not been abandoned or emancipated, is a mixed question of law and fact, little dependent upon mere intentions, when it is perceived, that other prevailing facts have prevented such intentions from having any important influence upon the condition of the children.

The case of *Green* v. *Buckfield*, 3 Greenl. 136, was decided upon a different provision for settlement, not containing the words "directly or indirectly" contained in the provision applicable to this case. And the report states, that the husband, wife and children, had separate places of residence, "the latter wholly abandoned by the parents and released from all control by them for nine years preceding" March 21, 1821; and that

two of them "for a long period of time before were supported as paupers." The rule presented by the case is, that supplies could not be considered as furnished to one as a pauper, "unless furnished to himself personally or to one of his family, and that those only can be considered as his family, who continue under his care and protection." The case does not determine under what circumstances a minor child is to be regarded as no longer under the parental care and protection, or is to be considered as abandoned. The case having found the fact of abandonment required no such consideration.

It was left for future cases to determine under what circumstances children should be considered to be under the care and protection of their parents, or as abandoned by them. The subsequent cases do no more than this, and could do no less. It is quite erroneous, therefore, to conclude, that they are inconsistent with it.

In the case of *Raymond* v. *Harrison*, 2 Fairf. 190, the difference of language used in the two different provisions for settlement already noticed, does not appear to have attracted the attention of the court. The fact of abandonment appears to have been so thoroughly established as to have been assumed in the instructions to the jury, and to have been the foundation, upon which the decision rested.

In the case of *Garland* v. *Dover*, 19 Maine, 441, it became necessary to consider and determine, under what circumstances a minor child could be considered as abandoned, or still under the care and protection of a parent. It was obvious that the mere fact, that the child was not residing in the family of the parent, would afford no satisfactory proof of abandonment. Some other and more satisfactory criterion was to be sought, and one was presented as having a powerful influence, that of the preservation or destruction of the parental and filial relations. It was approved by the court upon full consideration, and none more satisfactory has since been presented.

The considerations thus presented would authorize the jury to find, that the parental and filial relations between Ivory Hersom and his minor children, had not been broken up,

although suspended by operation of law; that they had not been abandoned by him, and that he had indirectly received supplies as a pauper, while he resided in Sanford, by the support of his children as paupers in Lebanon.

It will not therefore be necessary to notice the testimony tending to prove, that the testimony of Ivory Hersom was unworthy of credit, or that tending to prove, that his residence was not established in the town of Sanford for five years together, without having received supplies as a pauper, for the relief of those persons, who were residing in his family.

Motion overruled, and judgment on the verdict.

THOMPSON *versus* TOMPSON.

Where, in assumpsit, a set-off is filed, and evidence is introduced by the parties in support of their respective claims, and the plaintiff obtains a verdict for less than twenty dollars, he is entitled to quarter costs only, *unless* the jury certify, *in their verdict*, that the damages were so reduced, by means of the set-off claim allowed to the defendant.

Kimball, for the plaintiff.

Leland, for the defendant.

HOWARD, J. — This is an action of assumpsit, originally brought in the District Court. The defendant filed an account in set-off, and, at the trial, testimony was offered to support the respective claims of the parties. The plaintiff obtained a verdict for $6,53, and the Judge of that court decided that he was not entitled to recover more than one quarter of that amount in costs, and directed the taxation to be made accordingly. To this direction, the plaintiff excepted.

The direction of the District Court was clearly correct, under the provisions of the Rev. Stat. chap. 151, § 13, unless the case falls within the provisions of chap. 115, § 99. That section is as follows: — "In actions on contract, in which an account is filed in set-off, although the damages found for the plaintiffs shall not exceed twenty dollars, he shall be entitled

to full costs; provided, the *jury shall certify, in their verdict,* that the damages were reduced, as low as that sum, by means of the amount allowed by them, on account of said set-off, and as due upon it."

The court could not know, except by their certificate, that the damages were thus reduced by the jury, by means of the account in set-off. They did not so certify, and, therefore, the plaintiff did not present a case within the purview of the statute, allowing the taxation of full costs.

Exceptions overruled, and judgment to be entered on the verdict, with costs for the plaintiff, equal to one quarter of the amount of the damages.

POND *versus* NILES.

An account in set-off cannot be allowed, unless the clerk have noted thereon, the day upon which it was received and filed.

EXCEPTIONS from the District Court.

Assumpsit. At the trial, the defendant offered a claim in set-off. An entry had been indorsed thereon, by the clerk, that it was "received and filed before the new entries were called," but the entry did not show on *what day* the set-off was filed, or on *what day* the new entries were called. There was also a *docket* entry, that the defendant had filed a demand in set-off. There was no other evidence of the time, when the paper, called a set-off, was filed. The plaintiff objected, for those reasons, to the reception of the set-off account. But it was received, and a verdict rendered thereon in favor of the defendant.

Evidence was introduced by the defendant, that there had existed a co-partnership for a few months between the parties. The defendant offered his book and suppletory oath. The book contained charges against the plaintiff for half of divers sums of money, received by the plaintiff; and the defendant, (against the objection of the plaintiff,) was allowed to testify,

that the plaintiff had admitted having received said sums for the use of the co-partnership; he also testified, that he, the defendant, had no means of knowing, that the plaintiff had received them, except from such admissions.

The jury, having agreed and sealed their verdict, after the adjournment of the court, had, under leave of the court, separated for the night, and next morning presented their verdict, which was, that the defendant did not promise, &c., and assessed damages for the defendant, in the sum of fourteen dollars and forty-three cents; "the defendant also, to retain the buggy wagon and other articles named in the plaintiff's account."

The court then instructed the jury that they had no authority to award the buggy wagon, and other articles named in the plaintiff's account, to the defendant; but that if they found a balance due to the defendant, on his set-off, they were to inquire and bring in the amount of the balance thus found to be due; and thereupon sent the jury out the second time, without the consent of the plaintiff or of his counsel, and they returned a verdict, as follows: — "The jury find that the defendant did not promise, in manner and form as the plaintiff has declared against him, and assess damages for said defendant in the sum of fifty-four dollars and forty-three cents;" which verdict was amended, without consent of plaintiff's counsel, or of the plaintiff, in manner following; "the jury find the defendant did not promise in manner and form as the plaintiff has declared against him; and the jury further find a balance due from the plaintiff on his account filed in set-off of fifty-four dollars and forty-three cents."

Eastman, for defendant.

The presumption of law is, that the set-off was filed in due season. The entry on the docket was, "The defendant has filed a demand in set-off." This is the proper entry. If not seasonably filed, the clerk would have no right to receive it, nor to consider it as filed, *as a set-off*, at all; and had no right to make such entry on the docket. The clerk is the recording officer of the court, and it should be regarded as an

adjudication, made at that time, that it was duly and seasonably filed.

The entry upon the docket being intended as notice to the plaintiff, he should have objected, at the first term, if he did not consider it as filed in season, and then, the entry upon the docket might have been corrected, if wrong.

But we contend, that the bill was, *in fact*, duly and seasonably filed in set-off. And the defendant having done all that the law required, had a right to presume, that the clerk would make the proper entry on the paper. He could not stand by, and direct the clerk what to do, or how to do it; and the law surely will not cause him to suffer from the misprision of the officer of the court.

Luques, for the plaintiff.

Shepley, C. J. — The statute, c. 115, § 25, provides, that a defendant who would present a demand in set-off, shall file a statement of his demand on the first day of the term of the court, at which the writ is made returnable; and the clerk shall enter on the same, the day when it was filed. In this case there was no entry made upon the demand, of the day when it was filed. There was an entry made thereon by the clerk, that it was received and filed before the new entries were called. The day on which such call was made, is not stated. There was also an entry made upon the docket of that term of the court, "the defendant has filed a demand in set-off."

It is insisted, that the demand was in fact filed on the first day of the term; and that the defendant ought not to be prejudiced by an omission of the clerk's duty. The case however states "except as above, there was no evidence of the time, when said paper, called a set-off, was filed." There is no proof of any kind presented by the bill of exceptions, that the account was filed on the first day of the term, and no such question can arise in the case.

It is further insisted, that the plaintiff should have made objection to the entry upon the docket at the first term and

have had it corrected, if he would resist the reception of the demand in set-off. The entry upon the docket may have been correct, and yet there have been no compliance with the provisions of the statute; for, as amended by the act of 1847, c. 20, it does not require the clerk to enter upon the docket the day when the demand was filed. When there is not a compliance with the provisions of the statute, the court is not authorized by it to allow a set-off to be made.

It is not necessary to consider, whether the proceedings, in proof of the demand, or in taking the verdict of the jury, were legal. It will be sufficient to observe, that they are not approved. *Exceptions sustained, verdict set aside, and new trial granted.*

LITTLEFIELD *versus* MAXWELL.

Easements, in another's land, may be acquired by prescription, either by communities or individuals.

Easements, so acquired, are, in legal intendment, *without profit.*

A custom is local; it is alleged, not of persons, but of a place.

If one would prescribe for a *profit a prendre in alieno solo*, he must allege it in a *que estate*; in other words, if one would prescribe for such a right, in another's soil, as authorizes the taking or having what is, by legal intendment, a profit therein, he must allege it as pertaining to some specified lot of land, owned by himself, and that he and all those, *whose estate* he has in the land, have from time immemorial, exercised the right which he now claims.

A *custom* to take or have a *profit* in another's land, is bad.

To use another's land for piling and lodging wood upon it, is to take a *profit* in it.

A *custom*, so to use it, cannot be sustained.

TRESPASS QUARE CLAUSUM, for piling 300 cords of wood upon the plaintiff's land, described in the declaration. The defendant by brief statement pleaded: —

1st. That the inhabitants of the town of Wells, for more than 20 years, have claimed and exercised the right to haul and pile wood thereon, for the purpose of sale and shipping;

and that defendant is an inhabitant of Wells and hauled and piled his wood for that purpose.

2d. That the inhabitants of said town of Wells for more than 20 years have had a custom to pile wood thereon, for sale or shipping, at their free will and pleasure.

3d. That the inhabitants of Wells and all other persons in the neighboring towns, who have had occasion to haul wood there, for the purpose of sale or shipping, or to haul sea-weed or manure from the sea-shore adjacent thereto, from time immemorial have had a custom to haul and pile wood or sea-weed, or other things thereon, at their free will and pleasure, as a common landing place.

It was agreed that the defendant piled wood, as alleged in the plaintiff's declaration, upon the space described in the brief statement, which is a ridge composed of sand, gravel and stones, thrown up by the action of the sea along the front of the plaintiff's lot, forming a sea-wall, and above ordinary high water mark, but below extraordinary high water mark.

The defendant then introduced testimony, tending to prove, and offered to prove, that, from the year 1819 up to the date of the plaintiff's writ, such inhabitants of the town of Wells, and such individuals belonging to the neighboring towns, as pleased, had been accustomed to haul and pile wood upon the space described in the brief statement, under a claim of right, and without any objection or claim for compensation on the part of David Maxwell, who was all that time owner of the plaintiff's lot; that very many of said inhabitants and others had been accustomed yearly, and at all times, to deposit wood on said space; that the quantity piled on said space was comparatively small for the first few years, from 75 to 100 cords, but gradually increased from year to year, till, on some occasions, there has been nearly 2000 cords at a time, most of which was on this space; that, during that time, it has been customary for vessels to be brought up in front of this lot, or a lot adjacent thereto, to be loaded with the wood; that in piling the wood, each individual piled on any part of the space, he thought proper, if not previously occupied; that it has

been customary to pile upon all parts of the space; and that since 1819 the space has at many times been nearly covered with piles of wood and sea-weed.

The Judge excluded the testimony.

The cause was then submitted to the decision of the court upon the admissibility or sufficiency of the testimony so offered and excluded. If the testimony offered and excluded would, in law, be sufficient to prove the right, claimed by the defendant, a new trial is to be granted; otherwise the defendant is to be defaulted.

Bourne, for plaintiff.

The matters pleaded constitute no valid answer to the action. It is against public policy to sustain such a defence. The title is settled by the Colonial ordinance of 1641. The case of *Storer* v. *Freeman*, 6 Mass. 435, was but a republication of the same principle. An invasion of such titles would lead to endless litigation. Prescription is of incorporeal hereditaments only. To establish it, the possession must be adverse, unexplained and exclusive.

The easement here claimed is not incorporeal. The claim would destroy all beneficial use of the land by its owner. Profit *a prendre* in another's land cannot be prescribed for. *Pearsall* v. *Post*, 20 Wend. 124. Such a custom cannot be prescribed for.

User must be *adverse*. The plaintiff's land was vacant, never fenced and never can be.

How adverse? As the plaintiff could make no use of it, no negligence can be imputed to him. The assent of the owner must be presumed, and *volenti non fit injuria*. Therefore there can be no presumption of a grant. *Donnel* v. *Clark*, 19 Maine, 183; *Nelson* v. *Butterfield*, 21 Maine, 234; *Greene* v. *Chelsea*, 24 Pick. 80; *First Parish in Gloucester* v. *Beach*, 2 Pick. 60; *Thomas* v. *Marshfield*, 13 Pick. 249.

It is a sufficient answer to the whole defence, that the plaintiff used this land just as every other owner of the same kind of land, uses his own.

No prescriptive right to the shore has been acquired in New England.

User must be *unexplained.* Can there be any difficulty in explaining the user, or in accounting for the conduct of the plaintiff?

The Revised Statutes annul the doctrine of prescription. No limitation can operate here. The action is trespass, and our possession as well as our grantor's has never been lost. *Bethum* v. *Turner*, 1 Greenl. 111; *Greene* v. *Chelsea*, 24 Pick. 80.

The inhabitants of a town cannot gain such a right by custom or prescription. *Waters* v. *Lilly*, 4 Pick. 145; *Gateward's case*, 6 Coke, 60; *Pearsall* v. *Port*, 20 Wendell, 128; *Bethum* v. *Turner*, 1 Greenl. 111.

There could be no certain grantee to take, and none to discharge the easement. A perpetuity would be created which our law does not allow.

The cases reported, excepting *Coolidge* v. *Learned*, which is denied to be law, and is unsustained by authority, have reference to individual claims or privileges. The Revised Statutes refer to individual claims only. The provision in chap. 147, was not intended to create or give any such rights as are mentioned in it, but to prevent their future acquisition, without conforming to certain requirements. *Pierre* v. *Furnald*, 26 Maine, 437. It requires possession to be exclusive. Here the plaintiff has been in possession, at all times. The plea itself avers, that he is one of those in possession.

To prevent a prescription, the statute requires certain notice to be given to those, who are using the plaintiff's land. How could notice be given in a case of this kind? Who are the persons to be notified? Who are the certain other inhabitants of the neighboring towns?

Prescription, if admitted, must be limited to forty years, in analogy to the act of limitations of 1848.

Eastman, for defendant.

I. Custom is *unwritten law*, and respects *place*, as *prescrip-*

tion respects *persons*. Dane, ch. 26, art. 1, and cases there cited. Sup. Dane, ch. 26, art. 6, § 23; ch. 26, art. 2, and cases there cited; *Grimstead* v. *Marlow*, 4 Term R. 717.

Customs and *prescriptions* are the same, as to *origin*, *continuance* and *time*. Dane, ch. 79, art. 3, § 19.

1. As to *time immemorial*. Limitation of a writ of right, twenty years. A regular use of twenty years, unexplained, and uncontradicted, is sufficient to warrant a jury in finding the existence of *immemorial custom*. Sup. Dane, ch. 26. art. 6, § 23; *King* v. *Joliffe*, 2 Barn. & Cres., 54 to 64; *Tyler* v. *Wilkinson*, 4 Mason, 402, and cases there cited.

2. This custom was *continued*. From 1819 to 1846, when the plaintiff's title accrued.

3. It was *peaceable* and acquiesced in; not disputed at law or otherwise; for customs owe their origin to *common consent*. This was so. Plaintiff's grantor was the owner the whole time; he had knowledge of the use; was in a situation to enforce his claim or resist the use, and did not.

4. It was a *reasonable* custom. The *locus* was useful for this purpose and nothing else. It was needed for this, by all the inhabitants of Wells, and not needed by the plaintiff or his grantor exclusively.

5. It was sufficiently known and certain, as to the persons claiming and the thing claimed.

6. It was *compulsory*, under a claim of right. No leave or license was ever asked of, or given by, plaintiff's grantor.

7. That others have used the *locus* as a piling place, does not impair the rights of the inhabitants of Wells.

8. The *place* need not be limited by town lines. It may embrace a section of country, engaged in that particular business. *Conante ratione legis, curat lex.*

II. The public may acquire this right, in the same way as they may acquire a right of way, or a right to the use of a river not navigable, by an uninterrupted usage of twenty years. *Berry* v. *Carle*, 3 Greenl. 269, and cases there cited. *Shaw* v. *Crawford*, 10 Johns. 236; *Perley* v. *Chandler*, 6 Mass. 454; *Coolidge* v. *Learned*, 8 Pick. 504.

What was at first only a *local* custom, may by long use, have become a *general* custom.

WELLS, J. — The *locus in quo* lies above the ordinary high water mark of the sea, but below the extraordinary high water mark, and according to the principles of the common law, the title to it is in the plaintiff.

Sir Matthew Hale, in his treatise, *de jure maris*, chap. 6, speaking of the sea-shore, says, it is certain that that, which the sea overflows either at high spring tides or at extraordinary tides, comes not, as to this purpose, under the denomination of *littus maris*, and consequently the king's title is not of that large extent, but only to land that is usually overflowed at ordinary tides.

The defendant alleges in his brief statement, that the inhabitants of the town of Wells, for more than twenty years, have claimed and exercised the right to haul and pile wood on the premises described in the plaintiff's declaration, for the purposes of sale and shipping, and that the defendant is an inhabitant of that town, and hauled and piled his wood for that purpose; that the said inhabitants for the same time, have had a custom to pile wood thereon for sale or shipping, at their free will and pleasure, and that said inhabitants and all other persons in the neighboring towns, have had a custom to do the same acts, and also to haul sea-weed or manure from the sea-shore adjacent thereto, and to pile the same and other things thereon, at their free will and pleasure, from time immemorial, as a common landing place.

The question presented is, whether the inhabitants of one or more towns, can claim the right or custom by a long use of more than twenty years, to deposit wood upon the plaintiff's land.

In the case of *Bethum* v. *Turner*, 1 Greenl. 111, the usage of depositing lumber on the landing place, had continued for more than thirty-five years, but without any claim of title, except what might arise from the fact of occupation, and such usage was not considered sufficient to establish the right. In

the present case, the defendant offered to prove, that the acts alleged to have been done in the brief statement, were accompanied by a claim of right, and with the knowledge of the owners. That case, although like this in many respects, cannot be considered as an authority directly in point.

In *Gateward's case*, 6 Coke's Rep. 60, the defendant justified by a plea of a right of common for depasturing in the plaintiff's close, for all the inhabitants of the village of Stixwold. And it was held that the custom was bad, and that there was a difference between an interest or profit to be taken or had in another's soil, and an easement in another's soil, that a custom for every inhabitant to have a way to church or market is good, for it is but an easement and no profit.

In *Grimstead* v. *Marlow*, 4 T. R. 717, the defendant justified under a custom, that every inhabitant, dwelling in any ancient messuage within the parish of Leatherhead, from time whereof, &c., hath used to have common of pasture in the common meadow. Lord Kenyon said, there may be a custom for an easement, as a right of way, in *alieno solo*, but for a profit *a prendre*, the party must prescribe in a *que estate*, and he cites *Gateward's case*, and the case of *Hardy* v. *Hollyday*, a note of which was read by BULLER, J.

Waters v. *Lilly*, 4 Pick. 145, was trespass for taking fish in the plaintiff's close, and the defendant offered to prove, that the inhabitants of the vicinity had from time immemorial taken fish in the plaintiff's pond, which was an enlargement of a natural stream by a dam. But it was decided that the custom proposed to be proved, is not one that could be sustained in law, for a custom to take any thing from another's land, or for a profit *a prendre*, is not a lawful custom, and that such, if available at all, must be set up by prescription as belonging to some estate, and should be pleaded with a *que estate*.

In the case of *Perley* v. *Langley*, 7 N. H. 233, it is said, that it is not essential that such rights be prescribed for in a *que estate*, as holden in the language of 4 T. R. 717; for all rights that can be sustained by prescription, can be prescribed for in a man and his ancestors. But it is further said, that

the inhabitants of a town, as such, or the inhabitants of the ancient houses of a town, cannot claim a right of common, or other profit, in *alieno solo*, as a custom, for the inhabitants may not have the inheritance, and that there are no authorities that sustain the removal of the soil, or the taking of profits, from the soil of another, as a custom.

In *Pearsall* v. *Post*, 20 Wend. 111, and the same case, 22 Wend. 425, where the question under consideration was very fully examined, it was decided that the public have not the right, against the will of the owner, to use and occupy his soil, adjoining navigable waters, as a public landing and place of deposit of property, in its transit to and from vessels navigating such waters, although such user has been continued upwards of twenty years with the knowledge of the owner.

The principle to be extracted from the cases cited, is, that a custom for an interest or profit to be taken or had in another's soil, is bad, and that such right must be alleged by prescription in a *que estate*. In the case of *Perley* v. *Langley*, it is said, that such claim may be sustained as a prescription by the individual through his ancestors, while the other cases maintain that there must be a dominant as well as a servient estate.

A custom is local, and is alleged in no person, but laid within some manor or other place. Coke Litt. 114, a.

There are many easements for which a man may prescribe as having been exercised by him and his ancestors, or by a body politic and their predecessors, without profit, as a way through another's land, a sink and the like. 3 Cruise, title 31, chap. 1, § 21.

The public as well as an individual, may acquire a right of way by an adverse use of the same, but in this State, a *user* of twenty years is required. *Rowell* v. *Montville*, 4 Greenl. 270; *Estes* v. *Troy*, 5 Greenl. 368.

But such right is not considered a profit *in alieno solo*. It is the mere right of passing and repassing; the title to the land, and all the profits to be derived from it, consistently

with the right of way, remain in the owner of the soil. *Stackpole* v. *Healy*, 16 Mass. 33.

The case of *Coolidge* v. *Learned*, 8 Pick. 504, more fully sustains the right claimed by the defendant than any other, which has been examined. The facts of that case are not very fully stated, and the second plea appears to place the right upon the use of the landing for boards and timber in their transit to and from the river, more like a right of way, than that of piling and depositing timber upon the *locus in quo*. But the court recognize the right as one belonging to the public as well as the inhabitants of Watertown, and if it were a landing place, a place of deposit, the case would not be in harmony with that of *Pearsall* v. *Post*.

But is the right claimed by the defendant a profit *in alieno solo?* The premises mentioned in the declaration, consist of two and half acres. The defendant offered to prove that the inhabitants of Wells and others, had been accustomed to deposit wood upon them at all times, that the quantity piled upon the land was nearly two thousand cords at a time, that vessels were loaded from the front of the lot, with the wood, that each individual piled on any part of the land he thought proper, if not previously occupied, that it had been customary to pile upon all parts of it, and that since 1819, it had at many times been nearly covered with piles of wood and sea-weed.

Such a use of another's land, must be considered as a profitable one, arising to those who exercise it. It is not a claim to carry any thing away from the soil, but the direct and continual appropriation of it for the purposes of gain. Indeed it appears to go beyond a mere incorporeal right, and in the full extent of its exercise to claim the entire dominion of the land, so as to deprive the owner of any benefit from it.

In the case *Cortelyou* v. *Van Brundt*, 2 Johns. 356, the defendant claimed a right by prescription to erect a temporary hut for the purposes of fishing, upon the plaintiff's land. But it was denied, by THOMPSON, J. that prescription would in any case give a right to erect a building on another's land. He says, it is a mark of title and of exclusive enjoyment, that

title to land requires the higher evidence of corporeal seizin and inheritance, and that prescription applies only to incorporeal hereditaments.

The right of erecting a hut for temporary purposes, would not seem to be any more corporeal in its character, than the right of piling wood upon the land, to remain as long as might suit the pleasure of the owner.

But without deciding, that the claim set up by the defendant for himself and others, is an entire usurpation of the fee, and should be tried by the rules of limitation applicable to a claim of title, by a corporeal adverse seizin, it is enough for the decision of the case, to say, that the claim is certainly one of an interest or profit in the soil, and brings it within the rule that such a claim cannot be sustained by custom, and a

Default must be entered.

HOBBS *versus* PARKER.

Questions raised by pleading, and issues taken thereupon, followed by a verdict and judgment, cannot be agitated, in another suit between the same parties or their privies, concerning the same subject matter.

A reference made by a party in pleading, to documents concerning a point, *not in controversy*, will not invalidate his proceedings, although such document contain representations at variance from the allegations of the party making the reference.

Thus, if in a real action, a party, in order to elucidate his case, refer in his plea, to a plan of land, not in controversy, his rights are not concluded, by the reference, although the plan present views in conflict with the allegations of the plea. In such a case, he may show the plan to be erroneous.

A owned land, and was also a tenant in common with others, in an adjoining tract. The other co-tenants instituted a process for partition, describing the common land by its true boundary. By mistake in the plan, taken by order of the court, the divisional line between the two lots, was laid down erroneously, and by means of that error, a part of A's *own* lot was assigned to one of the petitioners. In a real action by such petitioner to recover said part, it is no answer to the title set up by A, that, by the erroneous line, a larger portion of the *common* land would fall to A.

Where each party has the same information, and an equal opportunity to ascertain the truth, it cannot be said, that the one wilfully withholds any thing, and thereby deceives the other.

WRIT OF ENTRY. The case came up on an agreed statement of facts.

One William Frost, at the time of his death, was seized in fee of a lot of land. After his decease, the title passed to John Powers and wife, and Abiel Hall and wife, who were seized in fee during all the proceedings had in the process of partition hereafter mentioned.

On the south of the Frost lot, and adjoining to it, was a tract called the Province mill privilege. The demandant and many others who had become tenants in common in said tract, instituted a process for partition of the whole tract, alleging that they were tenants in common with other persons, to them unknown, and setting forth the proportions of the land which they respectively claimed. They described the tract as bounded north-westerly by land formerly owned by the late William Frost, as the land was fenced at his decease. The court appointed one Goodwin as a surveyor.

The said Powers and wife, and Hall and wife, and Theodore Willard, entered their appearance as respondents, and pleaded three several pleas, in each of which they alleged that, as to a described small lot, within the general tract, they were, as tenants in common among themselves, sole seized in fee. In each of these pleas, in describing the small lot, there was contained a reference to certain marks and lines upon Goodwin's plan.

Upon these pleas issue was joined.

The jury found, as to the issue upon the first plea, that said Powers and wife, and Hall and wife, and Willard, were sole seized of the small lot therein described. The other issues were found for the petitioners. In all the tract, except said small lot owned by Powers and wife, and Hall and wife, and Willard, the said Powers and wife and Hall and wife were tenants in common with the petitioners.

A warrant was thereupon issued directing commissioners to assign to the petitioners their respective shares, excepting said small lot first described. The warrant described the tract as being bounded north-westerly by land formerly owned by the

late William Frost. The land now sued for was assigned to Hobbs, this demandant, upon that partition, and by the plan.

The report of the commissioners was accepted.

Parker, the tenant, is owner of the Frost lot, under Powers and wife, and Hall and wife, to whom the same had come, as above stated, from said Frost. He claims to hold a part of the demanded land, and contends that he has the right to prove, by parol, that the fence, on the southerly side of the Frost lot, (which existed at Frost's death, and was the true boundary line,) had been removed northwardly before the making of Goodwin's plan; and that a part of the land demanded belongs to him, as a part of the Frost lot, though within the parcel assigned by said commissioners to Hobbs. The plan is made a part of the case.

The demandant claims that the proceedings in said petition for partition and the judgment thereof, and said assignment to the demandant, are conclusive between these parties and that parol evidence is inadmissible, as contended for by the tenant.

The parties agree, that if said proceedings, judgment and assignment are conclusive between the parties; and that the parol evidence is not admissible as contended for by the tenant, then the tenant is to be defaulted as to the land not disclaimed by the tenant; but if otherwise, then this action is to stand for trial.

J. Shepley, for the demandant.

Powers and wife, and Hall and wife, have confirmed the plan by referring to it, in their pleas. Neither they, nor the tenant, who claims by a subsequent conveyance under them, can now object, that it included land not belonging to the Province mill privilege tract.

If the land now claimed, had belonged to the tenant's grantors, they should in the partition process have pleaded their sole seizin of it, as they did in relation to the three other small pieces which they claimed.

Those grantors were rightfully in court, through all the proceedings in that process. They pleaded to the petition and

might have resisted, and perhaps they did resist, the acceptance of the commissioners' report. At any rate, they must be considered as having had notice of it.

The proceedings and judgment in the partition process are conclusive. As between these parties, they fix the line between the Province mill privilege and the Frost lot, to be according to the plan.

The warrant required a partition of "the Province mill privilege" tract. It also described it, as bounded on the northwest "by land formerly owned by the late William Frost." Now, even if these phraseologies are to be controlled by the words in the petition, "as the land was fenced at his decease," still the plan must be held as the correct delineation.

If the "fence" is to control, the petitioners could not go beyond it, although it were some distance within the Province tract. But Frost's heirs, in such a case, could hold nothing in the tract, unless the plan be conclusive.

Powers and wife, and Hall and wife, would gain as much in the Province tract, as they would lose of the Frost tract.

After permitting, throughout the trial, what is now claimed as a part of the Frost lot, to be considered and treated as part of the Province tract, they cannot in law be allowed to controvert their implied admission. If their view of the boundary line be correct, they must have known it at the trial of the partition case, and ought to have disclosed it. If they had done so, they would, as tenants in common with the petitioners, have obtained less of the Province tract, and Mr. Hobbs' share would have been assigned him correctly. 28 Maine, 127 and 525; 21 Maine, 130; 19 Maine, 412; 16 Maine, 146; 13 Maine, 131; 4 Metc. 381; 12 Metc. 405 and 494.

Goodenow and *Appleton*, for the tenant.

There is no estoppel to show the land was a part of the Frost lot. To constitute an estoppel, the same point must be put in issue upon the record, and directly found by the jury. It is not established on collateral facts or inferences drawn

from a verdict. 3 East, 346; 11 Pick. 311; 5 N. H. 259; 7 Pick. 147; 15 Pick. 276.

Where the fence stood at Frost's decease, was not a fact put in issue, in the partition process. The issue there tried, was only the fact of sole seizin.

The plan was not taken to settle the exterior lines with third persons. The respondents in that process were not in fault that the warrant did not conform to the petition. *They* had no share set off to *them*. They could not plead sole seizin as to any part of the Frost lot, for it was not embraced in the petition. They were strangers, as relates to land extra the petition. They could not be heard to resist the report. The judgment "*quod fiat partitio*," extends only to the land embraced in the petition.

A plaintiff is estopped by his petition to claim beyond the boundaries described in it. 26 Maine, 277.

A partition, however regularly made, binds the right of possession only. It does not establish right in the property. 2 Mass. 462; 16 Pick. 500; 13 Mass. 212.

TENNEY, J. — The land in controversy is included in the boundaries of the portion assigned to the demandant under a judgment for partition, in a petition in which the parcel therein described is represented as bounded "north-westerly by land formerly owned by the late William Frost, deceased, as his land was fenced at the time of his decease." While the petition was pending in court, a surveyor was appointed, who made a survey and returned a plan thereof. The demandant was one of the petitioners, and John Powers and his wife, in her right, Abiel Hall and his wife, in her right, and Theodore Willard, appeared in defence and pleaded different pleas to different and distinct portions of the premises, whereof partition was prayed for, alleging that they were seized of the same solely, and denying that they were seized thereof in common with the petitioners. In some of those pleas, reference is made to the plan taken by order of court, for a description of the several parts so defended. Upon those pleas, issues to the

country were presented, and tried; but in none of them was involved any question, touching the *particular boundaries*, of the several parcels described, or of the whole tract. A verdict was returned for the respondents upon one of the issues, and for the petitioners in the others. Judgment was rendered, "that partition be made of so much of the premises described in said petition as remained after excepting therefrom the part thereof of which the said Powers and wife, and Hall and wife, and Willard, were found to be sole seized," which part excepted is described in the terms in the plea, that was applicable to that portion of the premises. Upon this judgment, a warrant for partition was issued; the commissioners appointed indorsed return of the division, as made by them; this return was accepted by the court, and final judgment thereon entered.

The grantors of the tenant, John Powers and wife, and Abiel Hall and wife, at the time the petition was pending, when the warrant for partition was issued, and when final judgment was rendered, were seized in fee of the land adjoining to the premises described in the petition, "as land formerly owned by the late William Frost, deceased, as the land was fenced at his decease."

A part of the land described in the demandant's writ is disclaimed; the residue, the tenant claims to hold, and contends that he has the right to prove, by parol evidence, that the same belonged to the said Frost, and as it was fenced at the time of his decease, and that the fence was removed northerly after his decease, and before the plan was taken in the suit upon petition for partition, although the same was afterwards included in said land assigned to the demandant by the commissioners, who made partition. The demandant on the other hand insists, that the proceedings on the petition for partition, and the judgment thereof, and the assignment to the demandant, are conclusive between these parties, and that parol evidence is inadmissible; and that the true line between them is to be determined by the plan taken in the case. This is the only question presented for consideration.

So far as questions are raised by the pleadings and issues thereupon taken, followed by a verdict and judgment, they cannot be agitated in another suit, between those who are parties or privies to such judgment. But for the purpose of presenting clearly, points really in dispute, reference may be made in pleadings to matters, not at all in controversy ; and it may turn out, that, in some respects, the things referred to, may be erroneous. These errors, if known at the time, would not in the least affect the questions litigated, which were unconnected therewith, and neither of the parties would be concluded by such reference. In real actions such disputes may arise, as render it convenient if not necessary, that a map should be made, which may represent the land that is the subject of the suit, and the different objects upon the earth, which may be supposed to have relation to it. And when all the evidence is adduced, it may be seen, that the plan is not wholly, or even in any respect, correct ; still it may essentially aid in enabling all interested in the trial, more clearly to understand the evidence, and thereby answer the purpose originally entertained in causing it to be made. The true location of a line between two contiguous owners of land may be the only object sought in a suit at law. A plan, made upon a survey directed by the court, may show distinctly the line for which each party contends, and other things deemed by them, respectively, as material. It is proper for the surveyor to protract all lines and other objects, which either may direct. By so doing, he does not even give to such lines the force of an opinion, that they are a true representation of what really exists upon the earth ; and his opinion, if given, has no more validity than that of any other person, having the same ability to know and understand the facts in the case. The plan itself, and the lines laid down thereon, can have no effect to conclude the parties to the suit, who may refer to it in their pleadings, any farther than they are adopted by the issues, and make an element in the judgment. Errors in any representation upon the plan, foreign to the questions involved, can in no respect control the rights of the parties.

The pleas of the respondents, upon the petition for partition, refer to the plan made by the surveyor in several instances. But it is for the purpose only of denying the title of the petitioners as claimed by them, to each part described in the different pleas, and not as raising the question, whether the lines between the several divisions are correctly delineated upon the plan. And it does not appear to have been a subject of attention by the parties, much less of controversy, whether the exterior boundaries of the land described in the petition were located according to its terms or otherwise. The dispute presented by the pleadings generally, had reference only to the land described, as between its several proprietors, and not to the rights of owners of other lands adjoining. The verdict of the jury had no reference to the plan, by which the line now in controversy, as laid down thereon, has been adopted or settled. The judgment has furnished no other guide for the partition, than such as the description in the petition, which makes a part of the judgment, would indicate, after excluding a certain portion, in which the jury found the petitioners had no interest. The warrant for partition and the return thereon can have no effect further than they are authorized by the judgments for partition. It is this judgment alone to which the subsequent proceedings must relate, and by it the rights of the parties must be determined. Land not embraced in the petition cannot be the subject of judgment or of division.

The line on which the fence stood at the time of the decease of William Frost, on the north-westerly side of the premises, described in the petition, is the true boundary; the judgment conforms to this. No issue was made at the trial, showing that this boundary was in question, or that the parties had any occasion to inquire whether the line upon the plan, intended to represent this boundary, was correct or erroneous; the plan in this particular cannot therefore have any control over the petition. The judgment being in its description of the land, identical with that of the petition, neither the warrant, nor the return of the commissioners, could with

effect, transcend it. The particular location of land upon the earth, which is the subject of legal dispute, is a question of fact for the determination of the jury upon the evidence presented. When title to land is exhibited, and the limits of the land are described in the documents of title, parol evidence is competent to show where those limits are to be found upon the face of the earth; and the evidence, offered by the tenant for this purpose, is admissible.

It is again insisted, that if the commissioners in setting off the portion to the demandant, under the warrant for partition, took land from the tenant's grantors, lying beyond that described in the petition, the part left to them to hold in severalty, of that embraced within the limits of what was the subject of division, was greater than it otherwise would be, and therefore they cannot legally claim to the line which they now contend is the north-westerly boundary of the tract assigned to him. In proceedings under a petition for partition, no person is to be considered a party, who has no interest in the land described. Strangers to the title therein, had no opportunity of making valid objections to the title of the petitioners as it is claimed by them, and the judgment cannot in any way prejudice their rights in other lands. The tenant's grantors were parties to the proceedings, under the petition, but no farther; they could not, as proprietors of an adjoining tract, object to an erroneous line upon the plan, if the description of the boundary in the petition, was in all respects correct. So far, therefore, they could not be precluded from asserting their title to contiguous territory afterwards, in any suit, which might bring in question generally such title between any parties. Neither can the acceptance of the commissioners' return and judgment thereon, without objection by the tenant's grantors, conclude him to the line which was adopted in the return of the commissioners, according to the facts as they appear in the case. To give these proceedings such effect, it must appear that the tenant's grantors wilfully caused the demandant in some manner to believe a different state of things from that actually existing, and to have in-

duced him thereby to alter his previous position. How far such deception, in a case like the present, would prevent the tenant from setting up the true line, we give no opinion. The case discloses nothing showing in the least, that those under whom the tenant claims to hold the land in controversy, had any agency by word or act, in causing the demandant to suppose that the true north-western line of the land, for which partition was prayed, was different from that which he now contends for. It does not appear that they had knowledge of the true location of that line, which was not possessed by the other party to the same extent. And where each party has the same information, and equal opportunity to ascertain the truth, it cannot be said that one wilfully withholds any thing from, and thereby deceives the other. The former possesses no fact, which he could impart, and conceals no means of learning other facts, which are not enjoyed by the latter. *Copeland* v. *Copeland*, 28 Maine, 525. *Parker* v. *Barker*, 2 Metc. 423. *Action to stand for trial.*

MOULTON *versus* CHADBORNE.

An officer may attach an indivisible article of property, though far beyond the value he was directed by his precept to attach.

He is not bound to take receipt for property attached, but may retain it in his own possession.

A request, by the debtor, that the officer will attach other property, instead of that which he has already attached, imposes no duty upon the officer. Neither does the offer of a third person to deposit money, for the officer's security, to induce him to discharge the property attached, impose any duty.

It is the officer's duty to attach personal instead of real property, if so directed.

The conduct and motives of the officer, at the time of making the attachment, must be looked at, in determining whether he acted unlawfully.

The mere offer, by the debtor, to have an appraisement of attached property, without any further steps taken by him, is insufficient to impose any duty upon the officer.

It seems, a vessel in good repair, at the port of the owner's residence, is not among the sorts of property, of which appraisal may be had, under R. S. c. 114, § 53 to 57.

CASE against the sheriff for misconduct of Chase, his deputy.

Trial before WELLS, J.

Plaintiff offered in evidence a writ, Bridges against himself, upon a note, the *ad damnum* and the order to attach therein being $100; upon which writ, Chase had returned an attachment of the Schooner, Golden Rule.

He then introduced witnesses, whose testimony tended to prove, that the schooner was the plaintiff's property, and worth $2500; that Chase put keepers on board; that he, the plaintiff, had much other personal property liable to attachment, of various descriptions, and in the aggregate, of many thousands of dollars in value, known to the officer and within his reach to be attached; among which were other vessels, ship timber, cordage, iron, cattle, hay, wood, boats, sails, and household furniture; several of the said articles being over $100 in value, yet much nearer to that sum than was the value of the schooner attached; that he had large real estates; that the Golden Rule was all fitted and about starting to sea, under contract to carry freight, of which the officer was notified; that he informed the officer he did not wish to pay the note, because he had a claim against Bridges, which he should lose, unless he could use it in set-off to the note; that he requested the officer to release the vessel and attach other property; that he offered sufficient receipters for the Golden Rule; that one Goodwin offered to lodge for the safety of the officer the $100, if he would release the vessel; that he requested the officer to have her appraised, that he might obtain the delivery of her on bond, as provided in R. S. ch. 114, § 53 to 57; and that the officer refused to comply with any of the said requests or enter into any of the proposed arrangements.

The court instructed the jury, "1st, that if the plaintiff had other personal property beside the Golden Rule, and which corresponded in value more nearly to the amount commanded to be attached in the writ, and which the officer, making the attachment, could have found upon due inquiry and reason-

able search, it would be his duty to attach such other property and he would not be authorized to attach the vessel; 2d, that the officer was not bound to take a receipter; 3d, that the offer to deposit $100, and the offer of plaintiff to turn out other property, at a period subsequent to the attachment, could have no influence upon the case; that the question for them to determine was, whether the officer acted unlawfully in making the attachment, and they were to look at his motives and conduct at the day and hour when the attachment was made; that the offer of plaintiff to have the vessel appraised must be laid out of the case; that no malicious disposition could be inferred from the officer's declining such offer; and that whether he had a disposition to oppress the defendant, must be gathered from what he did, and from such testimony as was admitted in evidence."

The verdict was for the defendant, and is to be set aside, if any of the instructions were erroneous.

SHEPLEY, C. J. orally. — 1. The first instruction, though the court would not be understood to sanction it as law, was as favorable to the plaintiff as could be justified. An officer may attach a vessel for $50, without waiting to see if a horse was free from incumbrances and might be held.

2. The officer is not bound to take any receipt for property. If he should do it, without consent of the creditor, he would be liable to him, at all events, for the property.

Should he do it, the contract would be a legal one, and it is frequently best for all concerned, that it should be done. But there is no obligation on the officer to do it.

3. The offer, by Goodwin, to deposite $100 was of no legal effect. It was not attachable on writ, and it was not the property of Moulton.

4. Equally unimportant was the request, that the officer should take other property as a substitute for the vessel. He was not compellable to do it.

It was the officer's duty immediately to attach personal

property, if so directed. He could not excuse himself by attaching real estate only.

If, by delay in examining title, he should fail to secure the debt, he would be responsible for it to the creditor.

5. The instruction was therefore right, that the conduct and motives of the officer, at the day and hour of making the attachment, was to be looked at, in determining whether he acted unlawfully.

6. The offer to have the vessel appraised was incomplete. But if complete, the statute provision does not apply to a vessel situated as this was. *Exceptions overruled.*

D. Goodenow and *Leland*, for defendant.

Appleton and *Eastman*, for plaintiff.

EMERY *versus* ESTES.

In a suit upon a promissory note, if the defence be that the consideration was illegal, the burden of proof is on the defendant.

In a suit upon such a note, given in part for spirituous liquors sold, if the defence be that the sale was illegal, the burden of proof is on the defendant.

In charging the jury, it is within the province of the Judge to arrange and comment upon the evidence, even though the arrangement and comment may have the appearance of an argument.

When a jury returns into court without permission, the Judge's direction that they withdraw to their room, is not a sending them out, within the meaning of the statute, which prohibits the jury to be sent out a third time.

WELLS, J. presided at the trial of this case. It was assumpsit on a note given to one Pray, payable to him or bearer. General issue, with statute of limitations, was pleaded. Testimony was introduced by both parties on the question, whether the note was given in 1842 or 1843. It was given for the balance of an account, in which the plaintiff had charged, among other things, for spirituous liquor, sold at different times. The defendant requested the Judge to instruct the jury, that those charges for liquor, being included in the note,

rendered the note wholly void. The Judge refused to do so, but instructed that those charges had no effect on the note. The jury, by leave of the court, came in, without having agreed upon a verdict; and stated that they found it difficult to reconcile the testimony of two of the witnesses. The Judge told them it was a case in which they ought to agree; that, as the facts to which the witnesses testified, occurred at different times, they might exist consistently with each other; that there was not necessarily any conflict in the testimony; and that it was their duty to reconcile the testimony, if they could. After again retiring to their room, they came into court, without permission, not having agreed. The Judge thereupon urged the importance of their agreeing. The defendant's counsel objected to the sending out of the jury the third time. But, as they had come in without permission, they were directed again to retire. Their verdict was for the plaintiff, and the defendant excepted to the instructions and doings of the Judge.

Appleton and *Kimball*, for defendant.

The instructions requested should have been given.

The note given on settlement of the account, which contained charges for spirituous liquors sold without license, was void.

When a *part* of a note is illegal, the whole is void. Stat. 1834, chap. 141, § 1; Rev. Stat. chap. 36, § 17; *Deering* v. *Chapman*, 22 Maine, 488; *Cobb* v. *Billings*, 23 Maine, 470; Cro. Eliz. 2 Kent's Com. 467; *Bliss* v. *Negus*, 8 Mass. 51; *Greenough* v. *Balch*, 7 Greenl. 461; *Maybea* v. *Coulon*, 4 Dall. 298; 6 N. H. 225.

The burden of proof was upon the plaintiff to show that Pray was licensed, when he sold the liquors.

The sending out of the jury a third time, was against law. Rev. Stat. chap. 115, § 67.

The fact that the jury came into court, without the consent of the Judge, can make no difference, for the statute no where requires that consent.

They have that right, and the statute seems to recognize it.

The ancient strictness and severity towards jurors, in *compelling* them to agree, has long since been done away. It would not be consistent with the genius of our government or laws, to use *compulsory* means to effect an agreement among jurors. *Com.* v. *Bowden*, 9 Mass. 494.

It was the object of the statute to protect jurors from unnecessary severity, as well as to secure the rights of the parties. 1 Wash. 202.

In cases of misdemeanors and civil actions, the right to discharge a jury rested at common law on the sound discretion of the court. 1. Bouvier's, L. D. 465,; 3 Story on Const. 17, § 1; 9 Wheaton, 579. This discretion is now limited by the statute.

The Judge expressed himself too strongly in saying there was necessarily no conflict in the testimony. *Lawrence* v. *McGregor*, 5 Ham. 309.

Goodenow and *Eastman*, for the plaintiff, were stopped by the court.

TENNEY, J. orally. — It is not necessary to inquire whether a note given in part for liquor sold in violation of law, would be void. For there was no proof that the liquors were illegally sold. Pray may have had licence to sell them. The burden was on the defendant to prove the sale illegal.

Did the Judge, in his observations, intrude upon the province of the jury? The Judge may and must decide in matters of law, but not in matters of fact. He may arrange the evidence, and comment upon it, even though the arrangement and comment may have the appearance of an argument. Here he did no more than to decide the law, and comment upon the evidence.

It is entirely suitable that the Judge should impress the jury with the propriety of coming to an agreement.

The second return of the jury into court was unauthorized. Under such circumstances, a direction for them to retire was not a sending out within the meaning of the statute.

Exceptions overruled.

Nason *versus* McCulloch.

In a suit upon a witnessed note, an account barred by the statute of limitations, but of about the same date with the note, and larger in its amount, was filed in set-off. Held, that, *as a set-off*, the law would not sustain it, nor allow so much of it to be proved as to balance the note. Neither will the law appropriate the account to the payment of the note, nor presume, after any lapse of time, that the plaintiff had so appropriated it.

Assumpsit on a witnessed note, given in 1829. The plaintiff and defendant formerly were joint-owners, with another person, of the ship Watchman. The defendant filed, in set-off, an account, the items of which were dated soon after the note was given. The balance due to the defendant on the account, purported to be greater than the amount of the note. The defendant had requested a settlement many years ago, but none had been made.

In a difficulty on another subject, in 1844 or 1845, the plaintiff adverted to his holding this note. The defendant answered, "you know that note was paid years ago, and that you owe me a balance of 150 to 200 dollars." To that remark the plaintiff made no reply. The defendant introduced proof concerning the set-off account, and also to show other money transactions, relative to the vessel, tending to prove that the balance of their dealings was in his favor.

The defendant contended that, though his account might be barred, yet he had a right to prove it, so far as to defeat the note; that the statute merely impaired the *remedy*, but did not discharge the *debt*.

The Judge ruled that, if the account was barred by the Statute of Limitations, it could not be allowed in set-off. The defendant contended that, as the plaintiff had in his hands the defendant's money for 19 years without paying it over, the law would presume he had appropriated it on the note. The Judge ruled that, if the plaintiff had defendant's money, "of which there did not appear to be any proof," the law would not appropriate it to the payment of the note.

The trial was before Wells, J. The verdict was for the plaintiff, and the defendant excepted.

Bourne, for defendant.

1. Defendant has the right to file and prove in set-off.

The statute merely bars the remedy, but not the debt. *Higgins* v. *Scott*, 2 B. & A. 413; *Spears* v. *Hartly*, 3 Esp. Rep. 81; *Thayer* v. *Mann*, 19 Pick. 535; *Eastman* v. *Foster*, 8 Mass. 24; Chitty on Contracts, 806.

When there are cross demands which accrued nearly at the same time, and the plaintiff has kept alive his demand by continual process, he cannot avail himself of the statute, to defeat the defendant's set-off. *Ord* v. *Ruspini*, 2 Esp. Rep. 569; Starkie's Ev. 900.

The English statute of set-off is the same as ours.

By our statute, chap. 146, sect. 26, all the provisions of the chapter shall apply to an account in set-off. What is the provision referred to? That no action shall be maintained, to recover. Does not the section refer to a recovery of a balance beyond the defendant's claim. If defendant is deprived of the *benefit* of a set-off, by discontinuance, &c.; what *benefit*, but a judgment for his balance? Why secure to him, the privilege of bringing a new suit, to have his claim offset, by other party; and thus be defeated and pay costs.

What could our statute have required of the defendant within six years? The law provides that in a suit by us, he might file his note in set-off. If he had $100 of defendant's money, and a note against him of the same amount, what was defendant bound to do?

The policy of the law did not require a suit by defendant, and the incurring of costs to no purpose.

As defendant could not have got the money out of plaintiff's hands within six years, will the law permit plaintiff, after that time has expired, to turn round and tell us that he shall not apply it to the note?

If demands are filed in set-off to a suit by indorsee, against the maker, on a note overdue, he may avail himself in set-off, though not proved as payment. *Sargent* v. *Southgate*, 5 Pick. 312; *Braynard* v. *Fisher*, 6 *ib.* 355; *Peabody* v. *Pe-*

ters, 5 *ib.* 1; *Shirley* v. *Todd*, 9 Greenl. 84; *Barry* v. *Norton*, 2 Fairf. 352.

He cannot recover a balance. His claim is proved as a payment, and therefore is not affected by the statute. Suppose Nason had indorsed the note, and the suit was now by the indorsee?

2. The defendant had a lien on the money in his own hands, to pay his claim against the plaintiff. Plaintiff's note is only evidence of money had and received by the defendant.

If the defendant had such lien, his demand, to the extent of his lien, is never outlawed. *Spears* v. *Hartly*, 3 Esp. Rep. 81.

A lien is never outlawed.

3. Nason had the right to appropriate money in his own hands, to the payment of his debt, and not having paid it over for nineteen years, the law must presume that he so appropriated it.

In *Sargent* v. *Southgate*, before referred to, the court say, "Indeed it is substantial payment to show that the plaintiff was indebted to an equal amount, and probably nine times out of ten, the items of an account filed were intended between the parties to go in discharge of the note. It is quite common for those who have given negotiable securities, to make advances to their creditors on the faith and expectation of an allowance and adjustment, although not in direct form of payment of their notes." Was not the plaintiff's note actually paid within six years? Was the payment wiped out by the lapse of that time?

Six years afford a presumption that the defendant has lost his evidence of payment.

Payment may be presumed from the course of dealing between the parties. Starkie's Ev. 1091.

4. The law appropriates money without the agreement of parties. The great subject of inquiry has been, "how shall it be appropriated, when the parties have not done it?"

Partridge v. *Dartmouth College*, 5 N. H. 288. Payment to a third person to discharge a lien shall be a payment to the plaintiff. Chitty on Bills, 370, note d.; *Portland*

Bank v. *Brown*, 22 Maine, 298; *Field* v. *Howland*, 6 Cranch, 8; *McKenzie* v. *Nevins*, 22 Maine, 135; *Hilton* v. *Burleigh*, 2 N. H. 195; *Starrett* v. *Barber*, 20 Maine, 457; *Peters* v. *Anderson*, 5 Taunton, 597.

The mere fact of the payment of money by A to B, is presumptive evidence of the payment of an antecedent debt. Starkie's Evidence, 1090; Peake's Cases, 30.

The Judge said, "It did not appear that the plaintiff had any money in his hands belonging to the defendant." But there is no evidence that at this time there were any other owners of this vessel to whom the money could belong, except the plaintiff and defendant. No one else appears, or undertakes to complain that the business is not settled.

J. Shepley, for the plaintiff.

WELLS, J. orally. — The defendant contends that, though his account was barred by the statute, he had the right to prove it, so far as to balance and defeat the note. But such a distinction would operate a repeal of the statute. The instruction given to the jury was right, and this is decisive of the whole case.

It is however said the law will appropriate the account to the payment of the note. But they were independent claims; having no connection with each other. To make such an appropriation would be making agreements for the parties. The law does not do it, neither does it presume, after any length of time, that the plaintiff had made such an appropriation. As to the Judge's remark that there did not appear to be any proof of defendant's money in the hands of the plaintiff, it is to be noted that the parties were jointly interested in the ship. In all dealings on that subject, the balance is to be found, before one can be considered as having the other's money. But if not so, such a fund is but an independent matter, of which the law makes no appropriation.

Exceptions overruled.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF CUMBERLAND,

1850.

KENDRICK *versus* SMITH.

For the keeping of property attached by an officer, no person is bound to render his services without present pay.

A contract for such service, whether it were an express or an implied one, made with a deputy sheriff, is a personal one; the sheriff is not liable upon it.

Though the service of such keeper was taxed by the deputy on the writ, and included in the judgment, and though the execution had been collected by the sheriff, the keeper can maintain therefor no action against the sheriff, after the latter has paid the taxed costs to the attorney, upon his claim of lien for fees and disbursements.

An omission by the deputy to pay for the services of the keeper, is not such an omission as gives a remedy, *under the statute*, against the sheriff.

ASSUMPSIT.

The defendant was sheriff of this county. One Morse was his deputy. Upon a writ, *Reed* v. *Kimball & al.*, Morse attached a large cotton factory, with the materials for making cloth, &c. Among others, he employed the plaintiff as a keeper, and taxed upon the writ $76 for the plaintiff's services, which sum was allowed and included in the judgment.

Morse died, and the defendant collected the execution recovered in that suit, amounting to $3161,72. The attorney of the plaintiff in that suit claimed a lien for his fees and disbursements, on all the costs taxed on the writ, and they were paid to him by the defendant, on the settlement of the execution.

The plaintiff proved that, previous to this suit, he made a demand upon the defendant for his said services, to which the defendant replied, that he had paid over the same, as above stated, to the attorney of the original plaintiffs.

Barrows, for the plaintiff.

1. The sheriff is liable for all neglects and misdoings of his deputy in matters pertaining to his office. Revised Statutes, chap. 104, sect. 1; *Tyler* v. *Ulmer*, 12 Mass. 163; *Ingersoll* v. *Sawyer*, 2 Pick. 276; *Gardner* v. *Homer*, 6 Mass. 325, 375; *Warner* v. *White*, 4 Shepl. 53.

2. The expense of keeping goods attached, is a lien on the goods; and the sheriff may rightfully pay the keeper, even where the debtor agreed to discharge the keeper's fees. *Twombly & al.* v. *Hunnewell*, 2 Greenl. 221; *Tyler* v. *Ulmer*, 12 Mass. 163.

3. The case finds that the sheriff, in this instance, assumed the custody of the property, personally, on the death of his deputy, and of course subject to the same liabilities for expense of keeping. *Ingersoll* v. *Sawyer*, 2 Pick. 276.

4. The action should be maintained on the ground of public policy, for the keeper's services are for the benefit of the sheriff, and his bondsmen, as well as of the creditor, and his pay should be secure.

5. The fees of the plaintiff were taxed for him individually by name, in the same manner as aids of the officer, in criminal cases, have their fees taxed. The money, when realized from the sale of the property upon which the lien existed, belonged to plaintiff, and the act of defendant in paying it over to any other person, after notice, is unjustifiable, and the defendant is liable for the amount, as money had and received

to the plaintiff's use. *Tyler* v. *Ulmer*, 12 Mass. 163; *Hutchins* v. *Gilman*, 9 N. H. 359.

6. It is no answer to this, that the attorney of the creditors claimed his lien upon the judgment, for that lien extended only to the amount of his personal fees and disbursements in the suit, and it was the defendant's duty, knowing how this sum should be appropriated, to have satisfied the plaintiff's claim out of the same moneys collected on the execution, the plaintiff having in effect claimed his lien also. The attorney's lien did not extend to the keeper's fees. *Thompson* v. *Brown*, 17 Pick. 464; *Stone* v. *Hyde*, 22 Maine, 318; *Bailey* v. *Butterfield*, 4 Maine, 112.

7. As to this plaintiff, the sheriff and his deputy were one. Such is their legal identity, that the promise of the deputy was the promise of the sheriff. The latter may be viewed as the principal, and the former as his agent.

8. Our claim is upon the liability of the defendant himself. That liability was perfected by his own act. He took the property, subject to all its liens and burdens. This raised an implied promise by him to pay the plaintiff.

Fox and *G. F. Shepley*, for the defendant.

Tenney, J. — This is an action of assumpsit against the defendant, as sheriff of this county, to recover compensation for the plaintiff's services, in aiding in the safe keeping of certain property, attached by the defendant's deputy, who has since died. The deputy made return of the attachment upon the writ, with the taxation of costs for the service, and for the expense in securing the property, including the charge made by the plaintiff, which was also embraced in the judgment, afterwards rendered. The execution, issued upon that judgment, was put into the hands of the defendant, who collected the full amount, with his own fees, in two certain drafts, one of which was in favor of the attorney who commenced and prosecuted the original suit, for the full amount of the costs taxed and other charges. This draft was delivered to the attorney, who receipted for the same on the execution, and the

other, which was for the debt and interest thereon, was passed to the creditors.

It does not appear that any express promise was made by the defendant, sufficient for the maintenance of the action. If he is liable at all, it must be on account of the relation existing between him and his deputy; his having received and collected the full amount of the execution; or upon the ground, that the plaintiff had a lien upon the judgment, as it is contended he had, for the payment of his claim.

"The sheriff shall be answerable for the misconduct, and all neglects of his deputies, while in office." R. S. chap. 104, sect. 10. This liability has been repeatedly held to extend only to the violation of official duty; and bonds, which sheriffs have usually taken of their deputies, have been restricted in their operation to security against the like delinquency, and have not been regarded as sufficient to sustain their promises. *Toby* v. *Leonard*, 15 Mass. 200; *Bailey* v. *Butterfield*, 14 Maine, 112.

The parties to a suit, or judgment and execution, who have been injured by a deputy sheriff, by reason of any of his omissions to do what his duty as an officer required him to perform, and strangers who have suffered by his official acts, have a remedy against the sheriff, commensurate with the injury received. But the deputy may be obliged for various reasons to make use of agencies, auxiliary to the full discharge of his duties, as a minister of the law, and for the services performed by those, employed by him, he is entitled to reasonable compensation, which is a just charge eventually, against the property attached and the debtor, if judgment is obtained for the creditor, and constitutes a part of the costs in the judgment. It often becomes necessary, that goods attached on mesne process should be removed, and that expense should be incurred afterwards in their safe custody. The persons employed for this purpose by the officer, who made the attachment, may be numerous, their services more or less important, some being entitled to a very small sum and others to a much larger, as compensation for their respective services, each as

they severally agree with the officer, or as the aid afforded may properly require. The individuals, who have thus assisted him in his duties, have done it under a personal contract, which renders the officer liable; but it cannot be contended, that each would have a claim against the sheriff, who appointed and commissioned the officer. Such a course would be attended with great delay and perplexity, for which there is no reasonable cause; for neither the agents employed by the officer are obliged to render these aids without present payment, nor is the officer himself required to enter upon the performance of his official labors, in precepts in civil proceedings, without an advance of his legal fees. The acts and omissions of the deputy, for which the sheriff is made liable, are tortious in their character, and therefore cannot properly be anticipated in all cases; hence the importance of a provision for the indemnity of those who may suffer thereby, such as the statute has provided. The deputy obtains the aid, which has been referred to, that neither he nor his principal should be liable for any claim for misconduct or negligence, and it could not have been intended by the authors of the statute, that the sheriff should be liable on the one hand for the omission of official duty in his servant, and for the means used by the latter to secure him for this liability on the other. It is quite obvious, that the omission of the deputy sheriff to compensate one, whom he employs to take charge of property attached by him, is not an omission contemplated by the statute.

The sheriff having assumed the custody of the property personally, after the death of his deputy, is holden for its safe keeping afterwards, to those who are interested therein, either as owners or attaching creditors, without having recourse to the sureties on the deputy's bond for any loss by his own neglects; but he is not thereby substituted, as it is contended, for the plaintiff, in the place of the deputy, and liable for his personal contracts; these contracts may be enforced according to their original import, between the parties thereto, or their rep-

resentatives ; but a stranger to such agreements, cannot be brought in as a new party, and made liable thereby.

The plaintiff has no lien upon the judgment, for the claim in suit. The creditor or owner of a judgment and execution is entitled to the full amount of the debt and costs, subject only to the lien of an attorney, for his fees and disbursements ; this lien can be enforced against the debtors, notwithstanding the creditor has undertaken to discharge it, by the receipt of the full amount of the judgment. The officer who collects an execution is liable, upon demand, for the entire sum. Beyond the attorney's lien, he is not permitted to withhold from the creditor any portion, for the payment to others, of their charges, for services rendered in the securing of property attached, although making a part of the costs, for which judgment was recovered. It was not the design of the statute to extend its protection by a lien so far.

The defendant having paid the full amount of the execution and discharged the only lien thereon, must be held exonerated, and, according to the agreement of the parties, a

Nonsuit must be entered.

DWINEL *versus* POTTLE.

Where a party relies upon his own book and suppletory oath, as evidence of the performance of services or the sale of articles, it is indispensable, in order to a recovery, that he should testify that the services were performed or the articles delivered.

EXCEPTIONS from the District Court.

Assumpsit for barrels sold. The plaintiff introduced his book of accounts, took the suppletory oath, and testified that he made the charge for the barrels at the date of the book-charge. He further testified, (against the objection of the defendant,) that the barrels were not paid for. On cross-examination, he testified that he did not deliver the barrels, but was absent from home when they were taken.

The defendant then objected to this testimony going to the jury, but it was admitted. The verdict was for the plaintiff.

Bennett, for the defendant.

1. The plaintiff was wrongfully permitted to testify that payment had not been made. That was a collateral or subsequent matter, and no part of the transaction, concerning which the book entry was made.

2. There was no evidence of a delivery. Such evidence is indispensable, when the book and oath of the party are relied on.

S. Fessenden, for the plaintiff.

The testimony that the barrels were not paid for, was at most but a useless statement. It did no harm.

There is no dispute that defendant had the barrels.

The case then turns upon the question of payment, and we have proved there was none. Besides, it was the defendant's business to prove payment, not ours to disprove it.

HOWARD, J. — Where a person has charged another, upon his books of account, with goods, or with labor and services, which may be the proper subjects of such charge, he is admitted in our courts, as a competent witness to support his claim for the account by his suppletory oath, generally, when better evidence, from the nature of the subject, is not attainable. But in order to render his books admissible as evidence, when the entries are made by himself, and supported by his oath, only, he must swear that he made them at, or about the time they purport to have been made; that they are his original entries of the transaction; and that the articles and services were respectively delivered, and performed, as there charged. *Cogswell* v. *Dolliver*, 2 Mass. 217; *Prince* v. *Smith*, 4 Mass. 455; *Faxon* v. *Hollis*, 13 Mass. 427; *Dunn* v. *Whitney*, 10 Maine, 12; *Mitchell* v. *Belknap*, 23 Maine, 477; *Leighton* v. *Manson*, 14 Maine, 213; 1 Greenl. Ev. § 118, and notes; Pothier on Obl., part 4, ch. 1, art. 2, § 4; 1 Smith's Leading Cases, 142; *Eastman* v. *Moulton*, 3 N. H. 157.

To prove his claim, the plaintiff relied solely upon the evidence furnished by his book, and his suppletory oath. He did not, however, swear to a delivery of the articles charged by him, and did not, therefore, present a case in which his book was competent evidence to be submitted to a jury.

The exceptions are sustained and a new trial granted.

PORTER'S ADMINISTRATOR *versus* PORTER.

A mere *recognition* or *acknowledgment*, by a bankrupt, of a debt which has been discharged in bankruptcy, creates no legal liability to pay the debt.

Such a liability can arise only upon an *express promise* to pay the debt.

A promise, by a bankrupt, to give a new note for such a debt, is not such an express promise as will sustain an action upon the original debt.

ASSUMPSIT, upon a note of hand dated in 1839.

The defendant relied upon a discharge in bankruptcy, obtained in the district of New Orleans in October, 1842, upon his petition filed in May of the same year, and on which he was decreed a bankrupt prior to Sept. 1842.

The plaintiff proved *that*, in Sept. 1842, his attorney called upon the defendant and requested payment or security for the note, and told him his instructions were to arrest, unless such payment or security was made; *that* afterwards the defendant was told, if he would give a new note, it would be received; *that* the defendant declared his utter inability to pay the note, but agreed to give for it a new note payable on demand, including principal and interest; and *that* the witness wrote a new note for the purpose, but the defendant did not sign it.

The case was submitted to the court for nonsuit or default.

Fox, for the plaintiff.

The testimony shows a new promise, sufficient in law to sustain the suit. A promise to give a new note is, by our law, a promise to pay, as the new note would be payment. The promise was made after the decree, but before the dis-

charge, in bankruptcy. It was therefore binding. Chitty on Con. 47, 180.

Fessenden & Deblois, for the defendant.

WELLS, J. — The defendant presented his petition to be declared a bankrupt, May 20, 1842, and obtained his certificate, October 10, of the same year. Being called upon by the attorney of the plaintiff in September, 1842, to pay or secure the debt from which he was subsequently discharged, he "declared his utter inability to pay the note, but agreed to give a new one, including principal and interest for the old one, new note to be on demand."

What the defendant said would very clearly be deemed a recognition of the debt, sufficient to take a case out of the statute of limitations, before the passage of the Revised Statutes. But the mere recognition or acknowledgment, by a bankrupt, of a debt, which has been discharged by bankruptcy, does not create a legal obligation upon him to pay the debt. Such obligation can only arise upon an express promise to pay it.

The statute of limitations barely suspends the remedy, but the bankrupt law discharges the debt. Yet the moral obligation resting upon every one to pay his debts, is considered a sufficient consideration to support an express promise by the bankrupt. And in such case the declaration may be upon the original contract. 1 Chitty on Plead. 40.

But the promise must be taken as it is made, and a promise to do one thing cannot be converted into a promise to do another.

The substance of the defendant's promise is, that he would pay the debt by giving a new note, he was unable to pay the money, but he would give a new note for the principal and interest. He did not agree to pay the money on the old note, and he cannot be held to do what he did not agree to do.

His promise was verbal, to make at a future time an agreement in writing, containing a promise to pay the old

debt. He did not intend to be holden to pay the debt by what he then said, but by an ulterior act to be performed at a subsequent time, by the giving a new note. And until that event took place his new liability would not be fixed. Whether he would be in any better condition legally by giving a new note, than in promising to pay the old, was a matter for his own consideration. He was at liberty to make the proposition in such manner as suited his own purposes, and he might have expected more indulgence, by giving a new note, if it should be accepted, than in making a verbal promise to pay the old one. Since, as the testimony discloses, he was threatened with an arrest unless he would pay or secure the debt.

If the defendant had said, I will not promise to pay the old note, for I am unable to do it, but I will give a new note, would that language imply a naked promise to pay the old note? How much does that which he did use differ from this?

The defendant's language cannot be limited, by a proper construction of it, to a mere verbal promise to pay the debt, but should be coupled with the mode of the proposed payment, as expressed and intended by him.

If any action would lie against the defendant upon a promise to pay the debt, in a manner different from that provided in the original contract, it would be necessary to declare specially on such promise. *Penn* v. *Bennet*, 4 Camp. 205. As where the debt was payable in money, and there should be a new promise to pay in specific articles. The declaration in this action could only be supported by a promise to pay in money; that proved is not of such character. Although by our law the receiving a negotiable note is a presumption of payment of the debt for which it is received, yet a promise, by a bankrupt, to give a note for a debt from which he has been discharged, is not a promise to pay such debt in money.

Any commodity may be received in satisfaction of a precedent debt, but a promise to deliver it for that purpose is not a promise to pay in money. Whatever mode of payment is

adopted, when effectual, it cancels the debt, but the modes of doing it may be various. And it is a well established rule of pleading, that the allegations and proofs must correspond.

Plaintiff nonsuit.

JAMES DEERING, *in Equity, versus* THE YORK AND CUMBERLAND RAIL ROAD COMPANY.

Upon a bill in equity, praying for an injunction and for relief, an Act of the Legislature ought not to be adjudged unconstitutional, on a mere preliminary hearing for the injunction, and before an examination into the general merits of the bill.

Thus, upon such a bill, calling for an immediate injunction against a rail road corporation, to stay their operations, under their charter, upon the plaintiff's land, upon the allegation that the powers, granted by the charter, were in violation of the constitution, it was *Held*, that, until the general merits of the bill should be examined, the injunction must be denied.

BILL for an injunction and for relief.

The bill, in substance, alleges *that* the plaintiff is owner and occupant of improved and valuable lands, upon which he resides; *that* defendants were incorporated with power to construct a rail road, and to purchase or to take, hold and use lands necessary for said purpose; provided, that when lands should be taken without purchase or contract, the company should pay damages, to be ascertained and determined by the county commissioners, in the same manner and under the same conditions and limitations as are by law provided in the case of damages by the laying out of highways, and that the lands so taken by the corporation, shall be held as lands taken and appropriated for public highways; *that*, by said charter, the defendants were invested with all the powers, privileges and immunities, and made subject to all the duties and liabilities, provided respecting rail roads, in chapter 81 of the Revised Statutes, not inconsistent with the express provisions of their charter.

The plaintiff's bill further alleges *that*, acting under said charter, the defendants have caused a portion of the route of said rail road to be located upon and over said lands of the

plaintiff, and have commenced using the same, and have cut down his fences and trees, and dug up and defaced his grounds, and are still committing great waste, and threatening to continue so to do, to his great annoyance, and to the prevention of his future improvement of the lands, and to the ruin of the same, *in the character in which they have long been enjoyed by him; that* there has been no agreement between the plaintiff and defendants, as to the price, to be paid for said appropriation of the plaintiff's lands; *that* the damages thereby created have never been ascertained and determined by the county commissioners, or in any other way, nor have the defendants paid or offered to pay any thing for the same; and *that* said injurious acts have been done without any purchase from or consent of the plaintiff, and without any pretence of right, except under said charter.

The plaintiff's bill further alleges *that*, whatever may be the purport of the defendants' charter, it cannot have conferred upon them the right to do the injurious acts aforesaid, because it makes no adequate and certain provision for the payment of damage or compensation for the lands taken as aforesaid, and is therefore unconstitutional and void; *that* the aforesaid doings of the defendants are wholly of their own wrong, and contrary to equity and good conscience, for which there is no adequate remedy at law. Wherefore the plaintiff prays that the defendants may be enjoined from further appropriation of, or operation upon, the said lands of the plaintiff, and for further relief.

For the purpose of a hearing at the present term, so far as relates to the injunction prayed for, the defendants admit the facts stated in the bill to be true.

W. P. Fessenden, for plaintiff.

John A. Poor, for defendants.

For the plaintiff, it was contended, *that* the defendants' proceedings, (unless justified by their charter,) are acts of waste, even under the strictest definitions of the ancient law; and *that*, *a fortiori*, they are such within the mitigated doctrines of modern times; also that they are, to the plaintiff, a nuis-

ance from which he is entitled to be exempted; and *that*, for such waste and such nuisance, the appropriate and only adequate remedy is at equity.

The counsel then contended, that the defendants' acts are not justified by their charter, because it is merely an unconstitutional and void enactment, inasmuch as it does not provide a "just compensation" for the private property which it authorizes to be taken for public uses.

These positions were enforced with much strength of argument, and a voluminous citation of authorities.

By the defendant's counsel, the provisions of the charter were vindicated with much force, and by a learned reference to adjudged cases.

The court having postponed a decision upon the general merits, and left the case, for the present, in an unfinished state, the arguments and citations, as they apply chiefly to the points hereafter to be decided, are postponed till the decision upon those points shall be made.

WELLS, J. — The plaintiff, by his bill in equity, charges the defendants with having committed waste upon his lands, and the doing of certain acts upon the same, which are denominated in the bill a nuisance to him. He also prays for an injunction to restrain the defendants from doing any further acts upon his premises, by virtue of their charter. The injunction is asked for at the present time without a hearing upon the general merits of the bill, and the defendants, without making an answer to the bill, admit for the purposes of the hearing, in relation to the injunction, that the facts stated in the bill are true.

It is contended by the plaintiff that if the act incorporating the defendants, allows them to take and use his land, before compensation is made to him, that then the act is so far unconstitutional and void.

It is quite manifest that the act, by a fair construction of its language, does authorise the taking and using of the land, before compensation is made, and in case the parties cannot agree upon the damages, they are to be determined by the county commissioners, in the same manner and under the same

conditions and limitations, as are by law provided in the case of damages by the laying out of highways. The statute, chap. 81, sect. 6, when real estate is taken by a rail road corporation, directs the commissioners, upon the request of the owner of such real estate, to require the rail road corporation to give security to the satisfaction of the commissioners, for the payment of damages and costs, which may be awarded by jury or otherwise, and it further provides that the authority of the corporation to enter upon or use such real estate, except for making surveys, shall be suspended until the security is given. And the charter of the defendants confers upon them all the rights, and subjects them to all the liabilities, provided in chap. 81, before mentioned, not inconsistent with the provisions of the charter. Any party aggrieved by the doings of the commissioners, in estimating damages, may have a jury to determine the matter of his complaint, agreeably to chap. 25, sect. 8.

By the charter and the provisions of the statute, the defendants may continue to use the real estate taken, by giving the required security.

By the constitution of this State, it is provided, art. 1, sect. 21, that "private property shall not be taken for public uses, without just compensation; nor unless the public exigencies require it."

The constitution does not prescribe that the compensation shall be made before the property is taken, nor when it shall be made.

In times of war and civil commotions, the government may need the property of its citizens for public uses, when the exigency is so pressing, that there is neither opportunity nor means for making compensation at the time when it is taken.

Lands are required for highways, turnpikes, canals and ferries, and the acts authorizing them to be taken have uniformly, so far as they have come to our notice, provided for compensation subsequently to be made.

But it is conceded, that in cases where the owner of the

land has a claim upon a town or county for his damages, that there is then such a degree of certainty as will ensure the eventual payment, and that it would not be in violation of the constitution to allow the property to be taken where a public corporation would be liable for the compensation subsequently to be made.

But even in those cases, the compensation would not be absolutely certain, for governments are subject to revolutions, and they may fail of making payment. As all future earthly events are doubtful, if the payment provided, though not absolutely certain, may still be constitutional, can any thing more be required than a reasonable certainty of it?

The law does not prescribe the kind of security with which the commissioners may be satisfied. They may require a deposit of public stocks and securities of a town, city, State or of the United States. But they may require security of a less satisfactory character, and it may entirely fail and the owner be subject to great injury, though not to the ultimate loss of his land.

This is strictly a constitutional question of great magnitude, not only affecting the plaintiff but having an important bearing upon the interests of others. Before the injunction can be granted, we must decide the act incorporating the defendants to be unconstitutional and void. And this decision we are called upon to make, upon a mere interlocutory proceeding, without sufficient opportunity for examination and deliberation.

In the case of *Moor* v. *Veazie*, the plaintiff asked for an injunction on the ground, that the charter under which he acted was constitutional, and it was presumed to be so, so far as to authorize a temporary injunction. There the charter was claimed to be valid, here invalid. There we could grant what was asked, assuming the act to be in accordance with the constitution, here we cannot do it, without deciding the act to be in opposition to the constitution.

As we assumed in that case the constitutionality of the legislative act, so we must in this, so far as relates to the

application for an injunction at the present time. The same rule, which authorized it to be granted in that case, requires in this, that it should be refused. We base our conclusion upon the rule, that an act of the Legislature ought not to be decided to be unconstitutional upon a preliminary hearing of this nature, before an examination of the general merits of the bill.

We therefore decline at present from expressing any opinion in relation to the validity of the defendants' charter. We have stated enough to show what the question is, and that it is one requiring very great consideration, and the most careful and attentive investigation. It must take the ordinary course of judicial proceedings, and will be decided, if the nature of the case requires it, upon the final disposition of the plaintiff's bill. *The injunction is denied.*

CROCKER *versus* PIERCE *& al.*

If one, by deed of warranty, grant land to which he then had no title, and afterwards acquires a title, it enures, *eo instanti*, to the benefit of such grantee, or the one, if any, to whom the latter, prior to such acquisition of the title, may have conveyed it, with like covenants of warranty.

Such a conveyance, in its effect, has priority to one, made to another person after the title vested in the grantor.

These effects are wrought by the covenants of warranty, on the principle of estoppel. They do not result from an attachment and levy.

A creditor acquires no title by an attachment and connected levy of land, of which, at the time of the attachment, the debtor had no title, but of which he had given a warranty deed, to a third person, though he, the debtor, after the attachment and before the levy, obtained the title; said warranty deed having been recorded prior to the levy, though not prior to the attachment.

The title thus acquired by the debtor, will enure to the use of his grantee, by force of the warranty.

An attachment of land upon *mesne* process can secure to the creditor, only the property which the debtor had in it at the time of the attachment. No subsequently acquired title of the debtor can be held by it.

ASSUMPSIT.

Money had been received by the defendants for timber cut, (stumpage,) on a township of wild land.

The plaintiff claims title to $\frac{5}{16}$ of the township, and brings this suit to recover that proportion of the stumpage money.

The only question related to the title, it being agreed that the plaintiff is to recover, if the title be in him.

The material facts are substantially as follows:—

The Commonwealth of Massachusetts, owning the township, gave their bond, in 1832, to convey it to the defendants upon payment of certain notes given therefor. The bond was recorded in 1833. The notes having been paid, the deed was given to the defendants, August 16, 1836, and recorded August 18, 1836. Prior to that conveyance, the defendants, by warranty deeds, had granted five-sixteenths of the land to several persons, from whom the same came by regular lines of conveyances to William Smyth.

[The Reporter infers, but has not the means of making it certain, that all the deeds in these lines of conveyances were deeds of general warranty.]

The immediate grantors of Smyth, were Levi Cram, by a deed of one-fourth of the tract, dated May 4, 1835, and recorded the same day; Alfred Johnson and Ralph C. Johnson, by separate deeds, each of one thirty-second part, dated September 4, 1835, and recorded the same day.

These three last mentioned deeds contained covenants of general warranty.

Smyth conveyed to the plaintiff by warranty deed, dated September 5, 1835, and recorded October 11, 1839.

On May 14, 1836, all said Smyth's right, title and interest to any real estate in the county, (in which said township lay,) was attached on a writ in favor of Homes & Homer. In that suit, judgment was recovered December 8, 1841, and the execution, issued thereon, was levied December 18, 1841, upon the above named five-sixteenths of the township.

Homes & Homer conveyed their interest in said five-sixteenths to the defendants, April 4, 1844, by deed, recorded April 17, 1844.

Shepley and Dana, for the plaintiff.

When the defendants gave their deed of warranty, they had no seizin in fact or in law. They had nothing but a personal right under the bond. *Shaw* v. *Wise*, 1 Fairf. 113; *Pro.* v. *McFarland*, 12 Mass. 325. Their deed therefore conveyed nothing.

At the time of Homes & Homer's attachment, Smyth had only a personal interest. He was, perhaps, the equitable owner, (though not the legal assignee,) of the right under the contract. (Stat. 1829, c. 431.)

They elected to consider it as an estate in the land, and so attached it. As Smyth had nothing in the land, they held nothing by their attachment.

But even if the attachment held his personal right, Homes & Homer lost the benefit of it by *levying upon the land*, instead of proceeding under the statute, *to sell the right;* the deed from Smyth to plaintiff having in the mean time been recorded. *Aiken* v. *Medex*, 1 Shepl. 157; R. S. c. 94; Act of 1847, chap. 21.

And if the levy was properly made, inasmuch as the attachment was made before Smyth's grantors had any title whatever to the land, or had conveyed any, defendants must claim that, when they acquired the fee in the land, it did not follow the line of their covenants of warranty, but enured to perfect the title of Homes & Homer.

But title *enures* only by virtue of covenants, which create estoppel. It is well settled that a deed of release or quitclaim does not contain *such covenants*, and no subsequently acquired title enures thereby. Nothing but covenants of warranty will suffice. *McCrackin* v. *Wright*, 14 Johns. 193; *Jackson* v. *Hubble*, 1 Cowen, 616; *Jackson* v. *Bradford*, 4 Wend. 622; *Jackson* v. *Waldron*, 13 Wend. 189; *Comstock* v. *Smith*, 13 Pick. 116; *Allen* v. *Sayward*, 5 Greenl. 227; *Baxter* v. *Bradbury*, 20 Maine, 260.

An execution creditor does not stand as well in this regard as a simple releasee. For the creditor's right is altogether adverse. And the debtor himself, giving no deed, and making

no covenants whatever, is not estopped from setting up a subsequently acquired title, against one claiming by virtue of a levy. *Pike* v. *Galvin*, 29 Maine, 183.

When the defendants obtained the title, *eo instanti* it enured, by virtue of their covenants of warranty, to their grantees and those holding under them. *Middlebury College* v. *Cheney*, 1 Vermont, 336; *Somes* v. *Skinner*, 3 Pick. 52, and cases cited; *Lawry* v. *Williams*, 1 Shepl. 281; *Jackson* v. *Murray*, 12 Johns. 201; *Stevens* v. *Stevens*, 13 Johns. 316.

But if Homes & Homer acquired a perfectly valid title by their levy, which would have been good in their hands, yet these defendants are utterly and forever estopped by their covenants, from ever, under any circumstances, setting up a subsequently acquired title, against those claiming in good faith by virtue of these covenants.

W. P. Fessenden, for the defendants.

Where a grantee claims title under a deed, he is estopped to deny the title of his grantor. This would extend, necessarily, to the first grantor in the line of his deeds. Greenl. Ev. 1, note to sect. 23, and last clause of sect. 24.

This estoppel operates not only in Smyth, but binds his grantees and all who claim under the same title. Greenl. Ev. above cited; *Hamlin* v. *Bank of Cumberland*, 19 Maine, 66, *vide*, which says, in such a case, "the grantee and all claiming under him are estopped to deny the seizin of the grantor." *White* v. *Patten*, 24 Pick. 324, and cases therein cited; particularly *Fairbanks* v. *Williamson*, 7 Greenl. 96, which is cited as law, on that point.

It is seen, then, that Crocker, claiming under a deed from Smyth, dated September 5, 1835, is estopped to deny that Smyth was then seized.

As against him, Smyth then had, and continued to have, an attachable interest. If he could convey, that which he could convey might be attached. It was attached, May 14, 1836, and a levy subsequently made.

That levy takes effect from the attachment, and operates, as if the land had been conveyed at the time of attachment.

Bryant v. *Fuller*, 19 Maine, 383; *Nason* v. *Grant*, 21 Maine, 160; *Fairbanks* v. *Williamson*, 7 Greenl. 96.

That case may be questionable to a certain extent: — viz. how far an estoppel is created by a mere quitclaim. If there were a warranty, as in this case, there could be no question.

The levy operates as a statute conveyance, and passes the covenants, contained in the deeds making the title. *White* v. *Whitney*, 3 Metc. 81.

The levy, when made, must be on the interest of the debtor at the time of the attachment; and no change in the title, between the attachment and the levy, can affect the levy. *Foster* v. *Mellen*, 10 Mass. 421; *Brown* v. *Bailey*, 1 Metc. 255.

As to actual possession at the time of the attachment, it is not material.

Pierce's deed conveyed both title and possession against him. It came to Smyth, and he was in possession, and while claiming under the deed, could not deny that he had seizin; and Crocker is bound by it. A deed, acknowledged and recorded, gives possession.

This case then finds that Smyth had possession.

And that possession, for all purposes of attachment and levy, continued after the deed to Crocker, until the same was recorded.

What could Smyth set up against this statute conveyance by levy? Nothing anterior to it. He is estopped. He might, perhaps, set up a subsequent conveyance from one who had a better title. *Doe* v. *Payne*, 1 Ad. & Ellis, 538.

Even this he could not set up against a warranty deed. He might against a quitclaim or a levy; for there are no covenants. And his grantees, being privies in estate, can go no further than he could.

This case is, by agreement, to be decided by the title; and, for the foregoing reasons, that title is in the defendants.

Shepley and *Dana*, in reply.

If it be incompetent for us, (as is contended on the other side,) to deny Smyth's title *prior* to his deed to us, yet there

is no principle which can preclude us from proving, that he subsequently acquired one. It is under such a subsequently acquired title, enuring by way of estoppel, that our claim is supported.

TENNEY, J. — It is a well settled principle, that if one having no title to lands, make a deed of the same with covenants of warranty, and he afterwards acquires a title, it will enure to the benefit of his grantee; or the one, to whom the latter may have conveyed, with like covenants, although the first grantee may have conveyed to a stranger, after the conveyance to his grantor by the original owner. This effect upon the title results from the covenants of warranty in the deeds by way of estoppel. "No right passeth by release, but the right, which the releasor hath at the time of the release made. For if there be father and son, and the father be disseised, and the son (living the father) releaseth by his deed to the disseisor, all the right, which he hath or may have in the same tenements, without claim of warranty, &c. and after the father dieth, &c. the son may lawfully enter upon the possession of the disseisor." Litt. § 446. And upon the text of Littleton, Lord Coke remarks, "the warranty may rebut and bar him and his heirs of a future right, which was not in him at that time. Co. Litt. 265, (a.) and (b.)

By the application of these principles, the conveyance from the Commonwealth of Massachusetts to the defendants would make perfect the title of Smyth by virtue of their deeds to those to whom they conveyed, and the deeds through and under which he claimed, if he had made no conveyance; and by the deed from Smyth to the plaintiff, the title would enure to the latter, unless some other claim interposed itself to prevent it.

But it is contended for the defendants, that before the deed from Smyth to the plaintiff could take effect against Homes & Homer, by its registry, their attachment was made, and that the levy, before its expiration, gave to the creditors the same title, which would have enured to them, by the doctrine of

estoppel, if they had held under a deed with covenants of warranty recorded at the time of the original attachment, and that the right of Homes & Homer passed to the defendants.

The purpose of an attachment upon mesne process is simply to secure to the creditor the property which the debtor has at the time it is made, so that it may be seised and levied upon in satisfaction of the debt, after judgment and execution may be obtained. The title to the property remains unchanged by the attachment.

An attachment can operate only upon the right of the debtor existing at the time it is made. No interest subsequently acquired by the debtor can in any manner be affected by the return thereof, when none was in him at the time. If the levy of an execution would not be effectual to pass any title to the creditor at the time of the return of the attachment upon the original writ, the latter could have no effect. *Eaton* v. *Whiting*, 3 Pick. 484; *Smith* v. *Peoples' Bank*, 24 Maine, 185; Stat. of 1821, ch. 60, § 1; R. S. ch. 114, § 29 and 30.

We have been directed to no case, and it is believed that none can be found, where a title has been held to enure to a creditor from an attachment upon a writ by way of estoppel, as from a deed with covenants of warranty, where there is no title of the debtor, upon which the attachment can operate. Upon the principle contended for, it would be in the power of a creditor, by a return of an attachment upon mesne process, to secure to himself any interest in real estate, which his debtor might obtain subsequently thereto, if the interest should be attachable.

At the time, that Homes & Homer caused the return to be made upon the original writ, Smyth, the debtor, had no title whatever in the land, nor had he seizin or possession. If he had made no conveyance, till the title passed from the Commonwealth of Massachusetts to the defendants, the attachment would be entirely without effect against him, but the title of the Commonwealth would enure to his benefit alone. The levy of an execution at the same time, would be a nullity, and the return of full satisfaction thereon, would not pre-

vent the issue of a new execution upon *scire facias*. When the levy was made upon the execution obtained upon the judgment recovered, the title had passed from the Commonwealth of Massachusetts to the defendants, and the same enured to Smyth, and instantly to the plaintiff.

The title of the land from which the timber was taken, being in the plaintiff, by the agreement of the parties, he is entitled to recover the value of the property so taken.

NOTE. — HOWARD J. had been of counsel in the case, and therefore took no part in the decision.

MAXWELL *versus* MAXWELL.

Where lands are held in common, one of the co-tenants may, *by action of trespass*, recover against another, treble damages for strip and waste committed by him, during the pendency of a petition for partition, even though the *defendant* himself be the petitioner.

In such an action, if the whole of an averment might be stricken out, and yet leave sufficient allegations upon which to support an action, such averment need not be proved.

In such a suit, the declaration need not name the other co-tenants. It is in suits against strangers to the common property, that the names are required to be stated, if known.

EXCEPTIONS from the District Court.

Trespass, under the statute, by one tenant in common, of land against his co-tenant, for committing waste.

The declaration charges, *that* the land was owned by these parties, and other persons as tenants in common; *that*, while a petition for partition of the land was pending, in which this defendant was petitioner, he cut down and destroyed one thousand spruce and maple trees standing on said land, and carried away and converted to his own use, the wood, and the branches thereof, viz. fifty cords of wood and twenty-five loads of branches, of the value, &c., and committed other strip and waste thereon, contrary to R. S. chap. 129, sect. 7; whereby the defendant became liable to pay three times the amount of the damage done to said land, which, by the eighth section

of said statute, the plaintiff is entitled to recover, to be appropriated, one-half to himself, and the other half to the other co-tenants, (except the defendant,) in proportion to their respective interests in the land.

It appeared in evidence, for the plaintiff, *that*, at the June term, 1847, the defendant filed in the District Court a petition for partition ; *that* notice was then ordered thereon ; *that*, at the October term, 1847, commissioners were appointed to make the partition ; *that* their report was presented at the March term, 1848, when the same was recommitted ; *that*, at the June term, 1848, they made a further report, re-affirming their former one, and *that* said report was accepted.

It further appeared in evidence for the plaintiff that, in December, 1847, certain men, under direction of the defendant, went upon the land, and there cut a quantity of wood, amounting to 24 cords, besides the limbs, and removed a portion of it. Upon this evidence, the Judge, for the purpose of more readily presenting the case to the Supreme Judicial Court, ordered a nonsuit.

M. M. Butler, for the plaintiff.

A. M. True, for the defendant.

The proof does not sustain the allegation. The action claims to be founded upon R. S. chap. 129, sect. 7, which provides, that if any co-tenant of undivided lands shall, during the pendency of a petition for partition, cut down, destroy, or carry away, &c., or commit *any strip or waste*, he shall forfeit, &c. From the connection of the words, it is apparent that the acts of cutting, carrying away, &c., must be such acts as would constitute strip and waste. The declaration charges that the defendant cut down and destroyed trees standing and growing, and carried off the wood and branches thereof, and converted the same to his own use, and *other* strip and waste did then and there commit. This implies that the acts described were acts of strip and waste.

The plaintiff then must prove that those acts constituted

strip and waste, or that there was some other act of strip and waste committed.

But the described cutting, destroying and carrying away, cannot appear to the court to be necessarily strip and waste. In this country, such acts are often judicious and useful, and even necessary for clearing up the land and increasing its value.

The petition for partition was filed June 15, 1847. The declaration charges the injurious acts to have been done from the first of that June till March, 1848. They may have been committed then, before the petition was pending.

This action is trespass *quare clausum.* It is inappropriate and unauthorized. One co-tenant cannot break and enter. The legal possession is in him. Each one is in possession for all. R. S. chap. 129, sect. 4; 1 Chitty's Plead. 165, 164; *Martyn* v. *Knowllys*, 8 T. R. 145; Com. Dig. Estate, K. 8.

The action should be debt for the forfeiture.

The names of the other co-tenants are not mentioned in the declaration. Yet they were known to the plaintiff, because given in the petition for partition, which had been served upon him. That they should have been inserted will appear from comparing the 8th, 17th, and subsequent sections of the statute.

A suit so highly penal ought to allege the acts to have been done wilfully, at least, wrongfully.

The defendant, at the time of the alleged trespass and waste, was a disseizor of his co-tenants, and consequently not liable to any action of waste under the statute, and did not intend nor commit wilfully any acts of waste. *Hubbard* v. *Hubbard*, 15 Maine, 198; *Prescott* v. *Nevers*, 4 Mason, 326, 332; 2 Black. Com. 194, n. 9; Cowp. 217; *Brackett* v. *Norcross*, 1 Greenl. 90; *Proprietors Kennebec Purchase* v. *Laboree & als.* 2 Greenl. 282.

WELLS, J. — This case comes before us by exceptions from the District Court. Upon the evidence introduced by the plaintiff, the Judge of that court ordered a nonsuit.

The defendant contends that the nonsuit was properly ordered, because the evidence does not support the declaration. The declaration alleges that the defendant cut down and carried away spruce and maple trees, and the number of them, and the quantity of wood made from them. The proof is, that the defendant procured to be cut twenty-four cords of wood, and removed a portion of it, but there was no proof of the kind of wood, which was cut.

Must the plaintiff fail of recovering unless he can prove the kind of wood cut?

In declarations upon contracts, they must be proved as laid. *Bristow* v. *Wright*, Dougl. 665; *Robbins* v. *Otis*, 1 Pick. 368. But both in cases of contracts and torts, if the whole of an averment may be stricken out, without destroying the plaintiff's right of action, it is not necessary to prove it. 1 Chitty on Plead. 307 and 372; *Gwinnet* v. *Phillips*, 3 T. R. 643; *Peppin* v. *Solomons*, 5 T. R. 496; *Williamson* v. *Altison*, 2 East, 446.

In an action of trover for a note, where an unnecessarily particular description of it is given in the declaration, an entire failure of any proof, as to such needless averments, will not defeat the action. *Ewell* v. *Gillis*, 14 Maine, 72.

By statute, chap. 129, § 7, the defendant is made liable to the plaintiff for cutting down or carrying away any trees, timber, wood or underwood, standing or lying on the lands held in common, while a petition is pending for a partition of the premises. The statute does not require a description of the kind of trees, and that averment might be stricken out of the declaration without impairing the plaintiff's right to recover. So also the allegation of the trees need not be retained, for the plaintiff would be entitled to recover upon the other averment of "fifty cords of wood," &c. The proof therefore does support that part of the declaration, which is necessary to be proved.

The objection as to the form of action cannot prevail. Pending the petition for partition, the acts of the defendant were made by statute an unlawful interference with the soil

and freehold of the plaintiff, and by the ninth section of the same statute such acts are denominated a trespass. If the defendant had a right at common law to cut down and carry away trees or wood from the land held in common, without being a trespasser, that right was suspended by the statute during the pendency of the petition for partition. And the form of action is to be adapted to the nature of the injury, which in this case related to the realty, and was produced by acts illegal and directly injurious. Trespass *quare clausum* appears to be the most appropriate action. *Maddox* v. *Goddard*, 15 Maine, 218. The statute of 1821, § 2 and 3, provided an action of trespass for such injury, which relating to real estate, must be understood to mean *trespass quare clausum*. *Hubbard* v. *Hubbard*, 15 Maine, 198.

It is said that the trespasses are not proved to have been committed during the pendency of the petition, but by the facts exhibited, they were so committed while the petition was pending.

By § 8, of statute c. 129, the damages may be recovered by any one of the co-tenants, without naming any one but the plaintiff, when the action is founded on § 7, against one of the tenants in common. The seventeenth section relates to actions brought by tenants in common, co-parceners or joint-tenants, against strangers to the common property, and does not affect the present action.

The parties have agreed, that if this court shall be of opinion that the nonsuit should be taken off, and that the action can be maintained upon the evidence in the case, that the court may assess the damages and enter final judgment.

The nonsuit is accordingly taken off and judgment is to be rendered for the plaintiff, the defendant to be heard in damages.

FOWLER *& al.* v. ROBINSON.

In a suit brought under the provision of R. S. chap. 76, sect. 18, 19 and 20, by a creditor of the corporation against a stockholder, the defendant cannot protect himself by proof that he has paid to the *corporation*, the whole amount to which the statute made him liable, (being one hundred per cent. upon his stock,) towards aiding in the payment of the corporation debts.

A corporation, being indebted to the amount of seventy-five per cent. of its capital stock, passed a vote that each stockholder should pay to the treasurer, that proportion, in order to create a fund for discharging the debts. The plaintiff and the defendant were both stockholders. Though many of the stockholders failed to make such payment, yet the defendant paid to the treasurer one hundred per cent. But, as the vote contained no stipulation that a stockholder, on making the payment as voted, should be released from the claims of creditors, it was *Held*, that the plaintiff, being a creditor of the corporation, though he concurred in the vote, was not barred thereby from recovering against the defendant.

ASSUMPSIT, brought by the plaintiffs, creditors of a corporation, against a stockholder, under the provisions of R. S. chap. 76, sect. 18, 19 and 20.

The case was submitted upon facts agreed.

The plaintiffs had recovered judgment against the corporation for $7351,57. Upon the execution, the officer had returned, that he had "made search for corporate property and estate, and had been unable to find any, and that he had notified the defendant," &c.

The plaintiffs and the defendants were stockholders, at the time the debt accrued to the plaintiffs.

At the meeting of the corporation, the defendant and one of the plaintiffs being present and concurring, it was voted that the company was indebted to the amount of seventy-five per cent. of its capital stock, and that each stockholder should pay that amount to the treasurer to create a fund for discharging the debts, and that he should receive a certificate thereof. The defendant, before the commencement of this suit, paid to the treasurer one hundred per cent. upon his stock, as and for a discharge of his liability, that being the full amount to which he is made liable by said statute, and said payment was known, at the time, to the plaintiffs.

The plaintiffs also paid seventy-five per cent. upon their stock, according to said vote.

Certificates for said payments were duly given to the plaintiffs and to the defendant for their said several payments. Some of the other stockholders made payments according to said vote, but many failed to do so.

The case was submitted for nonsuit or default, according to the legal rights of the parties.

W. P. Fessenden, for the defendant.

1. The plaintiffs are bound by the vote of the company, having been present and concurring therein. *Slee* v. *Bloom*, 19 Johns. 456, 476; same case, 5 Johns. Ch. Rep. 382; S. P. (same point,) 4 Metc. 176; S. P., *Stetson* v. *Kemp*, 13 Mass. 282.

The participation by the plaintiffs in the vote, must be deemed a discharge by them; otherwise much injustice would follow.

It was in reliance upon that vote, as a discharge, that the defendant paid his money.

2. The officer's return that he had notified the defendant, is not sufficient evidence of the notice. To give it that effect would protect an officer for wrongfully intermeddling with a stockholder's private property.

Shepley and *Dana*, for the plaintiffs.

Wells, J. — The plaintiffs, having established their case in conformity to the provisions of the statute, are entitled to recover.

The defence set up cannot prevail. For if the plaintiffs are bound by the vote passed at the meeting of the stockholders on the eleventh of August, 1848, one of the plaintiffs having been present at the meeting and assenting to them, they could not be precluded from pursuing the remedy afforded by law for the recovery of their debt, unless they had debarred themselves by a stipulation in the votes to that effect.

The object of the votes was to create a fund for the pay-

ment of the company debts. Each stockholder was to pay a sum, in proportion to the amount of his stock, to the treasurer of the company for the payment of the existing debts. That proportion was seventy-five per cent. If all the stockholders, as the votes contemplated, had complied with them, a fund sufficient to pay all the debts would have been created, and the plaintiffs would have received satisfaction with the other creditors. The plaintiffs did comply with the requirements of the votes by paying their proportion, and the defendant paid a sum equal to the whole amount of his stock, being twenty-five per cent. more than he was under obligation by the votes to pay. But the statement of facts shows, that although several thousand dollars were paid by different stockholders, pursuant to the resolutions and votes, yet there is a large number of stockholders, who have not paid any thing more than the amount of their stock.

The record of the proceedings of the meeting before mentioned does not contain any stipulation in the resolutions or votes, that a stockholder, who should pay his proportion of the debts to the treasurer, should be released from the claims of the creditors of the company. Without doubt each one expected to be released, because it was contemplated that all would pay their proportion voluntarily.

The plaintiffs were willing to unite with the stockholders in paying all the debts of the company, and have contributed their proportion. The votes require nothing more of them, they do not contain any stipulation, that their claims upon a stockholder shall be relinquished by his paying his proportion to the treasurer, nor are they susceptible of any such construction. The mode adopted for the payment of the debts has not proved effectual.

In *Slee* v. *Bloom*, 5 Johns. Chan. R. 382, the resolution of the trustees of the company provided, upon payment of the assessments in arrear, "that there should be no further demands made by prosecution against any subscriber upon his subscription, nor any proceedings be had against any subscriber other than by way of forfeiture of his said stock, in case of

his non-payment of any further calls." The plaintiff being present and assenting to the resolution, was considered bound by it, and precluded from prosecuting any subscriber, who had complied with the resolution. He could not do so without acting in violation of it. But in the present case, the language of the votes does not prohibit the plaintiffs from making their claim upon the defendant.

According to the agreement of the parties, a default must be entered.

HUMPHREYS *versus* SWETT *& al.*

Creditors of a certificated bankrupt are not precluded from maintaining a suit against him, upon a demand, which was proveable in bankruptcy, if they succeed in impeaching the discharge, for some fraud or wilful concealment, by the bankrupt, of his property or right of property.

If a creditor, whose claim was proved by him, and was allowed in bankruptcy, would avail himself of any such fraud or wilful concealment, or of any unlawful preference of creditors by the bankrupt, he can do it only by objecting, in the court of bankruptcy, to the granting of a discharge to the bankrupt.

A creditor, after the granting of such a discharge, is precluded by the bankrupt law from maintaining a suit against the bankrupt, upon any claim, which such creditor had proved, and which had been allowed to him in the court of bankruptcy.

ASSUMPSIT, for money paid. Green, one of the defendants, was defaulted. Swett, the other defendant, filed a brief statement of discharge in bankruptcy. The plaintiff, to impeach the discharge, filed specifications of fraud and wilful concealment by the bankrupt, of his property and rights of property, and of unlawful preference of creditors.

On the trial, before HOWARD, J. it appeared that, before the discharge was granted, the plaintiff had proved his claim, and that it had been allowed to him, in the court of bankruptcy.

A nonsuit was ordered, subject to the opinion of the full court.

G. F. Shepley, for the plaintiff.

The discharge of a bankrupt may be impeached for any fraud or wilful concealment of his property, contrary to the provisions of the bankrupt act, upon notice specifying such fraud or concealment. This may be done at any time subsequent to the granting of the discharge, as well as before. *Vide* Bankrupt Act, § 2 and 4; Chandler's Bankrupt Act, pp. 15, 22, 24.

S. Fessenden and *Barrows*, for the defendant Swett.

TENNEY, J. The defendant Swett, filed his petition in bankruptcy on Jan. 28, 1843, and obtained his discharge and certificate on June 20, 1848. The plaintiff, as indorser of the defendants, paid the sum of $217,47 before the petition in bankruptcy was filed, and he proved his claim against their estate in bankruptcy, and received a dividend thereon of $84,81. This suit is assumpsit upon the original cause of action. Green, one of the defendants, was defaulted, and Swett, the other defendant, pleads his discharge and certificate as a defence. The plaintiff attempts to avoid the discharge and certificate, by impeaching them on the ground of fraud, unlawful preference, and concealment of property, contrary to the provisions of the bankrupt act, having given in writing notice thereof, specifying such fraud, preference and concealment.

By the bankrupt act of the United States, approved August 19, 1841, in section 4, bankrupts, having complied with the provisions of the act, shall be entitled to a full discharge from all their debts, and a certificate shall be granted accordingly. Such discharge and certificate are not to be granted, until after notice to all creditors, who have proved their debts, and other persons in interest, to appear at a particular time and place, to show cause, why such discharge and certificate shall not be granted; at which time and place any such creditor, or other persons in interest, may appear and contest the right of the bankrupt thereto. And if any such bankrupt shall be guilty of any fraud or wilful concealment of his property, or rights of property, or shall have preferred any of his

creditors, contrary to the provisions of this act, he shall not be entitled to any such discharge, or certificate. Where such discharge and certificate are duly granted, they shall in all courts of justice be deemed a full and complete discharge of all debts, contracts or other engagements of such bankrupt, which are proveable under this act, and shall be and may be pleaded as a full and complete bar to all suits, brought in any court of judicature, whatever, and the same shall be conclusive evidence of itself in favor of such bankrupt, unless the same shall be impeached for some fraud or wilful concealment by him of his property or rights of property as aforesaid, contrary to the provisions of this act.

In the 5th section of the same act, it is provided, that no person coming in, and proving his debt or other claim, shall be allowed to maintain any suit at law or in equity therefor, but shall be deemed thereby to have waived all right of action and suit against such bankrupt.

The decree of discharge, after the notice required, and the subsequent proceedings, made those, who had claims against the bankrupt, proveable under the act, parties to those proceedings, and to the decree. Like all judgments, it is final upon the parties thereto, unless one who would otherwise be affected thereby, can bring himself within any exception to the general effect of the decree, provided by the act. One of these exceptions is, when the discharge and certificate shall be impeached for fraud or wilful concealment of the property or rights of property of the bankrupt. No one, who was a creditor, having a claim provable under the act, at the time of filing the petition by the bankrupt, was precluded from showing such fraud or wilful concealment, as would defeat the bankrupt's petition for discharge, or would vacate it, if obtained, so far as he would be prejudiced by it. If the creditor was one, who came in, and his claim was allowed against the estate of the bankrupt, he was entitled to object to the discharge for all legitimate causes, embracing fraud and wilful concealment; and the fullest opportunity was afforded by the law, for him to do it. But

if he omitted to make objection, or having made it without success, he was debarred from instituting and maintaining a suit upon his debt or other claim, which had been so allowed. It is expressly provided that the allowance of his claim, is a waiver of all right of action and suit against such bankrupt. This disability, however, to show fraud or wilful concealment does not extend beyond those, who have had an allowance of their claims. The act gives to others the right to institute suits upon their demands, and the discharge and certificate, is no defence, if impeached for those causes.

To permit creditors, who had an allowance of their claims against the bankrupt, to institute suits thereon, as they originally existed, and to impeach the discharge and certificate, would in effect secure to them an appeal from the decrees of the bankrupt court, to any court of a State, having jurisdiction of the parties and the original cause of action, where the debtor had not become a bankrupt. This is not consistent with the letter or the spirit of the bankrupt law, and such a construction of its provisions cannot be admitted.

The plaintiff in this case, having proved his claim in bankruptcy, had the opportunity of objecting to the discharge of the bankrupt, for the causes on which he now relies for the impeachment of the discharge. If he did not avail himself of his rights under the bankrupt act, he is not entitled in consequence, to a privilege, which the law does not afford him. If he did object to the discharge, he had a hearing before a court of competent jurisdiction; and the decree of discharge is as to him in the nature of a judgment, and he is concluded by that decree.

Other points were raised, and discussed at the argument, but their consideration is not essential to a final decision of the case. *Nonsuit confirmed.*

COLTMAN *versus* HALL.

If a child, having no father or mother, the guardian is entitled to the custody, as against a relative, to whom its father, a few days before his death, and in view of that event, had made a verbal gift of the child, "to take care of, have and keep, as his own child." The mother-in-law, however competent, is not entitled to the custody, as against the guardian.

REPLEVIN of a child, named Ellen Hall.

HOWARD, J. directed a nonsuit upon the following agreed facts.

Ellen's mother was sister-in-law to the plaintiff. They had been members of the same family till her marriage with Mr. Hall. Mr. Hall resided in Camden, and a few days before his death, and in view of that event, gave to the plaintiff the "charge and care of Ellen to take care of, have and keep as his, the plaintiff's, own child;" her mother having previously died.

Soon afterwards the plaintiff removed Ellen from Camden to his residence in Portland, with the assent of her stepmother, whose wish it still is, that the plaintiff should keep the child. He is a man of sufficient property to support and educate her. He kept her with care and faithfulness from March, 1848, to February 6th, 1849. On the last named day, the defendant was, by the Judge of Probate, appointed guardian to the child, and finding her in the street, as she was returning from the school-house to the plaintiff's, he took her into his sleigh, and removed her to his own home in Westbrook. The guardianship appointment and the removal of the child to Westbrook, were without the consent or knowledge of the plaintiff. No notice of any application for the appointment of a guardian was published.

If, on these facts, the action is maintainable, the nonsuit is to be taken off by consent.

Sweat, for plaintiff.

1. The defendant was not legally appointed as guardian.

The plaintiff had no knowledge of his application to be appointed, and no public notice of it was given.

2. The R. S. chap. 142, sect. 8, on which the plaintiff re-

lies, will not defeat this action. It is not enough for the defendant, that he is guardian. He must also show that, under all the circumstances of the case, he is entitled, as guardian, to the custody of the child. It was in accordance with this view, that the statute of 1821, chap. 66, sect. 3, was changed by the revised code. It was under that statute, that the case of *Bridges* v. *Bridges*, 13 Maine, 408, was decided.

Williams, for the defendant.

SHEPLEY, C. J. orally. — The statute of 1821 provided that, in a case like this, the defendant should have judgment. The mere fact that the defendant was guardian, was a defence. *Bridges* v. *Bridges*, 13 Maine, 408. The provision of the Revised Statute is different. Under it the defendant must show something further than his guardianship. He is to show himself entitled to the custody of the child, as his ward. Has this been done? By chap. 110, sect. 5, the custody pertains to the guardian, only when there is no father or mother competent to transact their own business. In this case, the child had neither father or mother. The mother-in-law is not within the statute. There was then no person entitled to the custody, above the guardian. True, the plaintiff was educating the child under a gift by the father. But the gift was not by last will; it was merely verbal; it cannot operate against the statute. *Nonsuit confirmed.*

FOWLER *& al. versus* KENNEBEC AND PORTLAND RAIL ROAD COMPANY.

The plaintiffs had contracted to build for the defendants certain sections of their rail road, at agreed prices. While the work was progressing, the defendants, with a view to some change in their location, desired a suspension of the work. Thereupon the contract was modified by the parties. For an agreed compensation, the work was to cease, till the further order of the defendants, and if the work should not be resumed within two years, the defendants were to pay the plaintiffs $750; if resumed within that time, the former contract was to apply to a residue part only of the said road sections;

and upon such resumption, the plaintiffs were, upon notice, to proceed with the work upon said residue sections, in the manner and at rates of price originally agreed. In the modified contract, a quantity of stones for the road, which the plaintiffs had procured, were purchased by the defendants, upon a stipulation that, if such resumption should take place, the stones should be re-purchased by the plaintiffs.

The location of the road having been altered, as to some of its sections, the defendants, within the two years, recommenced operating upon some of its unchanged parts. They gave no notice to the plaintiffs of their intention, but employed another company to do the work. *Held*, that, as the work was resumed within the two years, the plaintiffs were not entitled to recover the $750. *Held*, that the plaintiffs were entitled to do the work, when resumed, and to recover damages for not being called upon and employed to do it.

COVENANT BROKEN.

The facts are sufficiently stated in the opinion of the court. The case was submitted for nonsuit or default.

Shepley and *Dana*, for the plaintiffs, urged the following positions.

1. Where one party to an executory contract puts an end to it by refusing to fulfil, the other party is entitled to an equivalent in damages for the gains he would have realized from the performance. *Masterton* v. *Mayor, &c. of Brooklyn*, 7 Hill, 61.

2. By the resumption of the work, the original contract, which had been merely suspended, was revived.

3. By necessary construction, the defendants were bound to that contract.

R. Williams, for the defendants.

The contract was not mutual and was not intended to be. It left, and was intended to leave, the election with the defendants whether again to employ the plaintiffs.

The road, after the plaintiffs retired from the work, was located upon a different bed. The plaintiffs were not bound to build it there. It was therefore necessary to employ others to do it.

Upon the road, as contemplated in the contract, there has been no resumption of the work by the defendants.

The plaintiffs therefore are entitled to the $750, as stipulated, though not in this action.

TENNEY, J. — On Nov. 29, 1847, the plaintiffs, with one Cassidy, entered into a contract with the defendants to do certain work upon sections No. 1 to 11 inclusive, of their rail road, in a specified manner and within a given time. The defendants in the same instrument contracted with the plaintiffs to pay the consideration agreed upon, for their services. The work was commenced and continued to be prosecuted by the plaintiffs according to the agreement, till the defendants having determined to suspend all further work upon the part of the road embraced in the contract, entered into a further agreement on April 29, 1848; by which the original contract was to be suspended for the present; and that the work agreed therein to be done was to cease until the further order of the company; upon the resumption of the work at any time within two years from the date of the last agreement, by the defendants, the former contract was to apply only to sections No. 1 to No. 11, inclusive; Cassidy ceased to be a party; but the former contract was to remain in force against the other parties thereto, as it regarded sections Nos. 3 to 11 inclusive; and if the construction of said road from North Yarmouth to Portland was not resumed by the defendants within two years, they were to pay the plaintiffs the sum of $750, in addition to the sums which had been paid at the time of the execution of the latter contract. In consideration of the before mentioned agreement to modify the original contract, and the sum of $1000, paid to Cassidy, and of $2250, paid to the plaintiff, and the full payment of the amount of the stipulated price for their work, which had been done, the plaintiffs covenanted and agreed with the defendants, that upon the request of the latter at any time within two years, they would resume the work, upon the several sections to be done according to the latter agreement, and would do and perform all the covenants and agreements in the contract of Nov. 29, 1847, which they and Cassidy had therein contracted to do upon the several sections, from No. 3 to No. 11 inclusive, upon the same terms and conditions, for the same prices and terms of payment, and in the same manner

in every particular, as is provided for, in said contract, to be fully completed within two years from the time of such resumption. And it was further agreed between the parties, that the plaintiffs should purchase a quantity of stone, lying upon the line of the road, sold by them to the defendants, at the time of the suspension of the work, if the work should be resumed within two years, in the manner provided in the contract of April 29, 1848, and to allow the defendants the amount, which they paid therefor, in part payment of the work.

In Sept. 1849, and within two years from the date of second contract, the company resumed operations on a part of that portion of the road embraced in the modified agreement, and contracted with Nash and others to do the work thereon; and gave the plaintiffs no opportunity of performing the work, which they had contracted to do, although they were ready and willing to execute the agreement on their part.

The defendants contend, that by the contract of April 29, 1848, they were at liberty to employ others and not the plaintiffs to do the work, after they had resumed it, without incurring any liability therefor.

The intention of the parties must be ascertained from their contract, including the original agreement, and the subsequent modification. It is believed that their language and spirit are clear, and free from any ambiguity. The validity of the original contract is fully recognized in that made afterwards, excepting so far as it is changed by the latter. The parties do not undertake to cancel it, or to substitute therefor, entirely another. The agreement last made is expressly termed a modification of the one first made, which is referred to therein, as containing the several obligations of each party. Such being the character of the contract of April 29, 1848, that of Nov. 29, 1847, would be binding upon the parties, so far as their duties remained unchanged by the modification.

But the design of the parties is apparent from language which is still more direct and positive. Cassidy, for a con-

sideration mentioned was released from the contract, in which he had been interested as a party; "but the same shall remain in force against the other parties thereto, as regards sections three to eleven inclusive." The contracting parties to the original agreement are obviously the parties here referred to excepting Cassidy, and the term cannot be limited so as to apply to the individuals only, who composed one of the parties to the contract, unless from other parts of the instrument, such was manifestly the intention. Upon an examination of the whole contract, the restrictive construction contended for by the defendants cannot be admitted. It would not only pervert the plain meaning of the language quoted, but would not comport with the general purpose, evidently entertained by both parties.

Upon the resumption of the work, as provided in the contract, of April 29, 1848, the plaintiffs were bound to take the stone and allow their value in part payment of the work to be done, after the renewal of the labor. It was for the company to determine, whether the work should be recommenced within two years or not; and if it was the resumption by the defendants, which was to impose this duty upon the plaintiffs, without any obligation of the other party to employ them by making the request, to do the work, this provision in the agreement was absurd, and under the circumstances disclosed in the contract and the case, hostile to the interest of both parties.

The contract last entered into assumes that the omission of the company to resume the work within the period of two years, would occasion a loss to the plaintiffs of $750, which loss would be avoided by an opportunity of doing the work. It is not easy to understand, that the plaintiffs could be induced to surrender without consideration, all claim under the first contract, to the privilege of finishing the work, if the defendants should resume it within two years, and should employ others to their exclusion, and should at the same time exact the sum agreed upon, in the event, that the suspension should continue. It is remarkable that the discontinuance

of the farther construction of the road, which the company might feel compelled to prolong for the period of two years, should require them to make the payment of this sum, when upon a resumption, they might employ others instead of the plaintiffs, who were bound to do the work if requested, they were under no liability to compensate the plaintiffs for the loss of the benefit which was expected to accrue to them from a fulfilment of the agreement. It cannot be believed that such results were contemplated.

The defendants rely upon the language of the contract, that upon *the request* of the company at any time within two years, the plaintiffs were to resume the work, &c., insisting that it was only upon such request, which the defendants were at liberty to make or withhold, the plaintiffs were entitled to any of the advantages, which they might otherwise expect under their agreement.

It was for the company alone to elect, whether they would proceed with the construction of the road within two years; and if so, at what time. They had the right to call upon the plaintiffs to re-enter upon the work at any time during that period. The plaintiffs had no right to move therein without notice from the other party after the suspension. Before their liability would be revived, they were entitled to know the design of the company touching their future labors under the contract. This condition was for the purpose of giving the information to the plaintiffs, that the work was to be recommenced, and of creating a liability in them to perform it; they could be under none without a request from the company to that effect. This request was not intended as a step to be taken by the defendants, necessary to give the plaintiffs *a right* to perform what they had contracted to do, and to receive upon the performance, the benefits anticipated, but to perfect their *obligation* under the contract. This right of the plaintiffs' was fully secured to them in other parts of the agreement, and cannot be taken away by another clause, which admits of a construction, which renders the whole

harmonious, and according with the manifest intention, designed to be carried into effect.

It is again contended by the defendants, that they not having resumed the construction of the road in all its parts, as it was described in the contract after its modification, the plaintiffs, were not entitled to perform the work.

In one part of the contract of April 29, 1848, it is agreed, "that in the event the construction of said road from North Yarmouth to Portland be not resumed," by the defendants within two years, they will pay the plaintiffs the sum of $750, &c. In another part of the instrument, the language is, "that in the event, the said work shall not be resumed within the period of two years, the defendants will pay, &c. From this there can be no doubt, that the parties intended, when the company recommenced operations upon the road, the privileges and obligations of each party under the contract and its modification would be revived, and would be the same as if the suspension had not taken place. The road which the plaintiffs were to do the work upon, was so described in the instruments, that it is not suggested, that it could be misunderstood or its identity be matter of dispute. The work which the plaintiffs were to do was specified with sufficient precision; and when done the company was bound to pay the consideration according to the agreement. It was not in their power by any change in the location or mode of construction of the road, without the consent of the plaintiffs, to take from them the benefit of their contract, unless that right was secured to them. The written agreement contains no such provision; but on the contrary material changes were provided for, and the force of the contract was not to be thereby annulled or essentially impaired.

It is not to be supposed, that the defendants in resuming the construction of the road, would do so by simultaneous acts upon every minute portion of it. If the work was renewed upon a part of the road referred to in the agreement, it cannot with propriety be denied, that "the construction of said road" or that "said work was resumed," without some explanation,

to be found in the contract, that the language was used in a different sense, from its generally received meaning. No such explanation is found. And when the company are admitted to have resumed operations on a part of that portion of the road, embraced in the modified agreement of April 29, 1848, and to have contracted with Nash and others to do work thereon, it cannot be doubted, that it was such a resumption, as would come within the meaning of the contract. Whether there were any changes, which were so great that the road to be made by the plaintiffs, and that on which the company resumed their operations were not identical, the case is silent. We cannot assume that it was so. The decision must be upon the facts agreed, and which are before us. It does not appear from them, that any change took place after the modification. It is manifest from the case, that the construction of the road was resumed by the defendants within two years from the date of the contract of April 29, 1848.

The resumption having taken place by the company within the period of two years, they are not liable for the sum agreed upon by the parties as an equivalent for the loss, which was expected to result to the plaintiffs from an omission to resume the work within two years. But having broken their covenant they are liable for the loss, which has accrued to the plaintiffs in consequence thereof. These damages are to be determined in the manner provided for in the agreed statement of facts.

According to the agreement of the parties,

Defendants defaulted.

BRAMHALL *& als. versus* BECKETT.

If a mere accommodation note, given without consideration, be indorsed by the payee, before its pay-day, *bona fide* and for a valuable consideration, in the usual course of business and trade, to one who has no knowledge of any facts or circumstances, which would discredit it, the indorsee takes it freed from the defence that it was originally given without value.

But when the indorsee takes such a note merely as collateral security for a pre-existing debt, without parting with any right or extending any forbearance, or giving any consideration, he is not to be regarded as the holder for a valuable consideration.

Such a transaction is not according to commercial negotiations in the usual course of business and trade.

In a suit by *such* an indorsee upon *such* a note, the defence is open to the maker, that the note was made without value.

ASSUMPSIT, by the indorsee upon a negotiable note.

The case was submitted upon a statement of facts. The note was given without consideration, as an accommodation note, on the statement of the payee simply, that he wished to have the note to use. The note was given and dated the 29th of May, 1849, payable in thirty days. On the same 29th of May, the payee, being indebted to the plaintiffs, (on a demand, which was then already payable and which has not yet been paid,) indorsed the note to the plaintiffs, as collateral security for the payment of said demand. Nothing was paid and no claims given up by the plaintiffs for the note; nor was there any agreement for any extension of the old debt, nor any other consideration for the indorsement, except that it was made for said collateral security.

M. M. Butler, for the plaintiffs.

The note was received by the plaintiffs in the ordinary course of business. As against them the want of consideration for the note cannot be inquired into.

The point was not material to the decision of the cases of *Homes* v. *Smyth*, 16 Maine, 177; and *Norton* v. *Waite*, 20 Maine, 175; and the remarks of SHEPLEY, C. J. in delivering the opinion of the court were *obiter dicta*. Besides, a differ-

ent state of facts existed in the above named cases, from those in the case at bar.

Suppose, before a note is payable, a mortgage is made of property, real or personal, as collateral. There would be a sufficient consideration. Surely then negotiable paper ought to be valid. The rule of law ought to be the same, as to all sorts of security.

But, if such inquiry were admissible, the plaintiffs are entitled to recover. The note was furnished by the defendant to the payees to be "used" by them for such purposes as they pleased. It was an accommodation note. The rights and duties of the several parties to an accommodation note, are the same as in those denominated business notes. *Chandler* v. *Barlow*, 7 Pick. 547; *Chicopee Bank* v. *Chapin*, 8 Metc. 40; *Lincoln* v. *Stevens*, 7 Metc. 29; *Thompson* v. *Shepard*, 12 Metc. 311.

The equities are not with the defendant who put the note in circulation, to be used. They are with the plaintiffs.

When the indorsers of an accommodation note lend their names to the drawer, without any limitation or restriction, as to the manner in which it is to be used, he has the right to apply it to the payment or *security* of an antecedent debt, or to sustain his credit in any way. *Granden* v. *LeRoy*, 2 Paige, 209; 20 Johns. 288; 4 Cowen, 567; 5 Wend. 66.

Fessenden & Deblois, for the defendant.

The note, being without consideration between maker and payees, and the payees having received nothing from the indorsee for their indorsement, was without consideration between plaintiffs and defendant, and therefore payment of it could not be enforced. 3 Kent's Com. § 44—81; *Bay* v. *Coddington*, 20 Johns. 637; *Rosa* v. *Brotherson*, 10 Wend. 86; *Ontario Bank* v. *Worthington*, 12 Wend. 593; *Paine* v. *Cutler*, 13 Wend. 605; *Chicopee Bank* v. *Chapin*, 8 Metc. 43; *Homes & al.* v. *Smyth*, 16 Maine, 177; *Norton* v. *Waite*, 20 Maine, 175; *Smith* v. *Babcock*, 2 Woodbury & Minot, 246. In *Swift* v. *Tyson*, 16 Peters, 1, though the opin-

ion of STORY, J. was against us, his reasoning was in our favor.

HOWARD, J. — The question presented by the statement of facts is, whether a negotiable note, given by the defendant for the accommodation of the payees, and indorsed by them in blank to the plaintiffs, before maturity, and without notice of a defence, as collateral security for a pre-existing debt due from the indorsers, is open to the equities existing between the original parties; or whether the plaintiffs are entitled to protection as holders for a valuable consideration, within the meaning and policy of the commercial law.

It is now well settled that the want or failure of consideration will constitute a valid defence to an action on a bill or note, between the primary parties. So if one become a party to such instrument, merely for the accommodation of another, he may insist upon that fact, as a bar to an action thereon by any party, for whose accommodation the instrument was made. But if the instrument be negotiated *bona fide*, for a valuable consideration, to one who is not apprised of any facts, or circumstances which would discredit it, the accommodation party cannot be admitted to such defence.

If an accommodation bill or note be fraudulently negotiated, and come to the holder fairly, and without a knowledge of the fraud, and he receive it in satisfaction, or extinguishment, wholly or partially, of a pre-existing debt, he must be considered a *bona fide* holder for a valuable consideration.

These are doctrines of commercial law, upon which the authorities harmonize. But when the bill or note is taken as collateral security only, for a precedent debt, it is contended that the creditor cannot be deemed the holder for a valuable consideration. On this point the authorities have recently been supposed to be in conflict, and the law to be unsettled.

No case has been found in their reports, presenting this precise question, upon which the courts in England have given a direct opinion. There are diverse *dicta* to be found, from which we may infer what might be the opinions of individual

Judges, if a case were presented for decision, involving the question. As in the cases *Collins* v. *Martin*, 1 Bos. and Pul. 650; *Heywood* v. *Watson*, 4 Bing. 496; *De la Chaumette*, v. *the Bank of England*, 9 Barn. & Cres. 209; *Smith* v. *DeWitt*, 6 Dowl. & Ryl. 120; *Bramah* v. *Roberts*, 1 Bing. New Cases, 469.

In New York, the chancellor, Kent, held in 1821, that, where the holder of negotiable notes had not received them in payment of any antecedent and existing debt, nor for cash or property advanced, debt created, or responsibility incurred on the strength and credit of the notes, but as security merely for such debt, he was not a holder for a valuable consideration, so as to give him any equitable right to detain them from the lawful owner, and that such negotiation was not in the usual course of business or trade.

Bay v. *Coddington*, 5 Johns. Ch. 54; *Coddington* v. *Bay*, same case, 20 Johns. 637, in the Court of Errors, where the judgment of the chancellor was affirmed, in 1822.

The cases of *Wardell* v. *Howell*,, 9 Wend. 170; *Rosa* v. *Brotherson*, 10 Wend. 85; *Ontario Bank* v. *Worthington*, 12 Wend. 593; *Payne* v. *Cutler*, 13 Wend. 605; *Williams* v. *Smith*, 2 Hill, 301; *Bank of Salina* v. *Babcock & als.*, 21 Wend. 499; *Bank of Sandusky* v. *Scoville & als.*, 24 Wend. 115, and *Mohawk Bank* v. *Corey*, 1 Hill, 513, are to the same effect, and follow the doctrines of *Coddington* v. *Bay*, 3 Kent's Com. 81.

Afterwards, in 1842, the Supreme Court of the United States, say, in *Swift* v. *Tyson*, 16 Peters, 19, "Assuming it to be true, (which, however may well admit of some doubt from the generality of the language,) that the holder of a negotiable instrument is unaffected with the equities between the antecedent parties, of which he has no notice, only where he receives it in the usual course of trade and business for a valuable consideration, before it becomes due; we are prepared to say, that receiving it in payment of, or as security for a pre-existing debt, is according to the known usual course of trade and business." Thus disagreeing with the courts

of New York, on the point now presented for our consideration. Though this point was not raised in that case, yet it was elaborately discussed, by Mr. Justice STORY, and the leading English and American authorities extensively examined, and commented upon. Mr. Justice CATRON concurred in the decision of the court, but dissented from the "introduction, into the opinion of this court, of a doctrine aside from the case made by the record, or argued by the counsel, assuming to maintain, that a negotiable note or bill pledged as collateral security for a previous debt, is taken by the creditor in the due course of trade; and that he stands on the footing of him who purchases in the market for money, and takes the instrument in extinguishment of a previous debt."

Subsequently, in 1843, the case of *Stalker* v. *McDonald*, 6 Hill, 93, was carried to the Court of Errors, in New York, apparently to induce that court to overrule its decision in the case of *Coddington* v. *Bay*, and to conform to the opinion of Mr. Justice STORY, in *Swift* v. *Tyson*.

Chancellor Walworth, after a learned and elaborate review of the decisions of the courts in England, and in several of the United States, (more especially those cited by Mr. Justice STORY, in his opinion referred to,) re-affirmed the doctrines of *Coddington* v. *Bay*, and disapproved of the conflicting doctrines advanced in *Swift* v. *Tyson*.

The courts of New York are, therefore, committed to the doctrines of *Coddington* v. *Bay*. And the Supreme Court of the United States do not appear to have maintained different doctrines, excepting as evinced by their assent to the opinion of Mr. Justice STORY, referred to; and that, in a case where the point was not raised, and where the decision turned upon other considerations.

In New Hampshire, the doctrines of *Coddington* v. *Bay*, are recognized and maintained. *Jenness* v. *Bean*, 10 N. H. 266; *Williams* v. *Little*, 11 N. H. 66.

In Massachusetts, it would seem that the same doctrines are approved. *Chicopee Bank* v. *Chapin*, 8 Metc. 40;

Thompson v. *Shepherd*, 12 Metc. 311; *Washington Bank* v. *Lewis*, 22 Pick. 32.

So in Connecticut, *Brush* v. *Scribner*, 11 Conn. 388, and in Pennsylvania, *Petrie* v. *Clark*, 11 Serg. & Rawle, 377; and by the Circuit Court of the United States, first circuit, *Smith* v. *Babcock*, 2 Woodbury & Minot, 288.

In this State, the question now under consideration has never been directly presented for decision. In *Homes* v. *Smyth*, 16 Maine, 177, and *Norton* v. *Waite*, 20 Maine, 175, the opinions may be considered as favoring the doctrines advanced in *Coddington* v. *Bay*. In *Smith* v. *Hiscock*, 14 Maine, 449, the opinion proceeds upon the ground that the plaintiff, having paid a valuable consideration for the note, to Bachelder, "a fair holder for value" before it fell due, was entitled to recover, although it was passed to him, after it became payable. The note was indorsed to Bachelder, by the payee, with authority to make sale of it to pay a demand which he held, as deputy sheriff, against the payee. In pursuance of such authority it was sold to the plaintiff for that purpose, in good faith, and upon a full consideration paid, in conformity with an agreement made before, and executed after the note was payable.

The learned author of Story on Promissory Notes, (§ 195,) re-asserts the doctrine advanced by him in *Swift* v. *Tyson*, and cites Chitty on Bills, ch. 3, p. 74, (11th edition,) and Bayley on Bills, ch. 12, p. 500, 501, in support of his position. But it is not perceived that they support his doctrine to the full extent. Mr. Chitty says, "if a bill or note be indorsed as collateral security, that is an adequate consideration to enable the party to sue thereon, though he advanced no new credit on the bill or note;" and this is unquestionably correct, when no defence exists upon the merits.

It is believed that, upon a careful examination of the English and American decisions, including those cited by these learned authors, it will be found that the doctrines of chancellors Kent and Walworth, to which reference has been made, are not impaired, but rather supported by the weight

of authorities, although it may be remarked that the editor of Smith's Mercantile Law, (American edition, 1847,) in a note, p. 258, appears to have formed a different conclusion.

Thus stand the authorities, so far as we have examined them.

We hold, however, upon general principles, as well as upon authority, that the indorsee of an accommodation bill or note, who has given no consideration for it, and who does not claim through a party for value, is not entitled to protection against the equities of the accommodation maker, accepter, or indorser; but in the language of EYRE, C. J. (1 Bos. and Pul. 650,) "he is in privity with the first holder, and will be affected by every thing which would affect the first holder."

If he receive a bill or note as collateral security merely, for a pre-existing debt, without parting with any right, extending any forbearance, or giving any other consideration, the transaction will not constitute a commercial negotiation in the usual course of business and trade, and he cannot be regarded as the holder for a valuable consideration.

If this suit were brought by the payees of the note, the defendant, as accommodation maker, might rely upon the want of consideration as a valid defence; and when brought by the indorsee, who has neither given, nor forborne any thing for, or on account of it, and who, by legal effect, is prosecuting the suit for the benefit of the payees, the defence must be alike effective.

If this note were paid, it would be for the benefit of the payees; if not collectable, and any loss result therefrom, it would be their loss. Their indebtment to the plaintiffs was not affected by the transfer. They obtained no credit thereby. Neither party assumed any new liabilities, or relinquished any present rights in the operation. It was not a commercial negotiation within the meaning, policy, and protection of the commercial law. *Plaintiffs nonsuit.*

SMITH *versus* ROWE.

Upon neglect to pay the rent due on a lease at will, thirty days notice to quit, given in writing by the landlord to the tenant, is sufficient to determine the lease.

Until the end of that time, the tenant's possession is lawful, and the lease is not determined.

The thirty days notice in writing, upon which the process of forcible entry and detainer may be maintained, cannot be given until the tenancy is determined.

Such notice must be distinct from, and subsequent to, that by which the tenancy is to be determined.

EXCEPTIONS from the District Court, COLE, J.

Process of forcible entry and detainer, commenced on the 28th July, 1848.

It was proved *that* the land belonged to the plaintiff, *that* the defendant was occupying it under a parole lease, at a rent of $60, payable $15, quarter yearly; *that* rent was paid up to 20th July, 1847; and *that* notice in writing to quit was served on the defendant, June 19, 1848. Upon this evidence the Judge ordered a nonsuit.

E. H. Davies, for the plaintiff.

The defendant was a tenant at will. R. S. c. 91, § 30.

His estate was terminated immediately by the notice to quit. *Ellis* v. *Page*, 1 Pick. 43, 47; *Curl* v. *Lowell*, 19 Pick. 25; *Gould* v. *Thompson*, 4 Metc. 224, 228, 229; *Davis* v. *Thompson*, 13 Maine, 209.

The forcible entry process may be maintained at the end of thirty days from the time of such notice. *Davis* v. *Thompson*, 13 Maine, 209; 2 Metc. 29; 3 Metc. 350.

Fox, for the defendant.

WELLS, J. — The respondent was tenant at will to the complainant. Stat. c. 91, § 30. But not having paid the rent according to the agreement, notice to quit was served on him on the 19th of June, 1848, and this process was commenced on the 28th of July following.

The nineteenth and twentieth sections of the Stat. c. 95, are as follows: —

"Section 19. All tenancies at will may be determined by either party, by three months notice, in writing, for that purpose given to the other party; and, when the rent, due upon such lease, is payable at periods of less than three months, the time of such notice shall be sufficient, if it be equal to the interval between the days of payment; and, in all cases of neglect or refusal to pay the rent due on a lease at will, thirty days notice to quit, given in writing by the landlord to the tenant, shall be sufficient to determine the lease.

"Section 20. The preceding section shall not be construed to extend, or be applicable, to the proceedings in cases of forcible entry and detainer, or the notice required in such cases."

The nineteenth section prescribes certain modes of terminating tenancies at will, one when the rent is not paid, by thirty days notice in writing to quit. When a notice of three months is given, it must be understood, that the tenancy does not expire until the three months have elapsed. So too when a notice of thirty days is given, that the lease does not terminate, by the mere act of giving the notice, but at the expiration of thirty days. The tenant is lawfully in possession until the time mentioned in the notice has expired. And such appears to be the view taken of this statute in *Wheeler* v. *Wood*, 25 Maine, 287. The case of *Davis* v. *Thompson*, 13 Maine, 209, was decided before the passage of this statute.

After the termination of the tenancy, the landlord may enter and take possession without giving any notice of his intention so to do. And if his entry is resisted, he may treat the tenant as a disseizor and maintain a writ of entry against him, or a process of forcible entry and detainer by virtue of the second section of the statute, c. 128.

But if the landlord claims to have the benefit of the fifth section of the last mentioned statute, which provides, that "whenever a tenant, whose estate in the premises is determined, shall unlawfully refuse to quit the same, after thirty

days notice in writing, given by the lessor for that purpose, he shall be liable to the provisions of this act," &c. he must give the notice required by it.

Such unreasonable refusal is made equivalent to a forcible detainer. But to produce that effect, the tenant must hold over for the period of thirty days after his estate has terminated. *Clapp* v. *Paine*, 18 Maine, 264.

By § 20, c. 95, provision is expressly made, that the notice, mentioned in § 19 of that chapter, shall stand independently of the proceedings in cases of forcible entry and detainer, so that the notice to terminate the tenancy should not be adopted as the same notice required by the fifth section of c. 128. The two notices are disconnected from each other. No other conclusion can be formed without doing violence to the language of the statutes, than that where notice has been given to terminate the tenancy, and the landlord resorts to the fifth section of c. 128, he must give an additional notice according to the provisions of that section.

In *Wheeler* v. *Cowan*, 25 Maine, 283, there was a lease for a year, and the tenancy terminated at the end of the year. The notice in that case was after the termination of the tenancy.

In the present case, the notice given had no other effect than to put an end to the tenancy, and none having been given after its termination, this process which is sought to be maintained, not for any actual detainer *manu forti*, but by virtue of the fifth section of the statute before mentioned, cannot be sustained, and the exceptions must be overruled.

Mason *versus* The Kennebec and Portland Rail Road Company.

The charter of the Kennebec and Portland Rail Road Company provides a remedy, for the land owner, to recover damage for the location and construction of the track across his land.

The remedy, thus provided, is in exclusion of the remedy at common law.

In the estimate of that damage, is to be included the injury which may be done to the owner, by the erection of an embankment upon the site of the road, whereby the communication is destroyed between the parts of the land which lie upon the opposite sides of the track.

An action to recover damage for destroying such communication, either by taking the strip of the land for the site of the road, or by the erection thereon of such an embankment, proceeds, not upon the ground that the land for the road was illegally taken, but upon the ground that the power, granted by the charter, had been transcended or abused. It therefore presents no basis for a decision as to the constitutionality of that power.

Tenney, J. — This action is case, in which the plaintiff alleges, that he was seized as in his demesne of fee of a certain farm described, from April 14, 1845, to October, 1848, and during that time ought to have had a private way from his house to another part of his farm; that the defendants in October, 1848, built a rail road with a deep fill and high embankments, intending unjustly to disturb him, across the entire width of said farm, and thereby wholly obstructed and deprived the plaintiff of his way, up to the day of the date of the writ, which was May 16, 1849.

The defendants pleaded the general issue with a brief statement, justifying under their charter.

The plaintiffs offered to prove among other things that the defendants by their rail road, caused a separation of the part of his farm on which his house was situated from another portion, containing about twenty-four acres, on which is the most of his wood and timber, and some of his best pasture land; that a quantity of wood has been cut thereon, and is there ready to be hauled to his dwellinghouse and to market; and that by reason of the rail road he has been unable to remove the same, and also a quantity of timber; that the twenty-four acres are entirely surrounded by land, owned, cultivated and

enclosed, belonging to others, excepting on the side bounded by the rail road; that the distance over which loads must be carried upon the lands of others, from one portion of his farm to the other, is increased by means of the rail road from one hundred and sixty rods to three miles; that the only place, where a passage from one part of the farm to the other, separated by the rail road, was practicable, before its construction, has been thereby obstructed, a fill of twenty feet in depth, with no passag eway under or over the road on his land, having been interposed. The defendants admit, for the purpose of settling certain legal questions raised, that the facts so offered to be proved, can be established.

The plaintiff contended, under another count, that he was entitled to damages for the land taken as alleged.

If the act of incorporation gave power to the company to locate and construct the road, and in doing so they did not exceed the authority granted, their acts were not tortious; and the mode for settling the damages for any real estate taken for the purposes contemplated by the statute, when not agreed upon, are to be ascertained and determined by the County Commissioners, under the same conditions and limitations, as are by law provided in case of damages by laying out highways. The land so taken, is to be held as lands taken and held for public highways. R. S. chap. 81, sect. 3.

It is well settled by decisions of Massachusetts, before our separation from that Commonwealth, and other States, that when the legislature have authorized the laying out of highways, or the establishment of other works, deemed by them to be of public necessity and convenience, or when, in their opinion, it is for the public benefit, and in the construction thereof damages are supposed to result to the property of others, and a mode is provided by statute for the assessment and payment of the same, the party so authorized is not a wrongdoer; and the remedy for the person injured, is confined to the mode provided by the statute, and none exists at common law. *Stowell* v. *Flagg*, 11 Mass. 364; *Stevens* v.

Middlesex Canal, 12 Mass. 446; *Cushing* v. *Baldwin*, 4 Wend. 667. And if an injury is done to the property of an individual not situated upon the land, taken for the road, in the operations for its construction, the means not being inappropriate for the purpose, the damages therefor are to be estimated by the county commissioners, under the same authority by which they determine the more direct injury. *Dodge* v. *County Commissioners of Essex*, 3 Metc. 380.

The necessity for a way from one portion of the plaintiff's farm to the other does not change the principle. The owner of land has all the rights incident to his title thereto, not inconsistent with the right, which has been conferred upon others for public use, by a legislative act. The statute provision for the assessment of damages, extends to the injury occasioned by the interruption of the proprietor's passage from one part of his land to another, as well as to any other injury, which may be caused by the construction and use of the road, and when such damages as may be anticipated from its future construction, if it has not been made, are assessed, they are made up, on the whole injury done or expected to be done, including not only the loss of the use of the land produced by the road, but the probable expense of fences, and the diminution of the value of the land, by a separation from each other of different parts. If the ground has been excavated or elevated at the place where the communication between the two parts must be, the expense of a way under or over the road is to be considered, and if from the situation one portion cut off from the other will be greatly diminished in value, or rendered worthless, such facts may properly make an element in the computation.

The corporation entitled to the road, will be confined to those acts, which are necessary for the accomplishment of the object of the act. If they exceed their powers under their charter, and do injury to the individuals, over whose lands the road may pass, they are not protected thereby. The construction of a passage way across the rail road, which passes through the plaintiff's land, is not made a duty of the defend-

ants, either by the general statute on the subject of rail roads, or by the act of incorporation; and the omission to provide such means of communication is not in violation of their charter. There was no offer to prove, that any injury was done to the land separated from the residue of the farm, beyond that necessarily arising from a construction of the road.

It is contended by the plaintiff, that the acts under which the defendants justify as to the building the road, furnishes no protection, being so far unconstitutional, and in violation of the twenty-first section of the declaration of rights of this State, that "private property shall not be taken for public uses, without just compensation; nor unless the public exigencies require it." It is insisted that the law cannot be upheld, because no adequate provision is made for compensation; and that the security which is provided by R .S. chap. 81, sect. 6, if from a private corporation, does not meet the requirement of the constitution.

For reasons which are sufficient, the constitutional question, which the plaintiff has attempted to present, cannot in this action be entertained. It is unnecessary to advert to more than one of these reasons.

It is true, that according to the report of the case, the plaintiff in the third count of his writ claimed damages for taking three acres of his land, the same on which the rail road is constructed. In looking at the writ, which is made a part of the case, this count is not for the recovery of damages, arising from an alleged unauthorized appropriation of the land covered by the rail road, or for any injury, which the plaintiff has sustained by a supposed trespass thereon; but is confined to damages, which the plaintiff alleges he has sustained by being deprived of the former and accustomed use of the part of his farm cut off from the residue by the rail road, and the facilities for going to and from the same. The action in none of the counts in the writ is for taking the land for the road, or for an invasion of the rights of the plaintiff in any manner, to the portion of the farm covered thereby. But it is for the construction of the road in such a mode, that the plaintiff

has been limited in the proper enjoyment of his land *not* covered by it. The issue, whether the land, on which the road is built has been unlawfully taken, does not appear to have been designed by the plaintiff, in making his writ, to be presented, and it is not before us. There is no allegation, that the defendants placed any obstructions mentioned in the writ, *upon the land of the plaintiff;* and consequently there is no basis for a decision of the question, whether the act under which the defendants justify is in contravention of that part of the constitution referred to or otherwise. It is manifest that the injury of which the plaintiff complains, was one which he had sustained by acts of the defendants, which the charter did not authorize, and not that the charter conferred no power to appropriate so much of the plaintiff's property as was contemplated by the Legislature.

The action not being maintainable, according to the agreement of the parties, the plaintiff is to become nonsuit.

True, for the plaintiff.

Shepley and *Dana*, for the defendants.

WILLIAMS *versus* NEW ENGLAND MUTUAL FIRE INSURANCE COMPANY.

Warranties are a part of a *completed contract*. *Representations* are a part of the preliminary proceedings, which *propose the making of a contract.*

Representations in an application for insurance, become *warranties*, if referred to in the policy, and expressly made a part of it.

It seems, a warranty that there are no stoves in the building insured, is a warranty that stoves are not to be placed in it.

In the insurance of an unfinished dwellinghouse, which is in the process of being finished, a warranty that there are to be no stoves in it, must be understood to mean, that no stove is to be habitually kept and used in it; as stoves are ordinarily kept and used in dwellinghouses.

The use of a stove for a few days, for a purpose connected with the finishing of the house, is not a violation of the warranty.

In an application, (to the office in which the plaintiff has obtained insurance,) merely for leave to obtain an additional insurance, in another office, the statements made, are not warranties. They are only representations.

Williams *v.* New England Mutual Fire Insurance Co.

Though such representations be untrue, yet, if not fraudulently made, and if they are immaterial, and produce to the defendant no injury, they will not vacate the policy issued by the defendants.

Where, by its charter, a company is prohibited to insure upon property, to an amount exceeding two-thirds of its value, yet if the company voluntarily insure to a greater amount, without any fraud or misrepresentation on the part of the insured, the policy is not thereby annulled.

ASSUMPSIT, upon a policy, whereby the defendants insured to the plaintiff, on the 30th day of June, 1848, $1500, for three months, upon a double house, which he was erecting in Portland, and upon the materials for finishing it; at a premium of ten per cent. a year, till the building should be completed, and after that at the "average rate."

The Act by which the defendants were incorporated, contained the following among other provisions: — "All persons who may at any time become insured under this Act, and also their legal representatives, continuing to be insured therein, as is hereafter provided, shall be deemed and taken to be members of this corporation, for and during the time specified in their respective policies, and no longer, and shall at all times be concluded and bound by the provisions thereof.

"The directors shall determine the rates of insurance, the amount to be insured on any proposed risk, not exceeding two-thirds of the value of the property insured, and the premium and sum to be deposited therefor.

"If any other insurances shall be obtained, on any property insured by this company, notice shall be given to the secretary, and the consent of the directors obtained; otherwise, the policy issued by this company shall be void."

In the policy, the defendants promised, "*according to the provisions of said Act,*" to pay the plaintiff, in case of loss, &c.

The policy referred to the plaintiff's application, "for a more particular dscription, and *as forming a part of the policy.*"

The application was contained upon a printed form, prepared by the company, and presenting certain specific inquiries relative to the property.

To the fifth interrogatory, which was, "*the number of stoves*, and how secured?" the plaintiff's answer was, "*none.*"

On the 27th of August, 1848, the defendants, upon the plaintiff's application, enlarged the amount of the policy to $2000, and extended its term to 27th August, 1849.

In the fall of the year a stove was used, for a few days, in one of the rooms, for drying the paint.

On the 30th November, 1848, the plaintiff, in writing, represented to the defendants, that he had finished the building, and requested permission to obtain additional insurance of $400 at the Columbian office. They assented in writing, and he accordingly procured the insurance of the $400. There was testimony upon the question whether, in point of fact, the building was then entirely finished.

In his first application he represented the value of the property to be $2100. In the third, he stated that, "*having finished the building, he had increased the value of the property, some* $1200." To certain specific inquiries, the jury replied that at the time of the first application, the property was worth $2100; at the time of the second, $2800; and at the time of the third, $3340.

The house took fire in December, 1848, or January, 1849, and this action is brought to recover for the loss occasioned thereby.

The examination, made after the injury, showed that the fire originated in the cellar, and that in the cellar, there were found shavings, chips, and fragments of boards.

The trial was before HOWARD, J. — He instructed the jury *that*, if the permission to insure at the Columbian office was obtained by a false representation on the part of the plaintiff, and was *material*, the policy was thereby vacated; and *that* it might be material by enabling him to obtain an over insurance, tending to make him less careful to preserve the property; also, *that* an over valuation, if fraudulently made, would avoid the policy; but if made through a mere error of judgment, it would not have that effect; also, *that* the use of the stove would not defeat the action, unless the risk to the

property was thereby increased; also, *that* the application of 30th Nov. was, in law, a warranty that the building was then finished, and if that warranty was false, it would vacate the policy; *that* it was to be borne in mind, that the rate of premium was to be reduced as soon as the building was finished; and *that* if, in order to induce the defendants to reduce the premium, the plaintiff made any untrue representation, it would avoid the policy.

The verdict was for the plaintiff, and the damage was assessed at $896. It was agreed that the court should render judgment on the verdict, or direct a new trial, as legal principles should require.

Fessenden & Deblois, for the defendants.

The answers to the interrogatories, in the plaintiff's applications for insurance, are warranties. They are referred to in the policy, and expressly made a part of it. There is, then, a warranty that no stove was in the building. This warranty is co-extensive with the life of the policy. It is, by construction, as settled in a multitude of cases, a warranty that no stove should, at any time during the policy, be placed in the building. This warranty was broken, and the policy thereby became void; whether the use of the stove did or did not increase the risk.

But, suppose the policy to be in force, if the risk was not increased; the burden would then be on the plaintiff to show that the risk was not increased. Yet there was no particle of testimony on that point. *Clark* v. *Manf. Ins. Co.* 2 Minot & Woodbury, 472.

2. The statement in the plaintiff's application or notice of 30th Nov. that the house was finished, was a warranty of this fact. But in truth the house was not finished. Of necessity, this was a material point. For it was to affect the rates of the premium. The motive of the warranty was not in question. The instruction was erroneous, that if the warranty was false, and was made for the purpose of inducing defendants to reduce the rate of premium, it would avoid the policy. This wrongfully left the jury to infer, that if the warranty

was made *without that purpose*, it would not vitiate the policy. *DeLonguemare* v. *Traders' Ins. Co.* 2 Hall, 589; *Fowler* v. *Etna Fire Ins. Co.* 6 Cowen, 673; Marshall on Insurance, 248—252; *Clark & al.* v. *The Manf. Ins. Co.* cited before; *Routledge* v. *Burrell*, 1 Henry Blackstone, 254; *Oldman* v. *Renick*, 2 Henry Blackstone. 577; *Bean* v. *Stupart*, Douglass, 11; *Burritt* v. *Saratoga Co. Mutual Fire Ins. Co.* 5 Hill, 188.

It is not pretended that the building was finished. The verdict ought therefore to be set aside.

Again, the charter requires such notice to be given to the *secretary*. The notice given by the plaintiff was not directed to the secretary, but to the *company*.

3. There was an over valuation in the amount of the property insured, which vacated the policy. A breach of warranty, as to the value of the property thus insured, defeats the policy. Act of Incorporation, Dec. 20, 1844; *DeLonguemare* v. *Traders' Ins. Co.* 2 Hall, 589; *Burritt* v. *Saratoga Co. Mutual Ins. Co.* 5 Hill, 193; 2 Duer on Ins. 646, § 3.

The plaintiff was a member of the company.

The charter prohibits any one from insuring to an amount exceeding two-thirds the value.

By the finding of the jury, the plaintiff insured $1500 upon a property of the value of $2100 only; the second insurance brought up the sum insured to $2000 upon a property of $2800 only; the third insurance brought it up to $2400 upon a property of only $3340.

When he took the second insurance, he did not state the value of the property. He must be considered as warranting that the $2000, then insured, was not more than two-thirds the value of the property. This has been found by the jury to be untrue.

4. The accumulation of chips and shavings in the cellar was such gross carelessness, as, of itself, defeats the policy. On this ground also, the verdict should be set aside.

Shepley, C. J. — It is contended in the first place, that the

statement made in the application in answer to the fifth interrogatory amounts to a warranty, that no stove should be used in the building for any purpose, and that the instructions on this point were erroneous.

The instruction considered with reference to the testimony would only inform the jury, that the use of a stove in the manner, that the plaintiff informed the witness that it had been used, would not avoid the policy, if the risk was not thereby increased.

It is not difficult to distinguish between a warranty and a representation. The latter is a part of the preliminary proceedings, preceding and proposing a contract. The former is a part of the contract as completed. Ordinarily, therefore, a statement made in an application for insurance is a representation only; but it may be incorporated into the policy and thereby become a part of the contract. When thus made a part of the contract what would otherwise have been a representation, becomes a warranty. A reference made in the policy to the application will not be sufficient to make it a part of the contract. *The Jefferson Ins. Co.* v. *Cotheal*, 7 Wend. 72; *Snyder* v. *The Farmers' Ins. and Loan Co.* 13 Wend. 92; S. C. 16 Wend. 481; 2 Hall, 608. When the policy contains a clause declaring, that the application forms a part of the policy, it thereby becomes a part of the contract and its statements are thereby changed from representations into warranties. *Burritt* v. *The Saratoga County Mut. Fire Ins. Co.*, 5 Hill, 188.

The policy in this case, contains a clause similar to the one found in the policy in that case, "reference being had to said application for a more particular description, and as forming a part of this policy." By this clause, the application is made a part of the contract, and its representations become warranties.

Considering the application and the policy as thus forming one contract, the inquiry is presented, whether a correct construction of that contract forbids the use of a stove for a few

days, not for ordinary use, but for the purpose of drying paint in the building insured.

The fifth interrogatory, prepared with reference to risks usually assumed, seeks information respecting the number of stoves as ordinarily and habitually used, or as they are accustomed to be used in dwellinghouses and other occupied buildings; and how the stoves and funnels are secured. It does not present the inquiry, whether one might be introduced for a temporary and different use connected with the completion of an unfinished building insured, and not occupied for any other purpose than to complete it. The answer was evidently made responsive to the inquiry thus presented. The language of the interrogatory and answer had reference to the habitual use of stoves not to the temporary use of one, for a purpose connected with the completion of the building. Such appears to have been the construction in similar cases. *Dobson* v. *Sotheby*, 1 Moo. & Mal. 90; *Shaw* v. *Robberds*, 6 Ad. &. El. 75; *Grant* v. *Howard Ins. Co.*, 5 Hill, 10.

The statement was true when made, and when considered as a contract or warranty, that no stove should be used, as they ordinarily or habitually are in dwellinghouses, continued to be true to the time of the loss. The testimony does not therefore prove a violation of the contract on the part of the plaintiff; and the defendants can have no just cause to complain of the instructions on this point.

Secondly, it is said, that the statement made on November 30, 1848, that the building was finished, amounted to a warranty, and that being untrue it avoided the policy.

It was not made to obtain further insurance from the defendants; but to obtain their consent, that a greater amount of insurance might be obtained from another company. It is the application for insurance only, and not one for consent, that another company may insure, which is made a part of the policy. This is too plainly stated to require argument.

So much of the instructions on this point, as states it to have been a warranty, must be regarded as erroneous; but the

defendants can have no cause to complain of an error, favorable to their defence.

Considered as a representation it could only be material, as affecting the risk already assumed, by obtaining consent to an over insurance, which might induce the owner to become careless respecting its loss, or tempt him to cause the building to be burned. If no over insurance was effected, the increase of the amount insured, could only operate to relieve the defendants from a part of the risk already assumed, without depriving them of any part of their premium. It is said, that this representation might have the effect to induce the defendants to reduce the premium to "the average standard." The documents furnished do not clearly exhibit the meaning of that phrase contained in the letter of the defendants' agent, bearing date on August 27, 1848, when considered and compared with the phrase used in the policy of "standard rate ten per cent." Whatever may have been the meaning, there is no proof, that it had any effect to reduce the premium; and the jury have found that it was not fraudulently made to induce the defendants to reduce it. The jury have also found, that insurance was not then obtained, including the amount obtained from the other company, but to an amount little more than two-thirds of the actual value, so that no conclusion could be properly formed, that any temptation was thereby held out, injurious to the interests of the defendants. The jury have also found under the instructions, that this misrepresentation was not material. They might be justified in finding that it was not fraudulently made, when the defendants' agent admits, that he made, from information obtained from the plaintiff, a representation on the same day to the other company, that the building insured was unfinished. That a misrepresentation not fraudulently made and not material to the risk, will not prevent a recovery, is established by numerous cases, including those already cited.

3. In the third place it is contended, that there was an over valuation of the property, and that the policy was thereby vacated.

The jury have found the representations respecting the value, to have been true, under instructions, which could not have favored their conclusion.

If the first statement of value operated as a warranty, that warranty was kept, and the instructions were not therefore injurious to the defendants. The defendants have not, therefore, been aggrieved by these instructions. There was no representation respecting the value of the building made at the time, when the additional amount of insurance was obtained from the defendants, and if they voluntarily, without any misrepresentation, agreed to insure to more than two-thirds of the value, the policy would not thereby be annulled. *Fuller* v. *The Boston Mutual Fire Ins. Co.*, 4 Metc. 206.

4. It is insisted, that the verdict ought to be set aside, because the testimony shows, that the loss was occasioned by the gross carelessness of the plaintiff.

There was no representation or stipulation made, that the building during its completion, and while mechanics were at work upon it, should not contain bits of board or shavings. The testimony does not show by whom they were left or placed there; whether by the workmen or others, or with or without the permission of the plaintiff.

There do not appear to have been any instructions given or requested respecting this matter; and there is no sufficient reason to conclude, that the position could have been sustained upon the testimony introduced or established by the law applicable to it.

The policy would not be annulled or a recovery be prevented by proof of negligence on the part of the plaintiff or his workmen. *Dobson* v. *Sotheby*, and *Shaw* v. *Robberds*, before cited.

The testimony respecting the value of the building, as well as that respecting the amount of the loss, was conflicting. The jury alone should decide upon the credibility of the testimony of each witness. No sufficient reason appears, to authorize the court to determine, that they must have acted in

coming to their conclusions under the influence of any bias or prejudice.

Motion overruled, and judgment on the verdict.

SAGER *versus* THE PORTSMOUTH, S. & P. & E. RAIL ROAD COMPANY.

The common law liability of a common carrier, may be restricted by a notice from him, brought home to the knowledge of the customer, as to the extent of the liability to be borne by the carrier.

But no *notice* or *contract* can exonerate a common carrier from liability for damage, occasioned by his *negligence* or *misconduct*.

The want of suitable vehicles, in which to transport articles, is negligence on the part of a carrier.

A common carrier will be liable for damage to goods, resulting from disobedience of the directions, given by the owner and assented to by the carrier, respecting the mode of conveyance.

If, with a *bailee* employed to carry goods for him, the owner stipulate to take upon himself the risk of "all damages, *that may happen*" to the goods in the course of transportation, such stipulation will not exonerate the bailee from liability for damage to the goods, resulting from his *negligence* or *misconduct*.

The damages, which, within the meaning of that stipulation, *might happen* to the goods, would not include such as resulted from *negligence* or *misconduct*.

Such stipulation, however, would cast upon the owner, the burden of proving that the damage was *so* occasioned.

ASSUMPSIT. The plaintiff's horse was transported upon the defendants' rail way from Boston to Portland, for which the plaintiff paid freight, $2,75. It was upon a cold day in November, 1848. The horse was carried in an open car, and suffered serious injury from the exposure to the cold. This action is brought to recover for that injury.

A witness for the plaintiff testified, that he took the horse to the depot in East Boston, and requested one of the defendants' servants there to have the horse carried in a close car. He did not know the name of the servant, nor whether he had any charge in the transportation department.

The defendants introduced a paper, made in 1845, signed

by the plaintiff and many other dealers in horses and cattle, as follows: "We the undersigned, hereby agree to exonerate the P., S. & P. & E. Rail Road Company from all damages that may happen to any horses, oxen or other live stock that we send or may send over said company's rail road; meaning by this, that we take the risk upon ourselves of all and any damages, that may happen to our horses, cattle, &c.; and that we will not call upon said rail road company or any of their agents for any damages whatever."

The trial was before HOWARD, J. He instructed the jury *that*, by the common law, common carriers for hire were always bound to obey special directions given them as to the manner of transporting property entrusted to them; *that* they were bound to provide themselves with suitable carriages and conveyances; *that* they were bound to guard against improper hazards and injury to the property by storms; *that* they were liable for losses which might happen by injuries of every kind to such property, except those which occur from the act of God or public enemies; *that* the burthen of proof is on the defendants to show, when any loss happens, that it is not occasioned by their fault; *that* they are held to give and prove the excuse; and *that* this is the law, unless otherwise provided by special contract between the parties; *that*, by such special contract, they might guard against such an extent of liability; *that* the paper, signed by the plaintiff, might not excuse the defendants for every sort of accident, though happening without their fault; but that the same is a binding contract and excuses the defendants from liability for such losses as are incurred by the running off of the cars from the track, breaking the legs of live stock and the like accidents, but does not excuse them for their own malfeasance, misfeasance or negligence; *that* this contract shifts the burthen of proof to the plaintiff, and requires of him to prove that the loss was occasioned by the misconduct or neglects of the defendants; *that* parties have the right thus to change their liabilities; *that*, if the plaintiff gave the defendants special directions as to the mode of

carrying this horse, the defendants were bound to follow them, if they undertook to transport the property, or they could not avail themselves of the change of liabilities, provided for in the said paper; and *that* it would be such negligence, if they did not conform to these directions, as would make them liable for the loss, notwithstanding this written agreement; *that* such an omission to follow the orders given, again shifted the burthen of proof to the defendants to make good their excuse, and they would be bound to show *that* the loss was suffered without their fault; *that*, if the plaintiff relied upon having given directions to carry the horse in a close car, he must prove that such orders were given to the defendants or their officers, or to some agent of the company; *that* it was not necessary that this order should be proved to have been given to *that* officer of the company who had in charge the carrying of such freight to Portland, but it was enough if such order was given to any agent of the company there acting for them, whatever may have been the particular duty of such agent; but that the plaintiff was bound to bring the knowledge of the special directions home to the company; *that*, if no special directions were given to carry this horse in a close car, the jury would next consider and find, whether it was an act of negligence to transport the horse in an open car; *that*, if it was known to be the custom of the defendants to transport horses in either kind of car indiscriminately, the plaintiff would be bound by such custom, if there were no special directions; *that* the jury would next inquire, if they came to the question of damages, whether the horse was injured in the course of his transportation to Portland, and whether such injury was occasioned by the neglect of the defendants; *that* this was the rule, whether the special directions were given or not.

The jury returned their verdict for the plaintiff and assessed the damages at $155.

By agreement of the parties, the case was submitted to the court for a decision upon the principles of law.

Deblois, for defendants.

Two points are here presented.

1. Upon the effect of the paper signed by the plaintiff. Whatever be its import, it is binding upon the plaintiff.

That paper expressly relieves the defendants from the liability charged. He thereby became his own insurer, and the employees of the defendants, became his servants.

Fraud alone could make the company liable. *Bean* v. *Green & al.* 12 Maine, 422; *Parker* v. *Flagg*, 26 Maine, 181; *Holliston* v. *Nowland*, 19 Wendell, 247; *Bingham* v. *Rodgers*, 6 Watts & Sergent, 495; Story on Bailments, sect. 554, 555, and note to 557; *Riley* v. *Horn*, 5 Bingham, 217; *Mayhew & al* v. *Eames & al.* 3 Barnwell & Creswell, 601; *Clark* v. *Hutchins*, 14 East, 475; *Beck* v. *Evans*, 16 East, 245 and 247.

As to the plaintiff, the defendants are not bound by the rules relative to common carriers.

The making of such a contract, impugnes no policy or law.

The law of common carriers arose from the necessities of a semi-barbarous age. The progress of events has removed the occasion for it, and its rigors have been mitigated, so far as to give a qualified effect to notices. The question now arises, whether, by *express contract*, a party can cast off the obligations of a common carrier.

A party may waive any right, except as to immoral tendencies, or such *crassa negligentia* as amounts to fraud. An owner of goods has the right to say to a carrier, you may transport goods for me, exempt from the rigors of the ancient law.

The charge to the jury in this case, restricted that right. The plaintiff's stipulation protected us against "all damage," the Judge limited it to damage from common and ordinary accident. Except for the protection, given by that paper, the defendants would not have carried the horse; at least not for that price.

If mere *notice* of a restricted obligation, on the part of a

carrier, protects him, surely a written contract will be no less available.

If *notice* takes away the character of a common carrier, *a fortiori* a contract may do it.

Suppose a notice would relieve merely from common and ordinary accidents, yet a *contract* may relieve from losses even through gross neglect.

The defendants dislike to carry such freight. They consent only upon the owners assuming the risk. This is no invasion of policy, of law or of justice.

2. The direction to carry in a covered car, was not so given as to create an obligation upon the company. They have five or six hundred employees, in many various departments. To whom was the direction given? No one can tell. It should have been given to some one, having charge of the freight business. A notice to the baggage-master could have been of no use to the company. The company has usages. People employing them must deal according to those usages, and they must take time to know and to conform to them. This is the more requisite, from the rapidity of rail road movements. 22 Pick. 24; 1 Metc. 294; 4 Paige, 127.

S. Fessenden on the same side.

How far the rigid law of England is in force here, has never been presented, on solemn argument, to this court.

Cessante ratione, cessat lex, is a sound rule.

From the half-barbarism which gave rise to the old law, this nation has emerged into civilization and moral light. If parties, by their silence, acquiesce in the rigors of the old rule, let it be so. But I have yet to learn, that, in modern days, (when the chief dangers, against which that rule was adopted, have passed away,) the party may not, *by contract*, relieve himself from an insurance upon property conveyed.

The law of common carriers does not apply to the carrying of cattle and horses. It related only to money and merchandize. The transporting of live stock is of modern origin. Defendants are not bound to carry it. As well may it be re-

quired of them to transport meeting houses and ships. Must they take caravans of wild animals? Is a steam boat or rail way, bound as they are to carry *passengers*, compellable to mix them up with *lions*, *hyenas* and *monkeys*? Suppose a person becomes a carrier to distribute newspapers; is he compellable to transport rocks and piles of manure?

Besides, their charter itself, section three, gives the defendants the right to decide what descriptions of articles to carry. They are not bound to provide, beforehand, vehicles for every possible sort of property. They have indeed provided cars for cattle, but to be used only on condition that the insurance is taken by the owners.

The contract made by the plaintiff with the defendants, was not void for want of consideration; it sanctions no immorality, is not *contra bonos mores*. Suppose it should be thought the better policy to uphold the old rule, and to set aside the contract, I submit to this Honorable Court, that they have no right to do it. Such a decision would impair the obligation of a contract. Such a decision is forbidden by an express provision of our constitution. Public policy may change. But that provision is unalterable.

Even the ancient law had one qualification. The owner might go with his goods and take charge of them, at his own risk. I suppose, too, he might send his servant. So in this case, the plaintiff having taken the risk, made the defendants' employees his servants. At any rate, the contract protects the defendants against all but fraud or gross neglect. That either of these occurred, there is no pretence.

Shepley & Dana, for plaintiff.

Shepley, C. J. — It cannot be useful to notice or to attempt to reconcile the very numerous opinions and decisions respecting the responsibility of common carriers for the loss of property entrusted to them for conveyance. Most of the cases were collected or referred to in the opinion of Mr. Justice Cowen, in the case of *Cole* v. *Goodwin*, 19 Wend. 251

It will be sufficient to state the law established by the progressive and decisive weight of authority.

By the common law they were liable for all losses not occasioned by the act of God or the public enemy. They could not refuse to carry a package, and when its contents were not made known to them, they were often subjected to heavy damages without receiving any adequate compensation for the risk incurred. To obtain relief by a limitation of their liability, it became a very general practice to give notice, that they would not be answerable for the loss or damage of goods above the value of five pounds, unless the nature and value were specified and entered, and a premium paid accordingly. The effect of notices of this description was soon presented for judicial determination.

The conclusion, to which the courts ultimately came, was, that they could have no effect, unless brought to the knowledge of the owner of the goods, before he had entrusted them to the care of the carrier. That in such case they would have the effect to prevent a recovery of damages, for a loss not occasioned by the misconduct or negligence of the carrier or his servants, when the owner had not complied with the terms of the notice.

This conclusion appears to have been formed by a consideration, that a person informed of the notice, who intrusted goods to their care without making known their nature and value, consented, that they should be carried upon the terms proposed in the notice, and that a contract to that effect was thus made between the parties, by a proposal for their carriage upon certain terms stated, and by an acceptance of them. *Lyon* v. *Mells*, 5 East, 428.

The notices were usually given in terms so general, that a literal construction of the contract thus arising out of them, would have exonerated the carriers from liability for their own misfeasance or negligence and from that of their servants. Yet the well established construction of them has been, that they were not thereby relieved from their liability to make compensation for losses thus occasioned. *Beck* v.

Evans, 16 East, 244; *Smith* v. *Horne*, 8 Taun. 144; *Newborn* v. *Just*, 2 C. & P., 76; *Birkett* v. *Willan*, 2 B. & A., 356; *Garnett* v. *Willan*, 5 B. & A., 53; *Sleat* v. *Fagg*, 5 B. & A., 342; *Duff* v. *Budd*, 3 Brod. & Bing. 177; *Brooke* v. *Pickwick*, 4 Bing., 218; *Riley* v. *Horne*, 5 Bing., 217; *Bodenham* v. *Bennet*, 4 Price, 34; Story on Bailm., (4th ed.) § 570, where it is said, "it is clear, that such notices will not exempt the carrier from losses by the misfeasance or gross negligence of himself or servants," "for the terms are uniformly construed not to exempt him from such losses." Kent also states, "it is perfectly well settled, that the carrier, notwithstanding notice has been given and brought home to the party, continues responsible for any loss or damage resulting from gross negligence or misfeasance in him or his servants." 2 Kent's Com. 607. Mr. Justice COWEN, in the case of *Cole* v. *Goodwin*, while speaking of the decisions in Westminster Hall, respecting the liability of a common carrier, says, "it is equally well settled, that he cannot either capriciously, by a single instance, or by public notice, seen and read by his customer, nor even by special agreement, exonerate himself from the consequences of gross neglect."

In many of the cases the words "gross neglect," were used without any definite explanation of their meaning, and for some time it was considered to be doubtful, whether the carrier was not exonerated from losses occasioned by negligence or a want of that ordinary care, for which bailees are responsible. This doubt was removed by the decisions made in *Wyld* v. *Pickford*, 8 Mee. & Welsb. 443, and *Hinton* v. *Dibbin*, 2 Ad. & El. N. S. 646. In the former case, Baron PARKE, speaking of a carrier who had given notice, says, "he still undertakes to carry for hire, and is therefore bound to use ordinary care in the custody of goods and their conveyance to and delivery at their place of destination, and in providing proper vehicles for their carriage. It is enough to prove an act of ordinary negligence." In the latter case, Lord DENMAN observes, "again, when we find 'gross negligence,' made the criterion to determine the liability of a

carrier, who has given the usual notice, it might perhaps have been reasonably expected, that something like a definite meaning should have been given to the expression. It is believed, however, that in none of the numerous cases upon this subject is any such attempt made; and it may well be doubted, whether between gross negligence and negligence, any intelligible distinction exists." In his first edition of the treatise on Bailments, the law was regarded by STORY to be uncertain whether a carrier would be liable without proof at least of gross negligence. After the case of *Wyld* v. *Pickford* was decided, he says, in the fourth edition, § 571, "the question may however be now considered at rest by an adjudication entirely satisfactory in its reasoning, and turning upon the very point, in which it was held, that in cases of such notices the carrier is liable for losses and injuries occasioned, not only by gross negligence, but by ordinary negligence; or, in other words, is bound to ordinary diligence."

The cases of *Clark* v. *Hutchins*, 14 East, 475, and of *Mayhew* v. *Eames*, 3 B. & C., 601, cited by the counsel for the defendants, did not turn upon the question of negligence; and, upon the ground on which the nonsuits were ordered, they are opposed to the general current of the authorities.

A change was made in the law of England, as thus established, by the statute, 11 G. 4, and 1 W. 4, chap. 68. The first section of this statute relieved carriers from their responsibility for the loss or damage of certain enumerated valuable goods, contained in packages or parcels of the value of more than ten pounds, unless their nature and value were at the time of their delivery made known to the carrier, and his increased charge paid or agreed to be paid. The fourth section provided that no public notice should exempt a carrier from his liability at common law, for the loss or injury of goods not enumerated in the first section. By the construction of this statute, adopted in the case of *Hinton* v. *Dibbin*, a carrier is not liable for a loss of valuable goods exceeding ten pounds, occasioned by the gross negligence of his servants, unless their

nature and value are made known according to the provisions of the statute.

Although the doctrines established before the enactment of this statute were received in the State of New York, her courts appear since to have denied, that the responsibility of a common carrier can be restricted by any notice or agreement. *Hollister* v. *Nowlen*, 19 Wend. 234; *Cole* v. *Goodwin*, *idem*, 251; *Gould* v. *Hill*, 2 Hill, 623. Some of the considerations leading to such a conclusion appear to have been; that many of the English Judges and jurists doubted the propriety of the admission of a restriction by notice, and lamented its introduction; that it had been removed and the rule of the common law restored by the statute, with certain exceptions introduced by it; that the decisions respecting the effect of notices rested upon the unsound foundation, that the carrier could and had divested himself of his public character, and assumed that of a bailee for hire; and that he was not obliged to receive goods for carriage, except upon terms prescribed by himself.

However strongly such and other considerations might have operated, had they been presented to this court at an earlier time, it is not now at liberty to entertain them, without overruling a former decision, (*Bean* v. *Green*, 3 Fairf. 422,) in which it is said, that the attempt on the part of common carriers to limit and qualify the liability imposed on them by the common law, although sustained, is not to be favored or extended. To admit them to be exonerated from liability for losses occasioned by negligence, would be to extend the limitation of it.

Another form of notice, often given by the proprietors of rail ways and stage coaches, "all baggage at the risk of owners," has, when made known to them, been construed not to exempt the proprietors from losses occasioned by negligence. In the case of the *Camden and Amboy Rail Road* v. *Burke*, 13 Wend. 611, SAVAGE, C. J. says, "where notice is given, that all baggage is at the risk of the owners, such notice excuses them from losses, happening by theft or robbery," "but

not from losses arising from actual negligence." In the case of *Dwight* v. *Brewster*, 1 Pick. 50, PARKER, C. J. says, when speaking of a similar notice, "it was intended to guard the proprietors from liability in case the trunks, &c. should be stolen."

Nor do such notices prevent the proprietors from being liable for losses occasioned by neglect to provide sufficient and suitable vehicles and machinery. *Lyon* v. *Mells*, 5 East, 428; *Sharp* v. *Grey*, 9 Bing. 457; *Wyld* v. *Pickford*, 8 M. & W. 651; *Cam. & Am. Rail Road* v. *Burke*, 13 Wend. 611; Story on Bailm. (4th ed.) § 557, where it is said, "but at all events such notices will not exempt the carriers from responsibility for losses occasioned by a defect in the vehicle or machinery used for the transportation."

A carrier will be liable for disobedience of directions given and assented to respecting the mode of conveyance. *Streeter* v. *Horlock*, 1 Bing. 34; *Hastings* v. *Pepper*, 11 Pick. 41; *Demseth* v. *Wade*, 2 Scam. 285; Story on Bailm. § 509.

If a literal construction of the agreement signed by the plaintiff would exonerate the defendants from losses occasioned by the negligence of their servants, it will be perceived, that it could not be permitted to have that effect without a violation of established rules of construction, and without a disregard of the declared intention of this court not to extend the restriction of the liability of common carriers. The very great danger to be anticipated, by permitting them to enter into contracts to be exempt from losses occasioned by misconduct or negligence, can scarcely be over estimated. It would remove the principal safeguard for the preservation of life and property in such conveyances.

It however requires no forced construction of that agreement, to regard it as effectual to place the defendants in the position of bailees for hire, and as not exonerating them from liability for losses occasioned by misfeasance or negligence. The latter clause, "we will not call upon the rail road company or any of their agents for any damages whatsoever," considered without reference to the preceding language,

would be sufficiently broad to excuse them from making compensation for losses occasioned by wilful misconduct. It is most obvious, that such could not have been the intention; and that the true meaning and intention was, that they would not call upon them for any damages whatsoever, "that may happen to any horses, oxen or other live stock, that we send or may send over said company's rail road." The intention of the parties, by the use of the language contained in this last clause, is then attempted to be explained as follows: — "meaning by this, that we will take the risk upon ourselves of all and any damages, that may happen to our horses, cattle," &c. The meaning of damages happening to live animals is to be sought.

The word happen is defined by the words, to come by chance, to fall out, to befall, to come unexpectedly. An accident, or that which happens or comes by chance, is an event, which occurs from an unknown cause, or it is the unusual effect of a known cause. This will exclude an event produced by misconduct or negligence, for one so produced is ordinarily to be expected from a known cause. Misconduct or negligence under such circumstances would usually be productive of such an event. Lord Ellenborough, in the case of *Lyon* v. *Mells*, speaking of what "may or may not happen," explains it as "that which may arise from accident and depends on chance." An injury occasioned by negligence, is the effect ordinarily to be expected as the consequence of that negligence, without reference to any accident or chance. A correct construction of the agreement will not therefore relieve the defendants from their liability for losses occasioned by the misfeasance or negligence of their servants.

It will have the effect to change the burden of proof, and to require that the owner shall prove, that the loss was thus occasioned.

The instructions respecting the liability of the defendants for losses were therefore correct.

It is alleged, that those respecting the directions given by the plaintiff, for the conveyance of his horse, were erroneous.

If the only instruction had been, that "it was enough if such order was given to any agent of the company, there acting for them, whatever may have been the particular duty of such agent," there might have been just cause for complaint. The true rule would seem to be, that an order should be given to some servant or agent, who is acting upon the subject matter, or whose duty it is to act upon it, or to communicate to some one, whose duty it is to act upon it. *Fulton Bank* v. *New York Canal Company*, 4 Paige, 127. But the instructions also stated, "that the plaintiff was bound to bring the knowledge of the special directions, home to the company." If this was done through a servant, whose duty did not require him to act upon, or to communicate the directions, the company would become sufficiently informed of them; and it could not have been aggrieved by the instructions.

The testimony appears to have been sufficient to authorize the jury to find, that the officers of the company, specially charged with the transportation of freight, were informed of those directions; and that is all that could have been intended by the instruction, that a knowledge of them should be brought home to the company.

Judgment on the verdict.

NOTE. — WELLS, J. took no part in this decision.

PRAY *versus* GORHAM.

A mother, after the death of her husband, has no authority to assign, *by parole*, the services of her minor child, for the period of its minority, even though by the contract, the compensation for the services be made payable to the child.

Notwithstanding such a contract, even if made with the assent of the child, the child may, at any time, leave the service of his employer, and recover from him what his past services were reasonably worth.

In such a case, there is no validity in the ground, taken in defence, that it is not the child, but the mother who is entitled to the wages.

EXCEPTIONS, taken by the defendant.

ASSUMPSIT by a minor, to recover for several years labor, rendered by him whilst between eight and seventeen years of age.

The defendant introduced evidence tending to show, that the plaintiff's father being dead, his mother with the consent of the plaintiff, then under eight years old, contracted that the plaintiff should serve the defendant till twenty-one years of age, for which the defendant was to provide food, clothing, and schooling, and, at the close of the term, pay the plaintiff a specified sum of money; and that the plaintiff left his employ long before the stipulated term of service had expired. The defendant also insisted that the mother, and not the child, was entitled to the wages. *Dedham* v. *Natick*, 16 Mass. 135, 140; *Nightingale* v. *Withington*, 15 Mass. 274; *Lord* v. *Poor*, 10 Shepl. 569; *White* v. *Henry*, 24 Maine, 531; *Kane* v. *Sprague*, 3 Maine, 77.

The testimony of the mother was admitted for the plaintiff, against the objection of the defendant, to prove what sum the defendant was to pay upon the contract. Her testimony as to the amount, was in conflict with the evidence introduced by the defendant.

The trial was before HOWARD, J., who instructed the jury, *that* the plaintiff was not bound by the parol agreement, made by his mother or by himself; *that* he had a right to leave the defendant's service at any time, and *that* he might in this suit, recover the value of his services, deducting what the defendant had suffered, (if any thing,) from the plaintiff's leaving the defendant's service, as proved.

Ludden, for defendant.

Little and *Morrell*, for plaintiff.

SHEPLEY, C. J. — By statute of 1821, c. 170, § 1, and as revised, c. 90, § 1, children under the age of fourteen years may be bound as apprentices or servants until that age, by the mother, after the death of the father. But this power ceases on her subsequent marriage, c. 88, § 4. While the power exists, it can be exercised only according to the provisions of the stat-

ute, by an indenture of two parts, signed by both parties, c. 90, § 3. While the mother, after the death of the father, remains unmarried, she is entitled to the care and education of her minor children, c. 110, § 5; but this does not authorize her to make contracts with other persons for their services in a manner not authorized by statute, or to receive compensation for services rendered in consequence of an unauthorized contract.

The contract proved in this case was entirely unauthorized and inoperative; for it was not made by indentures signed by the parties, and it attempted to bind the infant until he was twenty-one years of age. The instructions were correct, that the minor was not bound by it.

It is contended, that the plaintiff can maintain no action to recover compensation for his labor, because his mother was, after the death of his father, entitled to his earnings. The case of *Nightingale* v. *Withington*, 15 Mass. 272, is relied upon as authority, where PARKER, C. J. says, "generally the father, and in case of his death, the mother, is entitled to the earnings of their minor children." A minor child may consent to become the servant of the mother, and she may make a contract with another person for his services, as she would for the services of any other person, who had for the time being become her servant, and may in such case recover for those services. *Clapp* v. *Greene*, 10 Metc. 439. If it be intended to declare, that the mother, after the death of the father, is entitled to the earnings of a minor child, in the same manner as the father while alive was entitled to them, the position cannot be sustained. 1 Bl. Com. 453; *Commonwealth* v. *Murray*, 4 Binn. 487; *People* v. *Mercien*, 3 Hill, 400; *Morris* v. *Law*, 4 Stew. & Port. 123. In this case the mother did not attempt to make a contract for her own benefit, but for the benefit of her child.

It is further insisted, that the exclusion of the answer to the third interrogatory, in the deposition of Minerva W. Turner, was erroneous. That answer would prove a conversation between the mother of the plaintiff and the wife of the de-

fendant, which would not contradict the testimony of the mother. And another conversation between the grandfather and grandmother of the plaintiff, and the defendant and his wife, which could have no effect upon the rights of the plaintiff. The answer was therefore properly excluded.

Exceptions overruled.

GAMMON *versus* FREEMAN.

If, on receiving a conveyance of land, the grantee, at the same time, as a mere instrument, conveys it to another, without himself taking any beneficial interest in it, the transaction gives him no such seizin, as will entitle his widow to dower.

And, if the conveyance, thus executed by him, be a mortgage, and if the estate be forfeited and held by virtue of the mortgage, the interest which he retained as mortgager, is not such a beneficial interest as to be the foundation of a claim to dower.

G had given his note to W for the purchase of wild land. By agreement, W conveyed the land to R, who, therefor, at the same time, conveyed a farm to G, and G at the same time mortgaged the farm to W, to secure said note. *Held*, that the momentary seizin of G, gave to his widow no right of dower in the farm.

Though one, claiming land under a conveyance from the husband of a demandant in dower, be estopped to deny the seizin of the husband, he is entitled to show that the seizin was not of such a character as to confer a right of dower.

To constitute several conveyances the parts of the same transaction, it is not necessary that the deeds bear the same date; nor that *in each of the deeds*, the parties should be the same persons.

DOWER. The marriage of the plaintiff and a demand by her of the dower were admitted. Whether the husband had such a seizin, as to entitle the plaintiff to dower, was the point in controversy.

She introduced a deed of the land from John Reed to her husband. The defendant offered to prove, and it is agreed that, if the evidence be admissible, he can prove the following facts.

Gammon, the plaintiff's husband, had given his notes to

Underwood and Greenough, for which they had given a bond to convey to him certain lands in the county of Somerset. It was afterwards agreed by all the parties, that Underwood and Greenough should convey the Somerset lands to Reed, in payment for which Reed was to convey to Gammon the farm, in which the dower is claimed; and Gammon was thereupon to mortgage the farm to Underwood and Greenough to secure the notes he had given to them. Conveyances were accordingly so made, all at one time. But the mortgage was dated back, to conform to the date of the notes. The mortgage was foreclosed, and the tenant derived title under the mortgagees.

G. F. Shepley, for the demandant.

Reed's deed created a seizin in the husband. The defendant claims under that deed, and is therefore estopped to deny that seizin. *Kimball* v. *Kimball*, 2 Greenl. 226. True, the husband's seizin was but momentary; but, if it be for his own use, such a seizin is sufficient. *Broughton's case*, Cro. Eliz. 503. In order to defeat a claim for dower, something more must appear, than that the seizin was but momentary. *Stanwood* v. *Dunning*, 14 Maine, 270. There is a case still nearer, *Gage* v. *Ward*, 25 Maine, 101. There the widow had dower. That case differs from this, only that the conveyance was to a third person by mere substitution. And in this case, the mortgage was merely to secure an antecedent debt. The consideration for his deed was fully paid to Reed, by the Somerset lands. The mortgage, then, was not to secure the purchase money, but another and a previous debt. No case has gone so far as to defeat a claim like this. Dower is to be favored.

W. P. Fessenden and *Eveleth*, for the defendant.

There was no dowable seizin. *Holbrook* v. *Finney*, 4 Mass. 566; *Clark* v. *Munroe*, 14 Mass. 351.

The only interest in the demandant is under the mortgage, which is neither discharged or extinguished. A mortgage is to be upheld. *Pool* v. *Hathaway*, 22 Maine, 85.

The seizin of the husband went out by the same act by which it came in. That is the true test.

I admit we are estopped to deny the seizin, but we may inquire whether it was a dowable seizin.

The case of *Gage* v. *Ward* differs widely from this. There the tenant had no connection with the mortgage.

Gammon's mortgage was not to secure an antecedent debt, but one created when the mortgage was given.

Our case is the same as if Gammon had mortgaged to Reed for the purchase money, and Reed had assigned to Underwood and Geenough. The difference is only in the form.

To support this claim would encourage fraud.

SHEPLEY, C. J. — The demandant claims dower in a farm formerly owned by John Reed. Her late husband, Enoch Gammon, was indebted to Underwood and Greenough for lands, which he had agreed to purchase of them. He appears to have made a bargain to sell three thousand acres of those lands to Reed, to be paid for by a conveyance of his farm. To enable Gammon to obtain a conveyance from Underwood and Greenough to Reed, it was agreed, that his farm should be conveyed to Gammon and be by him conveyed in mortgage to Underwood and Greenough. These conveyances were accordingly made and delivered at the same time, but the mortgage was ante-dated.

To make them parts of one and the same transaction it is not necessary, that the deeds should bear the same date. *Harrison* v. *The Trustees of Philips' Academy*, 12 Mass. 456. Nor is it necessary, that the same persons should be grantors and grantees. It will be sufficient that the deeds are delivered at the same time to accomplish the agreed purpose. *Clark* v. *Munroe*, 14 Mass. 351; *Gilliam* v. *Moore*, 4 Leigh. 30.

The result of the authorities appears to be, that when the title to an estate is conveyed to a person as a mere instrument to make a conveyance of it to another without taking any beneficial interest in it, and he does accordingly transfer it at the time, when he receives it, he does not become so seized that his widow will be entitled to dower. That when he

acquires a title beneficial to himself, although he may continue to be the owner for a time ever so short, he will be so seized, that his widow will be entitled to dower. The interest, which he may retain as mortgager, if the estate be forfeited and held by virtue of the mortgage, will not be such a beneficial interest, that his widow will be entitled to dower.

The counsel for the demandant alleges, that the mortgage was not made in this case to secure payment for the farm conveyed, but to pay a debt previously due to the mortgagees for other lands. It is true, that it was made to secure the payment due for other lands, but the other lands were used to make payment for the farm. The mortgage was therefore made to effect indirectly a payment for the farm. It became, in the hands of the mortagees, a substitute for the lands, which they conveyed to Reed as the consideration of his conveyance of the farm to Gammon, who does not appear to have had more than an instantaneous seizin, as the mere instrument of conveyance to others without any beneficial interest in it.

It is insisted, that the tenant is estopped to deny the seizin of the husband, as he holds the estate by a title derived from him. While he may not be permitted to deny, that the husband was seized, he may be permitted to show the character of that seizin, and that it was not such, that his widow would be entitled to dower. *Moore* v. *Esty*, 5 N. H. 479.

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

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

HADLOCK *versus* BULFINCH *& al.*

MOTION for a new trial. The testimony was too voluminous to be reported. The following are the principles, as announced by HOWARD, J., upon which the decision of the Court was made.

A mortgage of land can be discharged only by payment of the debt secured by it, or by a release.

A renewal of the note, secured by such mortgage, is not such a payment as will discharge the mortgage, unless so intended by the parties.

Where the mortgagee takes, for the amount due upon the mortgage, the note of the *assignee* of the mortgager, including annual interest, and gives up to such assignee the notes of the mortgager, this, *unexplained*, is not to be considered as a mere renewal of the mortgager's note, but as a substitution of a *new* security, and is such a payment as to discharge the mortgage.

If the mortgage debt has been paid, no action can be maintained upon the mortgage, even though it has not been formally discharged.

ELLSWORTH *& al. versus* MITCHELL.

A contract in violation of a statute, when introduced as evidence of a right to recover thereon, may be effectually resisted by a party to it, or by one in legal privity, but not by a mere stranger.

Where a mortgage is made to secure a claim, rendered void by the statute, and a subsequent mortgage of the same property is made to another person, to secure a lawful debt, the receiving of the money by the first mortgagee, for his claim, by a sale or a discharge of his mortgage, will not subject him to an action by the subsequent mortgagee to recover such money.

ASSUMPSIT for money had and received. Wyatt *&* Son kept the Cumberland hotel in Portland. Being indebted to the Bank of Cumberland, they made to the same three mortgages of the furniture and other personal property in the hotel. They had purchased of the defendant supplies to the amount of $2108,21, toward which they owed $1413,77.

To secure that amount to the defendant, and also to secure a debt to Walter Corey, they made to the defendant and to Corey a mortgage, subject to the mortgages given to the bank. A part of the defendant's account was made subsequent to the 7th of October, 1846, (that being the day, upon which the Act of 1846, chap. 205, took effect, entitled "an Act to restrict the sale of intoxicating drinks.") That part of the account contained charges to the amount of $779, for spirituous liquors and wines. The defendant did not prove that he was ever licensed to sell such liquors.

Subsequent and subject to the mortgage made to Corey and the defendant, Wyatt & Son made a mortgage to the plaintiffs, to secure a debt justly due to them of about $600. Wyatt & Son then assigned to Moses Woodward the right to redeem against all the mortgages.

Upon the back of said mortgage made to Corey and the defendant, there was an assignment of the same to Woodward, who paid to the defendant the amount which the mortgage purported to secure to them.

The plaintiffs now claim that the above named sum of $779 for said liquors, was unlawfully received by the defendant, and that the defendant must be held to have received to the use of the plaintiffs, so much of it as would be sufficient to pay the debt due to the plaintiffs, and secured by said subsequent mortgage of the same property.

The case was submitted to the court for a decision according to the principles of law.

Fox, for the plaintiffs.

The sale of the liquor was unlawful. The mortgage to secure the payment for it was invalid. The Act of 1846, § 11, declares that money, received by the seller for liquors so sold, is held in violation of law and without consideration. The plaintiffs have the better right to it. *Winslow* v. *Rand*, 29 Maine, 362. The payment for that liquor could not lawfully be secured by the mortgage of Wyatt to the defendant. There can be no legal lien for an unlawful claim.

When the defendant received the money from Woodward, he illegally withdrew from the plaintiffs the whole amount of the plaintiff 's debt, by taking the fund with which that debt ought to have been paid. That fund we may lawfully pursue in this form of action. *Randall* v. *Rich*, 11 Mass. 494; *Hunt* v. *Nevers*, 15 Pick. 505; *Appleton* v. *Bancroft*, 10 Metc. 231; *Milton* v. *Moshier*, 7 Metc. 244; *Gilman* v. *Wilbur*, 12 Pick. 154.

W. P. Fessenden, for defendant.

1. Wyatt could not have recovered the money sued for, in any other mode than that provided by statute. He would

have no common law remedy, and plaintiffs could have no greater right than Wyatt himself. Greenl. on Ev. 2, § 111; *Worcester* v. *Eaton*, 13 Mass. 376. And this is not an action under the statute. Stat. 1846, § 11, 12.

2. No action under the statute could be maintained, either by Wyatt or a creditor. Defendant received no money, nor did he ever receive, or have possession of, any property, as the case finds. He had a mere lien by mortgage, and that he sold, as he might legally do.

SHEPLEY, C. J. — This action, containing a declaration in assumpsit for money had and received, is not founded upon the Act approved on August 7, 1846. The declaration is not so framed as to enable the plaintiffs to recover by virtue of that Act; nor do they profess to have complied with its provisions. The provisions contained in the tenth section are relied upon to show, that the mortgage made to Walter Corey and C. C. Mitchell & Son, was illegal and void; and thence it is inferred, that Mitchell & Son, having received money to pay an illegal and void mortgage, cannot retain it, but must pay it to the plaintiffs, who were subsequent mortgagees of Wyatt & Son.

Contracts made in violation of the provisions of a statute cannot be enforced in a court of justice, and may be effectually resisted, when introduced as evidence of title by a party to them, or by one in legal privity with such party, but not by a mere stranger, who would attempt to enforce the law and to disturb the rights secured to the parties by such a contract.

This is the well established construction of statutes, which declare usurious contracts to be illegal and void.

In the case of *Green* v. *Kemp*, 13 Mass. 515, it was held, that a mortgage made to secure an usurious contract was void only as against the mortgager and those claiming the estate under him, and that one, who had purchased the equity of redemption only, and not the entire estate, could not avoid the mortgage by proof of usury. That decision appears to have

been noticed with approbation in the case of *Richardson* v. *Field*, 6 Greenl. 36, where the tenant being a party to the usurious contract was permitted to make such a defence.

In the case of *Dix* v. *Van Wyck*, 2 Hill, 522, the plaintiff, as mortgagee of personal property, claimed to recover it from an officer, who had seized it upon an execution issued on a judgment recovered by a creditor of the mortgager, and it was decided, that the officer might defeat the plaintiff's title by proof of usury, because the creditor had seized the entire property and thereby succeeded to the rights of the mortgager. It was at the same time admitted, "that a deed or contract can only be avoided for usury, by the party who made it, or by some one standing in legal privity with him, and not by a mere stranger to the transaction."

The statutes prohibiting the taking of unlawful interest, and the sale of intoxicating liquors, rest upon similar principles of legislation. The rules of construction, determined to be applicable to one class of those enactments, may well be applied to the other.

The plaintiffs, as subsequent mortgagees, are alleged to come within the rule, which admits those in privity of title to show, that a contract between other parties was illegal. But the plaintiffs, by their mortgage, did not purchase or obtain a title to the entire property already mortgaged to others. Their mortgage declares, that it was "made subject to said three mortgages and also to a mortgage to Walter Corey and C. C. Mitchell & Son." They therefore became the owners of the property, subject to those mortgages, and did not acquire the rights of Wyatt & Son to defeat the mortgage made by them to Corey and Mitchell & Son, according to the decision in the case of *Green* v. *Kemp*, by proof, that it was made in violation of the provisions of a statute.

This would seem to be the aspect, which the case would present, if it were admitted, that the defendant had received money on account of an illegal contract unexecuted.

But the plaintiffs allege, that the mortgage, to which the defendant was a party, has been paid and not purchased by

Woodward. If so, that contract was perfectly executed and extinguished, before this suit was commenced; and the plaintiffs do not present themselves as resisting a title obtained and insisted upon in violation of a statute, but as attempting to recover back money paid upon an executed illegal contract, and without having been the persons who made the payment.

When a contract not *malum in se*, made in violation of the provisions of a statute, has been executed, a party, who has performed by the payment of money, cannot recover it back, unless he can show, that it was not paid for value actually received, but was obtained wrongfully or by undue advantage; or unless he can exhibit a statute provision expressly authorizing such a recovery. *Lowry* v. *Bordien*, Doug. 468; *Tappenden* v. *Randall*, 2 B. & P. 467; *White* v. *Franklin Bank*, 22 Pick. 181.

By the common law, therefore, a person, who has purchased intoxicating liquors of one not licensed to sell them, and who had received and paid for such liquors, could not recover back the money so paid.

The Act of 1846, gave new rights to the purchaser and his creditors, and if he or they would enforce those rights, they must employ the remedy and pursue the course prescribed by the Act. In the case of *Andover and Medford Turnpike Corporation* v. *Gould*, 6 Mass. 44, PARSONS, C. J. says, "But it is a rule founded in sound reason, that when a statute gives a new power, and at the same time provides the means of executing it, those, who claim the power, can execute it in no other way."

It will not be necessary to consider the other points presented by the arguments. *Plaintiffs nonsuit.*

THOMAS *versus* HILL.

Damages are recoverable for an injury to a mill lawfully existing, occasioned by the erection of any dam, unless the right to maintain such mill shall have been lost or defeated.

CASE for diverting water from the plaintiff's mill on Royall's river. Both parties claim under one Powell, who formerly owned all the rights now in controversy. In 1779, he erected a mill on the falls, with a dam in contact with it, across the river, creating a water power which has ever since been in use.

In 1781, he built a dam across the river, about 10 rods above the former one. By this upper dam he conducted a part of the water from the river through a channel, cut around the falls; this channel was called the Forge stream, and upon it he erected works for the manufacture of iron.

In 1787, he conveyed, to those under whom the plaintiff derives title, the first named mill with the privileges appurtenant, reserving to himself, his heirs and assigns, the right to divert sufficient water through said Forge stream for the use of his iron works, or for any other mill requiring an equal amount of water power. The defendant has the rights which Powell retained under said reservation. In 1800, the dam by which the Forge stream was supplied with water, was carried away, and the stream was thenceforth entirely obstructed, and the iron works abandoned. That state of things continued till 1845, when the defendant re-opened the stream, and erected a dam of the same dimensions, and in the same place, of that which was carried away in 1800. By this dam much of the water was diverted from the plaintiff's mill, and this action is brought for that cause.

It was agreed that the defendant has the right to divert the water as he has done, unless debarred by the length of time for which the plaintiff and his grantors have had quiet enjoyment, (under their said title,) of all the water power, obtained from the running of the river in its natural channel at the site of their mill, undiminished by the exercise of any of the

rights reserved in their deed from Powell, from the year 1800 to the year 1845.

The case was submitted for decision, by

M. M. Butler, for the plaintiff and —

B. Freeman, for the defendant.

HOWARD, J. — This is an action of the case, for diverting water from the plaintiff's mill, and is submitted upon an agreed statement of facts.

The right of diverting a portion of the water of Royall's river from the mill, by a dam, through an artificial channel, was asserted and enjoyed, by the defendant, and those under whom he claims, from 1780 to 1800, and the right was then unquestionable. In the year 1800, the dam was carried away by a freshet, and the artificial channel entirely obstructed to the passage of water; and the "iron-works privilege," which had been supplied by the water previously diverted, was "abandoned, and so remained up to the year 1845, when the dam was rebuilt, and the channel re-opened by the defendant."

The plaintiff, in his own right, had the quiet possession and enjoyment of all the water power, obtained from the running of the waters of the river in their natural channel, at the site of his mill, and dam, undiminished by the exercise of any rights claimed by the defendant, from 1800 to 1845, when the defendant built the dam, and diverted the water as set forth in the declaration.

From this uninterrupted enjoyment of the use of the entire water power of the river, at his mill and site, without the exertion of any adverse use, right or privilege, a grant might fairly be presumed, or a just presumption of right might arise, in favor of the plaintiff's claim, sufficient to establish it at law. *Campbell* v. *Wilson*, 3 East, 294; *Bealey* v. *Shaw*, 6 East, 208; *Balston* v. *Bensted*, 1 Camp. 463; *Hilary* v. *Waller*, 12 Ves. 265; *Gray* v. *Bond*, 2 Brod. & Bing. 667; *Hazard* v. *Robinson*, 3 Mason, 272; *Tyler* v. *Wilkinson*, 4 Mason, 402; Angell on Watercourses, 76, 77, 94; 1 Greenl.

Ev. sect. 17; *Bolivar Man. Co.* v. *Neponset Manuf. Co.* 16 Pick. 241; Cruise's Dig. T. 31, chap. 1, sect. 26, 43; Bracton, L. 4, chap. 48, sect. 3.

But, independent of presumptions of law, the statute, (R. S. chap. 126, sect. 1, 2,) furnishes a complete bar to the claim of the defendant. The language is, "no dam shall be erected to the injury of any mill lawfully existing, either above or below it, on the same stream; nor to the injury of any mill site, on which a mill, or mill dam shall have been lawfully erected and used, unless the right to maintain a mill, on such last mentioned site, shall have been lost or defeated by an abandonment or otherwise." The plaintiff's mill was lawfully existing upon the river, and the erection of the dam by the defendant, some ten rods above it, caused an injury to the mill, by diverting the water, in violation of this statute.

Judgment for the plaintiff.

The defendant to be heard in damages.

JOSIAH PIERCE, *Judge, &c. versus* IRISH *& al.*

An adjudication by the Judge of Probate upon a matter, over which he has general jurisdiction, unless it be appealed from, is conclusive, until reversed.

A guardianship account may be settled by the Judge of Probate, after the minority of the ward has expired.

Upon such a settlement, the allowance of an item of charge by the guardian, for his negotiable note, given to the ward for a specified sum, is to be viewed, not as a decree of the court, that such sum is money still due to the ward, in the hands of the guardian; but as a payment made to the ward.

Such a charge is lawfully allowed, when the Judge of Probate is satisfied it was the intention of the ward to receive the note as a payment.

Where a ward, after arriving at full age, has examined the guardianship account, and certified thereon its correctness, and his assent to its allowance, the Judge of Probate does not exceed his authority in allowing the account, although no notice be given to the ward to attend at the settlement.

A neglect for three years, to settle a guardianship account, (except in certain cases,) is a breach of the bond. But if the ward examine the final account, and discharge the balance, by taking a negotiable note for its amount,

and afterwards the account be accordingly settled in the Probate Court, the damages accruing to the ward from the breach of the bond, will be considered as included in the settlement, or waived.

DEBT on a guardianship bond, given by Irish, in 1833, as guardian to Harriet M. Mason, a minor. The defendants pleaded performance. The ward became twenty-one years of age, on the 7th of June, 1838. The first and only guardianship account was made up as of said 7th June, 1838. It contained charges against her for cash disbursed, articles furnished, and services rendered, all of which left a balance due to the ward, of $1304,67; and it also contained a charge for a note of that date, and of the amount of that balance, given to her by said Irish.

Upon that day, the ward indorsed upon the account, a certificate that she had "examined it, and found it correct, and consented and agreed to its allowance." The account was accordingly settled in the probate office, in September, 1839, at which settlement it does not appear that the ward was notified to attend.

On the 9th December, 1841, that note was given up, and a new one of $1393,19, taken therefor.

To show that this note is unpaid, it was introduced by the plaintiff, and contained indorsements made thereupon, of several items, amounting to something over $200, received by the ward between April, 1842, and September, 1843.

All the items in the guardianship account are admitted to be unobjectionable, except that of the $1304,67. The plaintiff now contends, *that* that item, if intended to be allowed as a charge against the ward, was wrongful; *that* neither of said notes was received as payment, but merely as memoranda, exhibiting the amount due upon the account; *that*, in taking the notes, she did not intend to exonerate her guardian and his sureties from their liability upon the probate bond; *that* the proceedings of the guardian, in making the settlement, were fraudulent, and *that* his sureties were knowing and consenting to the fraud.

The plaintiff offered to prove, *that* the ward was the step-

daughter of the guardian, and an inmate of his family, until after she became of full age; *that*, for some time prior to said 7th of June, 1838, the guardian was totally insolvent, and has so remained; *that* one month prior to said day, he made a mortgage of sundry articles of household furniture, running to the ward, (the consideration of which was stated to be $500,) for securing the payment of a note of said Irish, for the sum of $1304,67, payable to said ward, and that said mortgage was witnessed by Daniel C. Emery, one of the sureties; *that* said Emery certified on the 11th of June, 1838, that the said Irish appeared before him and acknowledged said mortgage to be his free act and deed; *that* said ward never actually received any of the mortgaged property; *that* no person was present at the adjustment of said guardianship account; *that* the said ward was not apprised of the insolvency of her said guardian at the time of the settlement of his account, nor till long after the giving of the new note, in December, 1841; *that* the said Emery knew that the said Irish had given the note of Dec. 1841; *that* he proposed to said ward that she should take a new mortgage of said Irish's furniture, to secure the same in part, and *that* said Emery knew, at the times said guardian made said two notes, that said guardian was wholly insolvent, and unable to pay said notes, and did not disclose such fact to said ward. From all which the plaintiff contended, that said Harriet never ratified said proceeding, in taking and renewing said note.

WELLS, J., who presided at the trial, directed a nonsuit, which is to be taken off, if it was improperly ordered.

J. Goodenow, for the plaintiff.

When the condition of a probate bond has been broken, the judgment thereupon "shall be entered in common form for the penalty." R. S. c. 113, § 13; c. 115, § 78.

1. The neglect for three years to settle a guardianship account was a breach of the bond. R. S. c. 110, § 27 and 28; R. S. c. 113, § 17 and 20.

This action is therefore maintainable. Though the Probate

Court may settle such an account after the three years, yet that neglect must stand as a breach of the bond.

Where there has been a breach, a citation is not a necessary preliminary to a suit on the bond. *Potter* v. *Titcomb*, 1 Fairf. 64; 2 Fairf. 168.

2. The bond was broken, because there was not a faithful discharge of the trust. The guardian expended his ward's money, and substituted for it only his own note, which was but the note of an insolvent man. Such a proceeding was waste. 2 Story's Eq. p. 513 and 515.

3. The failure to pay over in money the balance to the ward, upon her arriving at full age, was another breach of the bond. R. S. c. 110, § 15. His own note was not money.

Her certificate that the account was correct, was but an expression that she found the debt side correct, in relation to the items there charged for her maintenance and education.

The taking of the note, by the ward, was no discharge of the liability on the bond. Between persons standing in such fiduciary relations, *uberrima fides* is required. 2 Kent's Com. 483, note b.

In transactions between a guardian and ward, after the minority has ceased, if the intermediate period be short, the former relation may be considered as still subsisting. 1 Story's Eq. 312, 313, 314 and 315.

The presumption of law in this State, that the acceptance of a negotiable note is payment of a pre-existing debt, may be rebutted by evidence. This evidence may consist of circumstances which show a different intent. *Butts* v. *Dean*, 2 Metc. 76; *Reed* v. *Upton*, 10 Pick. 524; *Whitcomb* v. *Williams*, 4 Pick. 230; *Fowler* v. *Bush*, 21 Pick. 230; Story on Notes, 107. What the intent of the parties was, is for the jury. 2 Greenl. Ev. 425.

That rule applies only to notes given for *simple contract* debts. Specialties are not within it. A note is merged in a bond. Is a bond also merged in a note?

The ward is not bound by her consent to take the note, if induced so to do by the suppression of a material fact. *Saf-*

ford v. *Bacon*, 1 Hill, 532. An accord without satisfaction is of no avail. Was the guardian under any higher obligation to pay by reason of his note? What was the new consideration? A promise to pay a debt, secured by an instrument of a higher nature, is void. 5 Cowen, 195.

This claim is not barred by the settlement made in the Probate Court, because there was no notice to the ward. 11 Mass. 507; 17 Mass. 90; Cowen & Hill's Notes to Phil. on Ev. part 2, page 868.

Whether proceedings in the Probate Court, after the ward's minority had ceased, could affect her rights, is matter of some doubt, as the probate jurisdiction is limited to persons under guardianship.

If the first note was not a payment, the renewal of it could not be. *Pomroy* v. *Rice*, 16 Pick. 22; 9 B. & C. 418.

If the guardian, at the giving of the note was insolvent, the sureties are placed in no worse condition, by being held on the bond.

Shepley and *Dana*, for the defendant Emery, one of the sureties.

The plaintiff's attempt to set aside the decree of the Probate Court, because the guardianship account was fraudulent, is but an attempt, in a collateral suit, to impeach the decree, for matters not apparent on the record. If aggrieved, the only remedy for a party, in such a case, is by appeal, or by writ of error, or by application for a new trial. *Goodrich* v. *Thompson*, 4 Day, 215.

"The decree of a Court of Probate, if not reversed nor appealed from, cannot be questioned in a collateral suit, unless fraud is *clearly shown*, or there is a defect plainly apparent on the face of its proceedings." *Allen* v. *Lyons*, 2 Wash. C. C. R. 475; *Blount* v. *Durach*, 2 Wash. C. C. R. 657; 14 S. & R. 184, n.; *President, &c.* v. *Groff*, *ib.* 181; *McPherson* v. *Cunliff*, 11 S. & R. 431; *Paine* v. *Stone*, 10 Pick. 76; *Brown* v. *Gibson*, 1 N. & M. 326; 2 Bailey, 60; 1 Bailey, 25.

The record shows the account to be closed. If it had been

unsatisfactory, the party should have surcharged and falsified; or have had the sum, if any, which the guardian had misapplied, specifically fixed. *Ordinary* v. *McClure.* 1 Bailey, 7. A guardian is not liable on his bond, till he has been cited by the Judge of Probate to account, and has refused, 1 Root, 51; or till a specific sum has been decreed to be paid over. 3 McCord, 237.

If necessary that the ward should be notified that the account was in the Probate Court for settlement, this court will presume it was done. *Tryon* v. *Trion*, 16 Verm. 313.

Such notice could have availed nothing to the ward. She had settled and discharged the account before.

The taking of the note and mortgage, and her subsequent conduct in renewing the note and receiving payments upon it, discharged the sureties.

If the bond was broken, by the three years neglect to settle an account, the breach was but nominal, and it was healed by the subsequent settlement. 8 Pick. 394.

If the giving of a note by the guardian, instead of paying money, was a breach, it was competent for the ward, after the breach, to discharge the sureties in the bond. This was done by the renewal of the note. 13 Wendell, 75; Chitty on Contracts, 6th Am. Ed. 113, n.

The extension of the pay-day was a discharge of the surety. He was thereby induced to neglect the means of securing himself.

Deblois and *J. Goodenow*, in reply.

The plaintiff does not attempt to set aside the decree of the Probate Court. He rather insists upon its validity. We spread the whole record before the court, in order to enforce the decree, which shows that there is money, belonging to the ward, in the hands of the guardian. For the note which he gave was not a payment.

The decree does not affirm that the guardian had performed his duties, or that he had paid the money, or that the sureties are discharged. The decree was just, but the defendants have not complied with it. It is a judgment in favor of the

plaintiff, and the note is but further evidence of its amount. In substance, it was only striking a balance to be carried to new account. The partial payments indorsed, are merely receipts for certain sums paid upon the judgment.

Here was no forbearance to collect the debt of the guardian, for he was insolvent. The surety cannot, therefore, have been injured.

TENNEY, J. — Every guardian is required to render and settle his account with the Judge of Probate, once in three years, and as much oftener as the Judge shall cite him for that purpose. And on the neglect to do so, the condition of the bond, which he is obliged to give to the Judge, is deemed to be broken, and he exposed to removal from his trust. Stat. of 1830, c. 470, § 10; R. S. c. 110, § 27 and 28. The bond to be given, is conditioned among other things, that he render a just and true account of his guardianship as often as and when by law required, and at the expiration of his trust, to pay and deliver over all moneys and property, which on a final and just settlement of his accounts, shall appear to be remaining in his hands. Stat. of 1830, c. 470, § 11; R. S. c. 110, § 15.

The duties of a guardian in many respects are similar to those of an administrator, and the bonds required of one and the other are also substantially the same, so far as their duties are analogous. The principles, which have been judicially settled touching the legal obligations of an administrator, will apply to the like obligations of a guardian. When an administrator has received personal property of an intestate, and shall not have exhibited upon oath a particular inventory thereof, and in all other cases of neglect or mismanagement, execution shall be awarded against him, for such part of the penalty of his bond, as may be adjudged on a trial in due course of law. Stat. of 1821, c. 51, § 72; R. S. c. 113, § 17. When not otherwise provided by law expressly, like proceedings, judgment and execution, so far as applicable, shall be had upon the bonds of guardians, and others, as is

provided in reference to bonds of administrators, in common cases. Stat. 1821, § 71 and 74; R. S. c. 113, § 19. The privilege is secured to the guardian to have his accounts with his ward settled by the Judge of Probate; and the administrator has the like privilege in relation to his accounts with the estate of which he has charge.

It is the peculiar province of the Judge of Probate to take care, that guardians render accounts with their wards as frequently as the law requires, and also whenever he supposes, that it may be for the interest of wards. He has a supervision over the pecuniary affairs of minors, they having no others, who can be legally called upon to look after and protect their rights against their guardians. It is his duty to examine guardians' accounts rendered to him, and adjudicate thereupon. If the guardian is aggrieved at any decree of the Judge of Probate, he can appeal to the Supreme Court of Probate. The same right of appeal is open to the ward, when a decree is made after his arrival at full age, and before that time through his guardian, from a decree upon an account of a former guardian, who has resigned or been removed. No other tribunal than a Court of Probate is competent to pass upon accounts of guardians, which have been duly rendered.

In *Jennison* v. *Hapgood*, 7 Pick. 1, it was held, that a party aggrieved by a settlement before the Judge of Probate of an administration account, must appeal, or if the proceedings might be treated as a nullity on account of fraud, the executor might be cited to account in the Probate Court.

In *Robbins, Judge*, v. *Hayward*, 16 Mass. 524, it is said by the Court, "He [the administrator,] is entitled to have his accounts first settled in the probate office. If a balance appear against him, and he do not pay over according to the decree of the Judge, his bond will be put in suit."

"The question of fraud in an executor's account cannot be tried collaterally. The Probate Court is the proper forum for settling the account. If the party aggrieved by the fraud is aware of it, at the time, when the account is allowed, he may appeal; and if he is not, he may cite the administrator to re-

settle the account and allege the fraud. *Paine* v. *Stone*, 10 Pick. 75.

This suit is upon a bond given to the Judge of Probate by James Irish, upon his appointment as the guardian of Harriet M. Mason, and the other defendants, as his sureties, on May 7, 1833. The bond is conformable to the requirements of the statute, and in its condition obliges the guardian to render an account once in three years, and to pay and deliver over all balances and sums of money, that shall be found remaining upon his account, the same being first examined and allowed by the Judge of Probate, for the time being, unto the said minors. The defendants pleaded a general performance of the condition of the bond. The plaintiff joins issue and sets out an assignment of the breaches upon which reliance is placed. — 1st, That on June 7, 1838, when Harriet M. Mason arrived at the age of twenty-one years, there was due to her from her guardian the sum of $1304,67, which he has not paid to his ward, though duly requested, but has fraudulently wasted and converted the same to his own use; and 2d, that the guardian did not render an account of his guardianship, as by law required, once in three years, and that the omission did not arise from sickness or other unavoidable accident.

The plaintiff contends, that by the settlement of the account rendered to the Judge of Probate, there is a balance found in the hands of the guardian, which has never been paid; that the decree of the Judge cannot properly apply to the charge of the note given for the balance, but only to the several credits therein, to the ward, and the charges against her, for disbursements in cash for her benefit, the articles furnished and the services performed for her, as contained in the account; that the Judge, having no authority to allow a payment upon the final settlement in any other manner than in money, the charge of the note is to be treated as a credit of that amount of cash, in the guardian's hands. It is denied that the ward intended to receive the note in discharge of the balance, or to exonerate the guardian or his sureties from their

former liability on the bond. It is further insisted, that the proceedings on the guardianship account, were fraudulent; and that the sureties consented to those proceedings, and therefore, were equally implicated in the fraud, with the guardian himself. And for the purpose of establishing the fraud charged, certain facts were offered to be proved; which was not permitted by the presiding Judge, who directed a nonsuit.

It is not contended on the part of the plaintiff, that he has the right to impeach or overhaul the decree of the Judge of Probate in this suit, but it is attempted to be maintained, that there was a balance found in the settlement, and that under the account as presented, and the facts offered in evidence, the action can be sustained.

The guardian presented his account, which was examined and allowed at a Probate Court, holden on the first Tuesday of September, 1839. The same account was prepared and exhibited to the ward, immediately on her arriving at the age of twenty-one years, on June 7, 1838, and she at the same time signed a memorandum in writing, in which she acknowledged that she had examined the account, found it correct, and consented and agreed to its allowance. The note is charged in that account, and she is supposed to have received it, in the same manner, that she received any other article in the account.

The adjudication of the Judge was upon a subject matter, over which he had general jurisdiction, and after the account was presented by the guardian, the juirsdiction over it, so far as the same was to be examined and allowed or disallowed, was exclusive in him. If all the proceedings were conformable to the provisions of the statute, the decree, not being appealed from, was binding upon the parties, so long as it should stand unreversed. Whatever was embraced in the account was a subject of that decree, and by it, was legally established. If the account contained any item, which the law would not authorize the guardian to make, or the Judge to allow, yet if the consideration of it fell within his jurisdiction, the allowance would be binding, if no appeal was taken from the

decree. After the adjudication, no appeal being claimed, the account has passed into a judgment of a court of competent jurisdiction.

The charge of a negotiable note of the guardian, for the amount of the balance in his hands, belonging to the ward, made the subject of the decree, cannot be regarded merely as credit of the amount in money. The note was received more than a year before the allowance of the charge therefor, and might have become obligatory upon the guardian by negotiation, even if he had been required to pay the same balance in money. It must have been understood by the Judge as something more than the simple acknowledgment, that he held this balance. He treated it as he did any other charge in the account, and the allowance, even if the Judge mistook his duty in relation to it, will equally apply to this charge.

If the ward admitted the account to be correct, and consented to be bound by it; and if she received the note after such consent, through imposition and fraud practiced upon her by the guardian, and the allowance was decreed before she was apprised of the fraud, so that she was prevented thereby from taking an appeal, the guardian is still entitled to have these questions of fraud tried and settled by the proper tribunal; and as we have seen, he should have been cited to appear before the Court of Probate, for the purpose of re-settlement of his account, when the whole subject could have been opened and examined.

But it is objected, that it does not appear, from the copies of the proceedings in probate, that the ward was notified to be present at the court, when the guardian's account was examined and allowed, and therefore she is not bound thereby. There being no evidence, that she was present at that time, or notified to be present at the hearing, it is perhaps inferrable, that the Judge, in making the decree, was influenced by her written admission, that the account was correct, and that she assented thereto. If it was necessary that she should have had notice, in order to make the decree effectual, and she was not notified, the decree becomes a nullity. But the guardian

having filed his account, which is admitted to be correct in all respects excepting in the charge of the note, he is entitled to have it examined, after proper notice shall have been ordered and given, and to require that it shall be adjudged in all its items, before a suit can be instituted and maintained upon the bond.

But was it necessary, that notice should have been given to the ward, to be present at the court, when the account was to have been examined, in order that the Judge should have jurisdiction to pass finally upon the account? An administrator's account cannot be settled in probate, without reasonable notice to the parties interested. R. S. chap. 106, sect. 40. In a settlement of a guardian's account, the statute requires no notice to be given. The reason for the distinction is obvious, touching the settlement during the ward's minority. The notice would be immaterial. The ward is supposed incapable of action. It is the duty of the Judge of Probate to guard his rights, when the guardian is adversely interested. And when the settlement takes place after the majority of the ward, the Judge is not exonerated from a continued vigilance over his affairs. It is proper, however, that a ward, having the right to act in his own behalf, should be notified and heard. And it is believed, that such has been the practice by Courts of Probate generally. But the statute has not directed what notices shall be given by administrators in the settlement of their accounts, farther than it shall be reasonable. This is entrusted to the sound discretion of the Judge, in each case. When it appears to the Judge, that the ward has had full knowledge of the account, after he has arrived at full age, and has in writing assented to its correctness, upon an examination, it cannot be said with propriety, that the Judge has exceeded his power, in allowing the account. The notice, which can be of service to the ward, has been received, and she has virtually been heard, so far as is useful to him.

It is true, as contended by counsel for the plaintiff, that until the final settlement of the guardian's account, after the

ward has come to full age, if the intermediate time be short, the relations between them may be regarded as subsisting; still it is competent for the ward to act in his own behalf, and, if his acts afterwards have the sanction of the Judge of Probate, upon a full view of the whole subject, it would not be reasonable, that it should be revised collaterally.

Until the note of the guardian in this case was given, and received by the ward, he had the amount in his hands, which he was bound to pay in money, if demanded. It may have been unwise, that this right of the ward should have been waived, but if she really intended to receive the note, as payment, and in discharge of the sum in the guardian's hands, and she was not induced to do so, by any fraud practiced upon her, or by a concealment, or in ignorance of material facts, she would be legally bound. The claim, which she had against her guardian, was the sum of money in his hands. The bond, to the Judge of Probate, was, in its character, collateral security therefor. It might require clear evidence to satisfy the mind, that it was her intention to receive the note, as absolute payment of her claim, but if such intention was fully manifest to the Judge of Probate, the act cannot be treated as a nullity, in a suit like the present. In the cases referred to upon this point, by the plaintiff's counsel, the question presented was, what was the intention, in giving a negotiable note, when security existed in a specialty? And no doubt was expressed if the design was to give and take the note, as payment of a sum due, although collaterally secured by an instrument of a higher nature, the transaction would be valid. *Fowler* v. *Bush*, 21 Pick. 230. We are to suppose that the Judge of Probate treated the matter as settled by the parties upon full consideration, and the decree is binding, till impeached in another mode than that attempted.

The failure of the guardian to render to the Judge of Probate his account for more than three years from the time of his appointment, was a breach of the bond. But no suit was commenced thereon till a long time subsequent to the settlement, which took place in the probate office, in September,

1839. The account which had been rendered, and then settled and allowed, purports to cover every thing arising under the guardianship, from its commencement, and was a final settlement between the parties. By the decree, all claim of the ward against the guardian, was discharged by the note, which was given and received. All damages accruing to the ward from previous breaches of the bond, are presumed to have been included in that settlement, or waived.

Nonsuit to stand.

NOTE. — HOWARD, J. having been of counsel in this case, took no part in its decision.

SMALL *versus* PENNELL.

The fee in lands, reserved for public range ways, remains in the original proprietors, until they part with it.

In an action of trespass by opening a road over the plaintiff's land, proof of the reservation of such a range way over the *locus in quo*, furnishes no defence.

Over such range ways an easement may be acquired by ways, legally laid out or by long user.

Such range ways, as to the right of the public to the use of them, are to be viewed as any other lands.

Where county commissioners have undertaken to locate a public way, their proceedings, until reversed, are valid, if they had jurisdiction to commence them, though their subsequent acts may have been erroneous.

Unless they had such jurisdiction, their doings are ineffectual, and may be avoided, even collaterally.

A general jurisdiction over the subject matter is not, *of itself*, sufficient to give validity to their proceedings.

A sufficient jurisdiction can be conferred, (in any case in which they may be called to act,) only by the preliminary measures, prescribed therefor by law.

Where county commissioners undertake to establish a town way, upon the unreasonable neglect or refusal of the selectmen to locate it, their records, in order to be effectual, must disclose the facts upon which their jurisdiction is founded.

In the establishment, by the commissioners, of such a way, it was *Held*, that they had no jurisdiction in a case, where their records showed neither a request made to the selectmen nor one made to the commissioners; nor

that any of the original petitioners had applied in writing to the commissioners, nor that application by any one had been made to them, within a year from the neglect or refusal of the selectmen.

Parole testimony, offered, not to prove a lost record of county commissioners, but as a substitute for such a record, is inadmissible.

TRESPASS QUARE. The plaintiff introduced a deed to himself of the *locus in quo*, dated April 19th, 1847, and proved *that* his grantor had been in possession of the land by fences, fourteen years previously; and *that* the defendants, in June, 1848, removed the plaintiff's fence and opened a road upon the *locus in quo*. It was admitted that the plaintiff's grantor is the plaintiff in interest in this suit.

The defendant offered to prove by the records, (which were more than eighty years old,) of the proprietors of the town, that the *locus in quo* was "part of a public range way or allowance-road." The presiding Judge ruled that, unless the defendant was a surveyor of highways, such proof would be no justification, and rejected the evidence.

The defendants also attempted to show a location by the county commissioners of a town way over the *locus in quo* in 1846, and introduced their records of that year.

The plaintiff objected to the reading of the record, on account of certain alleged deficiencies therein, which are sufficiently noticed in the opinion, given by the court.

The defendant offered to prove by parole, that he, as the servant of the agent appointed therefor by the commissioners, opened the road as located by them and did the other acts complained of. That proof was rejected.

In aid of the record, the defendant proved that the selectmen acknowledged in writing, under date of June 2d, 1845, "that they had been petitioned, and had refused, to open the road, which was afterwards located by the commissioners, and opened by the defendant."

One of the selectmen testified for the defendant to the same fact, and he had made search for the original petition in the selectmen's office, and believed it to have been lost.

Robert Starbird, for the defendant, testified, that he and

others petitioned the selectmen in writing to open the road, and that upon their refusal or neglect to do so, an application in writing was made to the county commissioners, who afterwards, in 1846, located the road. The testimony of the selectmen and of Starbird was objected to by the plaintiff.

HOWARD, the presiding Judge, ruled, *pro forma*, that the county commissioners' record was not admissible, as evidence.

A default was entered, which is to be taken off, if the said record was admissible, or if any of the evidence which was offered by the defendant and rejected by the Judge, ought to have been received.

Codman and *Fox*, for the defendant.

The record was admissible. It could not be impeached collaterally. The adjudication is valid till reversed on *certiorari*. 16 Johns. 55; 1 East, 355; 15 Maine, 73; 22 Maine, 128; 28 Maine, 277, 411; 26 Maine, 407; 3 Fairf. 237, 271. This is the turning point of the case. For acts done under a judgment of court, this suit cannot lie.

The minutes of the commissioners, where record is incomplete, are evidence. 3 Pick. 281; 27 Maine ; 18 Pick. 464; 23 Pick. 170.

If a record be lost, its contents may be proved by parole. 22 Maine, 442.

It is not requisite that the preliminary steps, to give jurisdiction, shall be shown by the record. The other proofs have established them.

The remedy for the plaintiff, if any, might have been by *certiorari*. His grantor might have petitioned under the statute for damages. This action cannot lie in favor of the present plaintiff. He did not own, at the time of the location.

The defendant, acting under the commissioners, was a public officer. 9 Greenl. 98; R. S. c. 25, § 40.

The exclusion of the records of the original proprietors of the town, was wrongful. They would have shown a way, reserved for the public, at least for the dwellers of the town upon the *locus in quo*. The lots were laid out *to*, but *not in-*

cluding, the range way. The plaintiff, therefore, had no title. His land does not cover one inch of the road. The case shows that the defendant was an inhabitant of the town, having rights upon the range way. He had the right to make the way, thus reserved, safe and convenient for himself and other townsmen to pass.

Fessenden & Deblois and *O'Donnell*, for plaintiff.

WELLS, J. — The plaintiff being in possession of the *locus in quo*, and claiming title to it by virtue of his deed from Andrew Low, is entitled to maintain this action, unless the justification set up by the defendant can prevail.

The defendant contends, and he offered to prove, that the land upon which the alleged trespass was committed, was a public range way. But the fee in such range ways remains in the original proprietors, unless they have parted with it, and an easement may be acquired over them by ways legally laid out, or by long user. In relation to the right of the public to their use, they are to be viewed in the same manner as any other lands. The proof offered by the defendant, if received, would constitute no justification, and was therefore properly rejected. *Howard v. Hutchinson*, 1 Fairf. 335.

The defendant also alleges, as a ground of his defence, that in April, 1846, the county commissioners located a town way over the *locus in quo*, and that he was employed by the agent of the county commissioners to make the road, and in making it, he did the acts of which complaint is made.

The plaintiff denies the jurisdiction of the commissioners in the case in question, and the legality of their proceedings.

Unless the commissioners had jurisdiction to authorize the commencement of their proceedings, they would be void. A general jurisdiction merely, by law, over the subject matter, is not enough; they can only have it in the particular case in which they are called upon to act, by the existence of those preliminary facts, which confer it upon them. Their doings are ineffectual unless they have power to commence them, and may in such cases be avoided collaterally. But having juris-

diction, if their subsequent acts are erroneous, they are valid until vacated by *certiorari*. *Baker* v. *Runnels*, 3 Fairf. 235; *Goodwin* v. *Hallowell*, *ibid*, 271; 12 Metc. 208; *Sumner* v. *Parker*, 7 Mass. 79; *Haskell* v. *Haven*, 3 Pick. 404; *Wales* v. *Willard*, 2 Mass. 120; *Loring* v. *Bridge*, 9 Mass. 124; *Davol* v *Davol*, 13 Mass. 264; *Frumpton* v. *Pettis*, 3 Lev. 23; *the case of the Marshalsea*, 10 Co. 68.

The only inquiry then, which can be considered, is, whether the commissioners had jurisdiction of the case upon which they undertook to act, and if they had not, the defence cannot be sustained.

By stat. c. 25, § 32, it is provided, that "if the selectmen of any town shall unreasonably refuse or neglect to lay out or alter any such town way, &c. when requested in writing, by one or more of the inhabitants, &c. the commissioners, at any meeting, within one year, on application of any of the persons, so requesting, by petition in writing, may cause the said, &c. to be laid out or altered," &c.

In such cases the commissioners have only an appellate jurisdiction, arising from an application to the selectmen in writing, and an unreasonable refusal or neglect by them to grant it. Then any of the persons, who have applied to the selectmen, may prefer their request, within one year, to the commissioners, by petition in writing. And the record of the commissioners must disclose the facts upon which their jurisdiction is founded, as it appears, was done by the record of the court of sessions mentioned in *Goodwin* v. *Hallowell*.

In this case neither the request to the selectmen nor the petition to the commissioners, was made a part of their records. The extracts from their records show that they acted upon "petition of Robert Starbird & als. petitioners for a town road in Grey." The contents of the petition not being stated, it cannot be known from the record whether this was the petition to the selectmen or the commissioners. The allegation in the record, "that the selectmen of Gray have unreasonably refused and neglected to lay out and locate the way, as set forth in the foregoing petition," is only one of the

requisites necessary to give jurisdiction; it must further appear that some of the persons, requesting the road to be laid out, made their application in writing to the commissioners, who have no right to act upon the subject unless it is legally brought before them by some of those aggrieved.

It does not appear by the record, as it should, that the application was made to the commissioners within one year from the neglect or refusal of the selectmen.

The parole testimony is offered, not to prove a lost record but as a substitute for the record itself. This is inadmissible. The acts and doings of the commissioners must be manifested by their records, which, if lost or destroyed, may be proved by parole evidence. But it is not suggested that their records have been lost. There is an omission to record what is essential in order to give validity to their acts.

The grounds of the defendant's justification failing, the default, which was ordered, must remain.

SMYTH *& al.* AGENTS OF THE VILLAGE SCHOOL DISTRICT IN BRUNSWICK, *petitioners for mandamus*,

versus

JOHN F. TITCOMB, TREASURER OF THE TOWN.

The court is authorized, both by the common law and by statute, to issue writs of *mandamus* to courts of inferior jurisdiction, to corporations and individuals, when necessary for the furtherance of justice and the due execution of the laws.

The process of *mandamus* cannot be used for the review or correction of judicial errors.

The collector of taxes of a town has the same powers, and is under the same obligations, to collect school district taxes, as in cases of town taxes.

The treasurer of a town has the same authority, and is under the same obligations, to enforce the collection and payment of school district taxes, as in cases of town taxes.

In discontinuing or reconstructing its school districts, a town may make its action to be conditional, dependent upon the consent of the districts to be affected.

Such conditional action is not a delegation of its authority.

By the special statute of 1848, ch. 140, the doings of the town of Brunswick, for the formation of its village school district, were confirmed, and the district is held to be legally established.

If a school district have legally voted to raise a sum of money, for purposes within their authority, and the assessors of the town ascertain the fact and assess the same, such assessment is not rendered inoperative by the omission of the district clerk to certify to the assessors the vote of the district.

On a summary hearing, upon a petition for a *mandamus*, the court will not determine the constitutionality of a law, involving merely the rights of third persons.

A ministerial officer, entrusted with the collection and disbursement of revenue, in any of the departments of the government, has no right to withhold a performance of his ministerial duties, prescribed by law, merely because he apprehends that others may be injuriously affected thereby, or that possibly the law may be unconstitutional.

PETITION for *mandamus*. The respondent was treasurer of the town of Brunswick.

Some proceedings were had by the inhabitants of that town, in April, 1848, with a view to the consolidation of three of its school districts into one, to be called the village district. These proceedings are sufficiently stated in the decision of the case by the court. In August, 1848, an Act of the Legislature authorized the inhabitants of the village district to raise, for the support of schools, a sum not exceeding, in any one year, three-fifths of the amount, apportioned to said district from the school money raised by the town for the same year, to be assessed and collected in the manner provided for the assessment and collection of school district taxes.

The petitioners allege *that*, at a legal meeting in April, 1849, the district voted to raise, by a tax, $702,56, being three-fifths of the amount apportioned to the district, out of the money raised that year by the town, for supporting schools; *that*, pursuant to the public Act of August 6, 1846, the district had borrowed $325, for repairing the school houses belonging to said district, which last mentioned sum, the respondent, as treasurer of the town, had received and duly paid out for said repairs; *that* the assessors of the town duly assessed said sums, (amounting with the interest on said loan, and with the authorized overlayings, to $1093,48,) upon the polls and es-

tates within said district, according to law; and committed to Stephen Snow, the collector of taxes of said town, lists of said assessment, with warrant to levy and collect the same, and pay the amount thereof to said Titcomb, on or before the first day of December, 1849; and also certified to said Titcomb, the assessment and commitment aforesaid; *that* said Snow, after collecting a part of the sums so committed to him, (out of which the money borrowed as aforesaid, has been fully paid,) has neglected to complete the collection, leaving not less than $600, yet uncollected; *that*, in execution of the contracts entered into by the district, for the support of schools, the officers of the district have drawn their order upon the selectmen of the town, in favor of a person having a just claim against the district, which order the selectmen have declined to pay or accept, for the reason, alleged by them, that the district has already received its full proportion of the school money, *raised by the town*, and that the amount raised by the extra taxation in the district, has not been collected, and, therefore, is not subject to the order of said district; *that* an order of the like tenor, and for the same purpose, has been drawn upon the said Titcomb, treasurer, which he has declined to pay, for the reason, alleged by him, that there are no funds in his hands, subject to such order; *that* said petitioners have frequently requested said Titcomb to issue his warrant of distress against the said Snow, collector as aforesaid; which he has wholly refused to do; *that*, by means of said refusals, the inhabitants of said district are aggrieved and deprived of their just rights: —

Wherefore, they pray that a Rule be issued to said Titcomb, to appear at, &c., to show cause, if any he have, why a writ of *mandamus* should not be issued by this court, commanding him to issue such warrant of distress.

This petition was entered at the term of the court held for the county of Oxford, where it was *ordered*, that a rule be issued to said Titcomb, to show cause, &c. at the term of the court then next to be held for the county of Somerset, when and where it was agreed, that the cause should be postponed

and stand for argument at the term of the court, then next to be held for the county of Waldo, and that the respondent shall then and there make such a written return in answer to this petition, as he would by law be required to make to an alternative writ of *mandamus*, and that, upon such return, or upon the default of the respondent to make such return, and upon the proofs adduced by the parties, if the opinion of the court shall be in favor of granting the prayer of the petition, a peremptory writ of *mandamus* shall then issue.

And at said term for the county of Waldo, the said Titcomb filed his answer.

That answer contained an extended and well drawn argument upon the law, applicable to the facts which it alleged. The facts will sufficiently appear in the opinion given by the court.

The grounds assumed by the respondent were, in substance:

I. The so called village school district never had a legal existence.

1. It was not created according to the constitution or the laws of the State. By article 8, of the constitution, the mode in which the Legislature may proceed to enforce the maintenance of public schools is exactly prescribed. It is only by acting through the towns. The Legislature has no authority to create, *directly*, a school district, with power to raise money.

2. The vote of the town to consolidate the three districts into one, "*if such should be their wish*," was a delegation of authority, such as it was not lawful for the town to make.

3. But if lawful, the districts never complied with the condition. They never expressed such a wish. The utmost that can be claimed from their respective votes, is that they concurred in a measure for uniting the more advanced scholars of each district into one school, under the statute of 1847, c. 25.

4. If the town had intended to merge the three districts into one, the law authorized it to be done only at some annual meeting in March or April.

5. The Act of the Legislature of August 3, 1848, did not

pretend to form a new district, but was merely confirmatory of the votes passed by the districts. It was therefore inoperative, inasmuch as the districts had not all voted for the formation of the new district.

6. It cannot have been the intention of the Legislature, by that act alone, to establish the Union district; for, if so, the town could have no authority to change its limits; a right which the law expressly gives to towns over their districts.

II. But, if the village school district had a legal existence, the tax was not legally assessed.

1. The Legislature had no authority, under the constitution, to *compel* individuals to become subject to taxation under any vote of *such* a corporation.

2. The assessors of the town had no official notice, from the districts, of their having complied with the condition of the town vote, whereby their consolidation was effected. In fact such compliance was never had.

3. The money assessed, was never raised by a legal vote of the district. For, beyond the amount voted, the assessors included $325, to repay money which the district had borrowed; and that money was borrowed for purposes not authorized by the statute of August 8, 1846, under which it purported to have been obtained, and upon different times of pay-day from those prescribed by that statute.

4. No certificate of the district vote, authorizing the borrowing of money, was ever furnished by the district clerk to the assessors or treasurer of the town; nor had any certificate been furnished them by the district agents, that money had been rightfully borrowed.

III. If it be constitutional for the Legislature to authorize school districts to raise money, the power cannot be given to a single district, by special legislation. It can be done only by a general law operating upon all the school districts in the State.

IV. In a state of facts, like those presented in this case, it is *not* the *school district*, even though legally constituted, but it is the *town*, which has authority to apply for a writ of *man-*

damus, to act, not upon any officers of the *district*, but upon those of the *town*.

The facts, disconnected with the arguments, presented in the respondent's answer, are admitted to contain the truth of the case.

Barnes, for the petitioners.

S. Fessenden, for the respondent.

The constitution of this State, article eight, recognizes that a general diffusion of the advantages of education is essential to the preservation of the rights and liberties of the people. To promote this important object, "the Legislature are authorized, and it shall be their duty to require the several towns to make suitable provision, at their own expense, for the support and maintenance of public schools."

This is the whole extent of the power of the Legislature, in regard to the establishment, support and maintenance of public schools.

It is therefore very clear that these public schools must be provided for, and maintained by the several *towns*, and at their expense.

It is in their corporate capacity only, that they can be compelled to perform this duty. And this duty can only be enforced by laws, acting under the sanction of penalties, and equally applicable to all the towns in the State; and on the towns only.

A law, to be constitutional, operating on a town, must operate on the *whole* town, and in its corporate capacity. The inhabitants of any territory in the State are not a town, unless incorporated as such. It is essential to a town, that the inhabitants be incorporated as such.

The Legislature has no power to compel any particular portion of the inhabitants of a town, either by name, by number, by geographical, or local position, or by pecuniary ability, to support and maintain public schools.

They cannot legislate to compel school districts, as such, to support and maintain public schools. What are school districts but geographical portions of the several towns, with the

inhabitants residing thereon? Definite portions of towns; not towns. They may be corporations; but they are *not towns*. And it is towns, and towns only, who may be made to feel that stringent legislation, which would coerce them to support and maintain public schools. *School District No.* 3, *Sanford* v. *Brooks*, 23 Maine, 545; Revised Statutes, chap. 17, sect. 2.

This village district, if it have a corporate existence, is a private corporation. A corporation created exclusively for the benefit of those inhabiting a small portion of the territory of Brunswick. It has none of the characteristics of a public corporation, established to promote literature. It is not an academy or college, to which all the citizens have a right of access. It is not an institution open to all the inhabitants of Brunswick even. One residing out of the limits of the village district, could have no access to the benefits of the school, should he hire his board in the district. It is a private school, existing by act of the Legislature only, if at all.

The Legislature cannot compel a man to become a member of such a corporation, against his will. 4 Wheaton, 518, *Dartmouth College* v. *Woodward*, see pages 707 and 708.

There are, by the constitution, but two modes by which the Legislature is authorized to make provision for the diffusion of the advantages of education, *without the consent, or direct assent of the citizens of the State.* One of the modes is by endowing colleges, &c.; the other is by compelling towns to make provision.

It is then in the power of the Legislature to make suitable provision for the support and maintenance of *public schools*, only through the action of the several towns. Not by laying a tax *directly* on the towns, or portions of the inhabitants of towns, but by *law* applicable to all towns, compelling the towns to make suitable provision, at their own expense, for the support and maintenance of public schools.

The power granted to towns to determine the number and limits of the school districts within them, and the duty required of them so to do, is a power and a duty *which* cannot

be delegated or exercised upon any conditions; 12 Mass. 206, 214. The vote of the town of Brunswick, which consolidated the three districts conditionally, was therefore void. 3 N. H. 168; 3 Story, 411. Even if such a conditional vote could be valid, the condition has never been performed, for the districts have never given their consent in any legal form.

The inhabitants of the several towns, cannot assign the power which is vested in the whole town, that of raising and expending money for the support of schools therein, to the inhabitants of the various school districts. The evils of such a system would be too glaring, and the absurdity too manifest. It would destroy at once that equalizing of *taxation* upon the people, and that equality of *burdens*, as well as privileges, which is a primary object of the constitution. It is partial legislation. And no good reason can be assigned, why the power might not be given to any small portion of the inhabitants to tax the residue, as to give to the inhabitants of a majority of a fraction power to tax the rest of the people.

But the great objection is, that it makes school districts entirely independent of towns, overlooking the eighth article of the constitution altogether. If the Legislature could, *without the intervention of towns*, authorize one school district to raise any sum of money for the support and maintenance of schools, and impose the duty so to do, the Legislature might give the same powers to, and require the same duties of, all the school districts; and the action of the several towns be superseded.

The Legislature, then, not having the power to authorize the district to raise money for the support of a public school, the act of the school district in voting the money for such object was merely void, the assessment was also void. He who should enforce the collection of it would be a trespasser.

Such a tax no collector can be bound to collect. And above all, the court, in its wide discretion, would never coerce a treasurer to enforce the collection of a tax, thus unconstitutionally raised and unconstitutionally assessed. Can such an officer rightfully be compelled, *without indemnity*, to

expose himself to trespass suits by every person who should, by the *mandamus* asked for, be made to pay an illegal tax? We believe not.

HOWARD, J. — This court has power to issue writs of *mandamus* to courts of inferior jurisdiction, to corporations and individuals, when it "may be necessary for the furtherance of justice, and the due execution of the laws." Rev. Stat. c. 96, § 5. As a court of the highest common law jurisdiction, it would have this judicial sovereignty and general superintendence throughout the State, upon the principles of the common law, if there were no statute upon the subject. It is the only power through which magistrates of inferior jurisdiction, and officers of the law, can be compelled to perform their official duties. The writ is to issue "in all cases where the party hath a right to have any thing done, and hath no other specific means of compelling its performance." 3 Black. Com. 110. But this process cannot be used to review or correct judicial errors. *Kendall* v. *The United States*, 12 Peters, 524; *Ex parte Hoyt*, 13 Peters, 279; *Ex parte Whitney*, 13 Peters, 404; *The People* v. *The Judges of Dutchess C. P.* 20 Wend. 658; *Kennebunk Toll Bridge, pet'rs*, 11 Maine, 263.

Upon the present application for a *mandamus*, notice has been ordered, and the respondent has appeared, and answered, by agreement, as upon the return of an alternative writ. He substantially admits the facts alleged and proved by the petitioners, [certain errors in the statement being shown and corrected by the proofs offered,] but alleges other facts and conclusions in avoidance, and as reasons why the writ should not issue. The answer is unnecessarily, if not improperly argumentative, but the facts, on which the respondent relies, and from which he draws his conclusions, are stated in conformity with the truth of the case, and in a manner to be readily apprehended.

The duties of the respondent, as treasurer of the town, in reference to school districts, are prescribed and imposed by statute. Upon receiving from the assessors of the town a cer-

tificate of the assessment of a school district tax, he had the same authority to enforce the collection and payment, as in case of town taxes. R. S. c. 17, § 33. And the collector, upon receiving the commitment and warrant for collection from the assessors, had the same powers, and was held to proceed in the same manner, as in the collection of town taxes. R. S. chap. 17, sect. 32. The assessors, collector, and treasurer are to be allowed by the school district, for assessing, collecting, and paying any district tax, a compensation proportionate to what they receive for similar services respecting town taxes. R. S. chap. 17, sect. 36. On the neglect of the collector to complete the collection and payment of the tax in question, by the time named in his warrant from the assessors, it became the duty of the treasurer to issue a warrant of distress to the delinquent, in the form prescribed by law, to compel the collection; (R. S. chap. 14, sect. 111,) unless he has shown that sufficient cause existed for omitting to conform to the provisions of the statute, in this particular, in this case.

The reasons set forth by the respondent, in his answer, for declining to issue a warrant of distress, assume substantially the form of objections. Waiving, for the present, the question of his right to make these objections, while occupying the position of a ministerial officer, charged with duties, upon the due performance of which, important rights and privileges, of large portions of the community, mainly depend, we will consider the objections as they are presented. For, if it is manifest from an inspection of the proceedings, that the collector has no authority to collect the tax, by reason of its illegality; or, that the persons assessed, on being compelled to pay it, would have a remedy back for restitution, the court will not grant a process, to enforce a collection that would be fruitless and oppressive.

The first objection is, that the village district, in which the petitioners allege that the tax in question was raised and assessed, was not legally created and established. Every town in this State is authorized and empowered, at the annual meet-

ing, to determine the number and extent of the school districts within its limits; "and, if necessary, may divide or discontinue any such district; or annex it to any other district in such town, with such reservations and conditions, as may be proper to preserve the individual rights and obligations of the inhabitants thereof." R. S. chap. 17, sect. 1, 2. Every school district, thus established, "shall be a body corporate; with power to sue and be sued, and to hold any estate, real or personal, for the purpose of supporting a school or schools therein; and apply the same to such object agreeably to the provisions of this chapter, independently of the money raised by the town for that purpose." R. S. chap. 17, sect. 20; Statutes of 1821, chap. 17, sect. 7.

The town of Brunswick voted, at their annual meeting, April 3, 1848, "that school districts Nos. 1, 2 and 20, be discontinued and to be constituted one district, to be called the village district, provided such shall be the wish of the several districts respectively." It will not be doubted that the town had authority, under the statute cited, (chap. 17, sect. 1, 2,) to discontinue and re-construct the school districts, within its limits, with such reservations and conditions as are therein mentioned. But it could not delegate its power, in this respect, derived wholly from the statute, to other corporations. The argument of the respondent's counsel is conclusive on this point. But while it was competent for the town to disregard the wishes of the districts, in such proceedings, it was equally competent to consult them. Making the wishes or consent of the districts a condition upon which its vote was to become absolute, did not transfer or delegate its authority to them. It would be no less the act of the town, when the vote took effect, because it might have been approved by the districts. The condition was prescribed for its own action, in a matter within its jurisdiction, and was not, in our opinion, designed to surrender its authority to the districts.

How the wishes of the districts were to be manifested, in order that the vote of the town might take effect, does not appear. Were they to be by votes or by silent acquiescence?

And if by votes, or resolves, in what manner, and to whom to be communicated? Each district acted to a certain extent, on the subject of the union of the several districts, and though, perhaps, it might reasonably be inferred that they thereby respectively manifested their willingness, and substantially their wish, to form the united district in pursuance of the vote of the town, yet such is not the express language of their votes. Whether, then, the vote of the town became effective to establish the village district, might, upon a strict construction, admit of some question, if the subject rested there. But, as if to place the matter beyond a doubt, the Act of August 3, 1848, c. 140, provided:—"SECT. 1. The vote of the inhabitants of the town of Brunswick, passed at their annual meeting, on the third day of April, one thousand eight hundred and forty-eight, establishing a school district in said town, to be known as the village district, is hereby confirmed, and the said village district shall have and enjoy all the powers and privileges, and be subject to all the duties belonging to school districts, under the laws of this State.

"SECT. 2. The inhabitants of said village district, are hereby authorized, at their district meeting, to raise such sum of money in addition to their proportion of the school money raised by the town, as may be deemed necessary for the support of the public schools, within said district; but the amount so raised by the district in any year, shall not exceed three-fifths of the amount apportioned to said district, from the school money, raised by the town for the same year.

"SECT. 3. The money so raised by the inhabitants of said district, shall be assessed and collected in the same manner as is now provided for the assessment and collection of school district taxes."

Section 4 authorizes the inhabitants of the district to choose their own agent, and to adopt any suitable by-laws, not repugnant to the constitution and laws, for the regulation of the schools in the district. This Act was designed to confirm the vote of the town, and to *establish* the village district, with enlarged powers and duties, and if constitutional and

operative, it clearly had that effect. The objection to the constitutionality of the Act, will be noticed hereafter, and the village district may be viewed as legally constituted.

The next objection is, that the tax under consideration was not legally assessed. It appears by the proof, that the village district met on the 27th of September, 1848, and, among other matters, voted to authorize the board of agents to purchase a lot of land upon which to erect a building for the accommodation of the high and grammar schools, and to erect the building, and to enlarge and repair the school houses belonging to the district, for the accommodation of the primary schools, and to furnish suitable rooms for the high and grammar schools, until permanent accommodations could be provided, and to hire on the credit of the district, "such sums of money, as may be from time to time needed for the expenditures authorized by the preceding votes, not exceeding five thousand dollars, and to give the necessary evidence of debt therefor." The last vote was adopted unanimously. (St. 1846, c. 208, § 1.) It also appears that this district, at their meeting, on April 17, 1849, voted to raise by taxation, such sum of money, in addition to their proportion of the school money raised by the town, as would be equal to three-fifths of the amount thus apportioned to them by the town. Act of 1846, c. 208; Special Laws, 1848, c. 40, § 2, 3. This vote was certified to the assessors of the town, by the clerk of the district, (R. S. c. 17, § 29,) but the votes passed at the prior meeting of the district, in September, 1848, were not fully and formally certified, either to the assessors, or treasurer of the town. It is urged that this is fatal to the assessment. (Stat. 1846, c. 208, § 3.) These sections of the statutes are directory to the clerks of school districts, and should be observed by them; and they would be responsible for the omission of the duties therein prescribed. But if the assessors, without such formal certificate of the votes to raise money, ascertain and assess the amount actually raised by the district, and proceed legally with their assessment, in all other respects, it would be legal and effective, notwithstanding such neglect of

duty by the clerk of the district. *Williams* v. *School District in Lunenburg*, 21 Pick. 82.

If, as is contended, the district borrowed the sum of $325, under their vote of September 27, 1848, for *repairing and enlarging* the school houses, and not "for the purpose of erecting a school house, and of purchasing land on which the same may stand," and therefore for an illegal object; and if this sum was assessed with other money legally granted and voted to be raised, the *assessment* would not thereby be rendered void. R. S. c. 14, § 88; c. 17, § 30, 31; Stat. 1846, c. 208, § 5, 6. But in fact, there were objects specified in the second and third votes of that meeting, for which the district could legally borrow money under the provisions of the sixth vote. There is nothing in the case, showing whether the money was borrowed for the purpose of erecting a school house, or purchasing land on which to erect it, or for repairing school houses, and furnishing suitable rooms for the high and grammar schools temporarily, unless the subsequent application of it to the latter purposes named should be supposed to indicate the object of borrowing. The certificate of the clerk of the district cannot have that effect, as it embraces only a part of the votes and proceedings of the meeting. And a misapplication of the money by the board of agents would not affect the validity of the assessments.

Another objection taken is, that the special law of 1848, c. 140, is unconstitutional, and that all proceedings under it are void. It does not, however, lie with the respondent, as a ministerial officer, to make this objection. He is not authorized, or required to adjudicate the law. On a summary hearing on a petition for a *mandamus*, this court will not determine the question of the constitutionality of the law, involving the rights of third persons, but will leave that question to be settled, when properly presented by parties to an action. For this hearing, we assume that the act is constitutional. *The People* v. *Collins*, 7 Johns. 549.

I would remark, however, that this act appears to be one of the class of acts, by which the Legislature has authorized

local taxation for local benefits and improvements of a public nature; and by which counties, towns, parishes, and school districts have been empowered, from the organization of our State government, (to date back no further,) to raise money to erect public buildings, to relieve the poor, and construct bridges and highways, to support religious worship, to establish and support schools, and to defray incidental charges. The taxation in all such cases, will necessarily be local, and when compared with other portions of the community, unequal; yet they have been held to be constitutional, and among the ordinary and most useful class of enactments. *Norwich* v. *County Commissioners of Hampshire*, 13 Pick. 60; *Thomas* v. *Leland*, 24 Wend. 65; *School District No.* 1, *in Greene*, v. *Bailey*, 12 Maine, 254; *Bussey* v. *Gilmore*, 3 Maine, 191; *Ford* v. *Clough*, 8 Maine, 334; *Hooper* v. *Emery*, 14 Maine, 375; *Baileyville* v. *Lowell*, 20 Maine, 178; *Kellar* v. *Savage*, 17 Maine, 444.

The petitioners are agents for the corporation, and the district prosecutes this petition through them. The objection, therefore, founded on the supposed want of proper parties, is not available. *Waldron* v. *Lee*, 5 Pick. 323.

We have thus noticed the principal objections; but there are considerations which lie at the foundation of these proceedings, that may be properly suggested at this time. A public officer entrusted with the collection and disbursement of revenue, in any of the departments of the government, has no right to refuse to perform his ministerial duties, prescribed by law, because he may apprehend that others may be injuriously affected by it, or that the law may, possibly, be unconstitutional. He is not responsible for the law, or for the possible wrongs which may result from its execution. He cannot refuse to act, because others may question his right. The individuals to be affected, may not doubt the constitutionality of the law; or they may waive their supposed rights or wrongs; or may choose to contest the validity of the enactment, personally. Public policy, as well as public necessity and justice, require prompt and efficient action from such offi-

cers. The State, counties, towns and school districts, must be supplied, in order to accomplish the purposes of their organizations, and the proper officers, in their respective departments, must seasonably furnish the authorized amounts.

The consequences would be ruinous if they could withhold their services, and the necessary means, either from timidity, or captiousness, until all questions of law, which might arise in the performance of their official duties, should first be judicially settled.

The respondent was required by law to issue a warrant of distress against the delinquent collector, without inquiry into the proceedings prior to the assessment and commitment of the tax, and as he has neglected that duty, without sufficient cause, a *peremptory mandamus* must issue.

SMITH *versus* MITCHELL.

If a receipter of attached goods give his written contract to pay the officer a specified sum or restore the articles, therein expressly admitting the goods to be of that value, he will not, in an action upon the receipt, be permitted to prove, that the articles were therein overvalued; or that such articles had sunk in price; or that he offered other goods of the same denomination, as good and as valuable as those attached.

ASSUMPSIT, by the sheriff, upon a written contract to pay $500, or re-deliver certain liquors, specified in the contract to be of that value, which the plaintiff had attached on a precept against a third person. Judgment and execution having been obtained by the attaching creditor, the plaintiff seasonably demanded the property. In a suit upon the receipt, the defendant offered to prove that the liquors were overvalued in the contract, and that such property had greatly depreciated in price since the giving of the obligation; also that on the day of the demand he offered to plaintiff other liquors of the same denomination, of as good a quality, and as valuable as those attached would have been, if kept till that time.

This evidence was all rejected.

A default was entered, which is to stand if that rejection was rightful.

W. P. Fessenden, for defendants, cited *Sawyer* v. *Mason*, 19 Maine, 49; *Shaw* v. *Laughton*, 20 Maine, 268.

Fox, for plaintiff.

TENNEY, J., orally. — The evidence was properly excluded. The defendant had his election whether to pay cash or deliver the identical articles. There was no right reserved to substitute other articles, or to deduct for depreciations. If so, controversies might arise as to the qualities and values. The contract seems framed to avoid such issues.

Exceptions overruled.

SWEETSER *versus* KENNEY.

When an action, brought into this court by exceptions from the District Court, is dismissed because irregularly brought here, no cost is allowed, unless the case be such, that the dismissal of it puts an end to the whole controversy. When an action, thus dismissed, is to go back to the District Court for further proceedings, neither party can claim costs, for neither party has finally prevailed.

EXCEPTIONS from the decision of the District Court, in a case, which had been submitted to referees, and in which they had made an award.

The exceptions did not show that the award had been finally acted upon in the District Court, either by an acceptance or a rejection of it.

This court declined to hear evidence on that point, and dismissed the exceptions for want of jurisdiction.

Butler then moved for costs against the excepting party, and cited 8 Metc. 343.

SHEPLEY, C. J. — In the case cited from Metcalf, the decision put an end to the whole controversy, so that it was known which party had finally prevailed. And that party, under the statute, as *the prevailing party*, was entitled to

costs. In this case neither party has finally prevailed. The suit is not terminated; it is, in effect, merely remitted to the District Court for further proceedings. How could costs be taxed? From the commencement of the suit? That is not pretended. And there is no rule for taxing by parts. Neither party has yet prevailed, and no costs, in this stage of the case, can be allowed.

STORER, *Appellant*, *versus* BLAKE *& al.*

One died intestate, leaving several children, of whom J was one. J died intestate, of adult age, never having been married, and never having received his distributive share in his father's estate. *Held*, that share was payable, not to his brothers and sisters, as heirs of their father, but to the administrator of J.

APPEAL from a decree of the Judge of Probate.

Nathaniel Blake died in 1845, leaving eight children and heirs, of whom John Blake was one.

The appellant was administrator.

In 1846, the administrator was directed by the Probate Court, to pay to said heirs their respective proportions of the estate, each share being $2024,06.

John Blake left the State in 1839, having never been married. He was last heard from in 1840, being then in Tennessee. In January, 1849, the remaining heirs of Nathaniel Blake obtained a decree of the Judge of Probate, that the administrator pay to them the share, which had been awarded to John Blake.

From that decree, this appeal is taken.

Fessenden, for the appellant.

Goodenow, for the appellees.

HOWARD, J., orally. — The respondents claim as heirs of Nathaniel Blake.

There were no facts in the case, from which it could be adjudged that John Blake was dead at the time of his father's

decease. Nor had any presumption to that effect arisen from lapse of time. He must be considered as being *at that time* in life, and as inheriting a share in his father's estate. If the respondents would entitle themselves to that share, they must come in, not as the heirs of Nathaniel, but as the heirs of John Blake, and through his administrator. *Decree reversed.*

On motion by the petitioner for cost, the court intimated that it might be deducted from the share in controversy.

DODGE *versus* BARNES.

Where, in a suit upon a contract relative to certain corporation stock, the contract, offered by the plaintiff in evidence, disagreed with the declaration as to the plaintiff's christian name, and also as to the name of the corporation; but the identities were apparent from the recital in the contract, and from the corporation records, to which the contract referred; *Held,* the variances, (between the contract and the allegations of the writ,) constituted no defence.

A transfer of corporation stock, made to fulfil a contract, is not ineffectual on account of its being made two days earlier than the stipulated day.

ASSUMPSIT upon a written contract, in which the defendant, after reciting that he had transferred to *Thomas Dodge* eight shares in the *Anson Woolen Factory*, promised *said Dodge* to pay him $376, provided *said Dodge* should, on the first day of June, 1846, transfer to the defendant eight shares in said factory.

Testimony was offered by the plaintiff, tending to show that, on the 30th day of May, 1846, one Cobb, claiming to act in behalf of the plaintiff, Thomas *T.* Dodge, left with the treasurer of the *Anson Woolen Manufacturing Company*, certificates of eight shares in the stock of said company, and requested said treasurer to transfer said shares to the defendant, which, according to the mode prescribed by the by-laws, the treasurer immediately did.

The records of the company, showing the transfer from the defendant to the plaintiff, and also that from the plaintiff to the defendant, were introduced.

The plaintiff proved that one Gage, acting for him, on the 17th day of June, 1848, presented the said contract to the defendant, and demanded payment.

The trial was before HOWARD, J.

A default was entered, subject to be removed, if the plaintiff, upon the evidence, was not entitled to recover.

McCobb, for the defendant, relied upon the variances between the allegations of the declaration, and the proofs presented in the contract.

1. It is alleged that the promise was made to the plaintiff, *Thomas T. Dodge* ; the proof is, that it was made to *Thomas Dodge.*

2. The allegation is of eight shares in the *Anson Woolen Factory ;* the proof is of eight shares in the *Anson Woolen Manufacturing Company.*

3. The allegation is, that the transfer was to be made "on or before the first day of June ;" the proof is, that it was to be made "on the first day of June." Greenl. on Ev. sect. 63 ; *Wilson* v. *Gilbert*, 2 B. & P. 281 ; *Whitwell* v. *Bennett*, 3 B. & P. 559 ; *Elwell* v. *Gilley*, 14 Maine, 72 ; *Boyden* v. *Hastings*, 17 Pick. 200 ; 1 Greenl. Ev. sect. 65, 66, 68, 69 ; Starkie's Ev. part iv. pp. 1290, 1542 and onward, 1577, 1579 ; 1 Chitty's Pl. 270.

The counsel also contended that the attempted transfer to the defendant was invalid ; because it was not proved that Cobb had authority ; and, because the transfer was not made on the first day of June. That it should be so made, was a condition precedent ; Story on Cont. sect. 27.

It might be important to the defendant, that he should not be a stockholder until the first day of June. Liability to company debts is sufficient to be mentioned ; for if the transfer was good, when made two days too early, it would be good, if made at any previous time, and the defendant be thereby exposed to liabilities, into which he never agreed to enter.

The transfer was also inoperative, because made, not by the plaintiff, but by the treasurer. None but the owner could

transfer. Angell & Ames on Corp., ed. of 1846, pp. 521, 522.

W. P. Fessenden, for plaintiff.

Howard, J. orally. — The variances, relied upon, constitute no sufficient defence. The recital in the contract and the records of the transfer, mentioned in the recital, manifestly show the trade to have been with the *plaintiff,* and that it related to shares in the *Anson Woolen Manufacturing Company.*

It is objected that the declaration contains no averment of the identities. But that omission is supplied by the proofs.

The transfer made May 30, would be in force on the 1st of June. As respects time, the transfer was therefore sufficient.

When the plaintiff, through his agent, Gage, demanded pay of the defendant, he ratified Cobb's doings.

The by-laws required the transfer to be made, not by the owner, but by the treasurer, who thereby became the owner's agent for that purpose. As to the want of notice, the defendant is presumed to know the mode of transfer, prescribed by the by-laws, and he also knew the time at which it was to be made. Further notice was not required. But, if required, it was sufficiently given by Gage to the defendant.

Default confirmed.

State *versus* Marston *& als.*

Indictment in the District Court against seven defendants, for an assault upon one Dyer, a schoolmaster. Three of the defendants filed pleas of misnomer in abatement, upon which issue was joined. The Judge overruled the pleas, and the defendants excepted.

The Court, by Shepley, C. J. orally. — The issue was for the jury. — Exceptions sustained.

Case remanded to the District Court.

A. W. and *J. M. True,* for defendants.

BROCK *versus* BERRY.

In a tenancy *at sufferance*, of a house and its lot, the landlord is chargeable in trespass *quare clausum*, if he enter by force to the injury of the tenant or his family, even after two months verbal notice to quit.

TRESPASS QUARE CLAUSUM, commenced in the Municipal Court. In the District Court, COLE, J., a motion was made, that the writ be abated, because the statute form was not pursued, inasmuch as the words, "*and for want thereof to take the body* of the said" Berry "and him safely keep so that he may be had," were omitted. The motion was overruled.

The general issue was then pleaded. Plaintiff introduced the deposition of Susan Fuller, an inmate of his family, and there rested his case. The deposition stated, in substance, *that* the plaintiff with his family, was occupying a house in Portland; *that*, in his absence, the defendant came to the house, and said he should take out the windows; *that* the wife and child of the plaintiff were sick; *that* that fact was told to defendant by said Susan Fuller, who forbade his removing the windows; *that* the defendant then took out two or three windows from the room, occupied by the plaintiff's wife, and one from the bed-room.

The defendant then offered to prove, *that* he was the owner of the house with its lot; *that* he had rented it by parole, to the plaintiff by the month; *that* plaintiff paid the rent at the end of the first and of the second months, and at the end of the third paid a part of that months rent; but had never paid any thing further; *that* plaintiff continued to occupy, as tenant at sufferance, about four months longer and up to the time of the alleged trespass; *that*, at several times, (at least two months prior to the alleged trespass,) he requested the plaintiff to leave the house and yield up the possession to him.

The Judge ruled that those facts, if true, would not constitute a legal defence. But by agreement they are to be considered as proved, for the purposes of the decision of this cause. If they constitute a defence, or if the writ ought to

have been abated, the plaintiff agrees to become nonsuit. Otherwise, defendant agrees to be defaulted, with judgment for plaintiff for four dollars damage. The case came into this court upon the following certificate signed by the District Judge : —

" It having happened, in the trial of this cause, that questions of law have arisen, the undersigned Justice of said court, with the consent of the parties, has drawn up this report of the case, presenting the legal points for decision, and the stipulation of the parties relative to the disposition of the case."

SHEPLEY, C. J. — This case is submitted upon a deposition and certain agreed facts. In cases reported here from the District Court, for the decision of legal questions, the questions ought to be specifically stated. That has not been done. Unless both parties waive the irregularity, the case cannot properly proceed.

The irregularity was waived.

John A. Poor, for plaintiff.

1. The defendant had not terminated the lease. The relation of landlord and tenant still subsisted. Mere neglect to pay the rent would not determine the tenancy. Thirty days notice in writing was necessary. None such had been given. It is fairly to be presumed that though verbally requested to quit, yet the plaintiff was authorized to remain, upon some new promise to pay. R. S. c. 95, § 19 ; *Moor* v. *Boyd*, 24 Maine, 242 ; *Wheeler* v. *Cowan*, 25 Maine, 283 ; *Meader* v. *Stone*, 7 Metc. 147.

2. Defendant did not enter to terminate the lease, but merely to commit a trespass. He made no avowal of his intent. He did not take possession. Plaintiff's family were still left in the house.

3. Plaintiff could not be turned out with violence, except by legal process. A man's house, he being in by right, is his castle. This is not like the cases, sometimes spoken of, where a possession is taken peacefully by the landlord. De-

fendant had no right to enter with violence, especially against protestation. *Wheeler* v. *Cowan*, 25 Maine, 283.

4. Even if defendant's entry could be considered lawful, his refusal to allow a reasonable time for plaintiff to remove his family and goods, renders him liable, and in this form of action. *Davis* v. *Thompson*, 13 Maine, 209; *Moor* v. *Boyd*, *supra.*

True, for defendant.

1. The writ ought to be abated.

2. The plaintiff had no right in the house. He was there by his own wrong. The letting was by the month. By the plaintiff's neglect to pay at the end of the third month, the contract was ended, and his subsequent holding was unlawful. *Hyat* v. *Wood*, 4 Johns. 150; *Wilde* v. *Cantellon*, 1 Johns. Cas. 123. By such holding, the plaintiff became mere tenant at sufferance. 4 Kent's Com. 116—118. In a tenancy at sufferance, the landlord may *peaceably* enter at any time; and, on allowing reasonable time after the entry, or after requesting tenant to quit, he may do any acts of ownership.

He cannot be sued for acts done to his own house, even if to make it untenantable. *Harris* v. *Gillingham & al.* 6 N. H. 11.

But, if plaintiff was tenant at will, the requisite notice to quit had been given, and the plaintiff might be expelled by force. 3 T. R. 295; 13 Johns. 236; 7 T. R. 431; 1 Bing. 158; 13 Pick. 39; 1 Strobhart, 313; 7 Iredell, 496; 2 Greenl. Ev. § 618; 13 Maine, 209, 216; 24 Maine, 247; 12 Metc. 302; 2 Metc. 29; 3 Metc. 350; 10 Metc. 223, 298; Co. Litt. 57, b.

The charge of exposing the health of the family is not proved; but if proved, a recovery for it cannot be had by *quare clausum*, if the entry was justifiable.

Poor, for plaintiff, in reply.

Whether in tenancy at will or at sufferance, there are but two ways to terminate it; one by written notice, the other by a peaceable reinstatement of the landlord into the possession. Neither of these courses was taken. 7 Metc. 147. Neglect to pay rent does not determine the tenancy.

HOWARD, J., orally. — We hold, with the District Court, that the motion to abate the writ was too late.

The facts tend to show that the tenancy was at will; but the parties have agreed it was *at sufferance*. The owner, then, had no right to enter by force. The tenant was entitled to reasonable time in which to remove, and might stay till removed by legal process. The owner had a legal remedy; he adopted an illegal one. *Action sustained.*

MOULTON *versus* BIRD.

In replevin, the defendant may, with a plea of *non cepit*, file a brief statement that the property is in himself, or in a stranger, and that it is not in the plaintiff.

From the plea of *non cepit* the common law drew an inference of *property* in the *plaintiff*.

That inference is dislodged, when, together with that plea, such a brief statement is filed.

Upon such plea, with brief statement that the special property and the right of possession are in the defendant, and not in the plaintiff, if there be a verdict of *non cepit*, the defendant is entitled to a judgment of return.

REPLEVIN. Plea, *non cepit*, with brief statement that the property was in one Carter, and that defendant, being an officer, had attached it as Carter's property; and that the property was not in the plaintiff.

The trial was before HOWARD, J.

Carter had owned the property, and had made a conveyance of it to the plaintiff. The defendant contended that that conveyance was fraudulent and void as against creditors.

The verdict was, that the defendant "did not take." Plaintiff moves to set aside the verdict, "because it is defective and informal, and does not find the issue presented in the case, and no legal judgment can be rendered thereon."

Fox, for plaintiff.

The real matter, submitted to the jury, was the question of property. This they omitted to find. The defendant's plea

admitted the property to be in the plaintiff; it only put in issue the unlawful taking or detention. *Whitwell* v. *Wells*, 24 Pick. 28.

On the issue of *non cepit*, the defendant cannot question the plaintiff's title. *Green* v. *Dingley*, 24 Maine, 137; *Vickery* v. *Sherburne*, 20 Maine, 34.

The brief statement created an issue of property in the plaintiff, or in Carter, without our filing any counter brief statement.

The rendition of a judgment on the verdict upon these pleadings, would not settle the title to the property. It would not be a bar to a suit in trover. It has no binding effect.

Rand, for defendant.

The verdict is sufficient. The trial was not upon the general issue alone. It was upon a state of pleading which involved both the taking and the ownership. The verdict rightfully followed the technical issue. No particular form of a verdict is necessary.

The jury could not have found for defendant, except on the ground of property.

The incongruity in the form is not greater than in verdicts on the plea of limitation, or set-off. Suppose a case in trover and a release set up, must the jury render verdict that defendant is guilty, but has been released?

We ask for a judgment of return. Such a judgment must depend upon the pleadings. In view of the whole pleadings, we are entitled to it.

Fox, for plaintiff, in reply.

If, as defendant contends, the pleading involved both issues, the verdict is defective, for it finds nothing as to the ownership of the property.

Shepley, C. J., orally. — Can there, upon this verdict, be a judgment for return? The pleadings seem inconsistent, yet they are allowable by our statute. At common law, the plea of *non cepit* admits property in the plaintiff. How then can

a return be ordered. In *Whitwell* v. *Wells*, 24 Pick. 25—32, it is said to be "well settled, on issue of *non cepit*, there can be no return, for it admits the property of the plaintiff. But that is where the only plea is *non cepit*."

In this case, it is true, there was no issue taken upon the point, for the law does not require one ; but there was a representation, lawfully before the jury for their consideration, that the special property and the right of possession, were in the defendant.

By the verdict, it is not the plaintiff, but the defendant, that prevailed. That verdict must have been rendered upon the ownership. The taking had been admitted and justified by the brief statement. The whole record must be examined together.

"In cases where there is a plea of property in the defendant, or in a stranger, and the issue is determined for the defendant, there should be a return." "The general rule is stated to be, that, where it appears from the record, that the defendant was in possession at the time of the replevin, he shall, if he prevail, have a return."

In this case, it appears of record by the brief statement, which is made equivalent to a special plea, by statute, that the property was alleged to be in Carter. The issue was found for defendant ; not specially on that plea, because no issue was joined on it. Yet it is apparent by the record, that no other fact was in issue, than that of property, which must have been found for defendant, and he, being in possession, is entitled to a *Judgment for return.*

VERRILL *& wife versus* INHABITANTS OF MINOT.

In a suit against a town for damage through a defect in the road, the plaintiff, with a view to account for the violence of his horse, may show that near the defect where the injury occurred, there was, in the road, another defect, which he had just passed, though without injury.

If a traveler's horse should, without the fault of the town, be running violently upon the road, it cannot be ruled, *as matter of law*, that the town is not responsible for an injury, sustained by the traveler, through a defect in the road, though it might not have occurred but for the furious running of the horse.

In such an action, bodily pain is a part of the injury for which damage may be recovered.

CASE, tried before HOWARD, J., for an injury sustained by the wife, through a defect in the highway.

It was a cross-road. In it was a hill about fifteen rods long. Two-thirds way down the hill there was a defect, extending two or three rods along the road. Then, for a short distance, the road was good, till it reached another defect, viz., a small gully, made by the running of water, diagonally across the road, about fifteen feet before coming to the foot of the hill.

Mrs. Verrill was riding down the hill alone, in a wagon. Just before reaching the first defect in the road, the horse started suddenly, and run furiously down the hill. Mrs. Verrill passed safely over the first defect, but at the second she was thrown out and badly injured.

The defendants' counsel objected to the admission of testimony, tending to show any other defect in the road than that by which the injury was occasioned; and also "requested the Judge to instruct the jury, that if the horse was running violently before and at the time of the accident, either with or against the will of the driver, and if that running was not occasioned by any fault or negligence of the defendants, the town could not be held liable in this action, even if the highway was defective, and though the injury would not have been sustained but for such defect.

"The Judge declined to give this instruction, and directed the jury, *that* if such running was caused by any fault of the

town, and if the highway was defective and occasioned the injury, the defendants would be liable; and *that*, if the horse had become uncontrollable, and was thus running without any fault of the driver, and not in consequence of any deficiency of the carriage, or the harness, or any vicious habit of the horse; and if the highway was defective, and the injury resulted from such defect, the defendants would be answerable."

The defendants' counsel further requested the Judge to instruct the jury, on the matter of damages, "that they could not make the mere bodily pain, occasioned by the injury to Mrs. Verrill, an item of damages."

The jury were instructed, that, in estimating the damages, the bodily pain suffered by Mrs. Verrill ought to be taken into consideration.

The verdict was for the plaintiffs and the defendants excepted.

In answer to specific inquiries, the jury returned, that the running of the horse was not occasioned by any fault of the town or by any fault in the driving, or any defect in the wagon or harnessing, or by vicious habits of the horse; but that the driver lost control of the horse by reason of a defect in the road.

Willis and *Fessenden* and *T. A. D. Fessenden*, for the defendants.

1. The evidence, showing the first defect, was improperly received, as Mrs. Verrill passed it in safety. It could only prejudice the jury. The jury found that the horse was on the run, without any fault of the town. The first defect then did no harm. It did not even incite the horse to run. Hence the proof of such a defect was inadmissible.

2. The driving was not with due care. A horse upon the run, without the fault of the road, cannot be said to be driven with due care. The special findings were inconsistent with each other. By those findings, the running, which caused the accident, was without fault of either party.

But the plaintiff must show there was fault in the town.

The horse was running in an extraordinary manner, against all prudence and without fault in the town. How then is the town responsible? The requested instruction then ought to have been given. *Merrill* v. *Hampden*, 26 Maine, 240; *Adams* v. *Carlisle*, 21 Pick. 146.

3. The bodily pain was not a legitimate item of damage. There is no standard to compute by. The allowance of it arose from assimilating the suffering to that in slander. But slander is an intentional wrong. Not so here. The damages to be recovered include only those by which the plaintiffs' property is impaired. They do not extend to any exercise or endurance of the feelings.

Woodman, for plaintiffs.

WELLS, J., orally. —

1. The evidence objected to was properly received. It exhibited the character of the road, and might have explained the action of the horse. It might have shown him to be an unsuitable one for use. The first of the defects might have incited the horse to more violence.

2. The requested instruction was, that if, without fault of the town, the horse was running violently, the town are not responsible. That was not a question of law. Horses have different habits and are of different spirit and temper. The question was one of fact for the jury. The instruction was properly withheld.

3. The statute allows a recovery for "bodily injury." That is something else than loss of time and expenses. Pain is part of a bodily injury, inherent in it. Though difficult to admeasure and assess, the injured party is entitled to recover for it. It must be confided to the sound discretion of the jury.

4. It is said there was inconsistency in the findings of the jury. Possibly the jury had different times in view; one when the horse started, the other when the accident happened. But at any rate, those findings do not show any error in the instructions, or preclude a judgment on the verdict.

Exceptions overruled.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF LINCOLN,

1850.

Fogg *versus* Fogg *& al.*

By a rule of the court, pleas in abatement, if consisting of matter of fact, not apparent on the face of the record, must be verified by oath or affirmation.

Such verification must be *positive* as to every matter of fact alleged in the plea.

An affidavit that the plea is true, according to the best knowledge and belief of the affiant, is not a sufficient verification.

When a plea, in order to be valid, requires a verification, it must be adjudged bad, if it have no verification, or if it have only a defective one.

A plea of non-tenure is required by the statute to be in abatement only. By the rule of court, it must be verified, or it will be held bad, on special demurrer.

Writ of Entry. Plea, that the defendants cannot render to the plaintiff the demanded premises, because they are not, and at the time of suing out the writ were not, nor at any time since have been, tenants of the freehold.

Appended to said plea was an affidavit, by the defendants' attorney, that the plea was true "*according to the best of his knowledge and belief.*"

To that plea the plaintiff demurred specially, and among

other causes, she set forth, in substance, that the plea was not verified according to the rule of the court, which requires that pleas in abatement, if containing matter of fact, not appearing of record, shall be verified by oath or affirmation.

The defendants joined in the demurrer.

J. C. Woodman, for the defendants.

1. By the statute of 1846, chap. 221, the plea of *non-tenure* can be pleaded in abatement only. But, as to the defendants, it is really a plea to the merits. It is therefore, not subject to be viewed with disfavor, as mere dilatory pleas are.

The rule of the court requires that pleas *in abatement*, if containing matter of fact, not appearing of record, should be verified by oath or affirmation. That rule was not designed for such a case as this, and ought not to be held applicable to it.

2. The defendants' plea is not within the rule, because it does not assert a fact, "not appearing of record." It is virtually a denial of an allegation contained in the declaration. That allegation is, that the defendants disseized, which is equivalent to an assertion that they claim the freehold. The plea is merely a denial of that assertion. In such a case, no verification of the plea is necessary.

3. When the rule was established, non-tenure was pleadable in bar, and needed no verification. In its nature, a verification was inapplicable. The alteration of its *name* by the statute, does not change its essential *character*. Suppose the Legislature should require *non assumpsit* to be pleaded in abatement, could a verification be required?

4. The demurrer is to the plea, not to the verification. A plea may be good in form, though there be no verification.

The plaintiff's remedy, if any, was by applying to the court to reject the plea, because not verified.

Tallman and *Booker*, for the demandant.

Shepley, C. J. — The act approved on August 10, 1846, c. 221, provides, that "the defendant may plead that he is not tenant of the freehold, in abatement, but not in bar."

By a rule of the court such a plea must be verified by affidavit.

The affidavit must in such case be positive as to every matter of fact therein stated. *Pearce* v. *Davy*, Say. 293. In the present case it contained no proper verification, being made to the truth of the plea to the best knowledge and belief of the tenants' attorney. This affidavit may have been correct, and yet the tenants may have been tenants of the freehold.

It is insisted in argument, that the demurrer being to the plea, all objection to the affidavit has been waived.

When an affidavit is required to constitute a good plea, it must be adjudged to be bad, if there be no affidavit or a defective one. The cases cited by the counsel do not authorize a different conclusion.

The argument quite fails to satisfy the mind, that it is not a matter of fact not appearing of record, that the tenants were not tenants of the freehold.

A motion has been made for leave to amend the affidavit by making an absolute verification of the truth of the plea. To permit this, after the action has been brought into this court by a demurrer and joinder in it, without requiring payment of the demandant's cost to this time, would not be just. If the tenants have no title to the estate, a judgment for possession rendered against them, will not affect the title of other persons; and it may be quite as well for them to submit to a judgment and pay the costs of the suit, as to pay the costs to this time and to continue the contest. If they have any claim to the estate, there will be opportunity to have a decision upon it under a plea to the merits.

Motion overruled, plea adjudged to be bad, and *respondeas ouster* awarded.

BENNER *& ux. versus* FOWLES *& ux.*

In a suit wherein the plaintiffs sue as husband and wife, it is not allowable, in the defence *under the general issue*, to prove that she was lawfully married to a former husband, who was living at the time of her second marriage.

In such an action, a plea that the plaintiffs had "never been joined in lawful matrimony," would not be good, either in bar or in abatement.

It seems, that a marriage *de facto*, whether legal or not, might be sufficient for the maintenance of such an action.

EXCEPTIONS from the District Court. Slander.

The general issue was pleaded.

The defendants offered testimony tending to prove, that the female plaintiff had been lawfully married to a former husband, who was living at the time of her second marriage.

To the admission of such evidence, the plaintiffs objected, but it was received.

The Judge ruled that if such former marriage, to a husband living at the time of her marriage to the other plaintiff, was proved, the action could not be maintained. Verdict for the defendant.

Lowell and *Reed*, for plaintiffs.

Ruggles and *Kennedy*, for defendants.

SHEPLEY, C. J. — In the case of *Dickenson* v. *Davis*, 1 Stra. 480, in an action brought by husband and wife, for assault and battery upon the wife, an offer was made to introduce testimony under the general issue, that the man had a former wife still living; and it was insisted, that the plea not only denied, that he beat the woman, but that it also denied, that he beat the plaintiff's wife, yet it was excluded by PRATT, C. J., who held, that it could have been received only under a plea in abatement.

To a personal action, by husband and wife, a plea, that they were never joined in lawful matrimony, would not be good either in bar or in abatement. It should deny the fact of their marriage. *Norwood* v. *Stevenson*, Andr. 227; *Alleyn &*

ux. v. *Grey*, 2 Salk. 437. In the latter case it was decided, that a marriage *de facto* was sufficient, and whether legal or not, was not material.

Exceptions sustained, verdict set aside, and new trial granted.

CROOKER *versus* JEWELL *& al.*

In a real action the demandant introduced a series of deeds from the year 1786, under which the title was traced to himself. One of the deeds was made in 1807, the grantor being then disseized. The tenant made title in himself under a different source, as shown by a series of deeds from 1804, under which possession had been held from that to the present time. *Held*, the demandant was not entitled to recover.

The owner of land, though disseized in 1804, conveyed the same by deed in 1807 to the demandant, who entered into possession. *Held*, that the demandant's action is not maintainable, if the subsequent acts of ownership, exercised by the disseizor, were of as important a character, and of as long a continuance, as those of the demandant.

Lapse of time furnishes no presumption that a debt, secured by a mortgage of land, has been paid, if the possession of the land has been constantly in the mortgagee.

By the act of 1789, an administrator of a mortgagee had authority to assign the mortgage; and such an assignment could be effected by a quitclaim deed, if the intent thereby to convey the title be apparent.

WRIT OF ENTRY. The trial was before SHEPLEY, C. J.

The demanded premises were about one acre of land and flats.

Among the deeds relied on by the tenants, was a mortgage from one Coombs to Nathan Hunt, and a quitclaim from Mary Hunt, as administratrix of said Nathan, made in 1811.

The other evidence, both documentary and oral, so far as necessary to be presented, will be found in the opinion of the court.

The demandant contended that, even if the grantor in the deed of 1807, was disseized by the tenants when the deed was made, yet he would be entitled to be restored to the possession, unless the tenants exhibited a good title.

The ruling was, *that* if a person was in the exclusive possession of premises and was disseized by one having no title, he would be entitled to be restored to possession, although he had no other title than possession; *that* the rule, however, would not be applicable to the present case, if the tenants held under a title superior to that of the demandant; *that* the jury would consider whether those, from whom the tenants derive title, had entered under their respective conveyances, and claimed to hold under them; *that* the deed from the administratrix of Nathan Hunt operated to assign the mortgage, there being no evidence that there had been, before that time, a foreclosure; *that*, in such case, the demandant, though he were once seized, would not on this ground be entitled to recover.

The jury found a verdict for the tenants.

If these rulings or instructions were incorrect, the verdict is to be set aside and a new trial granted.

Gilbert, for the plaintiff.

First. — 1. The instruction to the jury, that they were to consider whether the tenant's predecessors had entered under their respective conveyances, and claimed to hold under them, without qualification, implies too much. *Small* v. *Proctor*, 15 Mass. 495—499.

2. The connection of this remark of the Judge, seems to give to subsequent possession, in reference to Mary Hunt's deed, the effect to pass the title under it; if this is correct, then the same ought to have been explicitly given in reference to Curtis's deed, to Lowell & Crooker's subsequent actual possession.

3. The jury should have been instructed to inquire who was in possession, when Mary Hunt made her deed.

4. Crooker was in possession, when the tenants took their deed. If their subsequent entry vested the grantor's title in them, then Crooker's subsequent possession, cured the previous defect in his title, if any.

Second. The jury were instructed that there was no evidence of foreclosure. We think the question of foreclosure

ought to have been submitted to the jury. *Boyd* v. *Shaw*, 14 Maine, 58 — 62; *Taylor* v. *Weld & al.* 5 Mass. 109 — 121.

Third. If there was no evidence of a foreclosure previous to Mary Hunt's deed, there is no more satisfactory evidence of a subsequent foreclosure, within twenty years from the time that payment became due; and such being the case, the law presumes payment. *Joy* v. *Adams*, 26 Maine, 331 — 333.

And payment of the mortgage debt is a discharge of the mortgage. *Davis* v. *Maynard*, 9 Mass. 242 — 247; *Crosby* v. *Chase*, 17 Maine, 369 — 371; *Allard* v. *Lane*, 18 Maine, 9 — 11.

If the jury found no facts constituting a foreclosure, they should have been instructed that the mortgage debt was presumed to have been paid, in the absence of proof to the contrary.

Fourth. The instruction gave to Mary Hunt's deed the effect of an assignment of the mortgage.

But there is no evidence of an intention to assign. *Hunt* v. *Hunt*, 14 Pick. 374; *Cutter* v. *Danforth*, 1 Pick. 81; *Freeman* v. *McGaw*, 15 Pick. 82; *Hatch* v. *Kimball*, 22 Maine, 85; *Given* v. *Marr*, 27 Maine, 212; *Wingate* v. *Leeman*, 27 Maine, 174 — 178.

When an assignment of a mortgage is effected by a quitclaim deed, it operates as a bargain and sale. *Cases above cited.*

It is an alienation of the legal estate. *Gould* v. *Newman*, 6 Mass. 242.

Administratrix, as such, cannot make a deed of bargain and sale, or alienate the intestate's real estate.

Tallman and *Booker*, for the defendants.

Shepley, C. J. — The case is presented on a report of the testimony with the instructions to the jury, accompanied by a motion to have the verdict set aside as against evidence, and a motion for a new trial on account of evidence newly discovered.

The premises demanded comprehend about one acre, mostly composed of flats ground covered by the flood tides of the Kennebec river.

The demandant claims to have derived his title from the widow and administratrix of Doct. Samuel Duncan; and the tenant from a son and heir of the same person.

It was admitted, that Hannah Duncan was after the death of her first husband married to Caleb Samson, and that Mary Hunt was the administratrix of Nathan Hunt.

A tract of land containing about fourteen acres, with the marsh and thatch beds thereto adjoining and including the premises, was conveyed by Jonathan Davis and Jonathan Davis, jr. to Hannah Duncan, by deed bearing date on July 3, 1786, and recorded on August 30, 1786.

Caleb Samson "and Hannah Samson, administratrix to the estate of Samuel Duncan, in consideration of three hundred pounds to us paid by James Curtis, as guardian to the children of the said Samuel," convey to him all right, title and interest to the tract of land before named, excepting two acres in the south-west corner sold to Nathan Morrison. The deed, bearing date on April 30, 1789, was recorded July 8, 1789.

James Curtis, by deed bearing date on Nov. 28, 1807, recorded on December 1, 1807, in consideration of one dollar paid by his son-in-law, John Lowell, and for divers other good and valuable considerations, conveys to him all the right, which he acquired by virtue of the deed of Caleb Samson and wife to him.

John Lowell, by deed bearing date on November 13, 1821, and recorded on January 2, 1822, in consideration of $150, conveys the premises demanded to the demandant.

The tenants claim to have derived title to the premises by a deed bearing date on May 5, 1804, and recorded on Dec. 21, 1804, from Samuel E. Duncan to Nathaniel Coombs, describing them. Nathaniel Coombs, by deed bearing date on December 20, 1804, and recorded on December 21, 1804, conveyed the same in mortgage to Nathan Hunt.

Mary Hunt, as administratrix of Nathan Hunt, by quitclaim

deed, bearing date on September 10, 1811, and recorded on September 26, 1811, conveyed the same to John Green and William Richardson, who conveyed the same to the tenants on October 18, 1836.

The lot containing about fourteen acres, and called by a witness the old Doct. Duncan estate, appears to have been occupied in part at least, by Samuel E. Duncan, who built a house upon it. Coombs entered upon the part conveyed to him, and built a shed upon it, and occupied it for several years as a spar-maker. One witness states, for five, six or seven years. His mortgagee, Hunt, appears to have worked with him upon the premises, or to have occupied with him for a short time. After the conveyance to the Richardsons there is testimony tending to prove, that one of them occupied the premises till two or three years after the peace made in the year 1815, by keeping his rafts upon them as he had occasion to use them. The premises were taxed to the Richardsons from 1813 to the time when they were conveyed to the tenants, who, it is admitted, have occupied them since that time.

The testimony does not present any proof, that James Curtis or John Lowell ever took possession of the premises, or ever exercised any act of ownership over them. A witness for the demandant testifies, that in June, 1807, there was a piece of an old wharf and of an old mast-shed then standing on the premises; and that no one was in possession of them.

It is apparent, that the jury, upon the testimony, would be fully authorized, if not required, to find, that James Curtis was disseized at the time, when he made the conveyance to John Lowell.

The demandant's counsel, perceiving that he might thus fail to acquire any legal title, contended that he would be entitled to recover, because he had entered into possession under his deed from Lowell, and would be entitled to have that possession restored to him.

There was testimony to prove, that he had, after that conveyance, exercised acts of ownership over the premises, and

that he might be entitled to recover, if the tenants were found to be in possession without a better title. But if they could be regarded as holding under a title derived from Samuel E. Duncan, in the year 1804, accompanied by an actual entry and by acts of ownership by the several grantees, of as important a character and of as long continuance as those exercised by the demandant, it would become quite clear, that the demandant could not be entitled to recover.

It would become material in this aspect of the case, that the jury should be instructed, whether those conveyances were operative to convey the title, and that they should, as they were instructed to do, "consider whether those, from whom tenants derive their title, had entered under their respective conveyances and claimed to hold under them." The testimony would fully authorize the jury to find, that they did so enter and claim the premises.

"The plaintiff contends that this instruction is too strong." A reason assigned is, that "the testimony of Bennett is explicit, that the premises were abandoned at that date." He, however, only states, that no one was in possession in June, 1807. Or, in other words, that no one appeared to be in the visible occupation. Such testimony might well be regarded by the jury as failing to prove, that one, who had purchased for a valuable consideration, and who had entered under a recorded title and made improvements upon the estate, had abandoned it, because he had ceased for a time to be a visible occupant of a piece of flats ground, on which his improvements continued to remain. That clause of the instructions did not state any rule of law or attempt to control the judgments of the jurors. It simply and correctly directed them to the performance of an appropriate duty. The conclusion of the instructions, which states, that the demandant, if he were once seized, would not on this ground be entitled to recover, if the jury should so find, is not the subject of complaint. There can be no doubt, that it was correct.

The motion to have the verdict set aside, as being found against the evidence, cannot prevail.

The testimony newly discovered, is contained in the depositions of Benjamin McGill and of his wife.

The substance, so far as material, in that of the husband is, that he came to Bath in May, 1807. That in the fall of that year he worked with Coombs on the shore, a quarter or a third of a mile from the premises. That there was an old "rack of a shed, in which he told me, he used to work," standing on a cobb-work on the premises. That he often passed there during the summer of the year 1807, and did not know of Coombs working there then or afterward. That he worked with him in other places in the fall of 1808.

The substance of that of his wife is, that Coombs had a spar-yard on Donnell's creek, that he occupied it some time before and after his marriage, which took place in the year 1805, that she brought chips from there in the year 1808 which were not very bright. In answer to a question, where Coombs worked from 1804 to 1808, she says, "of course he worked in the shed, for he had no other spar-yard, that I know of."

This testimony could only be useful to prove, that Curtis was not disseized at the time of his conveyance made in the month of November, 1807. The remarks already made upon that part of the case may in many respects be applicable to it. Taken in connection with that of Bennett it would only prove, that Coombs was not then in the visible occupation of the premises. It would not, when taken in connection with the other testimony in the case, be satisfactory proof, that he had abandoned them, much less would it prove, that his mortgagee, Hunt, had. This testimony is also cumulative. The motion founded upon this testimony cannot prevail.

The first cause of complaint of the instructions has been considered.

The second, in substance is, that the jury were instructed, that there was no evidence of a foreclosure of the mortgage, before the conveyance was made to the Richardsons.

If the case presents any testimony, from which a foreclosure could have been properly found by the jury, the complaint

would be just. But the argument fails to satisfy the mind, that there was any.

The third is, that if there was no foreclosure, the instructions would be erroneous, because the presumption of law, arising from lapse of time, would then be, that the mortgage had been paid, and then the tenants would have no title.

Such a presumption does not arise in a case like the present, when the mortgagee or those claiming under him, and not the mortgager, have been in possession. *Howland* v. *Shurtleff*, 2 Metc. 26.

The fourth error alleged is, that the jury were informed, that they might consider the deed from the administratrix of Nathan Hunt as operating to assign the mortgage, made by Coombs to Hunt, to the Richardsons.

Two questions are presented by that clause of the instructions, whether the administratrix could lawfully assign the mortgage; and whether a quitclaim deed, purporting to convey the premises, would operate as an assignment of the mortgage.

The Act of the Commonwealth of Massachusetts, of February 11, 1789, then in force here, provided, that debts due on mortgages and the lands mortgaged "shall be assets in the hands of executors or administrators, as personal estate; and the executors or administrators shall have the same control and power of disposal of all the estate, which the deceased had in the lands, tenements and hereditaments mortgaged, as if they had been a pledge of personal estate." There being no doubt that an administrator could legally dispose of a mortgage, or pledge of personal estate, the authority to dispose of a mortgage of real estate is expressly given; and that would necessarily include the power to assign it.

A quitclaim deed purporting to convey lands may operate as an assignment of a mortgage of them. *Carl* v. *Butman*, 7 Greenl. 102; *Hunt* v. *Hunt*, 14 Pick. 374. Such a deed having been made in this case, not to the mortgager, or to any person holding the equity of redemption, could not operate to discharge the mortgage, or in any other manner, than as an

assignment of the mortgage. It is manifest, that the parties intended, that it should operate to convey the title held by the intestate, and the law will give it effect, that it may operate to convey the title in the only mode, in which it could be conveyed.

Motions overruled, and judgment on the verdict.

McVicker *versus* Beedy.

No action can be maintained in this State, upon a judgment recovered in another State, against a defendant, of whose *person*, the courts of that State had no jurisdiction.

The ownership of *property*, situated within a State, (whether it be in land, or articles, or credits, or in any other form,) does not, *of itself*, give to the courts of that State, jurisdiction of the owner's *person*.

Neither will an action, brought here upon such a judgment, be aided by the fact that a part of it had been collected, under the process of the court in the State where it was recovered.

A declaration may be amended, by striking out the original counts, and inserting others, if the cause of action be the same, and the form of the action can be retained.

Thus, where an action of debt, brought upon a judgment, recovered in another State, for labor performed, failed to be maintained, for want of jurisdiction in the court by which it was rendered, the plaintiff had leave to amend, by striking out the count upon the judgment, and inserting one for the labor performed.

An action in the form of debt, may be supported for labor performed.

Debt, on a judgment recovered before an Associate Justice of the Supreme Court of the State of Illinois, presiding and holding courts in the second judicial district for the county of Fayette.

By the record of that judgment, it appeared *that* the claim sued was for labor done in Illinois; *that* one William H. Lee was summoned as garnishee of said Beedy; *that* notices of said suit were published in the public newspapers, according to the requirements of the laws of Illinois; *that* bond was duly given for the payment of such costs as Beedy might recover; that the said Beedy did not appear, but made default;

and *that* the jury assessed the damages at the sum of $143,00, for which sum, together with cost, $15,43¾, judgment was rendered ; and *that* the garnishee disclosed in his hands, $67,92, the property of Beedy, and paid the same into court, to be allowed in part payment of said judgment.

The defendant here pleaded, *that* he was not an inhabitant of the State of Illinois, nor resident therein, at the time of the suing out of the original process, nor in any way amenable to said court of Illinois ; *that* he was never served with such process, and had no notice of the same, and was wholly ignorant thereof, and did not by himself or attorney, appear to such process ; but *that* he was, at the suing out of said process, an inhabitant of the State of Maine, residing in the town of Weld.

To this plea, the plaintiff demurs, and the defendant joins in demurrer.

The plaintiff also asked leave to amend.

Russell, for the plaintiff.

" Full faith and credit shall be given in each State, to the public acts, records and judicial decisions of every other State." Constitution of United States, article 4, sect. 1.

It is not competent for this court to look into the anterior proceedings, to see by what means the court of Illinois came to their result. 7 Cranch, 481 ; 3 Wheat. 234; Breese, 128. The question of jurisdiction in that court is not open.

But, if that question be open, the case exhibits enough to establish the jurisdiction.

1. The judgment was recovered upon a contract made in Illinois, by persons then resident there.

2. Property of Beedy, in hands of a garnishee, was attached and held in said process, and notices of the suit were duly published.

3. Nothing is pleaded here, to show a want of jurisdiction, but what was apparent to the court of Illinois. The matter of jurisdiction is therefore *res adjudicata.*

4. Courts of a sister State should be presumed to have jurisdiction, when they attempt to exercise it, and the exer-

cise of it is *prima facie* evidence of jurisdiction. *Shumway* v. *Stillman*, 4 Conn. 292.

5. If the jurisdiction does not sufficiently appear, to make the judgment binding upon the defendant, as a *domestic judgment*, courtesy will at least put it on the footing of a *foreign judgment*, so that it shall be taken as *prima facie* evidence of indebtedness. 1 Ham. 259.

May, for the defendant.

WELLS, J.—The question arising upon the pleadings in this case is, whether an action upon a judgment rendered in the State of Illinois, in which it appears that a garnishee was summoned in the suit, and paid into court the sum by him disclosed, can be maintained in this State against the defendant, who was not an inhabitant of that State, and did not reside there when it was rendered, nor when the original process was commenced upon which it was founded, but resided then in this State, and had no notice of the suit, and did not appear and answer to it.

In the case of the *Middlesex Bank* v. *Butman*, 29 Maine, 19, it was decided, that when it appears that a court rendering a judgment in another State had no jurisdiction of the parties, it will not be received here as a valid judgment, so as to prevent the maintenance of a suit for the original cause of action.

The only material difference between that case and this, consists in the garnishment and the payment of the money by the garnishee. The judgment in Illinois might be a protection to him, and the effects of the defendant in his hands might be lawfully applied in satisfaction of the judgment. But they being insufficient to satisfy it, the creditor has brought his action upon it to recover the balance. It is not perceived how jurisdiction over the effects, by attaching them in the hands of the garnishee, could give jurisdiction over the person of the defendant, who was not then amenable to it. The courts of a State may have jurisdiction over property situate within its limits, so as to authorize a seizure and sale of such

property according to its laws, but the exercise of such authority does not draw to them jurisdiction over the person of the owner residing in another State. No adequate protection can be afforded to persons, residing out of the State where the judgment is rendered, without the adoption of this principle. If no property had been attached in the hands of the garnishee, according to the authorities cited in argument, there would have been no jurisdiction over the defendant, and that act and payment in pursuance of it cannot be extended beyond their just effect, which gave the court power over the property and nothing more. And such was the opinion of PARSONS, C. J. as stated by way of illustration in *Bissell* v. *Briggs*, 9 Mass. 468.

In the case of *Woodward* v. *Tremere & al.* 6 Pick. 354, the replication states, that a schooner belonging to the defendants had been attached in North Carolina, and that a garnishee had been summoned, and he disclosed money in his hands belonging to the defendants, and was ordered by the court to pay it over to the plaintiff. But these facts were not regarded as sufficient to take the case out of the principle determined in *Hall* v. *Williams*, 6 Pick. 232, in accordance with which the case of *Middlesex Bank* v. *Butman* was decided. *Rangeley* v. *Webster*, 11 N. H. 299; *Ewer* v. *Coffin*, 1 Cush. 24; Story's Conf. of Laws, § 549.

We do not consider, that the court in Illinois acquired jurisdiction over the defendant, by summoning the garnishee and the payment of the sum disclosed, so as to enable the plaintiff to maintain an action on the judgment in this State, and the defendant's pleas are adjudged good.

The plaintiff has asked leave to amend his declaration by inserting appropriate counts upon the original cause of action. The request can be granted if the original cause of action is the same, as that now contained in the declaration. If the judgment were valid here, the original claim would be merged in it. But such is not the case. In *Perrin* v. *Keen*, 19 Maine, 355, an action was brought upon certain notes against the defendants as co-partners, but they were not considered

valid, and an amendment was allowed by filing a new count upon the original claim. That appears to be a direct authority in favor of the plaintiff in relation to the power of the court to grant the amendment in this case. *Barker* v. *Burgess*, 3 Metc. 273.

The plaintiff originally claimed to recover compensation for work and labor done, and on an account stated. The action upon the judgment was to recover for the same, though in a different form. The amendment is admissible, but as the defendant has been subjected to the expense of litigating upon the demurrer, the question of the validity of the judgment, it ought not to be granted without terms. It can be made by striking out the existing counts, and inserting others upon the original claim, upon payment of costs. *Eaton* v. *Brown*, 8 Greenl. 22.

It is suggested by the defendant's counsel, that the amendment will be unavailing, because an action of debt cannot be sustained for work and labor done. But the law has been otherwise settled. *Norris* v. *School District No.* 1, *in Windsor*, 3 Fairf. 293; 1 Chit. on Plead. 100 and 197; 8 Pick. 178.

JENKS *versus* MATHEWS.

An express contract, there being no fraud or misapprehension of the *facts*, cannot be set aside by one of the parties, so as to substitute an implied one.

The estate of a deceased person is not liable to pay for mourning apparel, purchased after his death, by his family.

One who furnishes such apparel, believing the estate to be liable for it, and *expressly* stipulating that he would resort only to the estate for his pay, cannot maintain an action therefor against any of the family upon an *implied* promise.

A misapprehension of the *law* by a party, will not authorize him to rescind an express contract, if there have been no *fraud* and no misapprehension of the *facts*.

ASSUMPSIT. At the death of the defendant's husband, one of her daughters, being one of the heirs of the deceased, requested

a third person to obtain from the plaintiff some mourning apparel for the defendant and her children; provided he would furnish them as a charge upon the estate of the deceased; which he accordingly did.

The defendant objected to purchasing the articles, because of her inability to pay. But, on being assured by the daughter, that they would be procured at the expense of the estate, she consented to receive them. The administrator refused to pay, and this action is brought against the widow to recover the value of the articles.

F. D. Sewall, for plaintiff.

1. An estate is not liable for mourning apparel purchased for the use of the widow, after the decease of the husband.

2. Where one consents, under a mistake of the law, to enter a charge upon his books to an estate, supposing the estate can be made liable, the law will not oblige him to abide by the agreement, and thus lose his remedy on the person, for whose use the goods were sold. *Warder* v. *Tucker*, 7 Mass. 449; *Freeman* v. *Boynton*, 7 Mass. 485; *Downing* v. *Freeman*, 13 Maine, 90.

3. From the facts in the case, it appeared that there was a contract between the parties, and the intention of the parties is to be taken to explain that contract.

4. If the defendant knowingly accepted and used the goods, purchased for her by a third person, she will be held to pay a reasonable compensation for them. *Abbott* v. *Hermon*, 7 Maine, 18.

Gilbert, for the defendant.

Wells, J. — By the contract between the parties, the plaintiff delivered the goods to the defendant as a charge upon the estate of her husband. The defendant declined to take the goods and make payment for them herself. She would receive them, if the plaintiff would look to the estate for compensation. He made inquiries, found it to be solvent, and delivered the goods. Both parties appear to have labored under a mutual mistake as to the legal liability of the estate. Not

being able to enforce his claim against it, the plaintiff contends that the defendant is liable upon an implied assumpsit.

It is a general rule, that where there is a special contract, it must be observed, and a party cannot resort to an implied one. But fraud and imposition constitute an exception to this rule, and the party defrauded has a right to rescind the special contract, and he is then remitted to the implied one. *Downing* v. *Freeman*, 13 Maine, 90; *Biddle* v. *Levy*, 1 Stark. 17.

But in this case there is no fraud, a mere mistake in supposing that the plaintiff had a legal claim against the estate of the deceased. Not a mistake of any fact, but a mistake of law.

The plaintiff is not at liberty to change the contract into which he has entered, by alleging his ignorance or mistake of the law.

"It is a well known maxim that ignorance of law will not furnish an excuse for any person, either for a breach or an omission of duty. *Ignorantia legis neminem excusat*; and this maxim is equally as much respected in equity, as in law." 1 Story's Eq. Juris. sect. 111. It is also said "that ignorance of the law, with a full knowledge of the facts, furnishes no ground to rescind agreements, or to set aside solemn acts of the parties." *Ibid.* sect. 137.

A person cannot be permitted to avoid the operation of an agreement, which he has made, with a full knowledge of the facts, on the ground of ignorance of the legal consequences, which flow from them. He is bound by the legal incidents of his contract, however ignorant he may be in relation to them, unless fraud or imposition be practised upon him. *Shotwell* v. *Murray*, 1 Johns. Chan. 512; Story on Sales, sect. 142 and 143.

If the defendant had sold a claim against the estate to the plaintiff, he having a full knowledge of all the facts in relation to it, although it should have proved invalid, and could not have been enforced against the estate, he could not reclaim the money paid for it. *Norton* v. *Marden*, 15 Maine, 45; *Norris* v. *Blethen*, 19 Maine, 348. The principle is the same, which

must govern the present case. The same result must follow, whether one pays money or sells his goods in ignorance of the law applicable to his contract.

This is not an executory contract, which may be defended for a want of consideration, but an executed one, fully performed and completed. The defendant was not to pay the price of the goods, but that was to be claimed of the estate. The plaintiff might have given them to the defendant, if he had chosen so to do, and after a delivery, he could not have reclaimed them.

His conduct is equivalent to saying, I will let you have the goods, and take the risk of obtaining my pay for them, from the estate. And the contract must be held as binding upon the parties, in the true and just sense which was intended, and cannot be changed, because in its operation, the plaintiff has met with an unexpected loss.

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

Barnes *versus* Trundy.

Words, not in themselves actionable, may be the foundation of an action of slander, by reason of some special damage, occasioned by them.

No action can be maintained for *such* words, spoken of a person with reference to his occupation, unless the declaration contain a distinct averment, that they were spoken of and concerning the plaintiff, and of and concerning his occupation.

When words, not in themselves actionable, become so by reason of some special damage occasioned by them, such special damage must be particularly alleged, and it must be proved as laid.

Slander. The trial was before Shepley, C. J.

The plaintiff alleges, *that* he is a trader of integrity and of good reputation; *that* the defendant, maliciously intending, &c., in the presence and hearing of many good citizens, falsely and maliciously uttered the following false and scandalous words, *of and concerning the plaintiff*, viz: — "It would

make no difference whether the government, (meaning the government of the United States of America,) got the goods, (meaning the goods of the plaintiff, seized by the said government on a libel against the plaintiff,) or Barnes, (meaning the plaintiff;) that in either case you, (meaning one Charles C. Mitchell of Portland aforesaid,) should get nothing from Barnes, (meaning the plaintiff,) that he, (meaning the plaintiff,) was a man of no character, and his word, (meaning the plaintiff's word and character,) not to be taken; he, (meaning the plaintiff,) had no property; that his property, (meaning the plaintiff's property,) was all made over and mortgaged; and ten dollars could not be collected of him, (meaning the plaintiff;) if you, (meaning said Charles C. Mitchell,) had called on me, (meaning said defendant,) I, (meaning the said defendant,) would have given you, (meaning said Mitchell,) a history of his character, (meaning the plaintiff's character,) at the time Barnes, (meaning the plaintiff,) got the goods, (meaning the goods bought of said Charles C. Mitchell by the plaintiff.") By reason of the speaking of which false and scandalous words, in manner aforesaid, the plaintiff hath greatly suffered in his good name and reputation, as a merchant and trader, and lost the good will and esteem of persons of wealth and business, who of late have refused to entrust the plaintiff with their property, or to continue and carry on any commerce with him.

Evidence, tending to prove that the words were uttered by the defendant, was introduced by the plaintiff.

The court instructed the jury, that the words spoken as alleged were not actionable in themselves; that the plaintiff, to maintain the action, must show special damage; and that, in consequence of the speaking of the words, some one person, at least, refused to give credit, or to trust the plaintiff with property, or to do business with him; that, unless they were satisfied such were the fact, the verdict must be for the defendant.

To which ruling the plaintiff excepted.

S. Fessenden, for the plaintiff.

To call a trader an insolvent or a bankrupt, is in itself actionable. 1 Pike, 110; Cheves, 17; 8 Porter, 486; Cro. James, 578; 3 Selwyn's N. P. 1058; 2 Esp. N. P. chap. 10; 2 Strange, 762; L'd Raymond, 1480.

The allegation of special damage is mere surplusage. Selwyn's N. P. Title Slander.

The words in this case were equivalent to calling the plaintiff a bankrupt. In common parlance, to call one a bankrupt, is equivalent to calling him an insolvent; that is, one not to be trusted, by reason of his insolvency.

If the words were not actionable, the defendant ought to have demurred.

When a count alleges the plaintiff to be a trader, and the words to have been spoken concerning him, the clear intendment of law is, that they were spoken of him in his character of a trader, and concerning his business as a trader.

Ingalls, for the defendant.

Shepley, C. J. — Certain doctrines respecting the maintenance of actions for slanderous words spoken, may be regarded as so fully established as to preclude further debate or controversy.

Words in themselves actionable must charge some punishable offence, impute some disgraceful disease, or be spoken of the person in relation to some profession, occupation, or official station in which he was employed.

Words in themselves not actionable may be the foundation of an action by reason of some special damage occasioned by them.

To maintain an action on the ground that words spoken of a person with reference to his profession or occupation, are in themselves actionable, the declaration must contain a distinct averment, that the words were spoken of and concerning the plaintiff, and of and concerning his profession or occupation.

The propriety and necessity for such a rule of law, may be tested by a single example. One person speaking of another says, he is dishonest and roguish. Such words will not be

actionable in themselves merely, because the person spoken of happens to be a lawyer or a trader. To make them actionable they must appear to have been spoken of him as a lawyer or trader, and without a distinct averment in the declaration, that they were so spoken, no cause of action is set forth in it. In the case of *Bloss* v. *Tobey*, 2 Pick. 320, after much research, it was said, examples are too numerous in the books of pleading to make it necessary to quote any of them.

When words in themselves not actionable become so by reason of some special damage, occasioned by them, such special damage must be particularly averred in the delaration, and it must be proved as laid. Cases to prove this are too numerous to be cited.

Let these rules be applied to the present case. The second count contains a colloquium stating, that the plaintiff "for many years past has been a trader" and an averment, that the words were spoken "of and concerning the plaintiff." It does not contain another indispensable one, that they were spoken of and concerning his trade, or of and concerning him as a trader, or of and concerning his character as a trader. The action could not be maintained on that count on the ground, that the words were in themselves actionable, because it contained no such averment.

Nor could the action be maintained on that count on account of special damage occasioned by the words, because it contains no averment, that any special damage named had been occasioned by the words spoken.

The plaintiff could not therefore have been aggrieved by the instructions. They might properly have been more unfavorable and have stated, that the action could not be maintained on that count, if there had been proof of special damage, because it contained no suitable averment of any such damage.

As the contest was confined almost exclusively to the first count, and to the pleadings having reference to it, the second count received little attention during the trial.

Exceptions overruled.

Fuller *versus* Kennebec Mutual Insurance Company.

Under a marine policy upon a vessel, to which an accident occured, if the disaster was such as to render a sale by the master necessary, it constituted a constructive total loss.

If the sale by the master was necessary, and warranted by the rules of law, it would, *even without an abandonment*, constitute a technical total loss.

A formal offer to abandon, made *after* such sale, cannot impair the right of sale which the master *previously* had.

The right to sell, as well as the right to abandon, is to be determined by the state of facts, existing at the time. In either case, the rights of the parties become vested, when the sale or the abandonment is properly made.

Though immediately after the sale, the vessel was repaired by the purchaser, at the port of disaster, that fact does not prove the sale to have been unnecessary.

The right to abandon is not necessarily lost, by an unwarranted and therefore ineffectual sale by the master.

A jury has a right to decline the finding of any other than a general verdict.

It is not indispensable, that a plaintiff, in order to recover for a total loss, should furnish an adjustment as of a partial loss.

Assumpsit on a valued policy of insurance on the plaintiff's schooner. She met a disaster near Vera Cruz, on the 26th March, 1847. A survey was called, and the vessel was condemned and sold, on the 5th of April. An offer to abandon was made on the 22d of April.

The question was, whether the plaintiff is entitled to recover for a constructive total loss or only for a partial loss.

The following instructions were requested but not given.

1. That the fact that the vessel was, immediately after the accident at Vera Cruz, repaired and carried to New Orleans, and then to Bath, is sufficient proof that the plaintiff might have done the same.

2. That the jury be directed, if they should find a total loss, to specify the items, and the value of each, which go to make up the fifty per cent. of particular loss, and also do the same, if they find a partial loss.

3. That, if the plaintiff had no right to abandon on 22d of April, the master would have no right, by reason of said accident, to sell the vessel at the time he did.

4. That, if they should find the sale was made by the master unnecessarily, the offer to abandon on the 22d of April was of no effect, and does not authorize the plaintiff to recover for a total loss.

5. That the plaintiff is not entitled to recover for a total loss, he not having furnished the defendants before, or at the time of his offer to abandon, nor produced at the trial before the jury, any adjustment as of a partial loss.

The jury found a verdict for the plaintiff for a total loss, which is to be set aside, if either of the said requested instructions ought to have been given.

There was also a motion by the defendants for a new trial, on the ground that the verdict was against evidence and against the weight of evidence.

F. Allen, for the defendants.

It is the master's duty to make repairs, when practicable. 3 Sum. 226; 9 Pick. 466, 483.

When full repairs cannot be made at the port of disaster, but temporary ones may be, it is the master's duty to make such temporary repairs, and go to the next port for full repairs, if they can be made for fifty per cent. 4 Wend. 45; 9 Pick. 483, 486; 1 Mason, 241; 16 Pick. 303; 21 Pick. 456.

In reckoning cost of repairs to make up 50 per cent., $\frac{1}{3}$ is to be deducted, new for old. 3 Sum. 45; 11 Pick. 90; 1 Phil. 371; 11 Mass. 253.

The expenses of navigating the vessel from the port of disaster to the port of necessity, are not to be reckoned in making up the 50 per cent., but are to be placed to the account of general average. 3 Sum. 27.

Also the cost of wages and provisions of men, while the vessel is undergoing repairs. 21 Pick. 472—483; 22 Pick. 191—198.

When repaired temporarily at port of disaster, and fully repaired at the port of necessity, the value of the old materials is to be deducted from the bill of full repairs. 3 Sum. 42.

To justify a sale by the master, there must be no alternative and no opportunity to consult the owners. 9 Pick. 466.

The motion for a new trial was very elaborately and learnedly argued by the counsel. But it is not considered to be within the scope of this work to report the evidence, or the arguments upon the evidence, on such motions.

Evans, for the plaintiff.

HOWARD, J. — The only question presented at the trial was, whether the plaintiff was entitled to recover, on a policy of insurance, for a partial, or for a constructive total loss of his vessel.

The verdict was for the plaintiff, for a total loss, under instructions from the court to which no exceptions have been taken, and which must now be deemed to have been appropriate. But, by the terms of the report, the verdict is to be set aside, if any of the requests for instructions, which were refused, should have been granted.

1. Though the vessel was repaired by the purchaser at the port of disaster, and soon after the accident, still that fact does not show that the sale by the master was not necessary and justifiable. If the sale was necessary, under the circumstances in which the vessel was placed by the disaster, it constituted a total loss, and the subsequent success of the purchaser in repairing and navigating her, cannot invalidate the proceedings, and convert the total into a partial loss. *Gordon* v. *Mass. Mutual Fire and Marine Ins. Co.* 2 Pick. 249, 265; *Hall* v. *Franklin Ins. Co.* 9 Pick. 483; 2 Phillips on Ins. 235; *Patapsco Ins. Co.* v. *Southgate*, 5 Peters, 604; 3 Kent's Com, 321, 324, 325; *Peel* v. *Merchant's Ins. Co.* 3 Mason, 27; *Bradlie* v. *The Maryland Ins. Co.* 12 Peters, 378, 397–8; *Holdsworth* v. *Wise*, 7 Barn. & Cress. 794; *Naylor* v. *Taylor*, 9 Barn. & Cress. 718. The right to sell, as well as the right to abandon, is to be determined by the state of facts at the time, and not by subsequent events; and in either case, the rights of the parties become vested when the sale or abandonment is properly made. *Rhinelander* v. *Ins. Co. of Pennsylvania*, 4 Cranch, 29; *Marshall* v. *The Delaware Ins. Co.* 4 Cranch, 202; *The Brig Sarah*

Ann, 2 Sumner, 215. This request was therefore properly denied.

2. It might not have been erroneous for the presiding Judge to grant the second request, but he might have declined to do it, as tending to embarrass the jury, and to produce unnecessary delay and perplexity in the proceedings of the court. If this request had been granted, and the instruction given, and the jury had disregarded it, the verdict could not be disturbed on that account; for they had a right to decline finding any other than a general verdict. *Devizes* v. *Clark*, 3 Adol. & Ell. 506; R. S. c. 115, § 66.

3. If the sale by the master was necessary, and warranted by the rules of law, it would constitute a technical total loss, without an abandonment. After such sale, the insured has nothing to abandon, and a subsequent offer to abandon, or an abandonment in form, cannot affect the right to sell. This requested instruction was, therefore, properly refused.

4. If the sale was unnecessary, and if it effected no legal transfer of the vessel, the subsequent offer to abandon, on the 22d of April, might have been effective and sufficient to authorize a recovery for a total loss, if the partial loss exceeded half of the value, and the abandonment had been seasonably and properly made. The right to abandon is not necessarily lost by an attempt to sell.

5. The plaintiff was not required to furnish *an adjustment* as of a partial loss, in order to recover for a total loss, as this request implies. The report of the surveyors, estimating the damages sustained by the vessel, and condemning her, and recommending a sale, was not conclusive upon the underwriters, but the presumption would be in favor of its correctness. The plaintiff must establish his right to recover, as in other cases, by evidence, and this he might do with, or without an *adjustment*.

The motion to set aside the verdict cannot prevail. The proof is conclusive that the vessel was injured by the perils of the sea, that the master in good faith called for a survey, that the surveyors, upon examination, condemned the vessel,

and recommended a sale, estimating the cost of repairs at $2980; and that the master acted upon the advice of the surveyors, and sold the vessel at the port of distress, (Vera Cruz,) at auction, for $300.

The testimony does not impeach the conduct of the surveyors, or of the master, but some portions of it tend to show that the cost of repairs might have been less than half of the value. Other portions, however, tend to establish a different conclusion, and we cannot say that the verdict was not justified by the evidence. *Exceptions and motion overruled.*

BARNES *versus* TAYLOR.

Upon the sale or transfer of a vessel, from one person to another, the certificates of the registry or enrollment pass to the purchaser.

They are of no further value to the seller, and, in trover against a third person, in whose hands they may be found, he can recover nothing for them.

TROVER, against the collector of the port of Wiscasset, to recover for the enrollment and license of the schr. Palo Alto.

The writ and pleadings may be referred to.

The plaintiff, on July 15, 1847, was the owner of the vessel, and of the cargo then on board; she was enrolled and licensed for the fishery; and was, on that day, seized by the collector of the district of Wiscasset, to whom her papers were surrendered; she was subsequently libeled, as forfeited; the forfeiture was confessed by the plaintiff; he petitioned the secretary of the treasury of the United States, to have the forfeiture remitted; a *remittitur* of the forfeiture was forwarded to the district attorney, and was filed in court; the secretary attempted to recall the same; but his right to do so was resisted, and a decision was made in the District Court of the United States, that the remission of the forfeiture was effectual, and could not be recalled; an appeal was claimed in behalf of the United States, to the Circuit Court of the United

States, and the judgment of the District Court was affirmed. While these proceedings were pending, a petition having been filed by the plaintiff, to have the property delivered to him, upon giving bond for its appraised value, it was ordered to be so delivered; and, on December 18, 1847, a precept issued from that court, directing the marshal to cause the property to be delivered to the plaintiff. On December 22, 1847, a deputy marshal made his return thereof, that he had caused the goods to be delivered to the plaintiff.

Testimony was introduced by each party tending to prove what was done and said on that occasion. There was some difference in the testimony, but the weight of the testimony clearly proved the following facts: — The plaintiff desired the deputy to deliver the property to an agent of C. C. Mitchell & Son, of Portland, and he was informed by the deputy, that he could not do so, as his precept directed him to deliver it to the plaintiff; the collector delivered the property to the deputy, who immediately delivered it to the plaintiff, who immediately delivered it to William Beals, an agent of Mitchell & Son, in the presence of the collector. The plaintiff and Beals both declared that the property was the property of Mitchell. They then went to the office of the collector, and there the plaintiff demanded of the collector the papers of the vessel, stating that the vessel would be of no use without her papers; and he was informed by the collector, that, if the vessel was his, he could have the papers; but if, as he had stated, the vessel was Mitchell's, he could not have them; but a temporary register would be granted, if desired. A copy of the enrollment was given to the plaintiff.

On December 25, 1847, the plaintiff and Beals went to the collector's office, with an order dated 24th December, and signed C. C. Mitchell & Son, claiming the vessel as mortgagees, and directing the papers to be delivered to the plaintiff, who presented the order to the collector, and again demanded the papers, and they were refused; the collector making the same remarks, which he had made at the time of the previous demand.

The property had been mortgaged by the plaintiff to C. C. Mitchell & Son, on July 24, 1847. The mortgage was recorded on July 26, 1847, and was lodged in the custom house on October 18, 1847, where it remained during the time when the transaction before named occurred.

The vessel had remained unused for want of papers, as the plaintiff alleged.

The case was submitted to the decision of the court.

S. Fessenden, for the plaintiff.

Barnes was the owner as to all the world, except the Mitchells. Whatever lien they had, could be enforced only by themselves. The defendant had no right to the papers. It is not for him to object that they were under mortgage. He was ordered by the secretary of the treasury to restore them to Barnes. They belonged to him, as part of the tackle and furniture. He had never lost the general property. The order of the secretary gave him the right of immediate possession. The action of trover, then, well lies.

The counsel then discussed the rule, admeasuring the damages, in cases of trover. As the decision turned upon another point, the argument is omitted.

Ingalls, for the defendant.

Tenney, J. — The laws of the United States provide, that whenever a ship or vessel, registered in conformity with the statute requirements, shall be sold wholly or in part to a citizen or citizens of the United States, the former certificate or register shall be delivered up to the collector, and by him, without delay, be transmitted to the secretary of the treasury to be canceled. And a ship or vessel so sold or transferred, shall be registered anew, by her former name, and a certificate thereof shall be granted by the collector. U. S. Laws of 1789, c. 11, § 10. Every ship or vessel shall be registered by the collector of the district in which shall be comprehended the port, to which such ship or vessel shall belong at the time of her registry; which port shall be determined to be that at or nearest to which the owner, if there be but one, or

if more than one, the husband or acting or managing owner of such ship or vessel usually resides. U. S. Laws of 1792, c. 45, § 3. When, upon a sale or transfer to a citizen or citizens of the United States, a ship or vessel is required to be registered anew, her former certificate shall be delivered up to the collector to whom application for such new registry shall be made, at the time the same shall be made, to be by him transmitted to the register of the treasury, who shall cause the same to be canceled. And in every such case of sale or transfer, there shall be some instrument of writing in the nature of a bill of sale, which shall recite at length the said certificate, otherwise the said ship or vessel shall be incapable of being so registered anew. And in every case, in which a ship or vessel is required by the statute to be registered anew, if it shall not be done, she shall not be entitled to any of the privileges or benefits of a ship or vessel of the United States. *ibid*, § 14. The same requisites, in all respects, shall be complied with, for the purpose of enrolling and licensing ships or vessels, to be employed in the coasting trade and fisheries, and for regulating the same, as are made necessary for the registering of ships and vessels by the act of 1792, c. 45; U. S. Laws of 1793, c. 52, § 2.

If the transfer of "the Palo Alto" by the plaintiff to C. C. Mitchell & Son was absolute, they residing in the district of Portland, it was necessary in order to prevent a forfeiture of all the privileges and benefits of a vessel of the United States, that a new enrollment should be made in the district of Portland, upon the surrender to the collector of that port, of the certificate of the former enrollment and license in the district of Wiscasset.

Upon the sale or transfer of a ship or vessel from one to another, it is well understood, that the certificates of registry or enrollment pass to the purchaser; and from these alone, he is enabled to cause a new registry or enrollment to be made, and proper certificates, thereupon obtained, unless they have been lost or mislaid. Consequently, in such cases, the former certificates are without value, and will secure no privileges or

benefits to the vendor, although he may be the master of the vessel after such transfer.

It is contended in defence of the action, that, from the evidence reported, the defendant was made reasonably to believe, by the plaintiff, the transfer of the vessel to C. C. Mitchell & Son was absolute at the time of the demand ; and that therefore, the refusal to deliver the papers demanded was justifiable, and was not sufficient evidence of a conversion.

It appears that the certificates in question had been surrendered to the defendant on July 15, 1847, and the reason for their being so deposited ceased on Dec. 22, 1847, when the vessel was delivered by the deputy marshal to the plaintiff, by authority of a precept then in his hands. On July 24, 1847, the plaintiff gave to C. C. Mitchell & Son a mortgage of the vessel, for the security of two notes of hand, which became payable in four months from July 10, 1847, which mortgage was duly recorded. This mortgage was deposited in the custom house, on Oct. 18, 1847, and remained there till after the demand was made for the papers. The mortgage was not foreclosed by operation of law, although there was a breach of the condition at the time of the demand. R. S. c. 125, § 30. Upon these facts alone, the defendant might have been bound to deliver the certificates upon the demand made by the plaintiff in his own behalf. But we understand from the evidence, that before the vessel was delivered by the deputy marshal to the plaintiff, the latter, in presence of the defendant, requested the delivery to be made to one Beals, who was acting as the agent of C. C. Mitchell & Son, Beals being present, and he and the plaintiff at the time asserting that the vessel was their property. The deputy marshal declined to deliver the vessel to Beals, giving as a reason, that he was directed in the precept under which he acted, to make the delivery to the plaintiff. Upon the delivery to the plaintiff, he immediately delivered the same to Beals for C. C. Mitchell & Son. The plaintiff and Beals afterwards, on the same day, went to the defendant, and at his office demanded the papers, saying that the vessel would be

of no use without them. The defendant expressed a willingness to comply with the demand, if the vessel belonged to the plaintiff; but referred to his previous statements as evidence, that he had no title, and was therefore not authorized to deliver them, and declined to do it.

Although the mortgage was not foreclosed by lapse of time, after the breach of the condition, the title of the vessel might have been absolute in the mortgagees, by an agreement between the parties to the mortgage; the mortgage continuing in the custom house was not inconsistent with such agreement. A sale and transfer of a vessel, like any other chattel, may be valid without any bill of sale or document in writing, though it may be necessary to entitle the purchaser to a new registry, giving an American character to the vessel; and the consequence of a non-registry is, that the vessel becomes a foreign vessel. *Bixby* v. *Whitney*, 8 Pick. 86; *Vinal* v. *Burrill*, 16 Pick. 401; *United States* v. *Willings*, 4 Cranch, 55; 3 Kent's Com. 5th ed. 130, 131; 1 Greenl. Ev. § 261; *Balkam* v. *Lowe*, 20 Maine, 369.

The evidence, therefore, necessary to give to C. C. Mitchell & Son the privileges and benefits of an American vessel, in the one, which they might have purchased, was not required to be known to the defendant, to justify him in retaining the papers in their behalf. Any notice which should be reasonably satisfactory, that they were really the owners, was sufficient to protect him in withholding the papers upon the demand.

The facts, which were presented to the defendant at the time of the first demand, were such evidence of an actual sale to C. C. Mitchell & Son, that he cannot be regarded as tortiously refusing to surrender the papers. It is not pretended, that the papers were called for, with the view of causing a new enrollment in another district; and that the same might be delivered up to the collector thereof. And no request was made of him of that character, by the plaintiff, as master of the vessel. The declarations of the plaintiff were full and unequivocal, that C. C. Mitchell & Son were the owners of

the vessel, and this without any qualification. His statements were confirmed by those of the acting agent of them who were declared by the plaintiff to be the owners; this confirmation was in the presence of the plaintiff, who interposed no remark, to gainsay or restrict the effect of the assertion, that the title was, as he had previously avowed it. The representations of either or both being true, made in the presence of the defendant, the papers, if received in the condition in which they were demanded, could give him no rights, inasmuch as they could have no legitimate effect, as evidence, that the vessel was one, entitled to the privileges and benefits of vessels belonging to the United States.

On December 25th, 1847, the plaintiff went to the collector's office, accompanied by Beals, presented the order of C. C. Mitchell & Son, and demanded the papers. They were refused by the defendant.

It does not appear, that at the time the order was presented, the plaintiff claimed to have any other rights, than such as would be given by the order; and he can have no benefit therefrom, excepting so far as it was proof that he was entitled to the papers in his own behalf. If it was a request to deliver the papers as belonging to them, and to no other, the refusal to deliver them was a wrong upon their owners and not upon their agent, sent to receive them. If the order had expressly declared or required the construction, that the signers of it had no title to the vessel, such as gave them an exclusive right to the papers, and that a delivery of them to the plaintiff as his, would interfere with none of their rights, and he had made the demand in his own name, a refusal might have created a liability. But the meaning of the order is not of such a character. It contains a request to the defendant to deliver the papers to the plaintiff, "as we wish him to continue master of said schooner, till further orders; although she is mortgaged to us, we wish him to manage the vessel."

This shows that they professed to have the control of the vessel, and to retain the plaintiff as *master*, so long as they should choose to permit it, but to be subject to their order.

The plaintiff made use of this order, and thereby assented to the correctness of whatever was declared therein. This claim would give him no interest in the papers, further than as their agent. The reference to the mortgage, is not absolutely inconsistent with the statement of the plaintiff, that C. C. Mitchell & Son were the owners. This statement, previously made, was not retracted by the plaintiff, when it was adverted to by the defendant as a reason for his refusal to surrender the papers. The existence of the mortgage and its contents are understood to be known to the defendant before the time of this demand, and its being referred to in the order gave to the defendant no additional information, excepting, that the signers of the order asserted no other title. If this stood alone, it might be reasonable that he should conclude, that they claimed no other right, than such as the mortgage would give. But when taken in connection with other parts of the order, it was at least doubtful, whether they intended to admit, that he had any other rights than such as they had conferred upon him as their agent, to be master of the vessel and to have the management of it, for them. When in connection, there was the positive statement of the plaintiff himself, that C. C. Mitchell & Son were the owners, accompanied by the delivery by him, to their acting agent, standing unqualified by any explanation, the refusal to deliver the papers as his, is not sufficient evidence, that he was guilty of a conversion of the property as alleged in the writ.

Plaintiff nonsuit.

Tyler *versus* Beal.

The *one* continuance, which, by R. S. ch. 116, sec. 14, a justice is authorized to grant, in a suit brought before another justice, may be ordered, either at the return day of the writ, or on a day to which the cause had been legally adjourned.

Assumpsit, brought before W. H. Lunt, a justice of the peace, who, on the appearance of the parties at the return day

of the writ, adjourned the action to October 20, 1848; and who, on that day, was unable to attend. Caleb Sampson, another justice of the peace, attended on said 20th October, and further adjourned the action to November 11, and noted the continuance on the docket. On said November 11, the parties appeared, and the general issue was pleaded and joined before justice Lunt, who rendered judgment for the defendant for cost. The plaintiff appealed, and in the District Court the defendant moved that the action be dismissed, because of the non-attendance of Justice Lunt on said October 20th.

The Judge sustained the motion and dismissed the suit, and the plaintiff excepted.

Russell, for the plaintiff.

Gould, for the defendant.

The power given to a justice of the peace to adjourn a suit, commenced before another justice, is confined to the return day of the writ; and cannot be exercised after the action has been entered. *Spencer* v. *Perry*, 17 Maine, 413.

HOWARD, J. — It has been decided by this court, that, under the act of 1834, chap. 101, the power of a justice of the peace, to continue a cause, triable by another justice of the peace, was limited to the return day of the writ. *Spencer* v. *Perry*, 17 Maine, 413.

The Revised Statutes, chap. 116, sect. 13, provide that a justice of the peace "may adjourn his court by proclamation, from time to time, as justice may require." Sect. 14, "Whenever a justice of the peace is unable, by reason of sickness, or other unforeseen cause, to attend at the time and place by him appointed for holding a court, any other justice in the county, who can legally try a cause between the parties in the pending suit, may continue such cause once, not exceeding thirty days, and note such continuance on the writ in such suit."

The language of the Revised Statutes is different from that of the statute of 1834, and was obviously intended to enlarge the power of the justice, who might be required to continue a cause pending before another justice. It authorizes him to

continue it once at any time appointed for holding the court, by the justice before whom the cause is pending, either on the return day, or day of adjournment, whenever the latter is unable to attend, for the causes mentioned in the statute.

In this case, the action appears to have been properly continued and tried before the magistrate, and to have been duly appealed, and entered in the District Court for a further hearing. *Exceptions sustained.*

ALLEN, *Administrator, versus* POLERECZKY.

A gift of personal property *inter vivos*, in order to be effectual, must be absolute, and the donor must, at the time of the gift, part with all present and future dominion over it.

ASSUMPSIT for money had and received to the use of Wentworth Allen, the plaintiff's intestate.

Wentworth Allen was a shipmaster. He returned from Mexico with health somewhat impaired. He, however, performed several coasting voyages afterwards. On starting upon one of these voyages, he placed in the defendant's hands $950, to be deposited in the savings bank. The defendant deposited the same to his own credit, taking a certificate thereof in the form, commonly called a bank book, which he lodged with his daughter Nancy, for safe keeping.

There was evidence tending to show, *that* an engagement of marriage between the intestate and said Nancy had subsisted for three or four years; *that*, on his return from that voyage, she showed to him the bank book; *that* he examined it, handed it back to her with a statement, in substance, that if he should die, before having made any different disposition of the money, it should be hers. He died soon afterwards, having done no further act in relation to the subject.

The jury were instructed that, if that testimony was believed, the plaintiff would not be entitled to recover. To that

instruction, the plaintiff, (the verdict being against him,) excepted.

Ruggles and *Ingalls*, for the plaintiff.

If the money can be withheld from the plaintiff, it must be either as a gift *inter vivos;* or as a *donatio causa mortis*, or by a nuncupative will.

There was no such delivery, as to constitute a valid gift *inter vivos.* It was not to take effect while the donor lived. The delivery of the bank book was not a delivery of the money, even symbolically. The book contained no contract. It was a mere abstract of the bank records. It was in itself of no value. The act of the intestate was testamentary. At most, it exhibited a mere intention of making a gift at some future time. There was a *locus penitentiæ*, during the whole residue of his life. 2 Kent's Com. 438; *Noble* v. *Smith*, 2 Johns. 52; Bac. Abr. 4, c. 110, a. § 1, 4.

2. The act was wholly inoperative as a donation *causa mortis.* 2 Kent's Com. 444, 445; *Weston* v. *Hight*, 17 Maine, 287; 2 Blackstone's Com. 441; *Waldron* v. *Dixon*, 5 Monro, 170.

3. Neither was there a nuncupative will. R. S. c. 92, § 9, 10 and 11.

Evans, for the defendant.

1. The defendant never appropriated the money. He was a mere messenger to deposit it. True, he deposited it in his own name. But the intestate ratified the act, and afterwards appropriated the money.

2. The intestate divested himself of the ownership. The book contained a contract, assignable by delivery. It represented the money, and stood in lieu of it. He gave it to Nancy. In the gift, there was no contingency. It was a valid irrevocable gift, effectual at the time. Accordingly, he never afterwards spoke upon the subject. We make no claim under a nuncupative will or as a *donatio causa mortis.* It is sufficient for us, that there was a valid gift *inter vivos.*

Shepley, C. J. — An opinion has been recently drawn in

the case of **Dole* v. *Lincoln*, pending in the county of Kennebec, in which the law respecting donations *inter vivos*, as well as respecting donations *mortis causa*, has been examined.

According to the conclusions therein stated, the gift must be absolute and irrevocable, and the donor must part with all present and future dominion over it, to constitute a valid donation *inter vivos*. According to the testimony in this case, it was to become the property of the donee absolutely, only in case of the death of the donor. It cannot, therefore, be sustained as a valid gift *inter vivos*.

Nor can it be sustained as a *donatio mortis causa*, for it was not given in contemplation of the near approach of death.

The peculiar circumstances of the case, must not be allowed to weaken the established rules of law. The instructions were erroneous. *Exceptions sustained, verdict set aside, and new trial granted.*

* Published in a subsequent page of this volume.

MIXER *& al. versus* COOK.

In a sale of chattels for ready pay, the seller may waive the condition of ready pay, and, by delivery to the purchaser, part with the property.

After such a waiver and delivery, the seller, in replevin for the goods, cannot avail himself of a fraud between the purchaser and the vendee of the purchaser.

REPLEVIN for twenty-eight barrels of starch. The trial was before SHEPLEY, C. J.

The plaintiffs formerly owned the starch. The defendant claims it under a purchase from Kimball & Coburn. The principal question was, whether a sale which the plaintiffs had made to Kimball & Coburn, passed the property from the plaintiffs. Testimony on that point was offered by both parties. The plaintiffs at one time had sued Kimball & Coburn on account for the starch, and attached it as their property.

The jury were instructed that, if satisfied the plaintiffs

were originally the owners of the starch, and that they made a contract to sell it to Kimball & Coburn for cash, that the property would not become Kimball & Coburn's without payment; unless the plaintiffs or their authorized agents waived their right to have the payment made at the time of delivery, and delivered it without requiring payment, and if they did so waive and deliver, the property would pass to Kimball & Coburn if there were no other difficulty.

The counsel for the plaintiffs contended, that there was a fraud committed upon the plaintiffs by the sale from Kimball & Coburn to the defendant. The jury were instructed *that*, as the plaintiffs did not prosecute this suit in the capacity of creditors of Kimball & Coburn, they could not present that question, and *that* the jury need not inquire respecting it, if satisfied that the property passed from the plaintiffs to Kimball & Coburn.

The jury returned a verdict for the defendant, which is to be set aside, if there was error in the instructions, or in the refusals to instruct.

Tallman, for plaintiffs.

There was no waiver of payment on delivery. There is no vestige of evidence of such waiver, except the bare delivery. But such delivery does not prove a waiver. 4 Kent's Com. 496, 497.

There was fraud on the part of Kimball & Coburn in obtaining the possession, and the plaintiffs are not bound by it. E. C. L. R. 146; 1 Hill, 201, 302; 6 Hill, 44; 21 E. C. L. R. 410.

There was error in the instruction that fraud between the defendant and Kimball & Coburn would not entitle the plaintiff to recover. There may be false representations without the use of words. If one, who had failed, obtains credit of one who supposes him solvent, the purchase is a fraud. Such a principle is vital to commercial safety. See the case of *Josselyn*, in Law Reporter of December, 1849, vol. 2. of new series.

WELLS, J. — Was this position taken at the trial?

Tallman. — It was not, but it belongs to all law, and all morality.

Mitchell and *Barrows*, for defendant.

TENNEY, J., orally. — The jury have found that there was a sale by the plaintiffs to Kimball & Coburn, and that the stipulation for payment on delivery was waived by the plaintiffs. The plaintiffs' property in the starch had, therefore, ceased.

If they had prosecuted the suit against Kimball & Coburn, in which they attached the starch, proof of fraud between the defendant and Kimball & Coburn, might have availed the plaintiffs. But they do not now claim as creditors.

Judgment on the verdict.

FELLOWS *versus* FELLOWS.

Though a wife have deserted her husband without cause, for a few months, yet if she go back and confess to him the wrong and promise a return to duty, and request admission again into his family, and he then refuse to receive her, and for five years neglect to make any provision for her support, such refusal and neglect constitute a desertion, on his part, for which she may maintain a libel for divorce.

LIBEL for divorce for cause of desertion. Defendant was defaulted. The parties were married in 1829. There was some difficulty in the family between the mother-in-law and the daughter-in-law. In the spring of 1836, during the respondent's absence from home, and without his consent, the libelant left his house and resided among her relatives till the fall of 1836. She then went with her brother to the town where the respondent resided, admitted to him her fault in going away, promised a faithful return to her duties, and requested him to receive her to his house. This he refused to do, and said, "if obliged to take care of her, he should board her at some place she would not like so well." She thereupon returned to her relatives, and has ever since resided with

them; the defendant not having made any provision for her support, or given her any permission to return to his house.

S. E. Smith, 2d, for libelant.

SHEPLEY, C. J. — We deem this a case of desertion within the meaning of the statute. *Divorce decreed.*

DODGE *versus* GREELEY.

In a conditional contract, if there be a failure to perform by one of the parties, the other may retract.

The condition need not be *expressed;* it may be *implied* from the nature of the transaction.

A writ from the District Court having been issued on a note of more than twenty dollars, the plaintiff received from the debtor, and indorsed, a sum which would reduce the debt to less than twenty dollars, upon a condition that the balance should be paid before the return day of the writ, but such balance was not paid. *Held,* the plaintiff might lawfully erase the indorsement.

Though an inadmissible deposition may have been received, yet if its contents be not of a character to operate against the excepting party, the verdict will not be disturbed on that account. A party has no ground of complaint, if he be not injured.

TRESPASS. One Healy had sued Dodge in the District Court upon a note, on which was then due about $21. Greeley had charge of the note, as agent for Healy. After the commencement of that suit, and before the entry of the action in court, Dodge paid Greeley $5, which Greeley indorsed on the note. Soon afterwards, Greeley erased the indorsement, and offered to repay the $5 to Dodge. Healy recovered over twenty dollars with full costs. For making that erasure, thereby exposing Dodge to a judgment for full costs, this action is brought.

The defence was that the $5 were received and indorsed, upon a conditional agreement that the residue of the note should be paid, with costs, before entry of the action. Upon that fact, evidence was presented to the jury.

The plaintiff objected to a deposition offered by the defend-

ant, because the caption did not state that the deponent was "first sworn." It was however admitted.

The Judge instructed the jury, *that*, if the $5 were received and indorsed on a condition that the residue and the cost should be paid before court, and the payment was not so made, the defendant had a right to erase the indorsement; *that* if the defendant agreed to receive the $5, and indorse it, if the plaintiff would pay the balance and cost before court, it was not necessary that the word "*condition*," should be used to make it a conditional contract, from which the one party might be relieved by the neglect of the other to perform it on his part.

Instruction was requested, by the plaintiff, that the simple fact of the plaintiff's agreeing to pay the residue before the session of the court and then failing to do it, would not justify the erasure, *unless* the indorsement was made on that condition *expressed.*

Such instruction was not given.

Verdict for defendant. Exceptions by plaintiff.

Gould, for plaintiff.

Lowell, for defendant.

WELLS, J., orally. —

The general principle is that, in a conditional contract, if there be but a partial performance by one party, the other may retract. The plaintiff failed as to his part, and cannot complain of the erasure. He had no right to be benefited by his own wrong.

There was nothing illegal in withholding the requested instructions. An agreement may, without *direct* and *specific* terms, embrace all that the request contemplated. The right to erase might be *implied* from the nature of the transaction.

Whether the deposition was wrongfully admitted, need not be decided; because its contents had no tendency to prove the issue for the defendant. A party has no ground of complaint, if he has not been injured.

Exceptions overruled.

LINCOLN *versus* EDGECOMB.

The enclosing of land by a fence, though erected beyond the true divisional line, is not a disseizin of the adjoining owner, *if* it was done through a mistake as to the true line, and *if* there was no claim to title beyond that line, and *if* the true owner has not been prevented from occupying his whole land.

The tenant erected a fence so as to enclose, with his own land, a piece of the demandant's land. But he erected it there by mistake, and without claiming title beyond the true divisional line, and had not prevented the demandant from occupying to that line. *Held*; it was not a disseizin of the demandant, though the fence had continued for eight or ten years.

THIS was a writ of entry. Eight or ten years before the suit, the defendant had erected a fence, which enclosed, (with his own land,) a narrow strip of the demandant's land. After evidence to the jury, the Judge instructed them *that*, if the tenant claimed title up to the fence, or prevented the demandant from occupying to the true divisional line, that would, in connection with the fence, amount to a disseizin; *that*, if they were satisfied, that the tenant built his fence there by mistake, and had not claimed to own beyond the true divisional line, and had not prevented the demandant from occupying within his fence to that line, although the placing of the fence there might have been an act of trespass, he would not be guilty of disseizing the demandant.

The jury found a verdict for the tenant.

If the instructions were erroneous, it is to be set aside and a new trial granted.

TENNEY, J., orally. — We hold the instructions to be correct. The distinction is between a fence erected on another's land by mistake, and one erected under a claim of title. The jury, in this case, have found there was no adverse claim.

Judgment on the verdict.

Mitchell and *Gould*, for demandant.

Gilbert, for tenant.

HOVEY *& al. versus* LUCE.

The defendant conveyed a dwellinghouse. It was but partly finished, and he gave an obligation to finish it. There was an erection, one and a half story high, with rooms for the family. In the rear of it, and annexed to it, was another erection, one story high, designed for a kitchen. Annexed to that was another unfinished erection, designed for a wash room and other appendages. *Held;* that this last erection was a part of the dwellinghouse, and that the obligation required the defendant to finish it for the uses originally designed, and in an appropriate workmanship.

On a motion to set aside a verdict for excessive damages, it is not competent to prove, *by the jurors*, their mode of computation.

COVENANT BROKEN. The trial was before SHEPLEY, C. J.

The defendant conveyed by deed to the plaintiffs, a lot of land in East Thomaston, on which stood a building principally finished, intended for a dwellinghouse, and described in the deed as "*a dwellinghouse.*" He took back a mortgage to secure a part of the purchase money. At the same time, he gave to the plaintiffs the following obligation: —

"Whereas I have this day sold unto" [plaintiffs] "a dwellinghouse, as per my deed to them of this date, and whereas said house is not fully finished, I hereby agree to cause said house to be finished in a workmanlike manner and to be well painted inside and out; also to have the fence round the same finished in the same manner as I have commenced doing; also to cause blinds to be put on said house, well made and painted, and hung with suitable latches for the same; — all of which I agree to do in a reasonable time, and to be done free of all charges to the said" [plaintiffs.]

There was testimony, tending to show the breach of the covenant, and also to show a performance of it.

The building or buildings upon the land, consisted of an erection, one and a half story high, with two rooms beside a bedroom. At the time of the sale this erection was very nearly completed on the outer and inner sides. In the rear, and annexed to that erection, was another erection one story high, designed for a kitchen, and annexed to that was another erection, designed for a wash room and other appendages.

The dimensions of this last erection were not proved. It was boarded, but not clapboarded; whether shingled, was uncertain. It was without floors or sleepers. There was no proof in what section or street of the town the house stood, or in what manner other buildings for the like use there were usually finished.

The plaintiffs resided in the house fifteen months. The defendant then took it into possession under the mortgage, which became foreclosed. Until it was so taken under the mortgage, the last mentioned erection, called the shed, remained unfinished, as at the time of the purchase. For that neglect to finish it, this action was brought.

A question arose, whether the covenants required the last named erection to be finished, and if so, in what manner.

The jury were instructed on this point *that*, if satisfied, that it was annexed to the other building, so that all the erections would constitute one structure, the defendant would be obliged to finish it in a manner suitable and appropriate to the other parts of the structure, as situated in the town and street where it was built; *that* defendant was not obliged to erect any separate building for a privy, but they would consider whether a suitable and appropriate finish would not require one to be prepared in some portion of the structure, or without it; *that* there did not appear to be any testimony to prove that the erection made in the rear was designed to be appropriated in any particular manner; and, *that* the mode in which it ought to be finished, if any further finish was required, must be inferred from the construction, appearance and situation of the other parts of the structure.

The Judge was requested to instruct the jury, that, if the plaintiffs would recover for any materials and labor expended on the woodhouse or buildings, other than "the dwellinghouse" itself, they should prove, that the same were not put into such a state of finish and completion by the defendant, as such buildings when finished, were usually put into in the vicinity of this dwellinghouse.

This request was refused, except as appears from the instructions given, as above stated.

A verdict was returned for the plaintiffs, which is to be set aside and a new trial granted, if any of the foregoing rulings, instructions, or refusals to instruct, were erroneous.

Lowell, for defendant.

The terms of the obligation refer to, and include only the single edifice, covered by one roof, which, in the common and ordinary use of the words, are signified by them. This is the proper construction to be given to the terms. 1 Bouvier's Law Dict. title House, p. 470, and authorities there cited; 2 Russel on Crimes, 56 and 489, and authorities in the text and notes; *Howland* v. *Leach*, 11 Pick. 151; *Hawes* v. *Smith*, 12 Maine, 429; *Littlefield* v. *Winslow*, 19 Maine, 394; *Robinson* v. *Fisk*, 25 Maine, 401.

The instruction, that "the defendant would be obliged to finish the shed in a manner suitable and appropriate to the other parts of the structure, as situate in the town and street where it was built," was incorrect. The agreement was to *finish* what was begun, not to do what was *suitable and appropriate.*

The parties had determined what finish they would have, and what should be a suitable manner of finish, having in view their wants, their means and the expense.

There was no evidence in the case calling for such an instruction; for "the dimensions of the building" were not proved, nor was there any proof of the section of the village, or of the street where the house stood, nor in what manner other buildings, of a like character there, were finished.

For similar reasons, the last branch of the instructions were opposed to the proper construction of the instrument, and not called for by any evidence in the case. *Blake* v. *Irish*, 21 Maine, 450.

The Judge having ruled that the shed was embraced in the defendant's covenants, then the instructions requested by defendant's counsel, were proper.

The instruction, that the jury would consider, whether a

suitable and appropriate finish would not require a privy to be prepared in some portion of the structure, or without, it was wrong. This is a question of the legal construction of a sealed instrument, and belonged exclusively to the court, and not to the jury. 1 Greenl. Ev. sect. 277, and notes and cases collected in the notes; *White* v. *Jordan*, 27 Maine, 370.

The defendant's covenant is not to be enlarged by construction, and the language employed no more requires a privy "in some portion of the structure, or without it," than it requires him to finish a stable, a woodhouse, a well, or a cistern.

The instructions were wrong, inasmuch as they did not indicate to the jury, what could be a reasonable time for the performance of the defendant's contract. *Greene* v. *Dingley*, 21 Maine, 131.

Evans and *Merrill*, for plaintiffs.

What constitutes a dwellinghouse? Is it only that part in which to sit, sleep and eat? or does it include all the portions necessary for comfort and for domestic purposes, agreeably to the customs of the neighborhood? "A man's house is his castle." He is as safe in the shed as in the parlor.

As to the extent of the finish, the Judge could have given no different instructions. There was to be unity of design, appropriateness. Whatever strikes the eye as suitable for the occasion, was requisite to be done. Till that was done, there was no finish to the work. Whatever the jury found to be the original plan, was to be carried out.

The requested instruction was substantially given.

The defendant objects that the court did not instruct, but left it with the jury to find, what was a reasonable length of time, in which the defendant should finish the house. But no request for such instruction was made. The work was not done during the fifteen months of plaintiffs' residence there. Surely that was the fullest extent of reasonable time.

Shepley, C. J., orally. — What was it designed by the obligation, that the defendant should finish? In the deed and in the obligation, the house is regarded as one structure. They

give no indication what part should be finished. If one offer to sell his house, can it be misunderstood what he intends? If the contract applies to one part only, to what part? The house was partly finished. We think it a reasonable and just construction, that the defendant should finish it to correspond with what had been already done. A reference to the part finished, would show whether the design had been carried out. The house was sold for family use. The instructions virtually left it to the jury, to decide what sort of finish the parties intended.

The court were not to instruct what was necessary to be proved, but what conclusions they should form, from what had been proved, relative to the matter in controversy. What was done in the vicinity to other houses, would furnish no safe rule. The house was to be finished to the extent originally designed, and in a suitable and appropriate manner.

We think the defendant's objections are not sustained.

There was also a motion to set aside the verdict, on the ground of excessive damage. Lowell proposed to read the deposition of the foreman of the jury, not to prove any misconduct, but simply to show how the computation was made up. He cited *Little* v. *Larrabee*, 2 Greenl. 37.

Shepley, C. J. — The rule on this point is settled. To allow jurors to testify as to their mode of computation, would affect injuriously the whole administration of justice.

Judgment on the verdict.

Lambard *& al. versus* Rogers *& al.*

Quaere, whether it be lawful, for an officer, to include dollarage in the penal sum of a bond, given by a debtor to relieve himself from arrest on execution?

If not lawful, yet, if the officer do it under a belief that it is allowable, the bond is protected as a *statute bond* under R. S. ch. 148, sect. 43.

Debt upon a poor debtor's bond, given to obtain his release

from arrest on execution. Among other fees, the officer charged $1,00 for travel from Augusta, without stating the distance; also $3,20 for dollarage, although he collected no part of the execution, except by taking the bond in suit. Those items made a part of the amount, which being doubled, constituted the penal sum of the bond. A default was entered, subject to the opinion of the court.

SHEPLEY, C. J. presided at the trial.

Gilbert, for defendants. The law allows dollarage only on sums *collected*. Here the officer *collected* nothing. The case does not show that the unlawful charges were included by "mistake, accident or misapprehension;" nor can a presumption to that effect be raised. The court will not take notice of the distance from Augusta. The obligation sued can therefore be valid, not as a statute bond, but only at the common law, and the defendant is entitled to be heard in damages.

Tallman, for plaintiffs.

WELLS, J., orally. — The law, (R. S. ch. 151, § 4,) allows dollarage for levying and collecting executions. If, in this case, the officer might legally tax the dollarage, the bond is a statute bond. If he could not so tax, still if, in doing it, he believed it was allowable, it may well be considered a misapprehension, coming within the protection of R. S. ch. 148, § 43. Either way, then, the bond is valid as a statute bond, and the plaintiffs are entitled to judgment, according to the 39th section of said chapter 148.

BROWN *versus* ATWELL *& al.*

Receiptors for property attached in a suit, wherein judgment has been rendered against the defendant, are bound by the judgment. They are not permitted to impeach it.

Even if there were no judgment, the officer is accountable for the property; and the receiptors, being merely his bailees, are accountable to him.

EXCEPTIONS from the District Court, RICE, J.

Assumpsit on a receipt for a vessel's wheel, which the plaintiff, as an officer, had attached on a justice's writ, sued upon an account annexed, wherein judgment had been recovered in the county of Lincoln, against the original defendant.

The defences necessary to be here mentioned were the following: —

First. There was no legal service of the writ in the original suit, in which the wheel was attached. This the officer, who served the writ, has in writing admitted.

Second. The justice, who rendered the judgment in that suit had not jurisdiction, as the residence of the original defendant was not in the county of Lincoln, but in the county of Penobscot; and no service had been made upon him in Lincoln.

Third. The promise, declared on in the original writ, was without valid consideration.

Fourth. The judgment in the original suit was obtained by the fraudulent collusion of the plaintiff with others.

The court ruled that the defences above mentioned, could not avail these defendants.

Lowell, for defendants.

When the record of a judgment *inter alios*, is introduced, any party to whom it may be prejudicial, may, by plea and proof, show that the court rendering it had no jurisdiction; or, if it had jurisdiction, that there was illegality in its proceedings. 9 Mass. 462; 2 Metc. 114; 2 Metc. 135; 6 Pick. 483; 23 Maine, 24; 26 Maine, 294; 27 Maine, 548; *Caswell* v. *Caswell*, unreported, Lincoln county, 1849; 2 Ann. Dig. of 1848, 233, § 41, 42; 1 Ann. Dig. of 1847, 318, § 29, 30; 2 Sup. U. S. Dig. 223, 224, § 139, 141, 147.

Bulfinch, for plaintiff, was stopped by the court.

TENNEY, J., orally. — The admission of the officer, who made the service, cannot affect the judgment in the manner contended for by the defendants. This case is clearly distinguishable from those relied on in the argument. So far as

the record shows, the justice had jurisdiction and the judgment was properly rendered. The defendants are bound by the judgment, until it be reversed. The defendants had no rights in the wheel, except what they derived from the officer. They are his bailees, and are not permitted to invoke the illegalities of the judgment. Whether the judgment were rightful or wrongful, or there were no judgment at all, the *officer* is bound to account for the property.

Exceptions overruled.

STETSON *versus* HOWE.

If a surety, who has become accountable to his principal to pay the debt, send his own money therefor, by the debtor, to the officer who holds a precept upon the demand, and the officer misappropriate the money, the surety, after having paid the debt to the creditor, may maintain assumpsit against the officer, and without a special demand, although the officer, when he received the money, was not notified to whom it belonged.

ASSUMPSIT for money had and received. The evidence tended to show the following facts.

Moses Call had a note against Knowlton, as principal, and the present plaintiff, as surety. The note was sued, and the writ was placed in the hands of this defendant, then a deputy sheriff. Knowlton had made a contract with his said surety to assume and to pay the debt, as the surety's own debt. The surety, this plaintiff, sent the money by Knowlton, in bank bills, to pay the note, and Knowlton accordingly paid it to Howe, but without disclosing that the money belonged to Stetson, or was sent by him. Howe never paid over the money to Call. After some years, Stetson paid the note to Call, and now brings this suit to recover of Howe, the money which he had sent to him by Knowlton. The defendant alleges that when the bills were brought to him, he attached them upon the writ against both defendants. And he produced the writ, with such a return upon it. That action was never entered, nor was the writ returned to the court.

The jury were instructed to ascertain to whom the bills belonged, which were paid to Howe; and that, if they belonged to the plaintiff, he was entitled to recover in this action, although no demand had been made by him upon Howe for the same, and no notice given to him, that the plaintiff made a claim thereto.

The verdict was for the plaintiff, and the defendant excepted.

Lowell, for the defendant.

Bank bills are attachable upon a writ. 1 Cranch, 103; 16 Pick. 569; 17 Pick. 463; 18 Maine, 178.

Knowlton, and not Stetson, was debtor to Call. No arrangement between them, to which neither Call nor Howe was a party, could change that relation.

In legal contemplation, the money paid was the debtor's money; and, if it were misapplied, he only could bring the suit for it. Knowlton, the debtor, handed the money to the defendant. And if it was taken in payment, it went to pay his own debt. There was nothing to indicate to Howe, that it was not Knowlton's money. There was, therefore, no privity between Stetson and Howe, and the law would imply none. Howe, if he had known by whom the money was sent, could consider the plaintiff as paying only as agent for Knowlton.

The action would be less at variance with legal principles, if the suit were brought by Knowlton. He is the party in interest. Stetson, if he recover, will only hold as trustee for him.

At any rate, a notice to defendant of plaintiff's claim was indispensable. Having attached the bills, he might hold them till notified the action had not been entered, or was ended.

But in fact, the suit, if any, should have been brought jointly by Knowlton and Stetson. Again, the action ought to have been in tort, and not in assumpsit.

Ruggles, for plaintiff.

Howard, J., orally, — The reported evidence shows, that the debt was originally due from Knowlton, and that he had

procured the plaintiff to become accountable to pay it. The jury were instructed to ascertain to whom the money belonged, which the defendant received. They found it was Stetson's. The defendant had misappropriated it, and Stetson, under his contract with Knowlton, had to pay the amount a second time. We see no error in the instructions as to the plaintiff's right to reclaim it from the defendant. No demand previous to the suit was necessary.

It is alleged, that the hills were attached. But the defendant fails to show that the attachment was perfected.

The writ does not appear to have been returned. That ground of defence is therefore unsupported. We are all satisfied that the instructions were correct.

Exceptions overruled.

STATE *versus* CUNNINGHAM.

There is no positive rule of law, which prohibits a jury, in a criminal case, from convicting upon the unsupported testimony of a *particeps criminis*.

EXCEPTIONS from the District Court, RICE, J. presiding. Indictment for larceny.

William Vanner was introduced by the government, and testified that he saw the defendant commit the act; and that he himself aided and assisted in the commission of it.

There was some testimony corroborating, and some testimony impeaching, that of Vanner.

The "counsel for the defendant, requested the Judge to instruct the jury, that they were not authorized to convict the accused, upon the testimony of Vanner, unless corroborated in something which is material, nor upon such testimony, even though corroborated; provided the impeaching testimony outweighs or balances that of the corroborating testimony." Those instructions the Judge refused to give. But he did instruct the jury, *that* they might "return a verdict of guilty, upon the sole and uncorroborated testimony of Vanner, if

they saw fit to do so; *that* it was in general, more safe not to render a verdict of guilty, upon the unsupported testimony of an accomplice or *particeps criminis; that* they could do so, if they were fully satisfied his testimony was true; *that* it was their province to weigh all the testimony in the case, not only that of Vanner, and that which corroborated him, but that which tended to impeach him; and if, from the whole, the government had failed to remove all reasonable doubt of the defendant's guilt, it was their duty to acquit. But if, from all the testimony, they were satisfied, beyond a reasonable doubt, that he was guilty, it was their duty to convict."

A verdict of guilty was returned and the defendant excepted.

Ingalls, for defendant.

The requested instructions ought to have been given. 1 Greenl. Ev. sect. 379, 380, 381; 2 Starkie's Ev. 12 and note; *U. States* v. *Kepler*, 1 Baldwin, 22.

The instruction given was clearly erroneous. It required the jury to convict, although Vanner's testimony might not only be uncorroborated, but impeached. *Ibid.*

Hubbard, for the State.

Shepley, C. J., orally. — There is no positive rule of law, that a jury may not convict upon the unsupported testimony of a *particeps criminis*. There may be cases, in which an omission, by the Judge, to advise the jury to look with great suspicion, on such testimony, might be deemed a neglect of duty. Each case has its peculiar circumstances, with reference to which the Judge should exercise a sound discretion, in advising the jury.

This case being put upon strict legal right, the

Exceptions are overruled.

PROPRIETORS OF DAMARISCOTTA TOLL-BRIDGE *versus* COTTER.

A Legislative charter, which authorized the erection of a toll-bridge, required it to be at least 24 feet wide, with sufficient rails on each side. It was constructed 24 feet wide between the rails, but with a central frame-work. The thickness of this frame-work, if deducted from the said width of the bridge, left the traveling pathway less than 24 feet. *Held*, that that reduction in the width of the pathway did not impair the right to receive toll.

THIS was an action to recover a penalty for forcibly passing the plaintiffs' bridge without permission, and without paying toll.

The plaintiffs were incorporated with power to erect a bridge and receive toll. A penalty was given for passing it forcibly without paying toll. The charter provides that the bridge "shall be at least twenty-four feet wide, with sufficient rails on each side for the safety of passengers, and be provided with a suitable draw, or opening through the same, for vessels to pass."

The bridge was built, in most or all of its parts, twenty-four feet wide between the rails. But, for greater strength, a frame-work was inwrought into the bridge, running along its centre, except at and near the draw. This frame-work, by occupying a narrow central strip of the flooring, made the traveling pathway a little less than twenty-four feet in width.

Among other defences, it was contended that the bridge, by reason of said reduction in its width, was not in compliance with the charter, and that therefore no toll was due and no penalty was incurred.

The jury were instructed, *that* "the bridge must have been built substantially, twenty-four feet wide, inside the railing; and *that* after deducting the thickness of the central frame-work from the width of the bridge, there must remain twenty-four feet, so that the public could have substantially twenty-four feet clear, unobstructed, and open for travel."

The verdict was for the defendant. The plaintiffs excepted.

Ruggles, for plaintiffs.

The principle involved in this case is important. If this

court confirms the ruling excepted to, the right to take toll for passage upon the bridges in this State, is utterly destroyed. The central frame-work was placed there only for the public safety. The counsel was proceeding to comment upon the charter, when the court stopped him, and expressed a wish to hear the counsel upon the other side.

M. H. Smith, for defendant.

The instruction to the jury, as to the effect of the central frame-work, was correct. It was a sound construction of the act of incorporation, (passed 1797,) which states, "that the said bridge shall be well built, of good and suitable materials, that it shall be at *least* twenty-four feet wide, with sufficient rails on each side for the safety of passengers, and be provided with a suitable draw or opening through the same for vessels to pass. In 22 Pick. 573, it is said, "it is a sound rule of construction, that every clause and word of a statute shall be presumed to have been intended to have some force and effect." The statute requires the bridge to be *at least* twenty-four feet wide, showing the intention of the Legislature to require a strict conformity with this condition.

This was a matter for the benefit of the public, and not for the benefit of the bridge proprietors, and should be construed, so as most to conduce to the advantage of the public.

If the frame-work in the middle of the bridge was a necessary part of the bridge, (as defendant by no means admits, it being a notorious fact, that similar bridges may be, and often are built without any such middle frame-work,) this necessity does not involve any need of having the bridge less than twenty-four feet wide in the clear, after deducting the frame-work. The act of incorporation clearly intended, that the bridge should be *at least* twenty-four feet wide, in available width, upon which the public could travel, and the plaintiffs might as well have taken up a part of the traveled way, with the railing and bracing thereto, and also with the frame-work on each side, as with the middle frame-work.

The instruction of the Judge, as to deducting the thickness of the middle frame-work from the width of the bridge, was

immaterial, as the case shows that the bridge was not twenty-four feet wide, at a place where there was no such frame-work: — viz. between the middle frame-work and the draw. This frame-work did not extend to the draw.

The plaintiffs were not entitled, in absence of proof to the contrary, to claim a presumption, from lapse of time, that the bridge was originally built twenty-four feet wide. Plaintiffs introduced proof as to the present width of the bridge, and introduced no proof as to what was its width, when built; and in the absence of all other proof, the most favorable ruling that the plaintiffs could ask for, was, that the jury might infer from the present width, what was its original width; and this was substantially the ruling; which ruling was correct, even upon the position taken by plaintiffs, that if the bridge was originally built twenty-four feet wide, it was immaterial whether or not, it was continued of that width, or made narrower since. But a reasonable construction of the language "it shall *be* at least twenty-four feet wide," would require the plaintiffs, not only to erect, but to maintain the bridge, at least of that width. The Judge did not require this proof of the plaintiffs, the instruction to the jury was, that the original structure must have been twenty-four feet wide; there was no instruction, that plaintiffs must prove, that it was maintained of that width, or that it was thus wide, when defendant passed without paying toll, or when the action was commenced.

This being a penal action, the statute upon which it is founded, will be construed strictly.

Shepley, C. J., orally. — We are all of opinion, that the instructions, as to the effect of the central frame-work, were erroneous. *Exceptions sustained.*

CASE

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF PENOBSCOT,

1849.

MOOR, *in Equity, versus* VEAZIE *& al.*

Constitutional law — monopoly — injunction — rights of riparian proprietors — action — construction of statute.

The riparian proprietors do not have the entire interest in the waters of a river, but the whole community have rights therein, which entitle them to regulate its public use, and these rights may be exercised by the Legislature as the agents of the public.

Semble, that an Act of the Legislature of Maine granting to certain persons the *exclusive* right to navigate certain portions of the Penobscot river, above tide waters, for a certain time, is constitutional.

Where any party claimed to exercise a right granted by an act of the Legislature, clearly unconstitutional, the court would not grant an injunction in his favor. The court would not refuse an injunction, if nothing appeared *prima facie*, against its constitutionality, *semble*.

An act of the Legislature granted to certain individuals the sole right of navigating the Penobscot above Oldtown by steamboats, for twenty years, on condition (1,) that the navigation of said river in certain specified parts should be improved; (2,) that a steamboat should be built and run over the route; (3,) that a canal or railroad should be built around Piscataquis falls within seven years. *Held*, that, inasmuch as the act did not prescribe the mode of determining when the condition had been complied with, the actual running of a boat on the route prescribed must be considered as the best proof of the performance of the conditions.

Questions relating to the sufficiency of such steamboat, as to size, power or the like, are not to be tested in suits between individuals.

The "twenty years" specified in the charter, commence running after the river has been so far improved as to be actually navigated by steam power, and the required rail road has been built and used.

In certain cases, before an injunction can be granted, the complainant should have had his right determined at law, or have shown it to have been of long continued existence and exercise. But where a State has authority to grant a right, and the grant is made upon conditions which are complied with, it is equivalent to the establishment of the right by a trial at law. The only reason under such circumstances for refusing an injunction, would be the unconstitutionality of the grant.

If, in improving the navigation of the river under the Act above referred to, it becomes *necessary* to build a dam, which will have the effect of preventing the passage of boats, rafts, &c., no damages can be recovered against the grantee, except by riparian proprietors upon whose land the dam is actually constructed. The presumption will always be that such dams are *necessary* and are erected in good faith.

BILL IN EQUITY for an injunction, and for relief.

The bill alleges that, on the 30th day of July, 1846, an Act of the Legislature was passed, in substance as follows; viz: —

"An Act to promote the improvement of the navigation of the Penobscot river: — Be it enacted by the Senate and House of Representatives in Legislature assembled, as follows: —

"SECT. 1. William Moor and Daniel Moor, jr., their associates and assigns, are hereby authorized to improve the navigation of the Penobscot river, above Oldtown; and for this purpose are authorized to deepen the channel thereof; to cut down and remove any gravel or ledge bars, or rocks, or other obstructions in the bed thereof; to erect in the bed, and upon the shore or bank of said river suitable dams and locks with booms, piers, abutments, breakwaters and other erections to protect the same; to build upon the shore or bank of said river any canal or canals, to connect the navigable parts of said river, or, (in case it should be deemed the preferable mode of improvement,) any rail road, for the like purpose.

"SECT. 2. They are authorized to take and hold so much land along the bank and shore of said river, or in the bed

thereof, as may be necessary for the location, construction and repair of their aforesaid improvements, and to take and use the gravel, stone and earth upon the land, so taken; and the damages for the real estate so taken, when not agreed upon by the parties, shall be ascertained and determined by the County Commissioners of Penobscot county, under the same limitations and restrictions as are by law provided, in case of damages, in laying out highways; and the damage for flowage created by any dam erected for the above specified purpose, shall be ascertained and determined in the same manner as is provided in the one hundred and twenty-sixth chapter of the Revised Statutes, for flowage created by mill-dams; provided that no claim for damage shall be sustained, unless made and prosecuted within two years from the time of the alleged injury.

"SECT. 3. The above grant is upon the condition, that the said William Moor and Daniel Moor, jr., their associates and assigns, shall, within seven years from the date hereof, improve the navigation of said river, from Oldtown to Piscataquis falls, and from Piscataquis falls to the foot of the Five Island Rips, and shall build and run over said route, a steamboat; and shall within said seven years, build a canal and lock round said falls, or a rail road to connect the route above said falls, with the route below said falls.

"SECT. 4. If said William Moor and Daniel Moor, jr., their associates and assigns, shall perform the conditions of this grant as contained in the last preceding section, the sole right of navigating said river by boats propelled by steam, from said Oldtown, so far up as they shall render the same navigable, is hereby granted to them for the term of twenty years from and after the completion of the improvement, as provided in the third section of this act. *Provided, however*, that the said William Moor and Daniel Moor, jr., their associates and assigns, in the exercise of said right of navigation, or in the erection of works they may make to promote the same, shall not obstruct the running of any logs, rafts or lumber down said river, which are usually driven or floated thereon, and, *provided, also*, that all boats, not propelled by steam, which may be used for

transportation on said river, shall be allowed to pass the locks and other improvement screated in pursuance of this Act, by paying reasonable rates of toll, which may be fixed by the Legislature after the said improvements are completed as provided in section third.

"SECT. 5. The said Wm. Moor and Daniel Moor, jr., their associates and assigns, are hereby created a body corporate by the name of the Penobscot River Navigation Company, with the powers incident to corporations described and defined in the seventy-sixth chapter of the Revised Statutes, and at common law, *provided*, that they shall at any time during the continuance of the above grant, elect by the vote of a majority in interest, and proceed to organize under and according "to the provisions of said chapter of the Revised Statutes."

The bill then alleges *that*, before the passage of said act, said Penobscot river, between the termini named in said act, had never been navigated by boats propelled by steam, nor by any other boats for the transportation of merchandize and passengers, except by small scows, the batteaux of the lumbermen, and the birch canoe of the Indians, nor was it deemed practicable for steam navigation; *that* the grantees, having explored the river, and believing the impediments to its navigation by steam, might be, though at a great expense, removed or surmounted, applied to the Legislature for a grant to make the improvements; *that* the grantees considered, under said grant, that they were vested, exclusively with the right to improve the navigation, both by removing obstructions, and erecting artificial works to effect that object; and also with the right, in exclusion of all other persons, to navigate the river with boats propelled by steam, for the transportation of passengers and freight for hire, above Oldtown falls, so far up as they should, during the continuance of their grant, have made improvements, such as would enable the boats to go.

The bill then alleges, *that* the grantees and their associates proceeded to the work, and made great improvements upon the river, [specifying somewhat in detail their character, extent

and localities,] so that the river became navigable for steamboats for a number of months in each year, during which it would, without such improvements, have been impassable; *that* they erected a rail road, two miles in length, around the Piscataquis falls, so as to connect between the steamboats below and those above the falls; *that* they erected five dams near the head of said falls, necessary for improving the river, and for enabling the plaintiff's boats to approach nearer to each other at said falls; *that* four of said dams are erected upon the plaintiff's own land, and one of them, as he is informed, is upon the land of said Veazie, purchased by him, as the plaintiff believes, with a design to defeat the improvement by the plaintiff, of said river for said purposes; and *that* said Veazie has openly avowed his intention to tear said dam away, though built, as the plaintiff supposes, under the lawful authority of the charter; *that* the grantees and their associates erected two steamboats, of suitable description for operating on said river to transport passengers and freight, and commenced running them on the 27th of May, 1847, and have ever since continued to run them, with some unavoidable interruptions, except when prevented by the ice; and *that*, in all respects, the conditions of the grant have been performed by the grantees and their associates. The bill alleges also, that prior to any of the proceedings of the defendant hereinafter complained of, the plaintiff had become assignee and sole owner of the boats and erections aforesaid, and of the franchise granted by the charter.

The bill then alleges, that the grant is a contract between the State and himself, fully performed and executed on his part, and he is thereupon entitled to have and enjoy the exclusive right of navigating said river, from Oldtown upwards, in boats propelled by steam, for the term of time mentioned in the grant.

The bill then complains, *that* the defendants, with a full knowledge of the facts above stated, have, without leave of the plaintiff, built a boat propelled by steam, and set her into use between Oldtown and Piscataquis falls, a distance of about

twenty-five miles, by transporting passengers and freight and receiving the emoluments thereof, using the channel and improvements made by the plaintiff as above stated, on that part of the route; *and* that said defendants openly avow their determination to run their said boat over and upon said route, and to erect another boat of the same kind, and employ her in the same way; and *that* for full redress and prevention against the wrongs aforesaid the plaintiff has no adequate remedy at law.

Wherefore the plaintiff prays, *that* summons may issue to the defendants, &c.; *that* an account may be taken, under direction of the court, of all moneys received by the defendants or by others for their use, for the transportation of passengers and freight as aforesaid; *that* they be enjoined from the further employment of the said boat, or any other steamboat for said purposes upon said route, and from tearing away or removing said dam; and *that* such further relief may be adjudged for the plaintiff as the case requires.

This bill was presented to the court, at its session, in the county of Franklin, for an immediate injunction. Whereupon it was ordered, that notice be given to the defendants, to appear before the court then next to be held in the county of Somerset, to show cause, &c.

At the term held in Somerset, *A. G. Jewett*, for the defendant, Veazie, read an affidavit of Veazie, stating that he could not be then ready for trial, and asking for delay.

Kelley, objected to delay, and cited *Steamboat Company* v. *Livingston*, 3 Cowen; *Gibbons* v. *Ogden*, 17 Johns. 438.

SHEPLEY, C. J., orally. — These proceedings are but preliminary, designed to be merely of temporary effect, to protect apparent rights. In such cases, it has been usual to give a hearing before the granting of an injunction. The plaintiff alleges a right in himself to the exclusive navigation of a part of the Penobscot river, derived from an Act of the Legislature, and that Act he has exhibited to us; and he alleges that his rights have been invaded by the defendants, and that they are openly threatening to continue the aggression.

The question is, whether he shall be protected, under the Act, *until* the *right* can be decided. The important points of the case are to come up, not on this incidental question, but on the final hearing, On such a preliminary hearing, the court would not decide whether an Act of the Legislature is or is not in conflict with the Constitution. It is not, therefore, perceived that much time can be requisite for preparation, to show cause against the prayer of the bill.

Should an injunction be granted here, the respondent might move to dissolve it, at the Penobscot session.

The case may be suspended, the preliminary hearing to be had at the next term in the county of Penobscot, in which the parties reside.

THE case accordingly came on, at the Penobscot session.

W. P. Fessenden, *G. F. Shepley* and *D. T. Jewett*, for the defendants.

Kelley, for the plaintiff, inquired whether the answers were put in.

Fessenden. This is an application for an injunction. It is to be heard, before any answer filed. The plaintiff must show enough to make out a case.

After some discussion, it was directed by the court, *that* the whole evidence on both sides should be read; *that* the plaintiff's counsel should then present his points, introduce his authorities and argue his case; *that* then the defendants' counsel should pursue a similar course, after which the plaintiff should be entitled to reply strictly. The testimony was accordingly heard. So far as material, the facts established by it will appear in a subsequent part of this report.

Kelley, for the plaintiff.

This court has jurisdiction. R. S. ch. 96, § 11; 2 Story's Eq. § 925, 926, 927, 928. The plaintiff's charter, § 1 and 2, gives broad powers but does not require the grantees to execute them all. Sec. 3 contains the conditions. But they are conditions subsequent. No man can interfere with the plain-

tiff's proceedings, any more *before* the condition is performed, than *afterwards.*

No charter is to be considered forfeit, till so decided by competent authority. 6 Cow. 23. The non-compliance with the provisions may be waived by the Legislature. 9 Wend. 351. It does not, therefore, operate a dissolution, until so declared by judicial decision. 5 Mass. 230; 12 Conn. 7.

The Legislature had authority to grant the charter. 7 Pick. 371.

There was no failure of performance on the plaintiff's part, but if there were, it is no protection to the defendants. The charter is good till revoked. Besides, the conditions were but subsequent ones. The plaintiff is allowed many years in which to perform. It is for the Legislature, not the defendants, to fix the length of time. Had the dams injured any person in the passage of his rafts, he might indeed complain, still the plaintiff's right to navigate the river by steam would not thereby be vacated, but the defendants were not injured. They are mere strangers.

Upon the question, whether the court will exercise its benign authority of injunction, I cite *U. S. Bank* v. *Osborne*, 9 Wheat. 738; *Turnpike Corp.* v. *Ryder*, 1 Johns. Ch. Ca. 610; *Charles River Bridge* v. *Warren Bridge*, 6 Pick. 376; *Livingston* v. *Van Ingen*, 9 Johns. 506; *Gibbons* v. *Ogden*, 17 Johns. 488; *Universities* v. *Richardson*, 6 Ves. 689.

G. F. Shepley, for defendants.

1. Before the right is determined at law, or unless the party has been long in possession, the court will grant no injunction for a private nuisance, except when irreparable injury would otherwise occur. *Whitehouse* v. *Hyde*, 2 Atk. 390; *Brown's case*, 2 Ves. Sen'r, 414; *Att'y General* v. *Doughty*, 2 Ves. Sen'r, 453; *Van Bergen* v. *VanBergen*, 3 Johns Ch. 283; *Att'y General* v. *Nicholl*, 16 Ves. Jr. 338; *Gardiner* v. *Newburgh*, 2 Johns. Ch. 162; *Utica Ins. Co.* v. ———, 2 Johns. Ch. 379; *Reed* v. *Gifford*, 6 Johns. Ch. 319; Eden on Injunc. 167; 3 Atkins, 21; 5 Metc. 118; 17 Maine, 292;

6 Johns. Ch. 46. In this case there is no pretence that any irreparable loss to the plaintiff can occur.

2. Has the court jurisdiction? Full equity powers have not been granted to it. In most of the cases cited, the courts declare the jurisdiction to be concurrent at equity *and* at law. But in this State, if there be a remedy *at law*, there is none at *equity*. R. S. 164, § 12.

The court does not possess the right, except under the head of "private nuisance." Here was no such nuisance, for there is no exclusive right in the plaintiff, until the conditions are performed.

3. Such must be the construction of the grant.

The exclusive right of twenty years does not commence, till a complete performance by the plaintiff. Till such performance, there can be no exclusive rights.

4. As to the situation of the parties, I refer to 3 Dan. Ch. Pr. 1859, 1860, citing 2 Bland, 461.

The plaintiff's remedy, if any, is at law. The defendants are of ability to respond in damage. But look at the other side.

The defendants' boat property is of a hazardous kind; an injunction would preclude them from prosecuting any action at law, and they would be without remedy for the injurious operation of the injunction.

As to the circumstances to call for an injunction, I cite 18 Eng. Ch. R. 299; 3 Meri. 621.

5. Apart from the question of constitutionality, I may suggest, under the head of *doubt* as to the *expediency* of granting an injunction, that the Act is inoperative; because the thing, attempted to be granted, did not belong to the State.

The riparian proprietor of land, covered by water, not navigable, has the sole use of it, consistent with the right of individuals of the public, for a way over it. The State, therefore, had no right to the land, which the Legislature could dispose of to the grantees of the charter. Hargrave's Law Tracts, found in 6 Cowen, 518; and Hale's Tract, *De Mare*, in 6 Cowen, 536, in note; *Commonwealth* v. *Chapin*, 5 Pick.

199; *Berry* v. *Carle*, 3 Greenl. 273; 17 Johns. 595; Angell on Water Courses, 2, 16, 17.

(*Moor*, the plaintiff. I rely on the case, *Spring* v. *Russell*, 7 Greenl. 273.)

Shepley. The right of passing over fresh rivers is an individual right, not one belonging to the public. It is like that of any other highway.

The case of *Spring* v. *Russell* was on a statute, which secured compensation to those injured. And such rights as the plaintiff claims were never before granted, except on the principle of private property taken for public use, on compensation paid.

A. G. Jewett, for the defendants.

The plaintiff must show that the land he takes is necessary to the making of the improvement. The 4th section of his charter requires that he should render the river navigable. He has no exclusive rights above where that has been done.

The improvements were to be made, not for the plaintiff alone, but for the public. Before the rail road was built, the defendants were rightfully running their boat.

[The counsel then examined the testimony, to show that the plaintiff had not fulfilled the conditions of his charter, and contended, therefore, that his rights had not been invaded.]

W. P. Fessenden, for the defendants.

1. Prior to the charter, the defendants had a perfect right to navigate the river by steam, though they had never used it. The object of the charter was to take away this right. The Legislature had no more authority to give exclusive rights to steamers, than to rafts or gondolas.

It struck me with some surprise when the court, at the presentation of this case at Somerset, intimated that on the preliminary hearing they would not decide as to the constitutionality of a legislative Act. Such has not been the practice. The cases already cited, *Gardiner* v. *Newburgh*, 2 Johns. Ch. 162, and *Livingston* v. *Van Ingen*, 9 Johns. 506, show that the court will *not enforce* an unconstitutional law. Even

on the preliminary hearing, the court will examine whether the plaintiff's right is clear and free from doubt.

But, in submission to the views of the court, I proceed on the assumption that the constitutionality of the charter is not now to be discussed.

2. What is the true construction of the grant? Upon its face, no provision is made for remedy to persons injured under it. Does it immediately and from its date, exclude all but the grantees from the navigation of the river? We say it does not. Its language forbids such a supposition. It is to become operative, only when certain acts shall have been done by the plaintiff. Whether he has done them, is a question of fact.

The statute concerning nuisances, chap. 164, sect. 12, provides for the trial of such questions by a jury. Will the court say the only object of the Act was to get a steamboat upon the river? Was it not rather to cause improvements to be made for the use of the public? "To promote the improvement of the navigation of the Penobscot river," is the very title of the Act. The contemplated improvements have not been made. Common boats and batteaux cannot go there. We contend that the grant never vested in the plaintiff, because its conditions were not complied with.

The Act authorizes the making of dams with locks, *or* a rail road at the falls. The plaintiff has made both; that is, a rail road for a part of the way, and dams for the residue. This was unauthorized.

There is also a provision that the grantees are not to obstruct the passage of rafts. The proof is, that the plaintiff has done so. But whether the proof is or is not such, he can have no vested rights, till the conditions have been all performed, and *proved* to have been performed.

He has built a dam upon the defendants' land, yet has not ventured to say in his bill, that the dam was necessary. Cannot the owner of the land raise the question, whether the plaintiff has performed the condition of his grant? I submit that the court cannot rightfully grant the injunction, and jeopard so much of the defendants' property, until it be

established, that all the conditions of the grant have been fulfilled.

3. The ground of the plaintiff's application, is, that he is subject to irreparable loss. But the fact is not so. The defendants are amply able to respond in damage; on the other hand, the law, whatever the *plaintiff's* ability, furnishes to the defendants no remedy, for their losses under an injunction.

The authority of the court, as invoked by the plaintiff, is upon the sole ground of a private nuisance. The cases already cited, show, to my apprehension, conclusively, that this summary interference should not be exerted. The plaintiffs citation from Story seems to favor his views, but every case cited by Story, contradicts his position. In the case of *The Charles River Bridge*, the court refused to grant the injunction on the ground of irreparable loss, but turned the party over to an action at law. The question of such loss, in this case, has not been settled. Unless the court decide that it shall not be previously settled, the injunction cannot be granted.

W. B. S. Moor, the plaintiff, *pro se*, in reply.

What is the true construction of the Act? In its first section, the State grants privileges, but imposes no duties. In the second, the State enlarges the franchise, and, in the exercise of its right of eminent domain, gives authority to take private property upon compensation made therefor. The third section imposes upon the grants a condition that, within seven years, the grantees should do certain acts. This third section must be a condition subsequent, else the first act of improvement would itself be a trespass. The charter was accepted, and the grantees went into possession of the franchise, and so remained till disturbed by the acts of the defendants. A trust was thus reposed by the State, for the benefit of the public. Its object was to introduce a new and better mode of transportation upon the principal river of the State. Of the means to execute it, the trustee is the constituted

judge. In carrying out this important trust, he is entitled to the aids of the court.

As to the import of the *proviso*, it is only necessary now to say that, when the public or any individual shall make complaint of any non-fulfilment, or of injury, I trust to meet it satisfactorily. The defendants' land, for the erection of a dam, was taken, and lawfully taken, under the charter. It has added greatly to the facilities of navigation.

It is competent for the Legislature to regulate any of the public rights, or grant them to an individual. The use of this river for navigation, though above tide waters, belongs to the public.

The right of the channel, made by the plaintiff, belongs to him. The use of it must be under the direction of one mind only, in order to prevent collision. Should the defendants attempt to obstruct the channel, can it be doubted that the court would enjoin them?

The time allowed for making the required improvements extends through the twenty years. Individuals, therefore, cannot object that they are not yet all completed.

The charter is in force till annulled on *quo warranto.* When that shall be done, I will yield a cheerful obedience to the mandate.

As to the jurisdiction, the authorities and the elementary books concur in determining, that in such cases, injunctions may be issued, till trial upon the merits may be had. Possession under a statute is equivalent to ancient possession. A statute right has all the force of an ancient right. 18 Eng. Ch. R. 298, before cited.

Shepley, C. J., orally. — There are certain facts in this case about which there is no controversy. An Act was passed by the Legislature of this State, approved July 30th, 1846, entitled "An Act to promote the improvement of the navigation of the Penobscot river," granting to certain persons, whose rights the present complainant has, on certain conditions, the exclusive right to navigate a portion of the Penobscot river, above tide waters, for a certain time.

Before July, 1846, that river had long been used for the running of logs, rafts, boats, &c., and had become for such purposes a public river; but the portion of it described in the Act had never been navigated by steamboats of any description, nor in any way by steam power. The complainant and his associates had expended some money, and performed certain labor on that part of the river, for the purpose of opening a passage for steamboats. During the year 1848, the complainant run steamboats on that part of the river where the navigation was not obstructed by ice, or prevented by the low state of the water, with the exception of a mile or two of railway, made by him, within the limits mentioned in the Act. And the steamboat of the respondent, Veazie, has, since that time, under his direction, and with a knowledge of the facts, navigated that portion of the river.

The complainant contends that the Act is in force; that he has complied with its conditions, and is entitled to the exclusive privilege; that the respondents have unlawfully and injuriously interfered with his rights; and that he is entitled to an injunction, to restrain them from further interference, until the final hearing of the bill.

It is said on the part of the respondents that the Act is unconstitutional and void. In this preliminary proceeding, the court do not intend to decide the question of the constitutionality of the law conclusively. To some extent that question must arise here. If, on an inspection of the Act, the court should perceive that it is doubtful whether the Legislature have the constitutional power to grant the right claimed, no injunction would be granted. But if, on inspection of the Act, nothing appears against its constitutionality, the court would not decline on that ground to issue the injunction. The state of facts may, perhaps, be different on the final hearing from what they now appear by the affidavits; and the court intend to say only, that *prima facie* the Act does not appear to be unconstitutional. It is said in Daniel's Ch. Pr., referring to 2 Bland, 461, that the object of an injunction is to keep things as they were before the interference, until the final de-

cision; but those remarks were not intended to have an application to the state of things like those existing in the present case. Improvements were to be made, and, of course, alterations.

It has been urged, for the respondents, that the riparian owners have all the interests in the waters of the river not acquired by usage, and that this is an individual, and not a public, right; and that, therefore, the Legislature have granted what belongs to individuals, and not to the State. Where the right is common to all the community, the Legislature have the power, as agents of the whole, to regulate the navigation of the river. As there is no mode by which the individuals, constituting the whole community, can do it, the Legislature may do it for them.

This is no new doctrine. In Hale's treatise *De Jure Maris*, a work generally approved, c. 2, prop. 3, in discussing the prerogative in fresh water rivers, the law is thus stated; that "another part of the jurisdiction is to reform and punish nuisances, to reform annoyances and obstructions to the general right, &c., not in reference to the propriety of the river, but of its public use." The court are not aware that this doctrine has been denied in any State. The legislation has been, in many cases, in accordance with it. The Legislature of this State, by an Act, authorized the changing of the circuitous channel of the Saco river, by a canal, to a direct course. The action of *Spring* v. *Russell*, (7 Greenl. 273,) for an injury sustained by the plaintiff in running his logs, in consequence of the change in the channel of the river authorized by the Act, was founded on the principle contended for in the defence in this case. The court decided that the Act was constitutional, and that the plaintiff had no remedy, but under the provisions of the act. A similar course of legislation has been pursued in New Hampshire, Massachusetts and Connecticut, respecting the navigation of the Connecticut and Merrimac rivers, by authorizing the erection of dams, locks and improvements.

But it is contended, for the respondents, that if the Act is

constitutional, that the complainant has not brought himself within its provisions, so as to be entitled to an exclusive right of steamboat navigation in that part of the river. The statute, approved July 30th, 1846, c. 361, is entitled "An act to promote the improvement of the navigation of the Penobscot river." The fourth section grants to William Moor and Daniel Moor, Jr., and their associates and assigns, "the sole right of navigating said river by boats propelled by steam, from said Oldtown as far up as they shall render the same navigable," "for the term of twenty years from and after the completion of the improvement, as provided in the third section of this Act," on certain conditions. That section contains three conditions. 1. To "improve the navigation of said river from Oldtown to Piscataquis falls, and from Piscataquis falls to the foot of the Five Island Rips." 2. To "build and run over said route a steamboat." 3. "And shall within said seven years build a canal and lock round said falls, or a rail road to connect the route above with the route below said falls." The first inquiry is, what is the meaning of the word *improve?* It is not defined in the Act. The first section authorizes certain things to be done, but does not require that they shall be done. What did the Legislature intend should be done by way of improvement? One engineer, employed by the respondents, tells what ought to be done and how much it would cost. Another engineer, employed by the complainant, proposes a different mode. And a witness, in his affidavit, says, that the river was navigable for a steamboat before any thing was done. And if several different persons should examine with the view of determining what should be done, and how, there is little probability that they would agree. Some Acts have described in what manner it shall be determined, when the conditions have been complied with; and in such case the grant could not take effect, until the evidence of performance appeared in the manner prescribed. In this Act there is no mode to be found by which this question is to be determined. The court, therefore, can ascertain whether the conditions have been performed only by looking

at the object the Legislature had in view. The great and leading object manifestly was to introduce navigation by steam power on that part of the river, where it did not before exist, and to give certain advantages, to encourage its introduction. That appears to have been the main and the controlling purpose. Now, it is an undisputed fact that steamboats were built by the complainant and actually went upon the route, described in the act, for a year or more. The court consider that the actual running of the boats by the complainant on the route described in the Act, as the best proof of the performance of the prescribed conditions.

But it is alleged, and it may be that it is so, that the Legislature intended to have steamboats of more power, and affording greater facilities. But this question is not to be tried by an individual. If one can do it, another may, and there might be constant litigation, and the verdicts might be various. If the Legislature decrees that the object has not been accomplished, and that the contract has not been properly performed, they may direct it to be tried in the proper manner; and that decision will be conclusive. And such are the uniform decisions of the courts on this subject.

The next inquiry is, when did the exclusive privilege for twenty years commence? It has been said for the respondents, that the exclusive right did not attach until every thing contemplated by the Act had been fully completed; and that all this has not yet been done. For instance, that there was to be no exclusive privilege until the rail road or the canal had been fully completed. A part of the clause in the Act, taken alone, would seem to favor such construction. But the whole statute is to be taken into consideration in giving a construction to particular words of it. It could hardly be supposed to have been the intention of the Legislature, that the grantees were to be subject to competition, when feeble and struggling to carry the whole design into complete execution in all its parts, and to be free from it, and to have no competition when they became strong; nor that the grantees, by delaying the full completion, should extend their exclusive

right forward to a time when more business might be expected on the river. If the words, *to continue*, were inserted before the words *for twenty years*, it would seem to remove any doubt. But, admitting this construction to be incorrect, the exclusive right would commence when the river had been so improved that it was actually navigated by steam power, and when the required rail road had been built and used. It is said that the rail road is an insufficient and unsuitable one. If this be so, it is to be settled by the Legislature, if they think proper, by directing proceedings to vacate the charter.

Has the complainant acquired such right, and placed himself in such situation, as to require the interposition of the court to protect him by way of injunction? It is said, that before an injunction can be granted, the complainant should have had his right determined at law, or have shown it to have been of long continued existence and exercise. In certain cases this is correct. If the complainant relies on a private grant, and there is a denial of the right claimed, he must first establish his claim at law. But in those cases, where there has been a long continued and uninterrupted possession and enjoyment of the right, an injunction may issue, without a trial at law. Where a State has the right to make the grant, and it has been made, and the required conditions have been performed, it has been held to be equivalent to a determination at law, that the right exists. Unless it be a matter of doubt whether the act complained of is a nuisance, the only object of a trial at law would be to test the constitutionality of the grant from the State. In the case cited, *Croton Turnpike Co.* v. *Ryder*, 1 Johns. Ch. 610, the Chancellor says, it is sufficient that the party is in possession of a statute privilege, unless the right to make the grant is a matter of doubt. In the present case, it has already been said, that the constitutionality of the Act, for the purposes of this hearing, is not to be considered as a matter of doubt; and the decisions seem to be uniform, that the Legislature have the right to regulate the navigation on fresh water rivers. The remark, however, is not intended to be so general as to include the great rivers passing through different

States. The cases cited for the respondent, such as *Ingraham* v. *Dunnell*, (5 Metc. 118,) in Massachusetts, and *Porter* v. *Witham*, in this State, (17 Maine, 292,) say, that the court should not proceed to an injunction in doubtful cases. The principle to be derived from the authorities seems to be this. Where the statute right does not appear to be in doubt, and the act complained of is clearly a violation of it, the power of injunction may be properly exercised; but where there is doubt as to the statute right, or it is uncertain whether the acts complained of amount to a nuisance, an injunction should not be decreed until the rights become ascertained at law. And it has been holden, that where the acts complained of are or may be destructive of the rights of the complainant, an injunction may be granted.

It is contended, in behalf of the respondents, that the dam on the western side of the river is not necessary, and that the object of the complainant in placing it there was not to improve the navigation of the river, but to prevent boats, rafts, and scows, from passing up the river; and thereby to increase his own profits. [Here a reference was made to some of the affidavits, and a portion of the testimony was stated.] If one of the respondents was the riparian proprietor of the land where the dam was erected, the Act gives compensation for any land taken, and it is not apparent in what respect that fact can change the rights of the parties. It is stated in one or more affidavits, that a workman who had been in the employment of the complainant in building the dam, said it was erected to prevent the existing navigation, and to introduce the mode by steam power. The declarations of workmen employed, cannot bind the employer, if made without authority. An engineer of high reputation has examined that part of the river, at the request of the respondents, and gives his opinion that this dam is wholly unnecessary. Another engineer states, that he was employed by the complainant to determine and direct the best mode of improving the river there, and that he directed the building of that dam, and that the complainant unwillingly assented to it. This engineer

still thinks it necessary. It is said that the dam did not have the effect intended, and that on that account the rail road was built further up than it was first intended. If the grantee of the privilege acts in good faith in his attempts to accomplish the object of it, and to perform the stipulated conditions, the law will not permit any individual to destroy the works thus erected, and make himself the judge of their necessity. And while the contemplated works remain incomplete, it may not be easy to say with certainty whether they will be necessary or not. The destruction of the works erected by advice of one engineer cannot be authorized, because one or more other engineers esteem them useless. It is also said that the dam is made between the head and the foot of the falls, when it was required that the canal or rail road should be made round the falls. If the dam there was properly placed to facilitate the rising of the falls, it cannot be said to be unnecessary. Although the complainant, by the Act, is required to build a canal or rail road around the falls, yet he is authorized by it to improve the navigation of the river between the foot and the head of the falls, as well as in other places; and he may, if it be practicable, so improve the falls as to enable him to ascend them a part of the distance by means of steam power, and the rest of it by rail road or canal.

The inquiry then will arise, whether the respondents have committed the acts complained of, and which are alleged to be destructive of the rights of the complainant, granted him by the Legislature. It seems to be fully proved, and, indeed, is undisputed, that one of the respondents, under whom the others act, has built a boat propelled by steam power, and has run it on this same route, in some places in the very channel cleared by the complainant, and has done the same kind of business. This must necessarily be injurious, if not destructive, to the interest of the complainant under the legislative grant. The interference of the respondents is clearly shown or admitted.

The court have jurisdiction; the right of the complainant, under the legislative grant, is not considered, for the purpose

of this hearing, as being doubtful; and the interference with it by the respondents is shown. Is it then the duty of the court to grant the injunction? The power to grant it should not be exercised where there is an adequate remedy at law. The inquiry then is, if the complainant should eventually prevail, has he such remedy? It is apparent, that if there be competition, there is no adequate mode of measuring the damages. There must be loss of business by the complainant, and there would be continual lawsuits. The respondents may reduce the compensation in such manner as to afford no profits to any one. Again, it must be remembered that there have been cases where a person has done business for nothing, for the sole purpose of driving the owner off from the route; and it is possible that it might be so done here. On the other hand, the consequence may be, that the boat of the defendants may become worthless, while the case is pending. But the court cannot shrink from performing its duty on that account. The respondent knew that the complainant's boats had run before he built his. The respondent knew the facts, and is presumed to know the law. One of the parties must suffer loss. The one who acts under the authority of the Legislature must not be selected to suffer, under such circumstances.

In view of the whole case, it is the unanimous opinion of the court, that the injunction must be granted.

NOTE. — The foregoing abstract of the points settled, and also the opinion of the court, were drawn up by HON. JOHN SHEPLEY of Saco.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF KENNEBEC,

1850.

Inhabitants of School-District No. Four, in Winthrop, *versus* Benson *& als.*

A possession of land, open, notorious, adverse and exclusive, indicates a claim of right, and will constitute a disseizin, unless controlled or explained by other testimony.

Such a possession continued for twenty years, uncontrolled or explained by testimony, is as effectual to pass the title as a deed would be.

A disseizor may surrender his possession to the disseizee, at any time before his disseizin has ripened into a title, and thus put an end to his claim.

When the title has been perfected by a disseizin, so long continued as to take away the right of entry, and bar an action for the land, that title cannot be devested by a parol abandonment or relinquishment.

Writ of entry. There was evidence tending to prove that the land formerly belonged to the ancestor of the defendants; and that the plaintiffs had occupied a portion, or the whole of it for more than forty years, for a school-house, woodshed and woodyard. It was proved, that a wooden school-house was erected there by the plaintiffs in 1802; it was taken down and a brick school-house was built in 1818 on the lot, near the site of the wooden one. A woodshed was placed near the brick school-house in 1824. In 1847, one Samuel Wood was the school agent. He was called by

the defendants as a witness, and testified that he procured the woodshed to be removed in the spring of 1847 from the north-westerly end of the school-house to the back side of the school-house at the other end; that he found the building must be removed; that it had been on another man's land on sufferance; that the defendants asserted a title, and showed it to him, and required the building to be removed; that he became satisfied the district had no title to the land, and that he removed the building for that reason. That the expense of removing it was $25, which was paid by the town, out of the money assigned to that district.

The plaintiffs objected to said Wood's testimony as not legally admissible, but the objection was overruled. It appeared, from the records of the district, that in June, 1847, soon after the removal of the shed, they had a meeting and took action for sustaining whatever claim they had to the land.

The defendants in their argument, contended that if, in 1847, the agent of the school-district, at the request of the defendants, removed the woodhouse to its present location, intending to relinquish and give up the land, and the district had subsequently ratified his acts by their conduct or otherwise, of which they were the judges; then such abandonment, notwithstanding the district might before that time have had an open, adverse, exclusive and notorious possession of the land, or some part of it, for more than twenty years, would operate an abandonment of their possession and a surrender of their claim to the former owners thereof, and the plaintiffs could not recover in this suit. The court, in opposition to the argument of the plaintiffs' counsel, gave such instructions.

The verdict was for the defendants, and the plaintiffs excepted.

May, for the plaintiffs.

An open, notorious, adverse and exclusive possession of another person's land, constitutes a disseizin. Such disseizin, continued uninterruptedly twenty years, becomes of itself a

perfect title, as good as any deed could make. One who has acquired such a title can be devested of it only by the mode in which he could be devested of a perfect title acquired by deed. 1 Greenl. Ev. Part 1, § 17.

Wood, the school agent, had no authority to dispose of lands, which the district, in any legal mode, had acquired. He was the agent, not of the district, but of the town. He was chosen by the town. As soon as his doings had become known, the district repudiated them, and did all in their power to regain possession. The instructions presented to the jury the question of ratification, by the district, of the doings of Wood. There was no evidence which called for such instructions, or could justify them.

But, apart from any thing relating to ratification, the instructions were wrong. 14 Pick. 106; 7 Metc. 94; *Hurd* v. *Curtis*, 7 Metc. 97; *Williams* v. *Nelson*, 23 Pick. 141; *White* v. *Crawford*, 10 Mass. 183.

Legal rights once vested must be legally devested; but equitable rights may be lost by abandonment. *Pickett* v. *Dowdall*, 2 Wash. 106.

Evans, for the defendants.

The acts of the school agent, in removing the woodshed, are binding on the district, especially after their ratification by paying the bills of expense. If the district could not surrender, except by a corporate act, neither could they disseize but in the same way. They never voted to disseize; all the acts of occupation were but the acts of unauthorized individuals. Disseizin is trespass. Did the district trespass? The individuals who put the buildings there, could remove them.

Rev. Stat. c. 17, § 40, gives school agents the custody of school-houses, with the right to repair.

But, if the plaintiffs' title had been perfected by a disseizin, they might waive it, as one might waive a forfeiture. They are not compellable to set it up; they may retire and leave.

The gentleman mistook when asserting that there was no evidence of ratification by the district. Their payment of

the expenses, incurred in removing the shed, was a ratification. A title by disseizin is not an absolute one, though it may be perfected at the election of a disseizor. Waiver or abandonment is to be regarded as evidence, that the possession was not adverse.

WELLS, J. — The jury were instructed, that if, in 1847, the agent of the school-district, at the request of the defendants, removed said woodhouse where it now is, intending to relinquish and give up the land, and the district had subsequently ratified his acts by their conduct or otherwise, of which they were the judges, then such abandonment, notwithstanding the district might before that time have had an open, adverse, exclusive and notorious possession of the land, or some part of it, for more than twenty years, would operate an abandonment of their possession, and a surrender of their claim to the former owners thereof, and the plaintiffs could not recover the said land in this suit.

It is true, that a mere possession of land of itself does not necessarily imply a claim of right. The tenant may hold in subjection to the lawful owner, not intending to deny his right or to assert a dominion over the fee. But the terms open, notorious, adverse and exclusive, when applied to the mode in which one holds lands, must be understood as indicating a claim of right. They constitute an appropriate definition of a disseizin, and the acts which they describe, will have that effect if not controlled or explained by other testimony. *Little* v. *Libbey*, 2 Greenl. 242; *The Proprietors of Kennebec Purchase* v. *John Springer*, 4 Mass. 416. An adverse possession entirely excludes the idea of a holding by consent.

If the plaintiffs have held the premises by a continued disseizin for twenty years, the right of entry by the defendants is taken away, and any action by them to recover the same, is barred by limitation. Stat. c. 147, § 1.

A legal title is equally valid when once acquired, whether it be by a disseizin or by deed, it vests the fee simple although

the modes of proof when adduced to establish it may differ. Nor is a judgment at law necessary to perfect a title by disseizin any more than one by deed. In either case, when the title is in controversy, it is to be shown by legal proof, and a continued disseizin for twenty years is as effectual for that purpose as a deed duly executed. The title is created by the existence of the facts, and not by the exhibition of them in evidence.

An open, notorious, exclusive and adverse possession for twenty years, would operate to convey a complete title to the plaintiffs, as much so as any written conveyance. And such title is not only an interest in the land, but it is one of the highest character, the absolute dominion over it, and the appropriate mode of conveying it is by deed.

No doubt a disseizor may abandon the land, or surrender his possession by parol, to the disseizee, at any time before his disseizin has ripened into a title, and thus put an entire end to his claim. His declarations are admissible in evidence to show the character of his seizin, whether he holds adversely or in subordination to the legal title. But the title, obtained by a disseizin so long continued as to take away the right of entry, and bar an action for the land by limitation, cannot be conveyed by a parol abandonment or relinquishment, it must be transferred by deed. One, having such title, may go out of possession, declaring he abandons it to the former owner, and intending never again to make any claim to the land, and so may the person who holds an undisputed title by deed; but the law does not preclude them from reclaiming what they have abandoned in a manner not legally binding upon them. A parol conveyance of lands creates nothing more than an estate or lease at will. Stat. c. 91, § 30.

The exceptions are sustained and a new trial granted.

STATE *versus* RIPLEY *& als.*

A conspiracy unlawfully to do an injury to the person of an individual, or to do any unlawful act, injurious to the administration of public justice, is a statute offence.

No overt act is necessary to make up the crime.

Acts may be evidence of the combination. For any other purpose, they need not be set forth or proved.

At the common law, when the conspiracy is to do an act, which, if done, would be an offence, known and acknowledged, the nature of which is well understood by the name, which designates it, it is unnecessary to set out the means, by which the crime was to be accomplished.

EXCEPTIONS from the District Court, RICE, J.

Indictment, charging that the five defendants, being evil disposed persons, and wickedly devising and intending one Henry K. Baker, in his person to injure, then and there did unlawfully conspire, confederate and agree together, with the malicious intent, the said Henry K. Baker, wrongfully and wickedly to injure in his said person as aforesaid, against the peace of the said State of Maine, and contrary to the form of the statute.

Also that the defendants, being evil disposed persons, and wickedly devising and intending to do a certain illegal act, injurious to the administration of public justice, to wit, to assault, beat, abuse, wound and ill treat one Henry K. Baker, in order to hinder and prevent said Henry K. Baker, one of the justices of the peace, within and for said county of Kennebec, from the performance and discharge of his duties in his office aforesaid, did unlawfully conspire, confederate and agree together, with the malicious intent, wrongfully and wickedly to do a certain illegal act, injurious to the administration of public justice, to wit, to assault, beat, abuse, wound and ill treat said Henry K. Baker, in order to hinder and prevent said Henry K. Baker, one of the justices of the peace, within and for said county of Kennebec, from the performance and discharge of his duties in his office aforesaid, against the peace and dignity of said State of Maine, and contrary to the form of the statute.

A general verdict of guilty was returned upon both counts.

The defendants contended, that the indictment was bad, viz: — that the first count was bad and insufficient: —

Because it does not specifically and minutely describe and set forth the illegal act complained of, or supposed to be the purpose of the conspiracy: —

Because it does not specifically describe and set forth a conspiracy to do any act, by name, which indicates a crime in law, and does not particularly set forth the means intended to be employed, and how those means were illegal and criminal: and because said first count does not set forth specifically the object, purpose and intention of the alleged conspiracy, and show in what manner the object was to be effected and that that object and those means constituted a legal crime.

In regard to the second count, the defendants contended, that it was defective, insufficient and bad: —

Because it does not specifically charge and fully set forth the purpose and object of the conspiracy, whether the conspiracy charged was to do an illegal act, or to injure the administration of public justice: —

Because it does not charge, that the conspiracy was to do an illegal or criminal act, in and of itself, and does no specify and set forth the object or intended act of conspiracy; and does not set forth the means, and in what manner such means would effect the object and purpose of said conspiracy: —

Because it does not charge or set forth, that said H. K. Baker was a magistrate, duly qualified to administer justice, nor that said Baker was in the act of administering justice, or was in the act of performing his duties as a magistrate, nor that he had even performed or contemplated, or had undertaken to perform any act, by virtue of the office of a magistrate of this county: —

Because it does not set forth how, and in what manner, the said acts would affect the administration of public justice.

But the presiding Judge overruled the objections.

Bronson and *Morrill*, for the defendants.

1. The first count is defective, in that it does not set forth

what kind of injury to the person of Baker was intended, or by what means it was to be accomplished.

2. The second count charges two distinct crimes, one to injure Baker, the other to defeat the administration of public justice.

It is also defective because it does not set forth the means to be used, or how those means, if used, could defeat the administration of justice.

It does not specify what duties of a public character, Baker was authorized or required to perform, or that he was in any act or in preparation for performing any act of such a character.

Vose, County Att'y, for the State.

TENNEY, J. — The Revised Statutes, chap. 161, sect. 11, define the crime of conspiracy, both in the purposes designed to be promoted, and the combination essential to effect them. Of the former is an injury to the person of another individual, and to do any illegal act, injurious to the administration of public justice. The latter consists in any two or more persons conspiring, confederating and agreeing together, with the fraudulent or malicious intent, wrongfully and wickedly to effect those purposes. No overt act, in carrying out the designs of those, who have conspired, confederated and agreed together for such object, is necessary, to make up the crime; it may be fully complete without it. This may be one mode of showing the criminal confederacy and agreement. It is often, that the intentions of a wrongdoer are ascertained entirely by acts done, which are the natural effects of unlawful designs; the acts and circumstances which accompany them, showing the connection between the acts, and the motives which produced them, are generally the most convincing evidence which can be adduced. The conspiracy is the gist of the indictment, and though nothing be done in prosecution of it, it is a complete and consummate offence, of itself. 1 Salk. 174.

It is not necessary that an indictment should contain allega-

tions of more than it is essential to prove, in order to present the crime intended to be charged; and the acts, which are not otherwise material, than as indicating the unlawful agreement and design, may well be omitted.

In an indictment for a conspiracy at common law, if the conspiracy charged, is an unlawful combination and agreement of two or more persons to commit a deed, which if done would be an offence, well known and acknowledged, the nature of which is perfectly understood by the name by which it is designated, no further description of the crime is required.

It is equally unnecessary to set out the means, by which the unlawful act was intended to be accomplished. It is only when the conspiracy is to promote a purpose not criminal or unlawful in itself, but when that purpose is to be effected by means, which are criminal or unlawful, that those means should be specifically stated in the indictment. The reason for this distinction is very obvious. If the conspiracy is to do an act, which if done would be criminal, the offence is perfect, without reference to the means to be used, and it is necessary that this criminal purpose should be so specifically alleged as to be well understood. If the conspiracy consists in the unlawful means to be employed, according to well established rules of pleading, those means, which are relied upon as giving the wrongful agreement a criminal character, should be specifically stated, although not the object of the combination, but merely the instrument promotive of it.

These general principles are well settled. *State* v. *Bartlett & al.* 30 Maine, 132, and cases referred to.

The indictment in this case consists of two counts. The first charges, that the defendants being evil disposed persons, and wickedly devising and intending one Henry K. Baker, in his person to injure, did unlawfully conspire, confederate and agree together, with the malicious intent, the said Henry K. Baker wrongfully and wickedly to injure in his said person, &c. The second count alleges that they unlawfully conspired, confederated and agreed together, with the malicious intent,

wrongfully and wickedly to do a certain illegal act, injurious to the administration of public justice, to wit: to assault, beat, abuse, wound and ill treat said Henry K. Baker, in order to hinder and prevent the said Henry K. Baker from the performance of his duty in the office aforesaid.

At the argument, the objections made at the trial and relied upon, are that the means by which an injury was to be done to the person of Baker, were not stated in the first count; and in the second count, that there is no allegation, in what manner the illegal act would be injurious to the administration of public justice, and that there is not set forth the particular duties of Baker, which they designed to defeat and hinder.

The purpose of the defendants, as alleged in the first count in the indictment, was to do an injury to the person of Baker; this purpose, if designed to be accomplished in the manner charged, was criminal by the statute, and it was of no importance by what means it was to be effected. Suppose A and B are overheard in conversation, and it is agreed between them, in the manner alleged in the indictment, that they will inflict an injury upon the person of C, and when one is inquired of by the other, what means shall be used to carry out the object, it is answered, that it will be better to suspend that, to be determined at a future time, or to be according to the circumstances, which may occur, when they design to meet the party to be injured, and such is the agreement between them, and they separate. Immediately the case is laid before the grand jury, could it be said with any propriety, that the case upon these facts was not one, which meets the statute definition of a conspiracy? The facts supposed show, that the number of persons necessary to form a conspiracy had conspired, confederated and agreed together, with the malicious intent, wrongfully and wickedly to injure the person of C. The means cannot be charged, for they have not been agreed upon, and the statute does not require, that they should be specifically designed as a necessary ingredient in the crime,

The objections to the second count are equally without

foundation. The charge is substantially an unlawful combination to do a certain illegal act, injurious to the administration of public justice, by committing an assault and battery upon a judicial officer, in order to prevent him from the performance of his appropriate official duties. In what particular manner, it was supposed public justice would fail to be administered, if the act alleged to be agreed upon was done, is not material, whether by inflicting such an injury as to physically prevent the justice from the discharge of his duty as a magistrate, or to intimidate him, so that he would be induced to abandon the course, which he had before intended to pursue. The conspirators might not have formed either in common or individually any conception, how the great purpose of the agreement should be carried into effect. It is equally unimportant as an element in the crime, intended to be charged, that the defendants settled by their agreements, or in their own minds, what acts of Baker, they supposed he designed or was about to perform; in this, they may have entertained no definite opinion. It was not necessary, that they should have supposed, he was expecting himself, or was expected by others to do any act, in the administration of public justice; if they designed to commit the assault and battery, and unlawfully confederated for that purpose with the belief, that it would hinder the administration of public justice, but it was not known or comprehended precisely in what mode, the object would be attained, the crime would be sufficiently alleged. They might wish to commit the assault and battery upon one, whom they supposed was a justice of the peace, by way of experiment, that it might in some manner, of which they had no definite idea, effect their purposes.

If the defendants formed the conspiracy, to commit the assault and battery upon Baker, for the object alleged, it is not material, that it should appear, that he was qualified and authorized to act in a judicial capacity. If the agreement meets the requirement of the statute, and the purpose designed is sufficient to constitute the offence, it is of no consequence, that they were so mistaken in some of the opinions, that if they

had known all the facts, as they existed, the agreement would not have been made. It is not essential to the crime, that their purposes entertained, should fail of completion, by means of their entertaining an erroneons belief touching the facts that they supposed were material. *Exceptions overruled.*

WILLIAMS *versus* THURLOW.

A real action upon a mortgage cannot be sustained, after the debt, secured by it, has been paid.

Where the amount of a note has been lodged by a debtor in the hands of a third person, upon a stipulation by him that he would therewith pay the note, and he afterwards purchases the note, the transaction constitutes a payment of the note.

And it is equally a payment, whether the said amount had been received by such purchaser in cash or in real estate at a stipulated price.

One holding under a warranty deed from a mortgager, has a right, in a suit against him by the mortgagee, to prove the payment made by the mortgager, by which the land was relieved from the mortgage.

WRIT OF ENTRY upon a mortgage. The demandant read the mortgage in evidence. The tenant relied upon the following facts, which he offered to prove, viz : —

Pitts and Bridge had contracted to sell a lot of land to Adam Johnson. Before he received the conveyance, Johnson gave to the tenant a warranty deed of a *part* of the lot. Soon afterwards, Johnson took the conveyance from Pitts and Bridge, paid a part of the consideration and, to secure the residue, gave to Pitts the mortgage now in suit. A few years later, Johnson conveyed the residue part of the land to one Merrow, upon a verbal stipulation, that Merrow should pay the mortgage notes. The demandant purchased of Merrow the said residue part of the lot, and agreed verbally that, as a consideration therefor, he would pay up the mortgage note given to Pitts, and cause the mortgage to be discharged. Afterwards, instead of paying the notes, and causing the mortgage to be discharged, he purchased the notes and took an assignment of

the mortgage running to himself, and brought this action upon the mortgage.

The Judge rejected the evidence, and a default was entered, which was, by agreement, to be stricken off, if the evidence was excluded improperly.

Paine, for the tenant.

The mortgage note was paid. The demandant retained in his own hands money, which belonged to the maker of the note, and which was lodged with him for the purpose, and upon his contract, to pay it. The maker of a note had a fund in the hands of Merrow, and Merrow placed it in the hands of the demandant, to pay the note with. Equity will regard the mortgage discharged, as it respects the first purchaser. *Cushing* v. *Ayer*, 25 Maine, 383.

Courts of law, in dealing with mortgages, are governed by the rules adopted by courts of equity. *Hatch* v. *Kimball*, 16 Maine, 146; *Collins* v. *Torrey*, 7 Johns. 278; *Wade* v. *Howard*, 6 Pick. 492; *Kimby* v. *Hill*, 4 Watts & Serg. 426; *Perkins* v. *Dibble*, 10 Ohio, 433.

The tenant can call upon Johnson for indemnity upon his covenants. He is therefore subrogated to Johnson's rights.

No legal principle is violated by allowing the defence.

The evidence offered, though it be oral, is not inadmissible on that ground.

The acknowledgment of the receipt of the consideration, contained in the deed to the plaintiff, does not estop the defendant from knowing that he retained the purchase money in his hands. *Schillinger* v. *McCann*, 6 Maine, 364; *Burbank* v. *Gould*, 15 Maine, 118; *Emmons* v. *Littlefield*, 13 Maine, 233.

The evidence offered would have established fraud; such fraud as would defeat the plaintiff's title.

Evans, for the demandant.

Would the evidence offered defeat the action? This is a suit *at law* to sustain a *legal* title. This seems decisive of the case. All the cases cited are at equity. The grantor of

the tenant was the mortgager. The statute takes care of the mortgager's rights. They are at equity. There is no case, which authorizes him to stand out against the legal title. Such would confound all distinctions, and all practice in the courts.

The testimony offered is, that the demandant agreed, by parol, to discharge the mortgage for the use of the tenant. Is not that the very sort of evidence which the statute forbids? Parol evidence might as well prove that the demandant agreed to buy in a mortgage. It is flat and plain against the statute.

The tenant has no claim which he can vindicate *at law*. Can one having a *legal* title, say "you hold a trust for me; I paid you money?" Why are equity powers given, except to supply such defects?

The gentleman says, "fraud." At most there was but a breach of trust, and parol proof was not admissible. 3 Metc. 556. But if fraud, the tenant's resort is to equity. In some cases, to some extent, law may relieve, where there are no courts of equity. Not where, as here, an appropriate tribunal is provided. At equity, notice of the defence must be given. At law, we could not anticipate it.

TENNEY, J. — Is it your meaning, that payment cannot be proved by parol?

Evans. — No, the evidence only proved that we had paid *nothing;* had merely omitted to pay. The rule is, that a mortgagee, buying in the equity of redeeming, may elect to have the mortgage upheld. The tenant has sufficient remedies in another forum, where we should have the benefit of all equities.

WELLS, J. — If the mortgage, under which the demandant claims to recover, has been paid, he is not entitled to the conditional judgment, and by statute chap. 125, sect. 10, judgment must be rendered for the tenant, and he will hold the land discharged of the mortgage.

The tenant offered to prove that Johnson, the mortgager,

procured Merrow, his grantee, to convey to the demandant, eighty-five acres of the land embraced in the mortgage, and that the demandant agreed, as a part of the consideration of the conveyance, to pay the mortgage to Pitts. But instead of paying it, and having it discharged, he took an assignment of it to himself.

A part of the price of the land remaining with the demandant, for the specific purpose of paying the mortgage, must be considered as so much money in his hands. If he had then owned the mortgage, it might have been directly paid by the conveyance of the land, upon an agreement to that effect. After he took the assignment, he was the only person to whom payment of the mortgage could be made. He united in himself the person, who should make the payment, and who should receive it. The money was left in his hands to pay the mortgage, and remained there when he took the assignment. After that event, he held the mortgage and the money appropriated to its payment. It would have been an unnecessary ceremony for Johnson to have taken the money from the demandant, and then handed it back to him again. Under such circumstances, the mortgage must be considered as paid.

The tenant claiming under Johnson by deed of warranty, the title, which Johnson obtained from Pitts, subsequent to Johnson's deed to the tenant, enured to him in the demanded premises, and conferred upon him the legal right of presenting in defence, the payment made by Johnson, by which his estate is relieved from the mortgage, that Johnson was bound to discharge.

The default is to be taken off,
and the action stand for trial.

STATE *versus* HEWETT *& al.*

In an indictment for a conspiracy, if the means, by which the alleged purpose was to be accomplished, be not set out, the purpose itself should appear to have been unequivocally illegal and forbidden by law.

It is not enough, that it sufficiently describe the crime attempted to be charged; it should also state the facts necessary to constitute the offence.

Where such facts are not stated, the indictment does not sufficiently charge any offence at the common law.

To conspire to "injure the property" of an individual, is a crime against the statute.

By the "injury to property" thus prohibited, is meant an injury to the property *in rem*, by which it is destroyed, or its value diminished. A conspiracy to deprive another of his property by cheating and defrauding, and *thereby* to cause an injury, is not within the prohibition of the statute, although by such fraud, the general amount of his estate would be diminished.

INDICTMENT charging, that the defendants "devising and intending one Owen Lawrence to injure and defraud, did unlawfully conspire, combine, confederate and agree together the said Owen Lawrence to injure, cheat and defraud of a certain horse, the property of the said Owen Lawrence, of the value of one hundred dollars, against the peace and dignity of the State.

There was testimony tending to show conspiracies by the defendants to obtain fraudulently from Lawrence two horses, at successive periods. The county attorney was required to elect, and did elect, for which one of the conspiracies the prosecution should proceed. After verdict against the defendants in the District Court, they filed a motion in arrest, upon which that court ruled the indictment to be sufficient, and to that ruling exceptions were filed.

May, for the defendants. The indictment is bad: —

1. It does not set forth any conspiracy to do an unlawful act.

2. It does not set forth the means which were to be used to accomplish the purpose.

3. It does not allege, that the means intended to be used were unlawful. *Lambert* v. *People*, 9 Cowen, 578; *People* v. *Echferd*, 7 Cowen, 535; *Commonwealth* v. *Eastman*, 1

Cush. 189; *Commonwealth* v. *Hunt*, 4 Metc. 111; *State* v. *Hewett*, decided in Maine; not reported.

Vose, County Attorney, for the State.

This indictment is, in form, an exact transcript from Davis' Precedents, also from Chitty's Crim. Law. And concise as it is, it is sufficient and valid upon the following authorities: — 8 Mod. 321; 11 Mod. 55; 3 Burr. 1330; 1 Stra. 193; 1 Salk. 174; 8 Mod. 11; 2 Barn. and Ald. 204; *The Queen* v. *Kenrick*, 5 Ad. & Ellis, 49; *King* v. *Parsons*, 1 W. Black. 392; *Queen* v. *Parker*, 3 Ad. & Ellis, 292; *Queen* v. *King*, 7 Ad. & Ellis, 782; *King* v. *Aeiry*, 2 East, 30; 9 Cowen, 578; 3 Serg. & R. 220, *Regina* v. *Mackarty & al.* 2 Ld. Raym. 1179; 2 Burr. 1125; 3 Ld. Raym. 325; *Commonwealth* v. *Ward & al.* 1 Mass. 473.

This form of indictment, has been in common use in this country and in England for more than half a century. The gist of a conspiracy is to effect an unlawful or criminal object, or to effect a lawful object in an unlawful manner. Clearly the object here set forth, was an unlawful one. *Hunt's case*, 4 Metc. 111. The proposed innovation would show all former convictions to have been wrong.

The offence here is sufficiently described, to inform the defendants of what they are charged, and to enable them to make defence.

A verdict in this case, would be a bar to another prosecution for the same offence, for the government was called upon to elect, and did elect, what to rely upon and that has become a part of the record.

The case in 1 Cush. 189, is inapplicable, for the statute of Massachusetts does not, while that of Maine does, make it criminal to conspire for the injury of a person.

Morrill, in reply. — The gentleman says, the statute in Massachusetts, is not like ours. But the offence here charged is not a statute offence; nor is it charged as such.

The case from Cushing shows, that the precedent in Davis' form is bad, and never had much use in Massachusetts. It has never had authority in Maine.

But if it had, the correction of the practice would not invalidate former convictions. Justice to new cases requires the correction.

HOWARD, J. — The indictment contains one count only, and sets forth that the defendants, "being evil disposed persons, and devising and intending one Owen Lawrence to injure and defraud, did unlawfully conspire, combine, confederate, and agree together the said Owen Lawrence to injure, cheat and defraud of a certain horse, the property of the said Owen Lawrence, of great value, to wit, of the value of one hundred dollars, against the peace and dignity of the State aforesaid." The sufficiency of this indictment is called in question, by a motion in arrest of judgment, which was overruled in the District Court, and is now prosecuted on exceptions.

An indictment has been defined to be a plain, brief, and certain narrative of an offence. 2 Hale P. C. 169. And it is a general rule of criminal law, that every indictment must contain a certain description of the crime of which the defendant is accused, and a statement of the necessary facts by which it is constituted. 1 Chitty's Crim. Law, 169. This is essential, and is required for the safety and protection of the defendant, and for the information, and correct action of the court, who are to apply the judgment, and the punishment, prescribed by law.

To constitute an indictable conspiracy at common law, there must have been an unlawful confederacy of two or more persons, to accomplish either an unlawful or criminal purpose, or a purpose not unlawful, by criminal or unlawful means. This indictment assumes to charge a conspiracy to accomplish an unlawful purpose, and falls within the first class of conspiracies mentioned, if it is embraced in either class. The purpose only is stated, but the means by which it was to be effected, are not set forth. The inquiry, then, is whether the purpose, as charged in the indictment, was criminal, or unlawful, at common law, or by statute. Cheating and defrauding

a person of property, though never right, was not necessarily an offence at common law. The transaction might be dishonest and immoral, and still not be unlawful, in the sense in which that term is used in criminal law. Cheating by false pretences, or by false tokens, is an offence at common law, as well as by statute. R. S. ch. 161, § 1. But the case at bar does not fall within that description of offences. There is nothing alleged in the indictment, by which we can determine whether the acts charged constituted any thing more than a private wrong, for which a civil action may lie for damages. In one sense all wrongs are unlawful; they are not approved or justified by law, and if injuries result from them, the law may furnish ample remedies; but to hold that they are therefore offences, unless made such by positive law, would not be consistent with an enlightened system of jurisprudence.

As the means, by which the purpose alleged in this indictment was to be accomplished, are not set forth, the purpose itself should appear to have been unequivocally illegal, and forbidden by law, or the indictment cannot be sustained. It is not enough that it contain a sufficient description of the crime attempted to be charged, but it should also contain a statement of the facts necessary to constitute the offence. The proof of such facts, when not properly averred, cannot aid the indictment, after the verdict. The indictment, therefore, does not charge an offence at common law. East, P. C. ch. 18, § 1, 2; Hawk. B. 1, ch. 71; 2 Russell on Crimes, B. 4, ch. 31, § 1; B. 5, ch. 2, p. 564; *The King* v. *Turner*, 13 East, 228; *The King* v. *Pywell*, 1 Stark. R. 402. In *Lambert* v. *The People*, 9 Cow. 578, this subject was elaborately discussed in the Court of Errors, and the authorities examined with much learning. Subsequently, the same questions were investigated by the Supreme Court of Massachusetts, with great ability and research, in *Commonwealth* v. *Hunt & als.* 4 Metc. 111; and in *Commonwealth* v. *Eastman & als.* 1 Cushing, 189. In each of these cases indictments similar to the present, on the points introduced in this case, were held to be insufficient.

This indictment does not conclude *contra formane statuti* but it may be sustained, "provided such omission do not tend to the prejudice of the defendant." R. S. c. 172, § 38. It is sufficient if it charge a statute offence. Does it charge such offence? The R. S. c. 161, § 11, provide that, if two or more persons shall conspire, confederate and agree together with the fraudulent or malicious intent wrongfully and wickedly to injure the person, character, business or property of another individual, or to do an illegal act, injurious to the public trade, health, morals or police, or to the administration of public justice, or to commit any felony, or crime punishable by imprisonment in the state prison, they shall be deemed guilty of conspiracy." The indictment does not charge a conspiracy with the intent to injure the person, character, business, or property of another, but substantially alleges it to have been with the intent to deprive another of his property, by cheating and defrauding, and thereby to cause an injury. Such injury might tend to lessen the general property of another; and so would an agreement to purchase for less than the value; or to obtain property without paying for it, where no false pretences were used; and yet, such transactions do not constitute crimes, and are not within the prohibition of the statute. The injury to the property of another contemplated by the statute, must be to the property *in rem*, as distinct from an injury to business, or a detriment, causing a diminution of the general amount of property. Such has been the construction of the R. S. c. 25, § 89, in suits for damages, occasioned by defects in highways.

The result of our deliberations is, that this indictment, regarding only what may be considered as substance, and material, does not charge a conspiracy punishable by the common law, or by statute.

This decision renders the consideration of other points raised, and discussed, unnecessary.

The exceptions are sustained,

and the judgment must be arrested.

STATE *versus* PHILBRICK.

An indictment must allege all the material facts, necessary to be proved, to procure a conviction.

Thus, an indictment for obtaining property by false pretences, is defective unless it set forth the sale or exchange, and that the false pretences were made with a view to effect such a sale or exchange, and that by reason thereof, the party was induced to part with his property.

THIS was an indictment which alleged that the defendant, on the first day of January, 1850, intending unlawfully and fraudulently, and by false pretences, to cheat and defraud one Samuel W. Goff, of a certain horse, the property of said Samuel W. Goff, did falsely, knowingly and designedly pretend to the said Samuel W. Goff, that a certain mare, the property of said Benjamin P. Philbrick, which he, the said Benjamin P. Philbrick, proposed to exchange for the horse aforesaid of Samuel W. Goff, was only thirteen years old; that the said Benjamin P. Philbrick had purchased said mare in the fall of 1849, of one Williams or Williamson, for a yoke of two-year old steers and twenty-five dollars, and in order to induce said Samuel W. Goff to exchange his said horse for the mare aforesaid, that he, said Philbrick, would remain in said Sidney, until the next morning, at the house of one William Gardiner, so that said Samuel W. Goff might rescind the bargain. Whereas, in truth and in fact, the said mare was more than twenty years old, and said Benjamin P. Philbrick did not purchase said mare of one Williams or Williamson, as he had represented, nor did said Benjamin P. Philbrick intend to remain in said Sidney, during the night, at the house of one William Gardiner, in order that said Samuel W. Goff might rescind the bargain, provided he should make the exchange aforesaid. And the jurors aforesaid, upon their oaths aforesaid, do further present, that the said Benjamin P. Philbrick by the false pretences aforesaid, did then and there knowingly and designedly obtain from the said Samuel W. Goff, one horse of the value of fifty dollars, with intent then and there to cheat and defraud the said Samuel W. Goff of the same.

The case, on the part of the government was, that the defendant proposed to exchange his mare for the horse of said Goff, and to obtain said horse by exchange, made said representations, and thereby induced Goff to exchange his horse for said mare.

The defendant objected to the sufficiency of the indictment: —

1. That said bargain and exchange is not sufficiently set forth.

2. It does not allege and charge that said Philbrick obtained the horse of said Goff, as to which the false pretences are alleged to have been made.

3. It does not allege and charge, that there was an exchange of horses between said Philbrick and Goff, nor that said Philbrick obtained said Goff's said horse, in exchange for his said mare.

The Judge instructed the jury that the indictment was good and sufficient, and that, if they were satisfied said representations were made to induce the said Goff to exchange his horse for defendant's said mare, and by said representations said Goff was induced to make said exchange, the verdict should be against the defendant.

Bradbury & Morrill, for the defendant.

Vose, for the State.

Shepley, C. J. — The bill of exceptions in this case was probably hastily drawn and allowed. It states, that the case was "that the defendant proposed to exchange his mare for the horse of said Goff, and to obtain said horse by exchange, made said representations, and that thereby said defendant induced said Goff to exchange his said horse for his said mare." The instructions to the jury are stated to have been "that if they were satisfied, said representations were made to induce the said Goff to exchange his horse for defendant's said mare, and by said representations said Goff was induced to make said exchange, the verdict should be against the defendant."

The proof as stated does not show, nor do the instructions require, that the jury should find, that the representations were false, or that the horse was obtained by false representations or pretences.

In the case of the *Commonwealth* v. *Strain*, 10 Metc. 521, the court upon examination of the decided cases came to the conclusion, "that the sale or exchange ought to be set forth in the indictment, and that the false pretences should be alleged to have been made with a view to effect such sale or exchange, and that by reason thereof the party was induced to buy or exchange, as the case may be."

The indictment should allege all the material facts necessary to be proved to procure a conviction. *The People* v. *Gates*, 13 Wend. 311.

The former part of this indictment alleges, that the accused by false pretences intended to cheat and defraud Samuel W. Goff, and proposed an exchange of his mare for the horse of Goff; but there is no averment, that such an exchange was made, or that the false pretences were made with a view or design to effect such an exchange.

The indictment does allege, that by the false pretences aforesaid, the accused did then and there knowingly and designedly obtain one horse of the value of fifty dollars from said Goff, but it does not contain an allegation, that by reason of such false pretences, Goff was induced to exchange his horse for the mare of the accused. The indictment is therefore insufficient.

Exceptions sustained, verdict set aside and indictment quashed.

BROWN *versus* WILLIAMS.

An attachment of land upon mesne processs, creates a lien in favor of the creditor.

A levy of his execution, seasonably made after judgment, has relation to the time of the attachment.

Such proceedings dislodge and defeat all liens and incumbrances, made by the debtor subsequently to the attachment.

If the debtor intermarry, pending such attachment, and dies subsequent to such levy, his widow has no right of dower.

ACTION to recover dower in the land of Benjamin Brown, the demandant's late husband. While he owned the land it was attached upon a writ issued in a suit against him. While that attachment was pending he intermarried with the demandant. After the intermarriage, judgment against him was recovered in that suit, and a levy of the land was seasonably made upon the execution issued on the judgment. The husband died after the levy, and the attaching creditor subsequently conveyed the land to the tenant, by warranty deed. The case was submitted to the decision of the court.

Bronson & Woart, for the demandant.

It is a standing ordinance of the law that, the marriage, with seizin in the husband during the coverture, and the death of the husband, gives to the widow a title to dower.

The marriage and death are admitted. The only question then is, whether there was seizin during the coverture. This is denied by the tenant, who contends, that the seizin was prevented by the attachment. But it is plain, that the husband was seized both in law and in fact. Not till the levy, did the seizin pass. The statute requires the levying officer to deliver seizin.

SHEPLEY, C. J. — Suppose a creditor attaches land; the debtor then marries and conveys to a married man; judgment in the suit is obtained and a levy of the land is made; in whom is the right of dower?

Bronson. — I submit that it is in the debtor's wife. Though the debtor might not convey, so as to bar his own wife of dower; yet, perhaps the claim of his grantee's wife might be defeated by the attachment. A lien, coming up by operation of law, would bind the creditor as well as the debtor. The debtor's own wife is let into dower by operation of law. His grantee's wife could claim only under a voluntary act.

The binding power of a lien by attachment is not without

its exceptions. Suppose a mortgaged estate to be attached, a discharge of the mortgage would alter the creditor's rights. So in cases of outstanding taxes. They would overrule the attachment by operation of law. But the question, in this case, is whether the seizin was in the debtor. He could have maintained a writ of entry.

SHEPLEY, C. J. — During the attachment the seizin was unquestionably in the debtor. The true question is, whether the levy defeated the effect of the seizin, and thereby dislodged the right of dower, as in the case of an elder title coming in and defeating the seizin, both of the grantor and the grantee.

Bronson. — The occupant, though under a defective title, has seizin, and may maintain trespass upon it.

In this case, the husband's seizin continued till the levy. The attachment merely postponed his right to aliene.

Suppose a creditor attaches and dies before levy, the attachment would have given him no seizin, and his widow would have no dower.

This attachment was made prior to the registry act of 1838. A liberal construction should be given, especially where there was no record notice.

J. H. Williams, for the defendant.

The attachment devested the demandant's husband of his original seizin, at least to the extent of barring dower in a wife, afterwards taken. *Grosvenor* v. *Gold*, 9 Mass. 209, 211; *Davenport* v. *Tilton*, 10 Metc. 327; *Davenport* v. *Lacon*, 17 Conn. 278. An attachment is a specific lien for the debt. No act of the debtor can impair it.

The seizin is taken, by the attachment, into the custody of the law, and at the levy passes to the creditor.

The title by the levy takes effect, by relation, from the date of the attachment. 5 Greenl. 371; 3 Fairf. 148; 21 Maine, 164; 22 Maine, 109. It places the creditor in the same position, as would a conveyance from the debtor, made at the time of the attachment. The attachment sets the property apart for the creditor. The debtor's absolute domain is gone.

The law in its steady progress perfects the title, by simply converting the lien into ownership.

SHEPLEY, C. J. — The estate in which dower is demanded was attached as the property of Benjamin Brown before the demandant was married to him. After that time a levy was made upon it by virtue of an execution issued on a judgment recovered in that suit, within thirty days after judgment, and the levy was seasonably recorded. The estate is held by the tenant under a title obtained by that attachment and levy.

The cases cited by the counsel for the tenant show, that a title obtained by levy takes effect by relation at the time, when the attachment was made; and that it operates as a statute conveyance made at that time.

If the husband of the demandant had conveyed the estate before his marriage with her, there would be no doubt, that the demandant would not be entitled to dower. As an attachment does not interrupt the seizin of the debtor, it is insisted, that his seizin during the coverture was sufficient to entitle the demandant to recover her dower.

It is true, that the husband had a seizin during coverture liable to be defeated by the subsequent proceedings, which have operated to defeat it from the time, when the attachment was made. A widow will not be entitled to dower, when it appears that the seizin of her husband has been defeated by an elder and better title. Her title must rest upon the title of her husband during coverture, and when it appears that his title has been so far defeated, that he had none in contemplation of law, during coverture, her right to dower fails. Litt. § 393. When she has been endowed, and the title of the husband is defeated by a paramount title, her dower must necessarily terminate upon the eviction. Butler's note, 170; *Durham* v. *Angier*, 20 Maine, 242.

It will not be necessary to consider the other points made in the case. *Demandant nonsuit.*

VOSE *& al., Executors, versus* HOLCOMB.

An assignment by a debtor, (made while the Act of April 1, 1836, was in force and unamended,) of his property for the benefit of his creditors, was void, if it required from the creditors, becoming parties thereto, a release from their demands, except so far as provided for in the assignment.

Such a *release*, embodied in such an assignment, was inoperative and void.

A creditor, having made such a release in such an assignment, is not estopped or precluded from repudiating it, though he may have received several partial payments under the assignment.

ASSUMPSIT for money paid by the plaintiff's testator prior to June 20, 1842, as surety for the defendant who relied, in defence, upon the covenants executed by the testator and others, in a general assignment of the defendant's property, made on said 20th of June, for the benefit of his creditors. The covenants were to accept the provision made in the assignment and release the defendant from all claims. Under that assignment, the testator received four dividends at different times.

The trial was before WELLS, J. The defendant submitted to a default. If, in the opinion of the court, the action is not maintainable, the default is to be stricken out, and a nonsuit entered.

For the defendant it was contended —

1. That the release was a contract which it was competent for the parties to make; and was effectual at the common law, although the *assignment* might not be valid under the statute of 1836.

2. A creditor may voluntarily execute a release to his debtor. Having done so, the release is not invalidated by the mere fact that it was incorporated into, or connected with, an assignment of the debtor's property. *Fiske* v. *Carr*, 20 Maine, 301.

3. The plaintiffs' testator, having become a party to the assignment, and received his dividends under it, shall now be estopped to deny its validity. 1 Greenl. Ev. sect. 207, and cases cited; *Roe* v. *Jerome*, 18 Conn. 138; *Middleton Bank* v. *Jerome*, *ib.* 443; *Brown* v. *Wheeler*, 17 Conn. 345; *Ken-*

ney v. *Farnsworth*, *ib.* 355; *L'Aoreux* v. *Vischer*, 2 Comstock, 278.

SHEPLEY, C. J. — The defendant made an assignment for the benefit of his creditors, containing a clause, by which they were required to release all their claims, while the Act approved on April 1, 1836, was in force without amendment.

The plaintiff's testator became a party to that assignment, and received dividends upon his claim by virtue of it.

Such assignments have been adjudged by this court to be illegal.

It is however insisted, that one, who has become a party to such an assignment and has received dividends under it, cannot be permitted to object to its validity, and the case of *Fisk* v. *Carr*, 20 Maine, 301, is relied upon.

That case was determined before it was decided in the case of *Pearson* v. *Crosby*, 23 Maine, 261, that an assignment containing such a release was illegal.

The other cases cited in defence show, that when one person has induced another to believe in the existence of a certain state of facts, and to act upon that belief to his own injury, if the facts should prove to be otherwise, he will be estopped or precluded from denying the existence of such state of facts.

That principle is not applicable to a case like the present. It does not appear, that the testator induced the defendant to make such an assignment or to believe, that it would be a legal one. The statute determines, what shall be the legal effect of their proceedings, irrespective of their signatures and acts. If parties could by their signatures and acts, make such an assignment valid and effectual between themselves, they would be enabled to repeal the provisions of the act so far as to make an instrument effectual for many, and it may be for most purposes, which the act declares shall not be valid.

When the act declares, that no assignment shall be valid, except the provisions of the act be complied with, it does not refer to an assignment or instrument, drawn and signed by

one party only, but to an assignment however perfected and in whatever stage of the proceedings, it may be introduced.

Judgment on the default.

STONE *& al. versus* WAITT.

If the owner of goods, by contract with the carrier, waive any of his rights touching the delivery, the carrier will, so far as the waiver extends, be relieved from liability.

When the transit of goods is ended, and the delivery is completed, or is waived by the owner, the responsibility of the carrier ceases.

If the consignee take charge of the goods before they have arrived at the ultimate place of delivery, the carrier's risk is terminated.

Where goods are sent by sea, and the master of the vessel is also supercargo, he acts, (after the arrival at the port of destination,) in relation to the selling of the goods, as the agent of the *consignor.*

When such supercargo, being also master of the vessel, has unsuccessfully used all reasonable efforts to effect a sale, and is under the necessity of leaving the port with his vessel, he is justified in committing the goods to a responsible commission merchant for sale.

Of the obligation of a common carrier to store goods, at the end of the transit.

Where, in assumpsit, an offer to be defaulted for a specified sum is made, and not accepted, and, on the trial a smaller sum is recovered by the plaintiff, the defendant's cost, arising subsequent to the filing of the offer, will be allowed, and set off against the *sum offered,* and the judgment will be for the plaintiff, for the balance, with his costs to the time when the offer was entered.

ASSUMPSIT for a quantity of hay. It was agreed that twenty-three tons of hay were shipped for Boston on board a schooner, whereof the defendant was master, in June, 1848, and consigned or entrusted to the defendant, as master of said vessel, for sale. The hay was laden on deck, by agreement of parties ; and it arrived at Boston on Thursday night, in good order and condition and well covered. The defendant on Friday morning, and during that day, made efforts to sell it, without effect ; he had one offer, at ten dollars per ton, on six months, which was refused, he not knowing the responsibility of the person proposing to purchase, and not feeling authorized

to sell on time. Not being able to sell in Boston, the defendant, on Saturday forenoon, went to Brighton to sell, but could not find a purchaser there; in the afternoon of that day, he went to South Boston and Dorchester, and was unable to find a purchaser at those places. On Sunday a rain commenced, which continued, with occasional intermissions, until the next Friday night. From Sunday to Friday night, the hay could not have been moved without spoiling. An addition of two sails was put upon the board covering, to protect the hay from the storm, still it was injured by the severity and long continuance of the storm, one-third of its value. Defendant endeavored during the storm to sell it; Messrs. Patch & White thought they would take half of the hay at a stated price, but the storm continued so long, that at length they refused to take it at any price. During the storm, the defendant saw William L. Stone, one of the plaintiffs, in Boston, and told him he had expended all the faculty he had, in endeavoring to sell the hay, and was unable to make sale, and asked him what he should do with it. He replied only, that he wished the hay in the middle of the ocean. The defendant's expenses in trying to sell, were $5,00. Being unable to sell, and it being necessary for the defendant to leave with his vessel, he lodged the hay with a responsible commission merchant, for sale, and to do the best he could with it. He sold it at auction. The nett avails were $40,75, which the defendant, to whom the account of sales was rendered, afterwards received.

After returning from Boston to Gardiner, said Stone inquired of him, if he had sold the hay. He replied he had not, but informed him of his efforts to sell, and the condition of the hay, and what he had done with it, in substance as narrated above; but did not render him an account current of sales, and has not till the present time.

The defendant offered to be defaulted at the first term for $36,00.

The action is submitted on the above statement of facts.

If the court shall be of opinion, that a custom among masters of vessels sailing from the Kennebec river to Boston, hav-

ing property consigned or entrusted to them for sale, to leave said property with commission merchants for sale, under the circumstances of this case, can have any effect upon this case, then it is to be submitted to a jury to decide whether such a custom exists; otherwise, such judgment, as the law and facts may warrant, is to be entered.

Danforth and *Woods*, for the plaintiff.

I. The defendant is liable as carrier. His duty was to store the hay, immediately on arrival. Kent's Com. vol. 2, 604, 605, and note; and vol. 3, 214 and 215, 4th ed.; Story on Bailments, 290 to 293, — 343 to 345, and 347; *Gibson* v. *Culver*, 17 Wend. 305.

The duty as carrier was not ended, until the hay was landed.

II. As consignee, the defendant is liable.

1. He was neglectful. It was his duty to store the hay immediately on its arrival. The deck of a vessel was no suitable place for keeping such an article a moment longer than was unavoidable.

2. He rendered no account of his sales or proceedings, and by that omission, he made the goods his own.

3. He constituted the commission merchant, to be the agent, not of the plaintiffs, but of himself, the defendant. This appears from many of his acts, particularly from his requiring the account of sales to be rendered to him, and the avails to be paid to him.

North, for the defendant.

TENNEY, J. — The risk of a common carrier terminates as soon as the goods have arrived at their place of destination, and are deposited there, and no further duty remains to be done under the contract to carry them. Story on Bailments, § 538. If the owner of the goods, by the contract with the carrier waive any of his rights touching the delivery, so far as the waiver extends, the carrier will be relieved of his liability. This is the law, notwithstanding any custom to the contrary. If a man has no warehouse of his own, and directs

the carrier to leave the goods at the wagon office, till he should find it convenient to remove, or to sell them, the carrier's responsibility will terminate with the deposit. *Ibid*, § 540, 541. When the transit is ended, and the delivery is either completed or waived by the owner, then the responsibility of the carrier ceases. *Ibid*, 542.

If the consignee take charge of the goods before they have arrived at the extreme or ultimate place of delivery, the carrier's risk will then terminate. *Ibid*, § 542; 2 Kent's Com. § 40, p. 469; *Strong* v. *Natally*, 4 Bos. & Pul. 16.

When the same person is not only master of the vessel, but also supercargo, he acts in two distinct characters. In the storage of the cargo and in the navigation of the vessel, and in the conveyance and the delivery of the cargo, he acts as the agent of the owners. But in the sale of the goods consigned to him, and accounting for the proceeds, he is not their agent, but the agent of the consignor. "After the arrival of the ship at the port of destination, he delivers the cargo as master, and receives it as consignee; all his authority as master is then determined." 2 Livermore, 215; *Williams* v. *Nichols*, 13 Wend. 58. These different characters in which the same person may act, are to be treated as distinct, as if the acts appropriate to each character, were confided to different persons. Story's Agency, sect. 36.

In the one case he is a common carrier, in the other a factor, and for any want of fidelity in that trust, his employers have the same remedies against him, that they would have against any other person and no other. *The Waldo*, Davee's R. 161.

It is insisted by the plaintiffs that the duties of the defendant, as a common carrier, had not terminated, when the hay was injured by the rain after its arrival in Boston; that it was incumbent on him, to have landed and to have stored it.

The facts of the case show no custom, on the subject of landing or storing hay, after it reaches the place of destination, where the master of the vessel is the consignee for the purposes of sale. The hay in this case "was shipped on board the schooner Echo, of which the defendant was master, to

be carried to Boston, and consigned, or entrusted to the defendant as master of said vessel, for sale." It does not appear that the defendant had any warehouse, or other building in which he was accustomed to store goods. The conduct of the parties shows, if it was the right of the shipper to have his goods landed and stored, that in this instance that right was waived by the plaintiffs. By the express agreement of the parties, the hay was carried upon deck, and was thereby in every respect as much exposed to rains on the voyage, as after its arrival.

The master continued to have charge of the vessel as master, after she arrived in Boston, and it must have been expected that a sale might be so speedy, that the storage would be an expense and trouble not anticipated under the circumstances; the landing of the goods would be no security from the weather, if they were not stored, and it could not have been designed, when they were to be in charge of the defendant, after he had fully performed all his duties as carrier, that they should be left upon the wharf, before their sale.

The conduct of the defendant shows, that he entered upon his duties as factor on Friday morning, the vessel having arrived on the preceding night; and he may be considered as having received the hay in his character of consignee from the time of his arrival. No complaint was made by one of the plaintiffs, who was informed by the defendant during the storm, that he had been unable to effect a sale, and was inquired of what should be done with the hay, indicative of an idea, that the contract as master of the vessel had not been fulfilled. Under all the facts of the case, the defendant is not shown to have neglected his duties as a common carrier.

Is he liable as consignee of the goods?

Factors are generally held liable for ordinary diligence. And if they act in good faith, and with reasonable diligence, they are protected. Story on Bailments, sect. 455.

If it was the expectation of the plaintiffs that sale of the hay should be made before it should be landed, so that it could be carried from the wharf by the purchaser, there has been no want of ordinary care imputable to him as consignee.

After all reasonable endeavors to make sale of the hay without success, and the time having arrived, when it became necessary that the defendant should depart with his vessel, it was his privilege to leave the hay in the hands of some suitable person for sale; he placed it in the hands of responsible commission merchants for that purpose, after that, he was relieved from further responsibility in relation to the sale; the persons with whom it was entrusted, became the agents of the plaintiffs, and were accountable to them. *The Waldo*, before cited; *Lawler* v. *Keaquick*, 1 Johns. Cas. 174; *Day* v. *Noble*, 2 Pick. 615.

The defendant received the sum of $40,75 as avails of the hay; and paid the sum of $5, for expenses in his attempts to make sale of it, before it was delivered to the commission merchants. Not having rendered his account to the plaintiffs of his doings, while he had charge of the hay, nor informed them therein that he held in his hands a balance of the proceeds, which came to his possession, he was liable. He was entitled to deduct the expenses, which he had incurred. He offered to be defaulted for a sum as large as the plaintiffs are entitled to recover, and costs are to be allowed him, from the time, that the offer was filed. These costs are to be set off against the sum offered, and judgment entered for the balance, in favor of the plaintiffs, with costs to the time, when the offer to be defaulted was entered.

PRESIDENT, &c. OF THE TICONIC BANK *versus* JOHNSON *& al.*

The taking of interest in advance upon loans made by a bank, is within the established and allowed rules of banking.

After a note given to the bank has become payable, the bank cannot lawfully take upon it a rate of interest, exceeding six per cent. per annum.

Where, in discharge of a pre-existing debt, several notes are given, containing a usurious rate of interest, reckoned upon the amount of the debt, each note is held to contain its proportionate share of the illegal interest.

Upon such notes, payments were made, partly in cash, and partly in notes given in substitution. It was *held*, that each of the substituted notes contained a portion of the usurious interest.

Ticonic Bank *v.* Johnson.

The final balance of all the notes was paid by a new note, which also reserved usurious interest. *Held*, that the last note did not reserve, within itself, the amount of the illegal interests, which had been included in all the preceding notes, and that such amount could not legally be deducted from it.

EXCEPTIONS from the District Court.

Assumpsit on a note of $200.

In payment of an execution against Johnson, he gave to the plaintiffs three notes, payable on time. Interest on the amount paid by said notes, was reckoned from their date to their respective pay-days, at seven per cent. a year, and included in the sum, $2359,25, to which the notes amounted.

Partial payments were made from time to time; some in cash and some in new notes, including the same rate of interest. To discharge the final balance, the note of $200, now in suit, was given, which also reserved the same rate of interest.

The Judge ruled that, from the sum, apparently due on the note, the jury should deduct the amount of interest, which had been reserved, above six per cent. in all the notes. To that ruling the plaintiffs excepted.

Paine, for the plaintiffs.

I. The interest received did not exceed the rate allowed by the established rules of banking.

II. Each of the notes, given in payment of the execution contained its proportionate part of the illegal interest. When any one of them was paid, the usury reserved in it, was paid, and cannot be considered as reserved in this note. More than ten-elevenths of the amount of all the notes has been paid, with the same proportion of the usury. Yet, by the ruling of the Judge, the whole of the usury is held to be reserved in this note. *Chadbourne* v. *Watts*, 10 Mass. 121; *Darling* v. *March*, 22 Maine, 184; *Pierce* v. *Conant*, 25 Maine, 33.

Bronson, for the defendants.

The contract with the plaintiffs, though contained in several notes, was one and entire. The notes collectively contained illegal interest. The taint attached to every successive note, even to the last, the one now in suit. "When the original loan is usurious, all the securities therefor, however remote, or

often renewed, are usurious." *Reed* v. *Smith*, 9 Cowen, 647; *Warren* v. *Crabtree*, 1 Maine, 167; *Bridge* v. *Hubbard*, 15 Mass. 96; *Jones* v. *Whitney*, 11 Mass. 74; *Lowell* v. *Johnson*, 14 Maine, 240.

This case is not like that of *Darling* v. *March*, cited on the other side. The note there in suit was given for a balance due on *one* of the notes; here the note in suit was given for the balance due upon *all* the notes.

Non constat that any of the sums paid on previous notes was for illegal interest. The presumption is, that such payments were, not for what was illegal, but for what was legally due.

TENNEY, J. — It is contended in behalf of the plaintiffs, that they have not received more interest, than that to which they are entitled, according to the established rules of banking; and that the instructions of the Judge, restricting the jury to the rate of six per cent. after the notes taken from time to time, became payable, was erroneous. Banks are prohibited by statute from taking any greater rate of interest or discount on any note or draft or other security, than at the rate of six per cent. a year; but such interest or discount may be calculated and taken according to established rules of banking. R. S. c. 77, § 49.

The taking of interest in advance upon loans made by banks, has been regarded as proper, according to well established rules of banking; and when notes given for such loans are taken up at maturity, by the substitution of new ones, the interest being advanced on the latter, it is treated as a new loan, and within the principle of the same rule, notwithstanding it may in the end afford to the bank a greater amount of interest for a year, than they would otherwise receive. *Maine Bank* v. *Butts*, 9 Mass. 49; *Agricultural Bank* v. *Bissell & al.* 12 Pick. 586. But after a note given to a bank has become payable, and in no manner taken up or renewed, it is subject to the rule, in reference to interest applicable to individuals, and the rate cannot legally afterwards exceed six per cent. Upon this point the instructions are not objectionable.

The jury have found, that the note in suit was for a balance arising from the notes given in satisfaction of the execution, recovered in 1842 in favor of the plaintiffs against Levi Johnson, the defendant, including interest computed from time to time upon notes renewed at the rate of seven per cent. a year. The verdict was for the amount of the note in suit, after deducting the excess over six per cent. included in the note, and also in the sums, which had been previously paid on notes taken up. This finding of the jury was authorized by the instructions of the Judge, "that if they should be satisfied, that in the notes given on the settlement of the execution, more than six per cent. interest was reserved, and that the note was given in payment of any balance of the notes growing out of that transaction, they would deduct such excess from the amount apparently due on the note."

It is insisted for the plaintiffs, that the whole execution and interest thereon, at seven per cent., having been paid, excepting the sum, for which this note was given, this note is to be treated as containing only such proportion of the excess, as the note bears to the whole amount received. In the case of *Darling* v. *March*, 22 Maine, 184, the sum of $3000 including usurious interest, was settled by a note of $1000, which was paid, and the note of $2000 in suit; and it was held that the latter would be considered as containing only two thirds of the illegal interest. In *Pierce* v. *Conant*, 25 Maine, 33, a part of the whole sum found due, including interest exceeding that of the legal rate, was paid by the transfer of certain notes secured by mortgage, and the balance was embraced in a note given by the debtor. It was decided, that the part discharged by the transfer of the notes was a payment, and comprised its proportion of extra interest. The case at bar is not perceived to differ in principle, from the cases referred to; and the jury were required by the instructions, to deduct a larger excess, than the law authorizes.

Exceptions sustained.

Randall *versus* Haines.

By the Act of 1845, chap. 172, "questions of law may be reported, by the Judge of the District Court, to the S. J. Court for decision, upon stipulations "relative to a *disposition* of the action by nonsuit, default, or otherwise."

But the stipulations must be such as to provide, that the *final* disposition of the action shall be dependent upon the decision of the questions of law.

A stipulation that, if the decision of the questions of law be in favor of one of the parties, the other shall still have the right to a jury-trial, will not authorize the action to be transferred, upon a report, into this court.

An action transferred upon such a stipulation, will be dismissed for irregularity.

Trover for a horse. The case came from the District Court. A witness was there examined for the plaintiff, who testified to certain facts relative to the mode by which the plaintiff acquired his supposed title, and also relative to the sort of possession upon which he relied.

By agreement of the parties, the Judge of the District Court reported the facts, deduced from the testimony, for a decision of the legal question, whether the facts showed such ownership of the horse as would enable the plaintiff to maintain the action. The report was made upon a stipulation, that, if the opinion of the S. J. Court should be in the negative, the plaintiff was to become nonsuit; otherwise, the case was to be put again to a jury, either in the S. J. Court or District Court, as the said S. J. Court should direct, in order that any defences, which the defendant might have, might be tried; the defendant not having yet offered any evidence.

The case was argued upon the legal question above stated, by *Morrill*, for the plaintiff, and by *E. Fuller*, for the defendant. But, as no decision upon that point was given, the arguments need not be presented.

Shepley, C. J. — This action was irregularly transferred from the District Court.

The Act approved on April 7, 1845, provides, that "it shall be lawful for the Judge, with consent of parties, to draw up a

report of the case, *presenting the legal points for decision*, and containing such stipulations, as the parties may make, relative to a disposition of the case by nonsuit, default, or otherwise." If the words "or otherwise" had not been used, there could be no doubt, that a final disposition of the action was to be made by a decision of the legal points presented. That those words were used, not to authorize any kind of disposition of the action by continuance or for trial, as the parties might agree, but to provide for a final disposition in some other mode than by nonsuit or default, as by a judgment for either party, with a hearing in damages, or a return of property in an action of replevin, will be apparent, when considered in connection with the language used in the second section. That section provides that this "court shall render judgment therein in the same manner and with the same effect, as on a report made by consent of parties, by a Judge of the Supreme Judicial Court."

When judgment is rendered on a report last named, it is always a final judgment. Reports in this court are sometimes made, authorizing actions to stand for trial by jury, upon some contingency, but such an order can in no proper sense be called or considered a judgment.

If the Act should be construed to authorize a point of law, not decisive of the action, to be reported, and the cause to be transferred to this court for its decision, with a stipulation, that it might upon a certain contingency, be remanded to the District Court for trial, the action might be transferred to this court and remanded several times; and causes not appealable upon the facts, might be thus transferred to this court for a trial by jury. Such could not have been the intention, and a correct interpretation of the language, does not authorize a transfer of the action, except for a final disposition of it by a decision of the points of law, presented for decision.

If the point of law presented in this case should be decided in one way, the report provides, that "the case is to be put again to a jury, either in the S. J. Court or District Court, as

the said S. J. Court shall direct;" and it was not, therefore, transferred to this court, according to the provisions of the statute. *Action dismissed, as irregularly transferred to this court.*

HOWARD, *in Error, versus* HILL.

Error does not lie to reverse a judgment of a justice of the peace, if the plaintiff in error had an opportunity to appeal.

Where a party, by his counsel, appeared before the justice, he is considered to have had an opportunity to appeal, although, before the judgment was entered, he had permission, upon his own motion, to withdraw, and did withdraw his appearance.

ERROR, to reverse the judgment of a justice of the peace.

The grounds, among others, upon which the plaintiff in error, who was the original defendant, intended to rely was, that the original writ was made returnable on "Monday the twenty-sixth day of December," whereas, in fact, the 26th of December was on Saturday.

By the justice's record, it appeared that the suit had been once continued, that at the adjournment, the original defendant appeared by counsel, and afterwards was, on his own motion, permitted to withdraw, and did withdraw his appearance, whereupon a default and judgment were entered.

Paine, for the plaintiff in error.

Smith, for the defendant in error.

TENNEY, J. — The original defendant appeared by his counsel at the time to which the action, being entered and the writ amended, on the plaintiff's motion, was continued. He was afterwards permitted to withdraw his appearance upon his own request; the defendant was then defaulted and judgment rendered against him.

Several errors are relied upon, as disclosed by the record. But we are met by a preliminary question, which renders the consideration of the errors assigned, and the determination of

their merits superfluous. The plaintiff in error had the opportunity of presenting his objections on an appeal. At the time of his appearance the case was open. It was competent for the justice, before whom the action was pending, to have entertained his motion, to dismiss it, on the ground that the return day was indefinite, so that he could not take jurisdiction, and it was not too late for him, to have directed the writ to have been restored to its original condition. If he had not the power to permit the amendment, he had no more jurisdiction after it was made than before; and the appearance of the defendant, for the purpose of making this objection, was not a waiver of his right to exception on that account; consent, even if express, could not confer jurisdiction, if none was before possessed. *Blake* v. *Jones & Tr.*, 7 Mass. 28; *Gardner* v. *Barker*, 12 Mass. 36; *Ames* v. *Winson*, 19 Pick. 247.

If the motion to dismiss the action had not prevailed, the general issue could have been filed, (R. S. ch. 116, § 30,) and if found against the defendant, an appeal could have been taken, and upon it all his objections could have been considered. By the authority of adjudged cases, which were determined in Massachusetts before our separation from that Commonwealth and since that time, a writ of error does not lie, where the party aggrieved is entitled to a remedy by appeal. *Savage* v. *Gulliver*, 4 Mass. 171; *Putnam* v. *Churchill*, 4 Mass. 516; *Jarvis* v. *Blanchard*, 6 Mass. 4; *Gay* v. *Richardson*, 18 Pick. 417. In the case of *Mark* v. *Guild*, 3 Metc. 372, which bears a strong resemblance to the one before us, in all its essential features, the court say, "if the validity of the judgment sought to be reversed, were properly before the court, on the writ of error, we are very doubtful whether it could be supported." "The rule, that he, who has the right of appeal shall not bring error, applies of course only, where the party had the opportunity to appeal. If he never appeared, or was never duly summoned, and the judgment was rendered against him by default, the case would be very different." In that case, as in the present, the defendant appeared, and withdrew his appearance; and he was afterwards default-

ed. The plaintiff in error having had the opportunity to appeal, takes nothing by his writ.

DOLE, *Administrator, versus* LINCOLN.

To constitute a donation, *inter vivos*, there must be a gift absolute and irrevocable, without any reference to its taking effect at some future time. The donor must deliver the property, and part with all present and future dominion over it.

To constitute a *donatio causa mortis*, the gift must be made in contemplation of the near approach of death, and to take effect absolutely, *only* upon the death of the donor. There must be a delivery of the property to the donee, or some other person, for his use. The donor must part with all dominion over it, so that no further act of him, or of his personal representative, is necessary to vest the title perfectly in the donee, should it not be reclaimed by the donor during his life.

To constitute a valid *donatio causa mortis*, the donor must part with all dominion over the property to the donee, to belong to him presently, *as his own property*, in case the donor should die without making any change in relation to it.

Such an alienation of property cannot be supported in law, if it be intended, not for the benefit of the donee, but as a trust fund to be dispensed for benevolent uses, at the entire and unlimited discretion of the donee.

Donations, not made in conformity to the statutes of wills and of frauds, but rather suited to contravene them, are not favored by the law. They are admitted with the greatest caution.

TROVER against Rodney G. Lincoln, for certain promissory notes, amounting to nearly $5000. It was admitted, that before the commencement of the suit, the plaintiff had demanded the notes of the defendant, who refused to deliver them.

William Stickney, called by the plaintiff, testified as follows: — "The notes were the property of Ebenezer Dole, the plaintiff's intestate, who died June 9, 1847; on June 3, 1847, the intestate, in his sick chamber, requested me to make a schedule of notes, which he wanted to give, or had given for benevolent purposes, (whether he said he had then placed them or given them into the hands of Lincoln, defendant, cannot say,) to be distributed by certain persons named, as

they thought best, after his decease. I said to him, "I suppose you understand this is not a legal transaction;" he said, "my family understand it, and will comply with my wishes in regard to it;" I made out the schedule. [NOTE. — The heading of the schedule is thus: — "Hallowell, June 3, 1847. The following is a list of notes, which I, Ebenezer Dole, wish to have deposited with R. G. Lincoln, the proceeds of which to be distributed according to the discretion of Rev. David Thurston, Austin Willey, R. G. Lincoln and William Stickney, to objects of benevolence, which, in the judgment of all, or a majority of the above persons think it will accomplish the most good." The list amounted to $4904,33. It included a note against said Stickney and several notes against Simon Page.] He wished me to act as one of the trustees to distribute the proceeds, and I consented to do so. When I made the writing, Simon Page was named as one of the trustees. I cannot tell why his name was not put into the paper.

Cross-examined. The paper was not signed by him, because he wished to make the sum exactly $5000. He became more sick soon afterwards, and never completed it. If the schedule, instead of the words, "wish to have deposited," had stated, that my note and Page's notes were in the hands of Lincoln, the ideas he communicated to me would have been as accurately expressed in the paper as I can recollect them. The intestate was conscious that he was very near his end, but did not, as I can now recollect, speak of it at the time of the conversation. He left a widow, and one son and three daughters, also a niece, who had been brought up in his family.

Austin Willey, called by the defendant, was objected to, but was admitted as a witness, and testified as follows: — I was present when some of the notes were indorsed and delivered to the defendant. The intestate said he had given certain notes to Mr. Lincoln, as one of several trustees, to be appropriated to purposes of benevolence according to their own judgment of his wishes and feelings, as he would do were he living. There was at least one note indorsed and

added to those that had previously been given. He expressed an intention to add something more to the fund by other notes. He informed me, that he had conversed with the persons named as trustees, and requested them to act in his behalf, and that they had consented to do so. I also consented. This was some two or three weeks before his death, he then had no expectation of recovery, expected soon to die. He told me he had requested Simon Page to act as one of the trustees, and that he would do so.

Cross-examined. — He requested Mr. Lincoln to get a file of papers for him out of his desk. This conversation was in his sick chamber, and the desk was there. The intestate selected a note from the file, and indorsed it. It was signed by William Stickney for $500, payable to the intestate. He said the other notes were in Mr. Lincoln's hands; that they were notes against William Stickney and Simon Page. At an interview a short time before, he told me he had placed notes in Mr. Lincoln's hands, for the purposes before stated. He said he wished to see Mr. David Thurston of Winthrop, and desired me to send for him, and I did so.

Simon Page, called by defendant, (objected to, but admitted,) testified — I had a conversation with the intestate a few days before his death; he asked me to act as one of the trustees of this fund, and I consented.

Cross-examined. — It was in his chamber — do not know that any other person was present — he said he wished to leave a certain amount of property for charitable purposes, and wished me to consent to be one of the trustees. I think he named the amount, but I do not now recollect it. It was to be left to the disposal of the trustees.

The statement of Rev. David Thurston, received by consent as evidence, was in substance, as follows: —

On July 27, 1846, the intestate informed me he had made what he considered a suitable provision for his family, and had set apart a portion of his estate for the promotion of the same objects which he had been accustomed to promote: viz. the cause of truth and righteousness, and wished the fund

to be used after his death, in an unostentatious way, for that purpose. As I understood his views, he requested me, with a few others, whom he named, to receive in trust such property as he might leave for this purpose, and that we should appropriate the avails of it to the furtherance of such objects as we might judge he would approve, if living.

At a subsequent interview, he told me he had added William Stickney to the number of the trustees.

The inventory of the intestate's estate was, real, $2060,00, personal $14,792,82, including the notes in controversy.

The case was submitted to the court upon this testimony, or so much thereof as may be legal, and if the plaintiff cannot maintain the action, it is to be entered for trial, that the sanity of the intestate, and the circumstances attending the transaction, may be determined by a jury. If it can be maintained, defendant is to be defaulted.

Evans, for the plaintiff.

The defendant is not entitled to hold the notes sued for, either as being a gift *inter vivos*, or as a *donatio causa mortis*. Not the former, because it was not to take effect until after the death of the intestate; not the latter, because it was not made in contemplation of immediate death.

It was evidently an attempt to make a testamentary disposition of property, long considered and designed, which might and should have been made conformably to the statutes, and was so understood by the intestate. Its validity was to depend on the consent of his family. This shows it was not a *death-bed* disposition. Such dispositions of property are allowed only when there is no time to make them in the formal and solemn manner required by law. 2 Kent's Com. 444, and seq.; *Weston* v. *Hight*, 5 Shep. 287.

The gift is void for uncertainty as to the purposes to be accomplished, and as to the persons to be benefited. It is not a gift to charitable uses, none being such except those enumerated in stat. 43, Eliz. c. 4; *Saunderson* v. *White*, 18 Pick. 333.

It is void also, there being no mode of enforcing the trust

attempted to be created, and the law will not uphold what it cannot enforce. There is no mode provided for administering the fund after the death of the persons named; no succession; the trust to them was personal.

If the stat. Elizabeth is in force here, *quod dubitatur*, still it does not cure nor obviate this difficulty; this being no devise, bequest, or legacy; and it is only by that statute that similar vague descriptions of purpose have been deemed capable of being supported.

It is also contended, that Willey was not admissible as a witness, being interested. *Borneman* v. *Sidlinger*, 15 Maine, 227.

In absolute gifts, the donor must part, not only with the *possession* but the *dominion* of the property; which was not done here. The donees were to have no control of it until after the death of the donor. 2 Esp. R. 643; *Noble* v. *Smith*, 2 Johns. 52.

S. Fessenden, for defendant.

The intestate was a gentleman of wealth.

There are no creditors to complain of any disposition, which he might make of his property. The right of its disposal was entirely with him. He made the gift; every thing necessary to the perfection of it, was done. The notes were delivered, and the intention of the donor was clearly and unequivocally expressed, and the notes were indorsed, and placed in the hands of the donee by the intestate, and accepted by the donee. The gift was absolute, and was perfected. The persons designated were to do with the property, as they pleased. This suit pre-supposes the notes to be in the defendant's hands. They were there rightfully, by delivery of the owner, who had no power to revoke the gift. *Grover* v. *Grover*, 24 Pick. 261.

The title had passed, and there was a donation "*inter vivos.*"

But if not so, there was a good *donatio causa mortis.* It was made in deep sickness, in view of the near approach of death, and had all the elements of an effectual gift.

Gifts to charitable uses are highly favored in law, and will be most liberally construed, in order to accomplish and carry into effect the intent and purpose of the donor. Trusts, which cannot be supported in ordinary cases, for various reasons, will be established and carried into effect, where the trust is raised in support of a gift, to a charitable use. If no executor or trustee is named, in ordinary cases the gift would fail, but in cases of charity, the want will be supplied by appointment by a court of equity. *Saunderson* v. *White*, 18 Pick. 328.

But the distinction most material to the present case is this, that where the purposes of the gift are vague and uncertain, the gift will be either declared void for uncertainty, or, if the gift and the trustee be sufficiently explicit, but the object of the trust vague and uncertain, it will be declared, in ordinary cases, a resulting trust for the heirs-at-law or distributees.

But, *in case of a gift to charitable uses*, this will never be done. In all such cases, the legacy will be sustained. *Mills* v. *Farmer*, 1 Merivale, 54; *Parish* v. *Stone*, 14 Pick. 198; *Borneman* v. *Sidlinger*, 15 Maine, 429.

The case of *Weston* v. *Hight*, 17 Maine, 287, was unlike this, and does not conflict with the position we maintain.

There is no uncertainty in the donation. It is sufficient that he make the designation of *charitable purposes*. And he might well confide in the discretion of the donees.

It was not designed to establish a permanent fund, the interest of which should be appropriated for charitable purposes. It is a gift to be used by the donees at their discretion, as well principal, as interest. No perpetuity was contemplated. The whole gift was to be expended by the donees.

The gift is *donatio causa mortis* to the individuals named, and there is no designation, other than such a charitable appropriation of the fund as their own discretion should dictate. Would it not be a good *donatio causa mortis*, to give a sum of money to a man to spend at his discretion in the cause of good morals? Or for the purposes of charity?

But, were the object of the donation uncertain to some extent, and were it designed as a permanent fund, there would

be found enough in the case to authorize the court to compel the donees to make such a disposition of the fund as would meet the intentions of the donee.

Evans, in reply.

The trustees were to have no control of the fund until after the intestate's death. It therefore was not a donation *inter vivos*. Neither was it valid as a donation *causa mortis*. It was mere purpose, long formed, to dispose of property without a will.

The gift is void for uncertainty. It does not pretend to be for the benefit of the persons named.

Gifts to charitable uses are only sustainable by virtue of Stat. 34, Eliz. c. 4. Parol gifts are not within it. But if this disposal of the property were by will, it could not be sustained. Here are no *cestuis que trust*, and courts can appoint none.

It is said charities are to be favored. This is an English rule, arising out of the prerogative of the King, as *parens patriæ*. 3 Black. Com. Book 3, c. 27, § 3.

Still gifts to charities are looked upon with suspicion. 2 Kent, 444, says they are of *dangerous* nature. *Wheeler* v. *Smith & al.* 8 Howard.

Shepley, C. J. — The testimony shows, that the notes claimed in this suit, were formerly the property of the intestate, and that they must still be regarded as belonging to his estate, unless he made a legal disposition of them during his life.

To constitute a donation *inter vivos*, there must be a gift absolute and irrevocable, without any reference to its taking effect at some future time. The donor must deliver the property, and part with all present and future dominion over it. *Grover* v. *Grover*, 24 Pick. 261.

The testimony clearly shows, that the intestate did not intend to make a gift of the notes to take effect immediately, without reference to his decease.

To constitute a *donatio mortis causa*, the gift must be

made in contemplation of the near approach of death to take effect absolutely only upon the death of the donor. *Ward* v. *Turner*, 2 Ves. Sen. 431; *Tate* v. *Hilbert*, 2 Ves. Jr. 111; *Borneman* v. *Sidlinger*, 15 Maine, 429; *Parish* v. *Stone*, 14 Pick. 198; *Raymond* v. *Sellick*, 10 Conn. 480.

There must be a delivery of the property; but a delivery to the donee, or to some other person for his use, will be sufficient. *Drury* v. *Smith*, 1 P. Wms. 104; *Wells* v. *Tucker*, 3 Binn. 366; *Contant* v. *Schuyler*, 1 Paige, 316; *Borneman* v. *Sidlinger*, 15 Maine, 429.

The donor must part with all dominion over the property, so that no further act is required of him, or of his personal representative, to vest the title perfectly in the donee, if it be not reclaimed by the donor during his life. *Hawkins* v. *Blewitt*, 2 Esp. 663; *Bunn* v. *Markham*, 7 Taun. 224; *Reddel* v. *Dobree*, 10 Simons, 244. An essential difference between a legacy and a *donatio mortis causa*, consists in the independence of the title of the donee of any act or consent of the legal representative. 1 Roberts on Wills, 7, note 5. Such donations "are properly gifts of personal property by a party, who is in peril of death, upon condition, that they shall presently belong to the donee in case the donor shall die, but not otherwise. 1 Story's Eq. § 606.

To establish a valid *donatio mortis causa*, the testimony in this case must prove, that the intestate parted with all dominion over the notes, by a gift of them to the persons named as donees, to belong to them presently as their own property, in case he should die without making any change.

William Stickney, one of the donees, called by the plaintiff, testifies, that the intestate, on June 3, 1847, requested him to make a schedule of notes, "which he wanted to give, or had given, for benevolent purposes; whether he said he had placed them or given them into the hands of Lincoln, (defendant,) cannot say, to be distributed by certain persons named, as they thought best, after his decease."

The witness produced the schedule then made by him, and stated, if instead of the words, "wish to have deposited," used

in the schedule, the paper had stated, "my notes and Page's notes were in the hands of Lincoln, the ideas, he communicated to me, would have been as accurately expressed in the paper, as I can recollect them." By making the change of language proposed by the witness, as nearly as may be, the language of the paper preceding the list of notes, would read as follows: — "The following is a list of notes which I, Ebenezer Dole, so far as it respects the notes of William Stickney and Simon Page, have placed in the hands of R. G. Lincoln, the proceeds of which to be distributed according to the discretion of Rev. David Thurston, Austin Willey, R. G. Lincoln and William Stickney to objects of benevolence, which in the judgment of all or a majority of the above named persons, think it will accomplish the most good."

It will be perceived, that the word placed, and not the word given, has been substituted for the word deposited, used in the schedule. The reason for this is, that the witness states, that he cannot say, whether the intestate said, he had "placed them or given them into the hands of Lincoln." The burden of proof to establish a gift is upon the defendant, and when the witness is uncertain, which word was used, there is no proof, that the word given was used, and no authority is therefore found for its use, to correct the written paper. And when the witness states how it should be corrected, he says, it should state, instead of their being deposited, that they "were" in the hands of Lincoln. The paper, therefore, with the change of language made, will state the whole legal effect of the testimony of the witness, and the intentions of the intestate at that time, will be better and more satisfactorily ascertained, than by the witness's recollection of his words spoken.

Austin Willey, called by defendant, testifies in substance, that two or three weeks before his death he was in the chamber of the intestate, who asked the defendant to hand him a file of papers from his desk, that after it was handed to him, he took out a note bearing date on April 15, 1846, for $500, signed by William Stickney, and payable to the intestate, and indorsed his name upon the back of it and

delivered it to the defendant, to be added "to those that had previously been given." That the intestate at that time said, "he had given certain notes to Mr. Lincoln, as one of several trustees named, to be appropriated to purposes of benevolence or charity according to their own judgment of his wishes and feelings, as he would do, were he living." He also states, "at an interview a short time before, he told me he had placed notes in Mr. Lincoln's hands for the purposes before stated."

The intestate died on June 9, 1847, this transaction must therefore have taken place before the schedule was made by Stickney.

Simon Page, called by defendant testifies, that he had a conversation with the intestate a few days before his death, when he said "he wished to leave a certain amount of property for charitable purposes, and wished me to consent to be one of the trustees."

It was agreed, that a certificate signed by the Rev. David Thurston, respecting his consenting to act as one of the trustees should be received as evidence. He states in that certificate, that he had a conversation with the intestate on July 27, 1846, when he stated, that "he had made suitable provision for his family, and had set apart a portion of his estate, for the promotion of the same objects which he had been accustomed to promote: viz. the cause of truth and righteousness." "As I understood his views, he requested me with a few others, whom he named, to receive in trust such property, as he might leave for this purpose, and that we should appropriate the avails of it to the furtherance of such objects, as we might judge he would approve, if living."

If this testimony were all to be considered as legal, when considered together, the effect is rather to prove, that he designed to entrust the property to them, to be used after his decease, for the purposes selected by them, than to be held by them as their own property, as a free gift from him. Several considerations strongly operate to convince the mind, that his intention was not to make a donation to them as men, but

to place so much of his property in their hands, as trustees, to be distributed. They are uniformly spoken of, or referred to by him, as trustees. According to the statement of Mr. Thurston, many months before his decease he expressed an intention "to leave a certain amount of his property for charitable purposes." There is no proof from any person, that he at any time actually made a donation, of the notes to the persons named. At most it can only be inferred that he had done so, from his declarations of what he had done. The word, give or given, as ordinarily used in conversation, does not necessarily convey the idea of a voluntary transfer of the title of the thing spoken of as given. That is only the primary signification stated by lexicographers, among more than twenty others; while the second is, that of transferring or delivering a thing from one person to another. The sense, in which the word is used, must often be ascertained by the connection in which it is used.

The declaration of the intestate to Mr. Willey, that he had given the notes to Mr. Lincoln, as one of several trustees named, does not, when considered alone, fairly convey the idea, that he had made a gift of them to him and others as their own property. But it must be considered in connexion with the language used before, to the same witness, that he had placed notes in Lincoln's hands for those purposes; and with his language used to Mr. Thurston, at an earlier, and to Mr. Page, at a later time; and also in connection with his latest and most authentic declaration reduced to writing, as it would be corrected by the witness, and which clearly indicates a disposition of his own property after his decease, by the agency of trustees. There are other considerations leading to the same conclusion, that he did not intend to make a donation to those persons to be held by them as their own property, and that he had not done it. It appears, that he had not fully completed his purpose. Mr. Stickney testifies, that all the notes contained in the schedule, and designed to constitute the fund, had not been placed in the hands of the defendant, that the paper was not signed by him, "because he

wanted to make the sum exactly $5000, and he became more sick soon after and never completed it." The written paper provides, that the proceeds should be distributed according to the judgment "of all or a majority of the above named persons," and the minority might thereby be deprived of all right to any portion of the property, for any purpose. After he had spoken to Mr. Willey of having given the notes to Lincoln, he assumed to exercise a control over the disposition of their proceeds, by the paper made by Mr. Stickney. It is quite certain, that he did not intend, that the persons named as trustees should take any beneficial interest in the property. They were to be the almoners merely of his bounty.

It is said in argument, that "gifts to charitable uses are highly favored in law, and will be most liberally construed, in order to accomplish and carry into effect the intent and purpose of the donor."

This doctrine may apply to gifts, properly of that character, but not to donations made, not in conformity to the statutes of wills and of frauds, but suited to contravene them. Such donations are not favored by the law, but are admitted with the greatest caution. *Ward* v. *Turner*, 2 Ves. Sen. 431; *Wells* v. *Tucker*, 3 Binn. 366; *Contant* v. *Schuyler*, 1 Paige, 316; *Raymond* v. *Sellick*, 10 Conn. 480.

It is also said, that if "the object of the trust be vague and uncertain, it will be declared in ordinary cases, a resulting trust for the heirs-at-law, or distributees; but in case of a gift to charitable uses, this will never be done. In all such cases the legacy will be sustained."

The statute of charitable uses, 43 Eliz. chap. 4, enumerates the devises and bequests, for which it provides; and it is well settled, that such as are not comprehended in that enumeration, are not aided by that statute. *Morice* v. *The Bishop of Durham*, 9 Ves. 399, and 10 Ves. 522; *Saunderson* v. *White*, 18 Pick. 328.

In the former case, the testatrix bequeathed all her personal

estate to the Bishop, upon trust, to pay her debts and legacies, and to dispose of the ultimate residue to such objects of benevolence and liberality, as the Bishop in his own discretion shall most approve of. The case was like the present, in leaving the objects of the charity to the unlimited discretion of the donee. It was decided, that the objects of the trust not being within the statute of Elizabeth, the trust failed. Upon a hearing of the appeal before Lord Eldon, he came to the conclusion, that "it was the intention to create a trust; and the object being too indefinite, failed. The consequence of law is, that the Bishop takes the property upon trust to dispose of it, as the law will dispose of it; not for his own benefit or any purpose this court can effectuate." He had before stated, "if the testator meant to create a trust, and not to make an absolute gift; but the trust is ineffectually created, is not expressed at all, or fails, the next of kin take. On the other hand, if the party is to take himself, it must be on the ground according to the authorities, that the testator did not mean to create a trust, but intended a gift to that person for his own use and benefit; for if he was intended to have it entirely in his own power and discretion, whether to make the application or not, it is absolutely given."

In this case, therefore, if it could be considered, that the intestate did intend to part with the dominion of the property absolutely and to create a trust, it could not be supported, even if there had been a declaration of it made in writing. The objects of it would have been too vague and uncertain, and it could have derived no aid from the statute of Elizabeth. If the persons named as trustees could take the property as an absolute gift, they would be directly interested in the event of this suit, and their testimony introduced by the defendant, must be excluded. This would leave the case to rest upon the testimony of William Stickney alone, and that clearly fails to establish any title to the notes, in the defendant, and those for whom he claims to hold them.

In whatever aspect the case may be viewed, either as presenting a gift *inter vivos*, or a *donatio mortis causa*, or as an

attempt to make a testamentary disposition, without the requisite forms of law, the defence fails.

Defendant defaulted.

SAMUEL DUNLAP *versus* BENJAMIN GLIDDEN, Jr. *& two others.*
SAMUEL DUNLAP *versus* BENJAMIN GLIDDEN, Jr. *& three others.*

Where a verdict and judgment have been recovered against a party to a suit, he cannot, (while such judgment is unreversed,) maintain an action against the other party jointly with others, upon an allegation that said verdict was unjust and false, and was procured by them, through fraud and perjury, under a conspiracy to affect that purpose.

In such an action, the plaintiff is estopped by the judgment, from proving the charges alleged in his declaration.

An action will not lie against one, who was a witness in another suit, for giving false testimony.

ACTIONS OF THE CASE, each charging, *that* Dunlap was the just and lawful owner of a lot of land; *that* said Glidden, however, had sued out a writ of entry for the land against Dunlap, and in that action had obtained a verdict and judgment for the same; *that* said verdict was obtained by the fraud of Glidden and by false testimony of two of the defendants and of other witnesses, under a conspiracy among all the defendants, by fraud and perjury, to deprive and cheat the plaintiff of his said land.

The defendants protesting, that the fraud and conspiracy are falsely charged, pleaded that the plaintiff is estopped, by the said judgment, from proving his allegations.

The plaintiff replies, that he ought not to be estopped, &c. because neither the parties nor the cause of action in the former suit were the same as in this action, and re-asserts, that said judgment was obtained by fraud, perjury and conspiracy as in the writ alleged. To that replication the defendants demur generally, and there is a joinder in the demurrer.

F. Allen, in support of the demurrer.

Lancaster and *Baker*, contra.

I. In one of the suits there are two defendants, and in the other suit three defendants, who were not parties to the suit, in which the judgment was fraudulently obtained, nor are they alleged to be privies in law, in estate or in blood. They are, therefore, not bound by the judgment, and can take no advantage of, &c. A record to be binding, must be mutually so. 1 Greenl. Ev. § 524; 1 Starkie's Ev. part 2d, § 62; *Burgess* v. *Lane & al.* 3 Maine, 165; *Maybee* v. *Avery*, 18 Johns. 352; *Sprague* v. *Oakes*, 19 Pick. 458.

II. The cause of action is not the same. The former suit raised a mere question of title. This charges a conspiracy to cheat, made effectual by false testimony of defendants. The actions did not accrue at the same time, one in Dec. 1846, the other in Oct. 1848. Same evidence will not support both. *Salem India Rubber Co.* v. *Adams*, 23 Pick. 256; *Gates* v. *Goreham*, 5 Verm. 317.

III. The pleadings admit, that the former judgment was obtained by the fraud and false testimony of defendants. Such a judgment is not only not an estoppel, but is not even admissible in evidence. Authorities cited above. Defendants ought not to take advantage of their own wrong, and unless this action can be maintained, the plaintiff has no remedy for the grevious oppression which he has sustained, and that great principle of constitutional law is violated. 3 Pick. 33.

IV. It is said the replication is defective. This is denied, but if it be so, the first fault was in the plea. For it does not answer the whole case; it does not allege, that the parties in the former suit, and in the present suits are the same or are privies; or that the judgment is yet in force.

WELLS, J. — The cause of action in these suits is the same, but the same defendants are not all joined in each of them. The declarations allege in substance, that Benjamin Glidden, jr. commenced an action against the plaintiff to recover several parcels of real estate, that a verdict was rendered in that action in favor of Glidden, and judgment was entered on the verdict, that all of the defendants fraudulently conspired together to defeat the plaintiff's title, and to aid Glidden in his

suit, and that by the false testimony of two of the defendants and others, the verdict was obtained against the plaintiff.

These actions are brought to recover damages arising from the judgment obtained by Glidden against the plaintiff, and if they should be sustained, the record would present the anomaly of a judgment remaining in full force, and of another, in which damages were rendered on account of the existence of the former one. But the judgment against the plaintiff, so long as it remains in force, must be considered as true and just. He cannot be permitted to aver the falsity of that judgment, as the ground for the recovery of damages. It constitutes in itself a clear and unequivocal denial of his allegations. He says, that by the fraud and conspiracy of the defendants, he has lost the land, but the judgment imports that it was properly rendered in the ordinary course of judicial proceedings.

It is contended, that the defendants were not all parties to the judgment, and cannot avail themselves of it in this suit, and that the plaintiff is not estopped in relation to them, some of whom are neither parties or privies, to deny the validity of the judgment. That principle would be correct in reference to those, who were not parties or privies, in a controversy with them in relation to the land, for the estoppel must be mutual. But it does not apply to these cases. They are not brought for the land, but to recover damages for the loss of it, and the judgment shows that the plaintiff was not entitled to it. He grounds these actions upon the exhibition of a judgment against himself, and claims to maintain them because it was unjustly obtained. Glidden, who was a party to the suit, might avail himself of any estoppel arising from it, in a case where it should become expedient for him to do so, and could not be deprived of the benefit of it by being united with others. The plaintiff himself presents the judgment as the cause of his injury, and the basis of his claim against all of the defendants. He does not seek to pass by it, as *res inter alios acta*, but in substance admits it to be binding upon him, though he contends it was unjustly obtained, and alleges that his damages have been caused by it.

The suits are analogous to an action of conspiracy, and to an action on the case, in the nature of a conspiracy, at the common law. And in such actions, it must appear, that the plaintiff has been acquitted or discharged from the prosecution commenced against him. 3 Black. Com. 126; *Case of Conspiracy*, 12 Co. 23; *Saville* v. *Roberts*, 1 Ld. Raym. 374; *Pollard* v. *Evans*, 2 Show. 50; *Fisher* v. *Bristow*, Doug. 215. But these actions have been superseded by the modern action for malicious prosecution. 1 Chit. on Plead. 136. In which action the plaintiff must show a want of probable cause as one of its essential elements.

It has been held that a conviction before a justice of the peace, having jurisdiction, is conclusive evidence of probable cause, although upon an appeal, there was an acquittal. *Whitney* v. *Peckham*, 15 Mass. 243. But exceptions have been made to this rule, where the conviction before the magistrate, was obtained by the fraudulent conduct of the prosecutor, and the accused was subsequently acquitted upon an appeal. *Bent* v. *Place*, 4 Wend. 591; *Payson* v. *Caswell & al.* 22 Maine, 226.

In *Payson* v. *Caswell & al.* the defendants were charged with a malicious prosecution, and also for a conspiracy to injure the plaintiff, by a prosecution known to them to be groundless. It is said by WHITMAN, C. J., that the want of probable cause is essential under either aspect of the case, and however malicious the defendants may have been, if they had probable cause for the prosecution, the policy of the law would shield them from harm, in a suit of this kind, whatever form it might have assumed.

The most satisfactory view, which can be taken of these cases, is to class them with actions for malicious prosecution, the principles of which apply to actions to recover damages, for the prosecution of civil suits, that are false and malicious. But a civil suit in such cases, is not considered false, unless it has been defeated, or appears to have been brought for a larger sum than was known to be due, for the purpose of oppressing the defendant by attaching his property, or arresting him when

he would not be liable to an arrest for the sum actually due. Hargrave & Butler's note, 297, to § 237 of Lit.; *Mathews* v. *Dickinson*, 7 Taunt. 399; Bul. N. P. 13; *Savage* v. *Brewer*, 16 Pick. 453. And the judgment in favor of Glidden, which was rendered upon a verdict of a jury, by the highest tribunal in the State, must be considered as conclusive evidence of probable cause.

The plaintiff cannot recover upon the ground alleged of false testimony given by some of the defendants. For an action will not lie against a witness for giving false testimony in another case. *Damport* v. *Sympson*, Cro. Eliz. 520; *Eyres* v. *Sedgwicke*, Cro. Jac. 601.

If the judgment was obtained, as is contended, by fraud and perjury, the plaintiff has ample remedy by law. The court, which rendered the judgment, upon proof of these allegations, would be bound to grant a new trial, so that upon a further investigation, justice might be done. The witnesses, if guilty, might be indicted for perjury, and so might all those be indicted, who had unlawfully conspired together to deprive the plaintiff of his rights, and their conviction would afford the most convincing evidence, that a review of the action should take place.

It is contended on the part of the plaintiff, that the pleas of the defendants are bad. But it does not become necessary to decide that question, for the declarations being bad, judgment must be rendered against the plaintiff as the party, who committed the first error in pleading.

The declarations in both actions are adjudged bad.

COWAN *versus* WHEELER.

It is not allowable for an officer, by his testimony as a witness, to contradict his return that, upon a levy of land, he had delivered seizin to the judgment creditor.

The receiving of seizin in such a case, *if ratified* by the judgment creditor, is effectual, although the person receiving it had no *previous authorization.*

In a levy of land by the number of its lot and by reference to the deed from the debtor's grantor, there is a sufficient description by metes and bounds, within the import of the statute.

WRIT OF ENTRY. The land formerly belonged to Isaac Cowan.

Lancaster, for the demandant, contends, that the land vested in the demandant by force of a devise in Isaac Cowan's will, and also under a conveyance from Isaac Cowan to Alfred Cowan, made after the date of the will, and a release from Alfred Cowan to the demandant.

D. Williams, for the tenant, contends, that the land became the property of the tenant by the levy of an execution in favor of the Augusta bank against said Isaac Cowan, upon an attachment made prior to his said deed to Alfred Cowan, and by a conveyance from the bank to the tenant and one Shaw, and by Shaw's release of his part to the tenant.

To repel the tenant's claim, the plaintiff insists, that the levy, was invalid upon the following grounds, besides some others which failed for want of proof, viz : —

1. The land was not set off by metes and bounds. 9 Mass. 92.

2. The person to whom the seizin was delivered by the officer had no authority to receive it.

3. The bank attached not only the land, but also personal property more than sufficient to pay the judgment, and were bound to levy the execution upon the personal property, before the land could be taken.

The facts proved will appear in the opinion of the Court.

HOWARD, J. — This case is submitted to us for decision, upon a report of the evidence, with power to draw such inferences as a jury would be authorized to draw from the facts stated in the report.

Both parties assert title to the demanded premises through Isaac Cowan, senior. The demandant claims by will, dated July 5, 1823, and approved and allowed, May 12, 1829. The testator died in July, 1828. In December, 1825, the testator

conveyed the premises, called the bog lot, to his son, Alfred Cowan; but this deed was not recorded, and there is evidence tending to show that it has been lost. In December, 1845, Alfred conveyed to the demandant, and the latter claims under the testator by deed, as well as by will.

The tenant, in support of his claim of title, proves that the Augusta Bank held a note against Isaac Cowan, senior, as principal, and James Shaw and himself, as sureties, for $200, upon which the bank instituted a suit, and attached the premises, in October, 1825, together with personal property of the principal; that judgment was obtained, December, 1826, for $232,95; and that a levy was made, January 13, 1827, on the premises, appraised at $174; and that the bank conveyed them to the tenant and Shaw, by deed of quitclaim, dated January 10, 1828, but not acknowledged, or delivered, till November 30, 1831. It was admitted that the tenant had acquired Shaw's interest in the premises, prior to the commencement of this action.

It appeared that the personal property attached, was receipted for; that it was worth more than enough to pay the execution; that it was demanded of the receiptor, by direction of Judge Bridge, the president of the bank, within thirty days from the recovery of judgment; and that the receiptor was responsible.

On the morning of the day when the levy was made, and before it was effected, a note was taken, by direction of the president, payable to the bank, or order, in 60 days, for $200, signed by Wheeler and Shaw as principals, and Baxter Crowell as surety.

This note was paid at maturity by the principals; and the balance of the execution was paid by them, within a year from the levy, in pursuance of an agreement with the bank.

The objections to the sufficiency of the levy will be noticed in the order in which they are presented in the written argument for the demandant.

1. It is alleged that the levy was insufficient, because the premises, upon which the execution was extended, were not

set out by the appraisers, or in the officer's return, by metes and bounds, as required by the statute of 1821, chap. 60, sect. 27; and because the levy does not embrace any land excepting in the town of Sidney.

The appraisers describe the land shown to them, and appraised, as "*lot numbered two hundred and ten*, in the town of Sidney, on Jones and Prescott's plan, containing two hundred acres, more or less, being the property of Isaac Cowan, one of the debtors, and the same he purchased of Robert G. Shaw, December 28, 1822." The officer returned that he had caused the execution to be levied upon the real estate described in the appraisers' return. This constitutes a description by metes and bounds within the requirement of the statute of 1821, chap. 60, sect. 27; *Boylston* v. *Carver*, 11 Mass. 517; *Buck* v. *Hardy*, 6 Maine, 162; *Rollins* v. *Mooers*, 25 Maine, 195.

The demandant claims the "north half of lot numbered 210, in the fifth range in Sidney and Belgrade, commonly called the bog lot." It is not pretended that the lot described in the levy, is not the same as that claimed, in part, by the demandant, but it is contended that the extent covered only such portion of the lot as was situated within the limits of the town of Sidney. The whole lot, however, appears to have been appraised and taken, and there is no evidence in the case to prove that it was not all located in Sidney, as stated in the return upon the execution. This objection cannot prevail.

2. The bank adopted the act of Cummings in receiving seizin and possession from the officer, and that is an answer to the objection that he had no authority to receive seizin.

3. The objection "that seizin was not delivered, and the levy not completed, in a reasonable time," is not supported by proof. But it appears that the levy was made and seizin delivered within thirty days from the date of the judgment; and that the levy was recorded within three months from the time it was made. It was not competent for the officer to contradict his return, in the manner proposed. This objection, therefore, fails.

4. The demandant contends, also, that the bank could not legally take the real estate of their principal debtor, when they had sufficient of his personal property attached to pay the execution and costs. The statute of 1821, c. 60, § 27, under which the levy was made, does not require the creditor to take personal estate of his debtor, in preference to his real estate, where either can be had. If "the creditor can find no personal estate to his acceptance, wherewith to satisfy his execution, and shall think proper to levy his execution upon his debtor's real estate," he may effect a levy thereon. The personal estate may be of a description not suited to be taken on execution; the ownership may be in dispute, and the property so situated that its seizure may involve the creditor in a legal controversy, and it may not be "to his acceptance." Practically, with us, personal estate would, generally, be preferred; but the law gives the creditor the right to take the real estate of his debtor, when the latter fails to satisfy the judgment, or to expose personal estate for that purpose, acceptable to the former. *Herring* v. *Polley*, 8 Mass. 120.

5. It is objected that the note given by Wheeler and Shaw, as principals, with Crowell as surety, was payment of the execution, *pro tanto*, at least, and that the levy subsequently, for much more than was due upon it, would be void.

Though the legal presumption is, that the taking a negotiable promissory note of the debtor, for a simple contract debt, will extinguish it, yet such presumption does not arise, where the debt is founded on judgment, or where the facts repel the presumption. And payment by any of the joint debtors, though sureties only, on the original demand, after levy, and within the year, would, unexplained, be presumed in law to have been made for redemption, rather than for a purchase of the premises. But the explanations of this payment, by the tenant, are satisfactory. His title stands upon that of the bank. Shaw testifies, that he and Wheeler were sureties for Cowan, senior, that they had no security for their liability on the execution, and that they "made a bargain with Judge Bridge to pay the debt to the bank, and to take the land levied

upon, Mr. Bridge remarking, that the bank did not want the land, but their pay, and that, in pursuance of this bargain, the bank did give us a deed of the bog lot." It appears that the note in question was not given or received in payment, but as collateral security for the debt, and that it was paid in connexion with the balance of the execution, and interest, and costs, to fulfil the bargain with the bank, and purchase in their levy. The transaction appears to have been consistent with the rights of all parties, and is sustainable in equity, and at law. *Nickerson* v. *Whittier*, 20 Maine, 223. The levy was therefore effective and available to the bank and its grantees.

The testimony of Louis O. Cowan tends to show, from the admissions of the tenant, that means or funds were furnished by or for the principal debtor, and that they were received by the sureties, one or both, for the purpose, and accordingly applied and paid to the bank, within the year, "to redeem and liberate the land;" but it does not show that the supposed means or funds were sufficient for that purpose, or that the demandant accomplished the redemption.

The tenant, having the title acquired by the levy of the bank, is entitled to judgment.

INHABITANTS OF WINSLOW, *petitioners for certiorari, versus* COUNTY COMMISSIONERS.

An appeal from the doings of County Commissioners, on a petition for the establishment of a highway, opens to the consideration of the committee, appointed by the District Court upon the appeal, the whole question which was before the County Commissioners.

If said Commissioners had established a portion of the road prayed for, and refused to establish the other portion, it is competent for the committee to establish the whole road.

Where the Commissioners have established one portion of the road prayed for, and, in their return, made no mention of the remaining portion, their silence in that respect, is to be considered a *refusal* by them, to establish such remaining part.

PETITION for a writ of *certiorari*.

An application had been made to the County Commissioners for the establishment of a highway between certain termini, and they had adjudged it to be of common convenience and necessity that the easterly portion of the route should be established, up to an existing road, which run nearly in the direction of the road prayed for to its western terminus. As to the residue, (the western portion of the route prayed for,) nothing was said in their return. The original petitioners for the road appealed to the District Court, and by that court a committee was appointed to view the route prayed for, and to report, whether, in their opinion, the decision of the County Commissioners ought, in whole or in part, to be affirmed or reversed.

The committee reported it to be their unanimous opinion, that it was of common convenience and necessity, that the eastern portion of the route, as located by the County Commissioners, should be established as a public highway; and they further reported it to be the opinion of a majority of the committee, (one of the three dissenting,) that a highway upon the western portion of the route should also be established. The report of the committee was accepted.

The petitioners, within whose town the said western portion of the route is situated, allege, that there is error in the proceedings; *because*, the committee had no authority to determine and report that the western portion of the route ought to be located. Wherefore a writ of *certiorari* is prayed for, to bring before this court the whole record and proceedings of the District Court, that the same may be quashed.

Paine, for the petitioners.

The question is, whether the committee had authority to adjudicate upon that part of the road, concerning which the Commissioners had made no decision whatever.

We submit that there could be no appeal where there had been no adjudication. Upon the westerly part of the road there had been no adjudication. As to that part, the supposed appeal could have no effect. If the Commissioners refuse to adjudicate, the remedy is not by appeal, but by *mandamus*.

The warrant to the committee required them to report whether the decision of the Commissioners should be affirmed or reversed. Suppose them to have reported that as to the eastern portion of the road, the decision should be affirmed, and that it should be reversed as to the residue. What judgment could the District Court render? There would be no decision to be reversed. Upon such a report, what could the County Commissioners do? Should they proceed to locate a new road, or follow the old one to the western terminus?

Morrill, contra.

SHEPLEY, C. J. — The question presented is, whether an appeal, taken by virtue of the act approved on August 2, 1847, from the Court of County Commissioners to the District Court, opens the whole proceedings upon the petition for revision, or only such part of them as was embodied in a formal judgment of the County Commissioners.

The first and second sections authorize any person "aggrieved by any decision" to appeal "from the decision" of the Commissioners. The third section speaks of an "appeal from the judgment" and of a report, whether "the judgment" shall be affirmed or reversed. The fifth section also speaks of "the judgment" being affirmed in whole or in part.

This phraseology might indicate, that it was the intention to limit the proceedings on appeal to a revision of the matter formally adjudicated upon by the County Commissioners.

It cannot be supposed, that the well known rule of law, that an appeal from one tribunal to another, when facts are thereby presented, vacates the judgment and opens the whole case for revision, was overlooked or disregarded by the Legislature. If a limited revision only was intended by the appeal, it might be expected, that the language would indicate it very clearly. It was doubtless expected, that the decision or judgment of the Commissioners would embrace the whole matter contained in the petition. There are provisions in the Act

exhibiting the intention to have the whole matter revised on the appeal.

The third section provides, that the committee appointed by the District Court, "shall proceed to view the route named in the original petition." That committee are to hear the parties and their evidence evidently respecting the route viewed. When they are required to report, whether, in their opinion, the judgment of the County Commissioners should be in whole or in part affirmed, such judgment must be intended, as would operate upon the whole route. In a certain event, after a decision upon the appeal, the County Commissioners are to proceed to lay out, alter or discontinue such highway, in whole or in part, having reference to the way described in the petition.

Taking into consideration the whole provisions of the Act, it appears to have been the intention to open by the appeal for revision, the whole proceedings under the petition.

The County Commissioners adjudged a part of the way prayed for, to be of common convenience and necessity, and laid it out, and were silent respecting the other part.

The provisions of statute, chap. 25, could not be complied with by laying out and causing to be recorded, part of a way prayed for, and by subsequently laying out another part of it, under the same petition.

The omission to lay out a part prayed for, is therefore, a practical denial of the prayer of the petition, to such extent.

It could not have been the intention of the Legislature to make the right of appeal depend upon the language used or omitted to be used, in making up in that respect a record of their proceedings, when the result prayed for in the petition was produced or refused. *Writ denied.*

McKown *versus* Whitmore.

In a suit upon contract, the plaintiff may be relieved from the statute of limitations, by plea and proof that the defendant fraudulently concealed from him, the knowledge of the cause of action.

But that relief cannot extend to a plaintiff, who had direct and ample means, in the exercise of ordinary prudence, to detect the fraud.

Assumpsit on the money counts. The statute of limitations was pleaded, to which the plaintiff replied that the defendant fraudulently concealed the cause of action. The case was submitted to the decision of the court, upon the evidence as reported by Wells, J., before whom the trial was had.

It appears by the report that the evidence tended to prove the following facts, viz: —

On the 12th of November, 1842, the plaintiff drew his check of $294, upon the Franklin Bank, and loaned it to the defendant upon his promise to repay, by depositing the amount in the bank to the credit of the plaintiff; the defendant used the check and in a few days afterwards informed the plaintiff that he had made the deposit in payment; there was an open deposit account between the plaintiff and the bank from the date of that check till their settlement in June, 1849; upon that settlement, the bank called on plaintiff to pay said check of November 12, 1842; an interview was had between these parties and the cashier of the bank; the defendant insisted that he had made the deposit; this was denied by the cashier; the bank books showed no such deposit, but did show, in the account with the defendant, a deposit of $294, made November 16, 1842, by him to his *own* credit; the books of the bank were open to depositors, so far as related to their own accounts; the plaintiff, between 1842 and 1849, was several times seen at the bank; he had, at times, a pass-book of his deposit account; there was a large number of checks charged in the plaintiff's account kept by the cashier; an error of $2000 was once discovered in that account; the defendant has signed notes as surety for the plaintiff to be dis-

counted at the bank, one of them about two years ago; there were some other circumstances testified to, which might have a tendency to show that the plaintiff had the means of discovering the defendant's failure to make the deposit, if such failure had occurred.

Evans, for the plaintiff.

The suit is not barred by the statute of limitations. It is protected by the 18th section, which saves all cases, where the cause of action is fraudulently concealed from the plaintiff. The assertion of payment, by the defendant, being untrue, and known by him at the time, to be so, was such fraudulent concealment as to prevent the operation of the statute.

A statement of a fact as true, which the party knows not to be true, whereby injury results to another, is now universally held to be a fraud, for which an action will lie. *Tryon* v. *Whitmarsh*, 1 Metc. 1, where all the cases are cited and reviewed.

It does not lie in defendant's mouth to make the objection, that plaintiff was negligent, and might have ascertained by inquiry, whether the money had been paid or not. The assertion was made with a view to being believed, and of influencing plaintiff's conduct; and defendant cannot complain that it had the designed effect.

Where one recommends another as worthy of credit, it may always be ascertained by inquiry, whether he be so or not; and yet it is never held to be the duty of the party acting upon such recommendation, to make these inquiries. In matters of *opinion* it is otherwise; but statements of *facts*, as *facts*, may always be acted upon at the responsibility of the party making them. It does not appear that plaintiff ever examined the books of the bank, or settled his account there, until June, 1849.

The suit was commenced August 28, 1849. Six years from the time the money was received, expired November 12, 1848.

Assuming that *any* negligence can be imputable to plaintiff,

it could only be, that he did not discover the fraud, prior to August 28, 1843, within nine months from the time the money was received, as the suit was commenced within six years from that date.

Emmons, for the defendant, argued: —

1. That, in view of all the facts, the presumption is, that the defendant has paid the amount of the check.

2. That the facts do not prove the defendant to have been guilty of fraud.

3. That there could have been no fraudulent concealment, because the plaintiff had the means in his own power, all the time, of discovery. 3 Mass. 201; 3 Greenl. 405; 9 Greenl. 131; *Farnham* v. *Brooks*, 9 Pick. 212.

"Undoubtedly," says Lord Kenyon, in *Pasley* v. *Freeman*, "where the common prudence and caution of man are sufficient to guard him, the law will not protect him, in his negligence."

HOWARD, J. — The statute of limitations furnishes a bar to this action for the defendant, unless he has lost its protection by a fraudulent concealment of the cause of action, from the knowledge of the plaintiff, until within six years prior to the commencement of the suit. R. S. c. 146, § 1, 18.

It appears that the defendant received the plaintiff's check on the Franklin Bank, for $294, on November 12, 1842, and that he received the money on the check from the bank, on November 16, 1842, under an agreement to deposit the amount of the check in the bank, to the credit of the plaintiff "in a few days afterwards." The defendant alleged that he made the deposit as agreed, but the books of the bank did not contain any evidence of it, nor was there any proof that it had been done.

He might, however, have made the payment as he stated, and the cashier of the bank might have neglected to enter it upon the books. But if his statement was erroneous, and if he did not in fact make the deposit, it might have been a breach of a moral and legal duty, but would not consti-

tute a *fraudulent concealment* of the fact from the knowledge of the plaintiff. For the plaintiff knew, or had the most ample and direct means of knowing, by the exercise of common prudence, and in law was held to know, whether the money had been paid or withheld. The books of the bank, and his account there, open at all times to his inspection, as well as his own pass-book, would have enabled him to detect the error, at once, if it existed, either in the statement, or payment, or credit. If he neglected his rights and interest in this respect, he must submit to the regular operations of the statute, which protects alike the debtor and the creditor.

The alleged cause of action having accrued more than six years before the date of the writ, and there being no proof of fraud or concealment, the suit is barred by the statute of limitations. *Plaintiff nonsuit.*

ROBBINS *versus* MERRITT.

If a plaintiff offer himself as a witness, and be sworn on the *voir dire*, and then be rejected as a witness, and the defendant then propose to him any inquiries pertaining to the cause, he is not thereby made a general witness to other facts.

From the making of any such inquiry, no inference can be rightfully drawn, that the defendant consents to the statement by the plaintiff, of any facts, except the facts thus inquired of.

To such inquiries, the plaintiff is not bound to answer.

And though he should answer to some inquiries, he is not compellable to answer to others.

EXCEPTIONS from the District Court.

Assumpsit on book account.

The plaintiff offered himself as a witness in support of his book account, and was sworn to make true answers to such questions as should be asked him by the court, or by its order.

After he had testified to some particulars, in support of his account, he stated, that other persons were present at the principal transaction, to which he had testified; and thereupon

the court ruled his book and testimony to be inadmissible, and ordered the jury to disregard it.

He was then asked by the defendant, if the signature of a certain paper, shown to him, was his; and he replied, that he could not state with certainty. Thereupon his counsel contended, that the defendant had constituted the plaintiff a general witness to all facts, pertaining to the cause, and the plaintiff was permitted by the court so to testify as a general witness.

The defendant excepted.

May, for defendant.

1. The plaintiff had been rejected as a witness. The question then was put to him as a party. He might have refused to answer. Defendant did not consent, that he should state any other fact. *Gilmore* v. *Bowden*, 3 Fairf. 412; *Kennedy* v. *Niles*, 14 Maine, 54.

2. If a general witness, he should have been sworn to tell the whole truth. This was not done. 14 Peters, 448; 16 Serg. & Rawl. 77; 3 Wash. 580.

Vose, for plaintiff.

1. The defendant, by his inquiry, made the plaintiff a witness. He could not object to his cross-examination by plaintiff's counsel. *Brown* v. *Burrus*, 8 Miss. 26; *Page* v. *Ranky*, 6 Miss. 433.

2. Substantial justice has been done by the verdict, as it stands.

Wells, J. — The plaintiff, having been sworn to make true answers to such questions as should be put to him by the court, or the order thereof, and his account book of original entries having been introduced in evidence, testified to charges made by him in it. But the court decided, that the evidence was inadmissible and directed the jury to disregard it. After these proceedings were had, and while the plaintiff was upon the stand, he answered inquiries put to him by the defendant, in relation to the genuineness of his signature to a letter, which was exhibited to him.

The plaintiff's counsel then contended, that the defendant had made the plaintiff a general witness in the cause, in the same manner as if he were not a party to the suit, and the court so ruled, and allowed the plaintiff to be examined generally upon the facts of the case.

It is a general rule, that a party cannot be a witness in his own cause, and in a case where he cannot claim to be admissible by the rules of law, but only by the consent of the adverse party, such consent should be expressed in a clear and unequivocal manner. A party may be desirous to have the answer of his adversary in relation to some fact involved in the trial, when he would be totally unwilling to allow him to testify at large upon the facts.

It is not contended, that there was any express agreement, that the plaintiff should testify generally in the cause, but that his right to do so is to be deduced from the course taken by the defendant. But it cannot be inferred from any thing which the defendant did, that he consented to any thing more, than that the plaintiff might answer the questions in relation to the signature. Beyond that, his consent cannot be further extended, it was manifested by his acts, and by them it must be limited and bounded. Because the defendant asked whether the letter bore the signature of the plaintiff, it cannot be assumed that the defendant thereby intended to make the plaintiff a witness as to all the facts arising in the cause, and place him in a position, which he could not occupy without a clear and explicit agreement.

Nor was the plaintiff under any legal obligations to answer the questions put to him or any that might follow; he could stop when he pleased, the parties were bound by what was done and no ulterior right arose from it; the condition was mutual, the plaintiff could not claim the privilege of a general witness, and the defendant could not compel him to be such, by any thing that had transpired.

In the case of witnesses, not parties to the suit, who are incompetent through interest or otherwise, the objection to them may be waived expressly, or by implication arising from

a partial examination of them in relation to the facts in issue when the objection is known by the party against whom they are interested. But afterwards they are legally bound to testify. Their obligation to do so, does not arise from consent on their part. No such obligation was imposed upon the plaintiff by the answers which he made, the law would allow him to decline answering any further, because he had not consented so to do.

The right claimed by the plaintiff could only arise by a mutual agreement, which does not appear to have existed, and which cannot be drawn by any just inference from what took place at the trial.

The exceptions are sustained and a new trial granted.

ROLLINS, *Administrator*, *versus* JOHN O. P. STEVENS *& al.*

The relation, resulting from the establishment of a commercial copartnership, does not authorize one of the partners to bind the company as sureties, upon the paper of other persons.

ASSUMPSIT upon a promissory note. The defendants were defaulted by consent, subject to the opinion of the court, as to their liability. The note was signed "John O. P. Stevens, principal: — W. & H. Stevens, sureties."

William Stevens and Hiram Stevens were co-partners in navigation and business of commerce, under the style of W. & H. Stevens. Their company name was affixed to the note, in the form above stated, by Hiram Stevens.

Whitmore, for the defendant, W. Stevens, cited, Story on Partnership, 190 to 210, and notes; 3 Kent's Com. 23, and notes; *Livington* v. *Roosevelt*, 4 Johns. 251.

WELLS, J. — It appeared by the evidence, that Hiram Stevens signed the name of the firm, consisting of himself and

William Stevens, to the note in suit, as sureties, for the other maker.

One partner has no authority thus to use the name of the firm, out of the scope of the co-partnership business, unless the consent or subsequent ratification of the other is obtained. The note, on its face, indicates that it was given for the debt of the principal, and not for the debt of the firm. And the burden of proving such consent or ratification rests on the plaintiff.

The plaintiff's intestate could not claim to be an innocent holder, without the knowledge of such want of authority, for the form of the contract was information to him, that the firm had no interest in it, they being partners in navigation and the business of commerce. Bayley on Bills, 58; *M. & M. Bank* v. *Winship*, 5 Pick. 11; 3 Kent's Com. 47; Gow on Partnership, 58; *Foot* v. *Sabine*, 19 Johns. 154.

According to the agreement of the parties, the default as to William Stevens is to be taken off, and the action to stand for trial.

WILLIAMS *versus* KENNEBEC MUTUAL INSURANCE COMPANY.

If a perishable article, or any part of it, shipped by sea, arrives *in specie*, at its port of destination, or can, by the exercise of reasonable care and diligence, be carried there in that condition, although when there it may be worthless, the insurers cannot be charged for a total loss.

If, by reason of the perils insured against, no part of it can be carried to the port of destination, in specie, the loss is total.

In such a case, an abandonment was held not to be necessary, though a portion of the article was in such condition as to be sold by the master for a sum certain, at the port of disaster.

Where there is such a total loss of the cargo, the insured is entitled to recover, as for a total loss of the freight.

ASSUMPSIT upon a policy of insurance, whereby $2500 was insured upon the cargo and $300 upon the freight of a schooner on a voyage from Gardiner to a port in the Chesa-

peake. The plaintiff claimed for a total loss of a quantity of potatoes, being that part of the cargo covered by the policy.

Notice of the loss was duly given to the defendants, and a demand made as for a total loss. But there was no abandonment.

The history and character of the disaster were given by a witness for the plaintiff. The substance of his testimony is presented in the opinion of the court.

Upon that testimony, and upon notarial copies of the protest and survey, so far as admissible in evidence, the case was submitted to the decision of the court.

Benjamin A. G. Fuller, for the plaintiff.

I. The evidence fully establishes the fact that the loss was occasioned by the perils of the seas. "*Proxima causa non remota spectatur.*"

II. This was a total loss, for which the insurers are liable, because : —

1. No portion ever reached the port of destination, nor under the circumstances was it the master's duty to forward them. *Narcasdier* v. *Cheshire Ins. Co.*, 8 Cranch ; *Dyson* v. *Rowcroft*, 3 B. & C. 474 ; *Roux* v. *Salvador*, 3 Brigh. R. 266.

2. It is well settled, that where the voyage is broken up by the destruction of the vessel, and it would not be the master's duty to forward, there would be a total loss of a perishable cargo, though existing in specie. *Poole* v. *Insurance Co.*, 14 Conn. 47 ; *Robinson* v. *Insurance Co.*, 3 Sum. 220 ; *Murray* v. *Hatch*, 6 Mass. 475 ; *Parry* v. *Aberdeen*, 9 B. & C. 411 ; *Treadwell* v. *Ins. Co.*, 6 Cowen, 270 ; 14 Johns. 138.

How much stronger, where the voyage is broken up by the perils of the sea, rendering the cargo of no value at an intermediate port, and of course of no value at the port of destination, if forwarded.

The true rule is that, when the goods would be of no value, if forwarded to the port of discharge, and the damage occurs by the perils insured against, the insurers will be liable for a total loss.

III. A total loss is where the goods lose their whole value by the perils insured against, whether fire or shipwreck. What difference does it make to either party, if the value is gone, whether the article exists or not?

IV. It has been settled, that it is a total loss of a perishable cargo, where the value is lost to the insured, even though part of it reached its port of destination. *Williams* v. *Cole*, 4 Shepl. 207; *Hugg* v. *Augusta Ins. Co.*, 7 Howard, 595, and in cases above cited.

Allen, for the defendants.

I. The loss was not from any peril insured against, but from inherent cause of decay in the potatoes. Can the court say it was from sea perils? They would not keep in our cellars. The world knows of the modern disease in the potatoe. But if occasioned by leakage, defendants are not liable. Here was not even a total loss of a part of a thing. All was saved though damaged. Benecke, 407; Abbott, 2d Am. Ed. 283 to 325. The potatoes might have been carried forward. There was not a total loss, for enough were sold to bring $192.

For plaintiff to recover, there must be of memorandum articles, an *actual* total loss. The rules generally applicable to losses do not apply to memorandum articles. 1 Johnson's Cases, 196; 3 Caine's, 108; 12 Johns. 107.

II. The schooner ought, after repairing, to have gone to the Chesapeake. She was prevented only because there were higher freights elsewhere. She was repaired and loaded in two weeks. The delay therefore was no ground of claim.

There was no abandonment; notice of loss is not equivalent.

The reason of the distinction between perishable and other articles is, to avoid the necessity of determining how much of the loss has arisen from inherent decay, and how much from the perils of the sea. For plaintiff to recover, would unsettle this most salutary principle.

There is no ground to recover for the loss of freight.

The vessel could and ought to have carried the freight by proceeding on the voyage. 1 Johns. 225; 3 Johns. 321.

Reliance seems to be placed upon the decision, *Hugg* v. *Augusta Insurance and Banking Co.*, 7 Howard, 595. But that case widely differs from this.

1. The policy was on the freight only, not on the cargo.

2. The bark Margaret Hugg was twice stranded, with seven feet of water in her hold. The schooner never stranded.

3. The cargo of the Hugg was forbidden to be landed by the board of health, except 150 tons, and that was ordered to be removed.

4. The cargo of the Hugg was not sold for any thing.

5. "The M. Hugg could not be repaired at that port, so as to have carried on the cargo." "She was only repaired sufficiently to bring her home in ballast."

6. "No other vessel could be procured to forward on the remaining cargo, even if it had been in a condition to be shipped."

7. The law, as stated in pages 605 and 606, is in accordance with our views, so for as the same is applicable to the case at bar.

Evans, for the plaintiff, in reply.

Shepley, C. J. — This suit is upon a policy of insurance, by which the company insured on account of whom it might concern, payable to the plaintiff, $2500 on the cargo, and $300 on the freight of the schooner Yucatan, from Gardiner to a port of discharge in the Chesapeake. The policy contained the usual clause, providing, that the company should not be liable for any partial loss, for goods esteemed to be perishable in their own nature.

The principal part of the cargo consisted of potatoes, a perishable article. The case is submitted for decision by the court, upon the testimony introduced.

The only witness examined testifies, among other statements, that the vessel sailed from Augusta, bound to Baltimore, on the 17th or 18th day of November, 1846; that the cargo was principally potatoes; that on the 23d day of that month,

a violent gale commenced; that it was very severe; that for a number of days they ran under bare poles, having no sails set; that the gale continued twenty-nine days; that the deck load was swept off, the foresail was gone, the flying jib gone, the mainsail and jib chafed very much, so they could not be of much use; that the sea broke over the vessel a great deal; that in the first of the gale she did not leak any; in a few days after she began to leak; that the sea struck her on the side of the house upon deck, and let the water into the cabin, and it leaked through the cabin floor, upon the cargo below; that she strained about her deck, and leaked badly; that the gale continued, until they were driven across the gulf stream and into the trade winds; that there were eight or ten days during the gale, when they dared not show their heads above the companion-way, more than two or three times; that he got out then, lashed himself to the pumps and pumped her off, and there was considerable water in the hold; that after the gale abated, they got the pieces of sails together, and tried to get to their port of destination, and found they could not; then tried to get to Savannah or Charleston and could not fetch either; that they then ran for Key West, where they arrived thirty-nine days out. That while running for Key West, they took off the after hatches, and one of the men jumped down upon the potatoes and sunk in up to his knees; that there was a bad smell in the cabin; that there were a few of the potatoes on the top, that looked rather bright. That after their arrival at Key West the cargo was examined by the captain, and the potatoes were sold at auction the next day after their arrival for $192. That a few of them, about twenty bushels, were picked off the top and put on the wharf, and some of these were sold by the purchaser, four or five baskets full were carried away, but were mostly, if not all, brought back and thrown into the dock as unfit for use; those in the hold were also all pitched overboard; a few on the top looked bright, but all under them was "mush." That the ordinary length of a voyage from the Kennebec river to Baltimore was twelve or fourteen days; and from fourteen to fifteen days

from Key West to Baltimore. That the planks on the bows of the vessel were split, so that there was a hole, when they got into Key West. That they laid there and repaired about a fortnight and loaded again and proceeded on another voyage. That the potatoes began to decay first between the main hatch and the foremast, where the vessel strained, and under the cabin; began at the bottom and rotted upwards, as he judged from appearances, when he examined them at Key West; that they decayed by the salt water; when they got into the trade winds, they were so far rotted, that nothing could save them; a few of them on the top did not look as though they were all decayed.

A notarial copy of the protest, and of a survey upon the vessel and cargo, at Key West, are presented as evidence, so far as legally admissible. These can only be received to contradict and discredit the testimony of those, who have subscribed them. *Senat* v. *Porter*, 7 T. R. 158.

The witness subscribed the protest, which does not mention many matters stated by the witness, while it does not appear to contain any thing materially at variance with his testimony. It does not mention, that the vessel leaked, or that they made use of her pumps, while it does state, that the sea was at one time breaking into the vessel, with the most fearful violence. The omission of her leakage, and that her pumps were used, may, perhaps, be accounted for, from the consideration, that they were occurrences of a kind so common, and so little suited to occasion, or to relieve them from imminent peril, as not to be particularly noticed, when the protest was extended. A leakage, which would not be dangerous to the safety of the vessel, and which might be destructive to a cargo of potatoes, might, perhaps, be overlooked in a protest, containing accounts of disasters much more dangerous to the safety of the vessel.

The court does not find itself at liberty to discredit the essential facts stated in the testimony of the witness, and it must proceed to apply the law to the state of facts thus disclosed.

The plaintiff can recover the insurance made upon the cargo only upon proof of an actual total loss. But there may be a total loss of cargo without an actual annihilation of it, and when something is obtained from it in the nature of salvage. What constitutes a total loss of perishable articles has long been the subject of much discussion and of some difference of opinion. These differences may, perhaps, be considered as substantially put at rest in England by the case of *Roux* v. *Salvador*, first decided after two arguments by the Court of Common Pleas, and finally upon error brought in the Exchequer Chamber. 1 Bing. N. C. 526 and 3 Bing. N. C. 266. It may not be too much to hope, that the question may be permitted to rest in this country upon the decision in the case of *Hugg* v. *Augusta Insurance & Banking Company*, 7 Howard, 595. The doctrines finally asserted in these two cases, after an examination of the cases formerly decided by different tribunals, are substantially the same; and they may well be received as productive of greater uniformity in the decision of the commercial questions involved in them, than can be expected from a refusal to adopt them.

In the former of these cases, Lord Abinger, speaking of the memorandum clause of a policy, observes, "It has no application to a total loss or to the principle, on which a total loss is to be ascertained." "The argument rests upon the position, that if at the termination of the risk the goods remain in specie, however damaged, there is not a total loss. Now this position may be just, if by the termination of the risk is meant the arrival of the goods at their place of destination, according to the terms of the policy. But there is a fallacy in applying those words to the termination of the adventure before that period, by a peril of the sea. The object of the policy is to obtain an indemnity for any loss, that the assured may sustain by the goods being prevented by the perils of the sea from arriving in safety at the port of their destination." "But if the goods once damaged by the perils of the sea, and necessarily landed before the termination of the voyage, are by reason of that damage in such a state, though the species

be not utterly destroyed, that they cannot with safetey be reshipped into the same or another vessel; if it be certain, that before the termination of the original voyage, the species itself would disappear, and the goods assume a new form losing all their original character; if though imperishable they are in the hands of strangers, not under the control of the assured; if by any circumstance, over which he has no control, they can never or within no assignable period be brought to their original destination; in any of these cases, the circumstances of their existing in specie at that forced termination of the risk, is of no importance. The loss is in its nature total to him, who has no means of recovering his goods, whether his inability arises from their annihilation or from any other insuperable obstacle."

These positions were received with approbation in the case of *Hugg* v. *Augusta Ins. Co.* In the opinion, it is said to be well settled, that "so long as the goods have not lost their original character but remain in specie, and in that condition are capable of being shipped to the destined port, there cannot be a total loss of the article, whatever may be the extent of the damage." "The rule it will be observed, as we have stated it, contemplates the arrival of the goods, or some part of them, in specie at the port of delivery, or that they were capable of being shipped to that port in specie. And hence, if the commodity be damaged, so that it would not be allowed to remain on board consistently with the health of the crew, or safety of the vessel, or if permission be refused to land the same, by the public authorities, at the port of distress, for fear of disease, and for these and like causes should from necessity be destroyed by being thrown overboard, notwithstanding the article exists in specie and might have been carried on in that condition, there would still be a total loss within the policy. In the cases supposed, it is as effectually destroyed by a peril insured against, as if it had gone to the bottom of the sea from the wreck of the ship. The same result follows also, if the goods be so much damaged as to be incapable of reaching the port of destination in their original character."

The doctrines respecting perishable articles may be thus briefly stated.

If the article or any part of it arrives at the port of destination in specie, or can, with the exercise of reasonable diligence and care, be carried there in that condition, although it may be worthless there, there can be no total loss.

If, by reason of the perils insured against, no part of it can be carried to the port of destination in specie, the loss is total.

By the application of these rules the rights of the parties must be decided.

When the potatoes arrived at the port of distress, all but a few on the top were greatly injured by sea-water, or, to use the word of the witness, were "mush." He states, that they were so far rotted before that time, that nothing could save them. If any attempt had been made to carry them in the same or in another vessel to the port of destination, there can be no reasonable doubt, that no one of them would have arrived there in specie or in an unchanged state or form. In the state, in which they then were, there is little reason to conclude, that they could have been allowed to remain on board consistently with the health of the crew, so long, as would be necessary for their conveyance to the port of destination. The probability is strong, that they never would have arrived there in any condition.

It is insisted, however, that the plaintiff, even on this view of the case, cannot recover, because the potatoes appear to have been sold for $192, and there was no abandonment.

In the case of *Roux* v. *Salvador*, the Court of Common Pleas decided, that the insured could not recover, because he had made no abandonment, and not because the loss was not considered to be total.

The necessity of an abandonment was elaborately examined in the Exchequer Chamber, and the decision was, that it was not required to entitle the insured to recover. That no abandonment is necessary, where there is a total loss of the subject matter insured. The rule as collected from all the decided cases, is stated by Phillips to be, "where the deduc-

tion from the amount of a total loss, is not the mere credit of a sum certain, but the remains of the property, that is specifically the subject of the insurance, or rights that may pass by assignment, an abandonment is necessary to entitle the assured to recover for a total loss. 2 Phil. on Ins. 240.

In this case, the deduction from the amount to be recovered for a total loss, is a sum certain, being the amount received for a sale of the potatoes. After that sale, there was nothing left to be abandoned but the sum so received, and that the law will dispose of without requiring an abandonment. The plaintiff will therefore be entitled to recover as for a total loss of the cargo insured.

He also claims to recover, as for a total loss of the freight insured.

The insurer of freight engages, that the owner of the vessel shall not, by the perils insured against, be prevented from earning freight, by a performance of the voyage. If, therefore, the owner by reason of such perils cannot perform the voyage, and deliver the cargo at the port of destination, he will be entitled to recover the amount insured. This may happen on account of the loss of the vessel, and the inability to procure another, or on account of the total loss of the cargo.

If he can perform the voyage, and deliver the cargo or some part of it, in that or some other vessel, although when delivered the cargo may be valueless, he will not be entitled to recover. *Griswold* v. *The New York Ins. Co.* 3 Johns. 321; *Salters* v. *The Ocean Ins. Co.* 12 Johns. 107; *Clark* v. *Mass. Fire and Marine Ins. Co.* 2 Pick. 104; *Hugg* v. *Augusta Ins. and Banking Co.* 7 How. 595.

If the expense of sending the cargo on to the port of destination by another vessel, will exceed a moiety of the stipulated freight, the insured may abandon, and then recover for a total loss. *Whitney* v. *The New York Firemen Ins. Co.* 18 Johns. 208; *American Ins. Co.* v. *Center*, 4 Wend. 54.

In the case of *Hugg* v. *Augusta Ins. Co.*, the insurance was upon freight. The case was presented on a difference of

opinion between the Judges of the Circuit Court upon certain questions.

The first question presented the inquiry, when the article insured is perishable, "are the defendants liable as for a total loss of freight, unless the entire cargo was totally destroyed, so that no part of it would have been carried to the port of destination, even in a deteriorated and valueless condition?"

The certificate directed to be sent in answer to this question was, that in case the jury should find the article to be perishable, "the defendants are not liable as for a total loss of the freight, unless it appears, that there was a destruction in specie of the entire cargo, so that it had lost its original character at Nassau, the port of distress; or that a total destruction would have been inevitable from the damage received, if it had been reshipped, before it could have arrived at Matanzas, the port of destination."

The total destruction named in the latter clause evidently means such a total destruction as was named in the former clause, a total destruction in specie, that would occasion a total loss. As the conclusion has already been stated, that such a total destruction, as would have been a total loss, must inevitably have happened, before the potatoes could have been carried to the port of destination, the freight will be lost by a total loss of the cargo, before it could have arrived, and the voyage have been performed. The plaintiff will therefore be entitled to recover as for a total loss of the freight insured.

Defendants defaulted and an assessor appointed.

INHABITANTS OF WINTHROP *versus* INHABITANTS OF AUBURN.

Under the special Act of 1842, chap. 9, sect. 3, by which the town of Auburn was incorporated, wholly from a portion of the town of Minot, a person, whose settlement in Minot had been gained by a residence in that part of it, made into the new town, is held to have his settlement in Auburn, if he have not gained a new one elsewhere.

ASSUMPSIT for supplies furnished to Elias Chick and family

as paupers. It was admitted that Chick had gained a settlement in Minot by residing and having his home more than five years in that part of it which, on the 24th of February, 1842, was incorporated into the town of Auburn. The defendants contended that, if the pauper did not actually dwell and have his home in the bounds of Auburn, at the time of its incorporation, that town is not liable in this action.

It was proved that Chick removed into the town of Winthrop, in January, 1836, and there was evidence tending to show that he had resided there the most of the time since, and it was not proved that he had a residence in Minot or Auburn since that period.

There was no evidence that said pauper actually dwelt and had his home in the bounds of the town of Auburn, at the time of its incorporation, nor that he had resided for five years together in the town of Minot, or Auburn, subsequent to the sixth of January, A. D. 1836.

WELLS, J., instructed the jury, *that* this was the case of a division of a town, as provided for in the first clause of the fourth mode of gaining a settlement; *that*, upon the division of Minot, the paupers' legal settlement would be in that part of the divided territory, wherein his last dwelling-place fell, if he had not gained one elsewhere, though absent therefrom at the time of such division; *that*, as it was admitted said pauper had dwelt and had his home on that territory of Minot, which now constitutes the town of Auburn, for five years prior to January, 1836, the latter town thereby became liable for the support of said pauper, unless it appeared he had subsequently gained a legal settlement in some other town.

The verdict was for the plaintiffs, and the defendants excepted.

J. Goodenow, for the defendants.

1. The case shows that the pauper did not dwell and have his home within the bounds of the town of Auburn, when it was incorporated, to wit, on the 24th February, 1842. He had gained a settlement in Minot, prior to 1836; but had removed therefrom, when it was divided and a part of it incor-

porated into a town by the name of Auburn. His settlement, therefore, was not transferred from Minot to Auburn, and if not, the defendants are not liable, and the position taken at the trial is correct. To this point is cited, *Hallowell* v. *Bowdoinham*, 1 Greenl. 129; *Mt Desert* v. *Seaville*, 20 Maine, 343; *New Portland* v. *Rumford*, 13 Maine, 300; 4 Metc. 571.

2. Admitting that the instruction of the presiding Judge was correct, in relation to the case being that of a division of a town, as provided for in the first clause of fourth mode of gaining settlements in the Revised Statutes, yet this instruction is materially modified. The jury are further instructed, that, as it was admitted, the pauper had dwelt and had his home on the territory of Minot, which now constitutes the town of Auburn, for five years prior to January 6, 1836, the latter town thereby became liable, unless it appeared he had subsequently gained a legal settlement in some other town.

This instruction is conceived to be erroneous, and inconsistent with what preceded it. The town of Auburn did not thereby become liable, unless the pauper, after that time, gained a settlement in some other town than Minot. The last dwelling-place of the pauper in Minot, prior to the division, may have been in what is now Minot. The plaintiffs say, the pauper's settlement is in Auburn; this is denied, and the burden of proof is with the plaintiff, to satisfy the jury of this fact. But by this instruction, they may have been led to simply determine, whether, since 1836, the pauper gained a legal settlement in some other town than Minot; and if they find he did not, then, inasmuch as it is admitted he once lived there, on what is now Auburn, therefore, the defendants are liable.

3. If the pauper had been chargeable to the town of Minot, when it was divided, his legal settlement would have been unchanged by the act of division, though the defendants may have been obliged to contribute to his support. Special Laws, 1842, chap. 9, sect. 3.

4. The Act incorporating the town of Auburn, and the provision therein respecting paupers, was designed to apply to

those only, who dwelt and had their homes in Minot, at the time, and did not embrace the descendants of those who had previously removed therefrom. The inhabitants only, were invested with the rights and privileges that other towns enjoy. *Freeport* v. *Pownal*, 23 Maine, 472; *Smithfield* v. *Belgrade*, 19 Maine, 390; *Harvard* v. *Boxborough*, 4 Metc. 571.

May, for the plaintiffs.

The defendants also filed a motion for a new trial.

HOWARD, J. — The town of Minot was divided in 1842, and one portion of it incorporated as the town of Auburn. From facts admitted, it appears, that Elias Chick, the alleged pauper, had acquired a legal settlement in Minot, on that part of the territory thus incorporated, prior to January 6, 1836; although he did not reside in either of those towns at the date of the incorporation of Auburn.

The settlement thus acquired, continued until lost, or defeated, by gaining a new settlement, in some of the modes prescribed by statute. Act of 1821, c. 122, § 2; R. S. c. 32, § 1, 2. By the act by which Minot was divided, and Auburn incorporated, (Special Laws, 1842, c. 9, § 3,) it was provided, that "all persons who may hereafter become chargeable as paupers, shall be considered as belonging to that town on whose territory they may have gained a legal settlement, and shall be supported by the same."

Upon the division of Minot, the legal settlement of Chick, previously acquired in that town, if he had not gained a new settlement elsewhere, became fixed in Auburn, and would continue until another had been gained by him in some other town.

The only instructions of the presiding Judge, recited in exceptions, were to this effect, and they are unexceptionable.

The wife and children of Elias Chick would follow and have his settlement, (R. S. c. 32, § 1,) and supplies duly furnished to them, as paupers, would be recoverable from the town in which he had a legal settlement.

We do not discover from the report, that the verdict is

against the evidence, the weight of evidence, the instructions of the Judge, or the law; and the exception and motion are, therefore, overruled.

STATE *versus* MAGRATH.

In a recognizance, taken by a justice of the peace, for the prosecution of an appeal to the District Court, in a criminal prosecution, it is necessary that his jurisdiction should appear in the proceedings.

That jurisdiction does not appear, if the recognizance fails to show, in what county the supposed offence was committed.

WRIT OF SCIRE FACIAS, on a recognizance, entered into before a justice of the peace. The condition was in substance, that whereas the said Magrath had been convicted and sentenced by the justice for the crime of selling certain liquors, contrary to law, and had appealed to the District Court, now if he shall "personally appear at the court aforesaid and prosecute his appeal," &c.

The recognizance did not state in what county, city or town, the supposed offence of unlawfully selling liquors was alleged to have been committed.

Oyer of the recognizance and of its condition having been had, the defendant demurred to the writ, and set forth several causes of demurrer; and, among others, that it did not appear that the justice had any jurisdiction to demand and receive the recognizance. There was a joinder in demurrer.

Paine, for the defendant.

Vose, County Attorney, contra.

WELLS, J. — It is necessary that the jurisdiction of justices of the peace should appear in their proceedings, in order to sustain them.

By statute ch. 205, § 6, forfeitures or penalties, arising under that Act, may be recovered before any justice of the peace, &c. in the county where the offence was committed. A justice would have no authority to take a recognizance for prose-

cuting an appeal from his judgment, unless the offence alleged was committed within his connty. The want of jurisdiction would render his proceedings void.

The condition of the recognizance, upon which the action is founded, and which is exhibited by the pleadings, does not state in what town or county the offence was committed. It does not appear that a justice of the peace for the county of Kennebec was authorized to take the recognizance. It must therefore be held void. This conclusion is sustained by *Libby* v. *Main & al.* 2 Fairf. 344, and by the cases cited. Nor is such recognizance made valid by statute ch. 171, § 30. For the authority of the magistrate cannot be ascertained from the description of the offence charged.

Judgment for defendant.

KENNEBEC AND PORTLAND RAIL ROAD CO. *versus* KENDALL.

A corporation cannot, in an action at law, recover for its shares or for their assessments upon them, unless the holder has made an *express agreement* to pay for them, or unless, by its charter or other statute provision, a *personal obligation* is imposed upon the holder, to make such payment.

An agreement in writing to subscribe a specified number of shares to the stock of a corporation, is not an express promise to *pay* for them.

Where a power has been given to corporations to collect their assessments on the shares, by a sale of the stock, an inference is not readily drawn, that the Legislature, without any express enactment to that effect, designed to create also a personal liability on the share-holder.

Where neither by contract, nor by statute enactment, is there any personal obligation upon a stockholder to pay for his shares, such obligation cannot be created by any by-law or vote of the corporation.

A statute authority "to make and collect such assessments on the shares," "as may be deemed expedient, in such manner as should be prescribed in their by-laws," does not confer, nor does any statute of the State confer, upon the corporation, the power to create a personal liability upon the stockholder, to pay for his shares.

A by-law, made under such authority, and providing that "if the shares of any such delinquent stockholder shall not sell, for a sum sufficient to pay his assessments, with interest and charges of sale, he shall be held liable to the corporation for any deficiency," will not sustain an action at law for the deficiency.

Kennebec and Portland Rail Road Co. *v.* Kendall.

A by-law of a corporation, though made in pursuance of an express power to make such laws, must be lawful and reasonable, in order to be valid. If contrary to the common law, or to a legislative Act, it is void.

THIS case was submitted to the court upon a report of facts agreed. It was assumpsit upon the following paper, signed by the defendant and many others; viz:—

"We hereby agree to subscribe to the stock in the Kennebec and Portland Railroad Company, the number of shares, at $100 each, set against our names, including our former subscription." "Augusta, Oct. 28, 1846."

Against the defendant's name was written the number, "twelve."

The plaintiffs were incorporated by an Act, passed 1836, to which additional Acts were passed in 1841, 1845, and on July 16, 1846.

By the charter, the corporation had the power to ordain and establish such by-laws as shall from time to time be deemed necessary and proper for the management and regulation of their affairs, not repugnant to the laws of the State; also to make and collect such assessments on the shares of the capital stock, as may be deemed expedient, in such manner as shall be prescribed in their by-laws.

Among the first by-laws of the corporation, (and they were adopted on the 28th of October, 1846, the day of the defendant's subscription,) there was one authorizing the directors to make assessments upon the shares, and the treasurer, in case of delinquency by any stockholder in the payment thereof, to sell and transfer his shares, &c.

Also a by-law, providing that, "if the shares of any such delinquent stockholder shall not sell for a sum sufficient to pay his assessments, with interest and charges of sale, he shall be held liable to the corporation for any deficiency.

At the date of the writ, a large amount of stock had been subscribed by a large number of share-holders, and the whole of that amount had been expended under the charter, and for the purposes contemplated therein, including the amount of the twelve shares, which had stood in the defendant's name.

Eight assessments of five dollars each had been made upon each of said twelve shares; the defendant had neglected to pay them; and the twelve shares had been sold at auction by the treasurer, for $480. This suit is brought to recover the remaining $720, due upon the shares, together with interest and charges of the sale.

Several exceptions were taken by the defendant, to the regularity of the proceedings as to said assessments and sale, but they need not here be further noticed.

J. H. Williams, for the plaintiffs.

A stockholder is bound by the charter to pay for his shares. To enforce such payment, there is a right not merely to assess and sell the shares, but the charter authorizes a collection of the assessment in such manner as the by-laws shall prescribe, and the by-laws prescribe the remedy we are now pursuing.

B. A. G. Fuller and *Morrill*, for the defendant.

1. The *paper* signed by the defendant contains no promise to pay. Without such promise no action can be maintained; the remedy is only by a sale of the shares.

2. The *charter* contains no provision, making stockholders personally liable. Its authorization of by-laws can give no validity to by-laws, which should attempt to impose a personal liability upon a stockholder. The charter contemplates an enforcement of the stock-payments by the sale of the shares, and it gives no double remedy. The corporation can exercise only such powers as are expressly given, or result by necessary implication. It cannot, by any vote or act, enlarge its charter powers, either as to the subject on which it operates, or the persons or property of its members. *A. & M. Turnpike Corporation* v. *Gould*, 6 Mass. 40; *Same* v. *Hay*, 7 Mass. 102; *N. B. & B. Turnpike Corporation* v. *Adams*, 8 Mass. 138; *Mid. Turnpike Corporation* v. *Swan*, 10 Mass. 384; *Glass Co.* v. *White*, 14 Mass. 286; *Same* v. *Dewey*, 16 Mass. 94; *Mill Dam Cor.* v. *Ropes*, 6 Pick. 23; *Cutler* v. *M. F. Co.* 14 Pick. 483; *Bridge Co.* v. *McMahon*, 1 Fairf. 478; *Small* v. *Herkimer Man. Co.*, 2 Comstock, 343.

Evans, in reply.

It is now to be seen, whether persons, associating as partners, shall thus, by pledging themselves, induce others to expend their time, care and money, to promote public objects, and then violate their pledges, and taunt their associates with the folly of having trusted them. Shall new inducement be held out to such dishonesties?

This suit is upon a contract, requiring no shrewd, microscopic, double lens view, but merely a common sense construction.

The defendant, by his subscription, though not expressly, yet virtually undertook to pay. *Bangor Bridge Co.* v. *McMahon*, 10 Maine, 478. It was, in legal intendment, a promise to pay for twelve shares, at one hundred dollars each, as the same should be called for, by instalments. There were, in fact, no assessments; that expression is used simply in reference to a popular phraseology.

The by-laws were valid. They conflict with no law of the State, and are of vital importance to the success of this great enterprise. They operate only as internal regulations, and are to be presumed to have the assent of the defendant. The cases in 11 Metc. and in 6 Pick. were not like this. In 2 Comstock, there was a forfeiture of shares. Same case, in 2 Hill.

With great confidence, I maintain that the defendant is liable in law, as he certainly is, even by the lowest code of morals, which his own selfish soul could suggest.

Shepley, C. J. — This action has been commenced to recover the amount remaining unpaid of assessments made upon twelve shares of the stock of the corporation after a sale of them at auction. The defendant denies, that he became the owner of those shares; that the proceedings were legal, by which the assessments were made and the shares sold; and if they were, that he is personally liable to pay any balance remaining unpaid. The last objection will be first considered.

Admitting, for this purpose, that he became an owner of the stock, and that all the proceedings respecting the assessment and sale were legal, the inquiry is presented, whether the defendant is personally liable to pay the amount assessed and remaining unpaid.

A corporation may, in an action at law, recover the amount due for its shares or for assessments legally made upon them, when by its charter or other statute provision, a personal obligation is imposed upon the holder to pay for them. And when the holder has made an express agreement to pay for them. Without proof of such an agreement, or personal obligation, the corporation cannot recover. These positions are established by many decided cases, a few of which will be referred to.

Bangor Bridge Co. v. *McMahon*, 1 Fairf. 478; *Bangor House Proprietary* v. *Hinckley*, 3 Fairf. 385; *South Bay Meadow Dam Company* v. *Gray*, 30 Maine, 574; *Franklin Glass Company* v. *Alexander*, 2 N. H. 380; *Worcester Turnpike* v. *Willard*, 5 Mass. 80; *Andover & Medford Turnpike Company* v. *Gould*, 6 Mass. 40; *Portland, Saco & Portsmouth Rail Road Company* v. *Graham*, 11 Metc. 1; *Essex Bridge Company* v. *Tuttle*, 2 Verm. 393; *Hartford & New Haven Rail Road Company* v. *Kennedy*, 12 Conn. 499; *Turnpike Company* v. *Thorp*, 13 Conn. 173; *Goshen Turnpike Company* v. *Hurtin*, 9 Johns. 217; *Herkimer Manufacturing & Hydraulic Company* v. *Small*, 21 Wend. 273; *same* v. *same*, 2 Hill, 127; *Small* v. *Herkimer Man. & Hydraulic Company*, 2 Comstock, 330; *Canal Company* v. *Sansom*, 1 Binn. 70; *West Philadelphia Canal* v. *Jones*, 3 Whart. 198; *Silk Company* v. *Anderson*, 1 McMullan, 300; *Selma & Tennessee Rail Road* v. *Tipton*, 5 Ala. 787.

There may be differences of opinion in the decided cases, whether a particular form of subscription to the stock would constitute an agreement to pay for it; and there are serious differences of opinion, whether charters and statutes impose a personal liability.

When the language of a charter or statute does not in

terms authorize the corporation to make a call personally upon a holder of stock, or impose upon him a personal obligation to pay, but authorizes a collection by sale of the shares, the construction in this and most of the other States has been, that no personal obligation to pay was imposed. While in an elaborate opinion in the case of *The Hartford and New Haven Rail Road Company* v. *Kennedy* the court appears to have come to a conclusion, that a personal liability was imposed by the charter, not in express terms, but to be inferred from the design and purpose of the Act, to have payment made for the stock subscribed. However satisfactory the reasoning to authorize such an inference may be, when no other mode of obtaining payment is provided, it cannot readily obtain the concurrence of other minds, when a mode is provided, by which the design and purpose of the charter may be accomplished, without imposing a personal liability. There can, in such case, be no occasion to infer that a liability was intended to be imposed, different from that expressly provided. To come to such a conclusion in this State, would be to change the law, existing when the defendant signed the subscription, and to impose upon him a liability, which he did not, according to the existing law, assume.

Under a statute providing, that "it shall be the duty of the directors, for the time being, to call for and demand of the stockholders respectively, all such sums of money by them subscribed, at such times and in such proportions, as they shall see fit, under penalty of forfeiture to said company of their shares, and all previous payments made thereon," the decision was made in the case of *The Herkimer Manufacturing and Hydraulic Company* v. *Small*, 21 Wend. 273. And the language was regarded as imposing upon the directors, the duty to make a personal call, and upon the share-holder a personal obligation to pay. In a case between the same parties, in 2 Comstock, 330, a majority of the court came to a different conclusion.

If this action is maintained, it must be by virtue of the contract subscribed by the defendant; or by virtue of some

statute provision; or by virtue of such provision considered in connection with the by-laws of the corporation.

The subscription made by the defendant, on October 28, 1846, contains no promise or agreement to pay for the shares. It is at most but an agreement, by which he became the owner of twelve shares of the stock, subject to payment to be made for them.

The sixth section of the charter provides, that the corporation "may make and collect such assessments on the shares of such capital stock, as may be deemed expedient, in such manner as shall be prescribed in their by-laws." Here is no personal obligation imposed by the charter itself. All that can be claimed, is, that the clause authorizes the corporation to impose such an obligation by its by-laws. The language is peculiar. It does not authorize the corporation to make assessments on the shares, and to collect them in such manner as shall be prescribed in their by-laws. The authority conferred is to "collect such assessments on the shares" "in such manner as shall be prescribed in their by-laws." When it was well known at the time, when the charter was granted, that by the law, as administered in this State, no personal obligation to pay was imposed upon the owner of stock without an express provision therefor, if it had been the intention to subject the owners of the stock to such a personal liability, it is highly improbable, that the Legislature would have omitted to do it, and have delegated the power to do it to the corporation. The language used can have its full effect without a construction, which would confer such a power. It is more appropriate to authorize a collection on the shares by a sale or other disposition of them as the by-laws should prescribe, than it is to confer the power to impose a personal liability. This construction is sustained also by the consideration, that by the first section of the charter authority is conferred to make by-laws "not repugnant to the laws of the State," and that neither by the existing laws nor by the acts then recently passed concerning corporations, c. 200, and defining the rights and duties of rail road corporations, c. 204, is any such liability

imposed. The general act respecting corporations contained in the Revised Statutes c. 76, § 6, authorizes them to determine by their by-laws the mode of selling shares for non-payment of assessments, but it imposes upon the share-holder no personal obligation to pay. The charter cannot be considered as specially delegating the power to impose such an obligation not imposed by the charter or any statute provision.

The sixteenth by-law provides for the sale of shares, when the assessments made upon them have not been paid, and that "if the shares of any such delinquent stockholder shall not sell for a sum sufficient to pay his assessments with interest and charges of sale, he shall be held liable to the corporation for any deficiency."

A corporation may contract with one of its members as well as with a stranger. When it so contracts, there are two parties to the contract, the terms of which can no more be varied by one party without the consent of the other, than they could be, if made between individual persons. A vote passed by the corporate members can have no effect upon a contract made by the corporation with one of them to his prejudice. The legal effect of the paper subscribed by the defendant cannot be varied by a vote or by-law of the corporation. As it contains no promise to pay, one cannot be engrafted upon it by a by-law or by any other act of the corporation. *Revere* v. *Boston Copper Company*, 15 Pick. 363.

The defendant being exempt from any personal liability to pay by the existing laws of the State and by the charter, the laws regulating the relations and duties of corporations and their members cannot be changed by a corporate by-law. A by-law, made in pursuance of an express power to make such laws, if contrary to the common law or to a legislative act, is void. It must be lawful and reasonable. Com. Dig. By-law, B. 1; *Sargent* v. *Franklin Ins. Co.* 8 Pick. 96; *Durham* v. *Trustees of Rochester*, 5 Cow. 462.

In the matter of the *Long Island Railroad*, 19 Wend. 37,

a question arose, whether the directors could declare a forfeiture of stock to the corporation for the non-payment of instalments due, and it was decided that they could not without being expressly authorized by statute to do so. In the opinion it is said, "the general law has ascertained the rights of person and property of the citizen, and established modes of proceeding in case of a violation of them, and corporate bodies must conform to them in seeking redress, the same as individuals."

As the case fails to show, that the defendant has assumed any personal liability to pay assessments regularly made upon the shares, it will not be necessary to consider the other questions presented.

Plaintiffs nonsuit.

SHAW *versus* BERRY.

An innkeeper's liability for goods and chattels, stolen or injured at his inn, extends beyond his own fidelity and that of his servants.

He is responsible for *well* and safe keeping.

He is bound to keep the goods and chattels, so that they shall be *actually* safe, except against inevitable accidents, and the acts of public enemies, and of the owners of the property, or of their servants.

Proof that there was no negligence in himself or in his servants, is not sufficient for his immunity.

CASE against an innkeeper, for an injury to the plaintiff's horse, while at the defendant's stable.

The horse was placed at the stable in the evening, and one of his hind legs was found, in the morning, to have been broken above the gambrel joint. The evidence tended to show, that he was treated with care and faithfulness, that he was placed in a safe and suitable stall, with sufficient and suitable bedding; and that the injury happened without the fault of any one.

The Judge instructed the jury, *that* the rule of law applicable to common carriers, was not applicable to innholders;

that the law, in case of injury to goods or property, while in the custody of the innkeeper, presumes it to happen through his negligence or fault, and would hold him responsible for it, unless he could prove, (the burden being on him,) that he was guilty of no fault; and *that* if the defendant had proved that he was not in fault, the action could not be maintained. The verdict was for the defendant, and the plaintiff excepted.

Evans, for the plaintiff.

Innkeepers are liable to the same extent as common carriers. *Mason* v. *Thompson*, 9 Pick. 280; 5 Term, 274; 1 McCord, 509; 21 Wend. 282; 12 Pick. 306. 2 Kent's Com. 594, says, "rigorous as this law may seem, and hard as it actually may be in some cases, it is, (as Sir Wm. Jones observes,) founded on the principles of public utility, to which all private considerations ought to yield. Travelers, who must be numerous in a rich and commercial country, are obliged to rely almost implicitly on the good faith of innkeepers, and it would be almost impossible for them, in any given case, to make out proof of fraud or negligence in the landlord."

This is the very reason assigned by writers, for the strictness in the law of common carriers; the danger of combinations and the difficulty of proof. 9 Pick. 280; Story on Bailments, § 490, 491.

Between the liabilities of these two classes of bailees, no just distinction can be taken; both for hire; both entrusted exclusively with the property; both having great opportunities of fraud; both protected by their situation, against proof of misconduct; both bound to receive articles. 2 Comstock, 209.

Paine, for the defendant.

Innkeepers are not responsible to the same extent as common carriers. Loss of the goods will be presumptive evidence of negligence. He may repel that presumption by proof. Story on Bailments, § 472, 482; 12 Mod. 480; 2 Kent's Com. 4th ed. 592, 3; *Dawson* v. *Chamney*, 5 Q. B. 164;

Dickman v. *Rogers*, 4 Humph. 179; *Hill* v. *Owen*, 5 Blackf. 323.

Calye's case, 8 Coke, 32, is the leading case. Not liable, unless some fault in the innkeeper or his servants.

Mason v. *Thompson*, cited on the other side, was a case of theft. Theft is *conclusive* evidence of negligence. This is different. There can be no inducement for a landlord to *injure* property.

What is an act of God? Is it any thing more than an inevitable casualty? And what is an inevitable casualty, but a casualty which happens in spite of human care and vigilance? The horse breaks his leg, and the keeper has done all he could do to prevent it. Has Divine Providence no means of executing its purpose, but the thunder bolt?

TENNEY, J. — In the case at bar is involved the question, to what extent an innkeeper is responsible for the horse or goods of his guest, whom he entertains for hire. It has been held by some courts and jurists, that his liabilities are similar to those of common carriers; others have considered the law less rigorous towards him. *Calye's case*, reported in 8 Coke, 32, has long been regarded as the leading case upon this subject; and in some respects, a difference of opinion has existed, as to its doctrines. In that case, according to the report, "it was resolved by the whole court, that if a man comes to a common inn, and delivers his horse to the hostler, and requires him to put him to pasture, which is done accordingly, and the horse is stolen, the innkeeper shall not answer for it, for the words of the writ, which lieth against the hostler are, "cum, secundum legem et consuitudinem regni nostri Angliæ, hospitatores, qui hospitia communia tenent ad hospitandos homines per partes ubi hujusmodi hospitia existent transeuntes et in eisdem hospitantes, eorum bona et catalla infra hospitia illa existantia absque subtractione seu amissione custodire die et nocte tenentur, ita quod pro defectu hujusmodi hospitatorum seu serventium suorum hospitibus hujusmodi damnum non eveniat ullo modo."

From parts of the commentary in the report in *Calye's case*, upon the language of the writ just quoted, it has been supposed by some, that innkeepers are liable only for the want of fidelity, in themselves and their servants. It is therein said, "the words are, *ita quod pro defectu hospitatorum seu serventium suorum, &c. hospitibus hujus modi damnum non eveniat*, by which it appears that the innkeeper shall not be charged, unless there be a default in him or his servants, in the well and safe keeping and custody of their guest's goods and chattels, within his common inn; for the innkeeper is bound by law to keep them safe, without any purloining or stealing."

Judge Story, in his treatise upon bailments, on the authority of *Calye's case*, as well as other decisions, says, "But innkeepers are not responsible to the same extent as common carriers. The loss of the goods while at an inn will be presumptive evidence of negligence on the part of the innkeeper or of his domestics. But he may, if he can, repel this presumption, and show that there has been no negligence whatsoever; thus, although a common carrier is liable for all losses occasioned by an armed mob, (not being public enemies,) an innkeeper would not be liable for such a loss." Sect. 472. But the commentator thinks that this doctrine should be stated with some hesitation, in view of the case of *Richmond* v. *Smith*, 8 Barn. & Cres. 9, where a different view of the law seems to be entertained. Again, in sect. 482, he says, "By the common law, as laid down in *Calye's case*, an innkeeper is not chargeable, unless there is some default in him or in his servants, in the well and safe keeping and custody of his guest's goods and chattels, within his common inn, but he is bound to keep them safe, without any stealing or purloining. This doctrine, however, is to be understood with this qualification, that the loss will be deemed *prima facie* evidence of negligence, and that the innkeeper cannot exonerate himself, but by positive proof, that the loss was not by means of any person for whom he is responsible."

If *Calye's case* is further examined, it is believed that this interpretation is not authorized in all respects. After the language quoted by Judge Story in *Calye's case*, the report goes on and says, "and it is no excuse for the innkeeper to say, that he delivered to the guest the key of the chamber where he lodged, and that he left the chamber door open; but he ought to keep the goods and chattels of his guest there in safety, and therewith agrees, 22 Hen. 6, 21, (b); 11 Hen. 4, 45, (a) and (b); 42 Edw. 3, 11, (a). And although the guest doth not deliver the goods to the innholder to keep, nor acquaints him with them, yet if they be carried away or stolen, the innkeeper shall be charged, and therewith agrees 42 Edw. 3, 11, (a). And although they who stole or carried away the goods, be unknown, yet the innkeeper shall be charged. 22 Hen. 6, 38; 8 R. 2 Hostler, 7; *vide* 22 Hen. 6, 21. But if the guest's servant, or he who comes with him, steals or carries away his goods, the innkeeper shall not be charged; for the fault is in the guest to have such a companion or servant." From the whole commentary upon this point in the case, it fully appears, that an innkeeper is responsible for the goods of his guest, which may be stolen from his inn; and the construction, to be adopted, when the whole report is examined, is, that the liability does extend beyond the fidelity of the innkeeper and his servants, in the common acceptation of the term. He is responsible for the *well* and *safe keeping*, &c. He is bound to keep the goods and chattels so that they shall be actually safe; inevitable accidents, the acts of public enemies, the owners of the goods and their servants, excepted. Proof that there was no negligence in the innkeeper or his servants, is not sufficient for his immunity. And herein no question arises in regard to the burden of proof. It is not necessary for the guest to prove negligence to support his action; nor will proof by the innkeeper, that he was guilty of no negligence, be an excuse, unless he brings himself within those cases which are excepted. And it is believed that such is the current of authorities. In Comyn's Digest, vol. 1, page 298, in reference to *Calye's case*, it is said, "an innkeeper is not

liable, and an action will not lie, if the goods are lost without any fault of the innkeeper," but the import of this language is qualified by that which immediately follows; "as if the guest order his horse to be put into the pasture, and he is lost there, without any neglect of the innkeeper."

It was held in *Bennett* v. *Miller*, 5 Term R. 273, that if an innkeeper refuse to take the charge of goods till a future day, because his house is full of parcels, he is liable to make good the loss, if the servant of the plaintiff in charge of the goods stop as a guest, and the goods be stolen during his stay. ASHURST, J. remarked, "If it had appeared, as the defendant's counsel have suggested, that these goods were lost through the negligence of the plaintiff's servant, the case would have deserved further consideration, but nothing of that kind appeared in the Judge's report." And in the same case, BULLER, J. says, in reference to the passage from 1 Com. Dig. 298, which had been cited for the innkeeper, that the action does not lie, *if the goods are lost without any fault of the innkeeper*, "cannot be supported if taken in a general sense, for all the authorities agree, that it is not necessary to prove negligence in the innkeeper."

In the case of *Burgess* v. *Clements*, 4 M. & Sel. 306, Lord Ellenborough uses the following language. — "The law obliges the innkeeper to keep the goods of persons coming to his inn, *causa hospitandi* safely, so that in the language of the writ *pro defectu hospitatoris damnum non evenat ullo modo*." And afterwards, "the cases show that the rule is not so inveterate against the innkeeper, but that the guest may exonerate him by his fault, as if the goods are carried away by the guest's servant, or the companion, whom he brings with him, for so it is laid down in *Calye's case*." The principle seems to be recognized, that such keeping the goods of the guest as would be a protection for an ordinary bailee for hire, will not relieve the innkeeper from responsibility; but that he is not chargeable when the loss happens through the negligence of the guest, or those for whom he is responsible.

Kent v. *Shackford*, 2 B. & Ad. 803, was a case, where an

action was brought against an innkeeper, to recover the value of a bag containing bank notes, lost by the plaintiff during the time he resided as a guest at the defendant's inn; on plea of not guilty it appeared, that the plaintiff, his wife and another lady, Miss Stratford, took a sitting-room and two bedrooms at the inn, so situated, that the door of the sitting-room being open, a person there could see the entrance into both the bed-rooms. The plaintiff's wife laid a reticule, containing the money, on her bed, and afterwards returned into the sitting-room, leaving the door between that and the bedroom open. After remaining in the sitting-room about five minutes, she sent Miss Stratford for the reticule, and it was not to be found. It was not contended for the defendant, that upon these facts he would not be liable for *goods* and *chattels*, but he denied that money was either. Lord Tenterden, C. J. said, "there are many cases, where money has been recovered in an action against carriers, who like innkeepers are liable by the custom of the realm; and I cannot see any distinction in this respect between an innkeeper and a common carrier. The principle, on which an innkeeper is liable for the loss of the goods of his guest, is both by the civil and common law to compel the innkeeper to take care, that no improper persons be admitted into the house, and to prevent collusion between him and such persons. In the Dig. lib. 4, tit. 9, § 1, after stating the law, that an innkeeper is liable for the goods of his guest, it is said, *Nisi hoc esset statutum, materia daretur cum furibus adversus eos quos recepiunt conniti.* If we should grant the present rule, we should break in upon that principle. If a lady were to leave a valuable shawl in her room, the innkeeper (though unacquainted with its value) would clearly be responsible for it, if lost.

Richmond v. *Smith*, 8 B. & Cres. 9, was, where a traveler, on going into an inn, requested that his baggage should be taken into the commercial room, to which he resorted, from whence it was stolen. It was decided that the innkeeper was responsible, although he proved, that according to the

usual practice of his house, the baggage would have been deposited in the guest's room, and not in the common, if no order had been given respecting it. The Lord C. BARON told the jury, that the defendant was in the situation of a carrier, and could not get rid of his common law liability, unless by giving express notice. And on a motion for a new trial, Lord TENTERDEN, C. J., said, "It is clear, that at common law, when a traveler brings goods to an inn, the landlord is responsible for them. The situation of the landlord was precisely analagous to that of a carrier, and that the direction given to the jury was right." In the same case, BAYLY, J. said, "It appears to me, that an innkeeper's liability very closely resembles that of a carrier. He is *prima facie* liable for any loss not occasioned by the act of God or the king's enemies, although he may be exonerated, when the guest chooses to have the goods under his own care."

The case of *Clute* v. *Wiggins*, 14 Johns. 175, recognizes the doctrine that innkeepers are chargeable for the goods of their guests, lost or stolen out of their inns; and to render them liable, it is not necessary that the goods should be delivered into their special keeping, nor to prove negligence.

In Massachusetts, it has been decided that innkeepers, as well as common carriers, are regarded as insurers of the property committed to their care, and are bound to make restitution for any injury or loss not caused by the act of God or the common enemy, or the neglect or fault of the owner of the property. *Mason* v. *Thompson*, 9 Pick. 280.

Chancellor KENT, in reference to the liability of innkeepers, says, "In general he is responsible for the acts of his domestics and for thefts, and is bound to take all possible care of the goods and baggage of his guests deposited in his house or intrusted to the care of his family or servants." He remarks, that it is laid down in *Calye's case*, that the innkeeper was bound absolutely to keep safe the goods of his guest deposited within the inn, and whether the guest acquainted the innkeeper, that the goods were there or did not; and that he would in every event, be bound to pay for the

goods, if stolen, unless they were stolen by a servant or companion of the guest.

The cases decided, make no distinction between the subtraction or loss of the goods on the one hand, and injury to them on the other, so that the innkeeper would be relieved from responsibility in the latter cases, when he would be liable in the former.

The jury were instructed, that the rule of law applicable to common carriers was not applicable to innholders, and that if the defendant had proved that he was not in fault, then he would be exonerated and the action could not be maintained. The jury must have understood, that if the defendant and his servants had conducted with such care and prudence as is required of bailees for hire generally, and that negligence was not imputable to them, he could not be holden for the loss. All these facts may have been proved and he might still be liable for the injury sustained by the plaintiff. The evidence adduced may have satisfied the jury that the injury to the horse was the result of inevitable accident. But under the instructions, it was not necessary that such should be the finding to authorize a verdict for the defendant.

It is not perceived that the rulings in the admission of evidence, which was objected to, were erroneous.

Exceptions sustained.

TILTON *versus* PALMER.

In petitions for partition, the whole object, legally sought, is a division of the land, between those who have *title*, as tenants in common.

To such processes, persons in possession by disseizin, (unless their occupation has been of sufficient length of time to ripen into a title,) are not parties, and their equitable rights are not changed or affected by the proceedings.

An entry on the docket, by such a disseizor, in such a process for partition, could not impair his equitable rights.

In a writ of entry by the party to whom a portion of land had been set off in severalty, it was *Held*, if the tenant should prove that, for more than six

years prior to the filing of such a petition for partition, he and those under whom he claimed, had been occupying and improving the same portion of the land, his right to betterments therein, would not be abridged by the partition.

WRIT OF ENTRY. General issue, with claim of betterments. The demandant was formerly seized of one fourth part of a tract of land, as a tenant in common with others. On the 1st of May, 1847, he filed a petition for partition, and, after the giving of the public notice, ordered by the court, such proceedings were had as that a portion of the land was set off to him in severalty, by commissioners, whose report was accepted in May, 1849. At the October term, 1847, the tenant entered his appearance in that process, but withdrew it at the October term, 1848. The land demanded in this suit is a part of the premises so set off in severalty to the demandant.

The tenant, for the purpose of establishing his right, to have the value of his improvements ascertained by the jury, offered evidence tending to show that he and those under whom he claims, had for more than six years prior to the filing of said petition for partition, been occupying and improving the premises. This evidence was excluded, and the tenant was defaulted, under an agreement that, if the evidence was legally admissible, and would establish a right to betterments, the default should be removed.

Morrill, for plaintiff.

Bronson and *Woart*, for the defendant.

TENNEY, J. — The statute of 1821, chap. 37, and the Revised Statutes, chap. 121, on the subject of partition of real estate, so far as they are applicable to questions like those now presented, are substantially the same. In the former, the judgment rendered upon the report of the commissioners, who make the partition, after the report is accepted, and after the proceedings are recorded, shall be valid and effectual to all intents and purposes. Sect. 2. In the latter, final judgment, confirming the partition, shall be conclusive as to all rights both of property and possession, of all parties and privies to the judgment. Sect. 31.

The case of *Baylies & als.* v. *Bussey*, 5 Greenl. 153, was a decision under the statute of 1821, in which the possession of the respondent appeared to have continued for a period of more than six years before the filing of the petition. In the case at bar, it was not admitted by the demandant that the tenant had held the premises for so long a time before the petition, which was relied upon, with the subsequent proceedings, ending in a judgment thereon, as an effectual interruption of the tenant's possession, which had before commenced. But we apprehend, that, notwithstanding the supposed difference in the facts, the principle of the case referred to, will equally apply to the one before us. The doctrine there maintained is, that in a petition for partition, the whole object sought is a division of the land between those who have a title thereto, as tenants in common; and that the question touching the equitable rights of a person in possession by disseizin, cannot be presented; and consequently are not to be changed or in any way affected by the proceedings under such a process; that the disseizor, whether he has been in possession for a longer or shorter time, if the period is not sufficient to give a title, has no sort of interest in the question, how the land shall be divided, between those, who have the title. As a disseizor he assumes to have no rights, which can be considered in the trial, and hence none which he really has, can be taken away by the judgment. The court say, "the final judgment is considered as placing each one in possession of the part so assigned, and as giving him a several seizin; and on such seizin the assignee may maintain his writ of entry; and the judgment establishing the partition completely bars the legal possessory title of the respondent and all those, who might have become respondents." "The object of the petition for partition was, and always is, to effect a division of the legal estate between, or among those, who own it. The statute does not profess to interfere with any rights or claims of an equitable character, in making the partition."

The one having an adverse possession of the land divided

for a period of more than six years before the filing of the petition, not being affected by the judgment of partition, cannot be regarded as a party thereto, under the statute. Chap. 121, sect. 31. Consequently an adverse possession for a less period than six years from the same time, cannot make the holder a party to the petition, and the proceedings thereunder before judgment, notwithstanding he may have entered and withdrawn his appearance, because he had no interest in the premises, upon which he could be heard in that cause.

It may be doubted, whether those, who are parties to the process of partition and to the final judgment, are so put into possession by the partition, as to disturb the adverse possession of a stranger to those proceedings. But that question is not involved in the present controversy. It is nothing but the partition actually made, which can purge the disseizin of the one in possession, and abridge his equitable rights. If the possession has been continued for the space of six years, and he has made improvements, those are to be protected in the mode provided in the statute, notwithstanding the partition. In the case before us, it is admitted, that the tenant entered into adverse possession of the premises, and commenced his improvements more than six years before the final judgment upon the petition for partition.

The rulings of the presiding Judge, that the tenant was debarred, by the *petition* for partition and the proceedings thereon, from any claim for betterments, and that he had no claim thereto, unless the improvements and buildings had been made or commenced six years before the date of the petition, were erroneous.

The default is taken off,
and the action stands for trial.

MOTLEY, *libelant, versus* MOTLEY.

The provisions of the Revised Statute, which prescribes the causes for which divorce may be decreed, are not repealed by the statute of 1849, chap. 116.

Under the former, the party injured could *claim* a divorce, as matter of *right*. Under the latter, the appeal can be made merely to the *discretion* of this court.

Both Acts are in harmony, and both in force.

The discretionary power, conferred upon the court by the Act of 1849, is applicable only to causes of divorce, not provided for in the Revised Code.

Thus, a combination of such wrongs as might, each, become, by a sufficient length of continuance, a ground of divorce, falls within the provisions of the Act of 1849, and may be ground of immediate divorce.

Where there has been habitual drunkenness, (though of less than three years continuance,) and a wilful desertion, (though of less than five years continuance,) and extreme cruelty to the libelant, the court has the discretionary power to decree a divorce.

LIBEL for a divorce, setting forth the marriage in 1822; and *that*, in June, 1848, the respondent deserted the libelant wilfully, and without reasonable cause, and has ever since lived separate and apart from her, has neglected and refused to furnish suitable maintenance for her, or their minor children, seven in number, although abundantly able to so provide for them; *that*, for the three or four years prior to the time of said desertion, and up to this time, he has been an habitual and confirmed drunkard, and thereby rendered unfit to have care of his family; *that*, for five or six years before said desertion, he had treated her with extreme cruelty; wherefore, she prays that a divorce may be decreed, &c.

Clay, for libelant.

This process is brought under the Act of 1849, chap. 116. We expect to show the desertion as alleged; that it was without any justifying cause; that defendant was a confirmed drunkard some years prior to the desertion; and for four or five years had treated the wife with extreme cruelty.

TENNEY, J. — You charge drunkenness. Do you make that the ground of the libel?

Clay. — It was not of sufficient continuance to meet the statute.

SHEPLEY, C. J. — You have a charge of cruelty. That sort of conduct is ground for divorce from bed and board only, except by considering all the law to be repealed, which relates to divorce from bed and board.

Clay reads the Act of 1849, and thinks this case is embraced by its provisions.

SHEPLEY, C. J. — Then you must consider the Act of 1849 to extend only to such particular cases, as may not be provided for in the Revised Code.

Witnesses were then examined for the libelant.

SHEPLEY, C. J., orally. — This inquiry involves the construction of the statute of 1849. Does that Act operate as a repeal of the Revised Statutes, as to causes of divorce? It contains no *express* provision for such repeal. There is, then, no repeal, unless the new provisions are clearly repugnant to, and inconsistent with, those of the former law.

But not only does the new law not pretend to *repeal* the former one, but purports to be "*additional*" to it.

In reality, the acts are not at variance. They may have their full operation, with entire consistency. Take the law as to adultery, for instance, or of five years desertion. Under the former act, dower and alimony could be decreed. By the Act of 1849, no provision for such decrees is made. The law of 1841, gave the injured party a *right* to a divorce, and the court is bound to render such a decree. The *discretion* of the court was not appealed to, but *strict right* was demanded. The Act of 1849 gives no such *right.* It is merely upon the *discretion* of the court, that a party can call. These are but instances, brought to show that the acts are not inconsistent. We hold, therefore, that both the acts are in force.

The discretionary power, conferred by the law of 1849, is extremely broad, but it has limits. It is to be exercised only

when conducive to domestic harmony and consistent with the peace and morality of society.

What then are the cases, or, the classes of cases, in which the power can be properly exercised? Suppose the case of a party, who had been for three years a common drunkard. In such a case the law gives a *right* to a divorce. That law is an exposition of the discretion of the Legislature upon the subject. Could this court set up *its* discretion above that of the Legislature, and decide that it would require proof of four years habitual drunkenness? Or that it would be satisfied with proof of two years? We think the discretion of the Legislature a safe standard, as to every cause of divorce, for which they have made provision.

But there may be cases for which the former laws did not provide; such, for instance, as the co-existence of several of the prescribed causes, though neither of them have continued so long as to be, of itself, a sufficient ground of divorce. Such cases come within the discretionary power, conferred by the Act of 1849. For them the R. S. furnished no guide, and have indicated no standard.

In this case of Motley's, there is a combination of wrongs, there is habitual drunkenness, there is extreme cruelty toward the libelant, so that her personal safety is endangered, and there is wilful desertion.

For either of these wrongs the law makes an appropriate provision, but it is silent as to a combination of them. That combination brings the case within the statute of 1849. We are, therefore, now called upon to exercise a sound discretion. Considering that there is a family of children, is this a case in which a divorce would be conducive to domestic harmony, and consistent with the peace and the morality of society? We think it is, and accordingly there must be a

Decree of divorce.

Note. — The foregoing construction, given to the Act of 1849, under which this case was decided, seems to have been rendered less important, by the passing of the Act of August 16, 1850, giving to the court a much more extensive jurisdiction in cases of divorce. — Reporter.

EBENEZER SMALL, *libelant, versus* EMMA R. SMALL.

The Revised Statute, chap. 89, relating to divorce, was not repealed by the Act of 1847, chap. 13, or by the Act of 1849, chap. 116.

When a desertion of one of the parties by the other, is the only cause shown, it must be of at least five successive years continuance, in order to justify a divorce.

LIBEL for divorce, setting forth the marriage in 1831, and that for the last eleven years the respondent has treated the libelant with great disregard and contempt; has evinced a want of that respect and affection for him, necessary to the peace and well being of a family; that her conduct has been unkind and censorious; that she has denied him the rights of a husband; endeavored to injure him in his profession, as a physician, and in other modes rendered the life of the libelant uncomfortable and unhappy; that on the 24th March, 1849, she left his house without his consent, and without occasion therefor, and has never since resided in the family, or discharged her duties as a wife, and has refused ever again to return to his house, or to see him, or have further correspondence with him. The libel is dated February 6, 1850.

May, for libelant.

Morrill, for libelee.

SHEPLEY, C. J., orally. — The wife left her husband's home, and, at the institution of this process, had been absent about eleven months. During the additional two months, since the filing of the libel, she has declined to return, and her language indicates a purpose of living hereafter separate from him. There does not appear to have been any just occasion for her conduct. Against her husband, or against the arrangements he has always made for her support and comfort, there has not been shown any thing to justify her absenting herself from him. *Against her*, there has appeared no occasion for this legal proceeding, except the desertion charged in the libel. Is this a sufficient ground on which to decree a divorce? One cause only is alleged. That is to say, the

desertion. The statute of 1841 has made such provision for that description of cause, as to the Legislature, in their judgment, seemed proper. Their view was, that it would be unsuitable to authorize a divorce for that cause alone, unless it was continued for at least five successive years. That is an exposition of what the Legislature deemed to be a sound discretion, in such cases. That provision is unrepealed. It is unaltered and unaffected by the Act of 1849, upon which, probably, this libel was expected to be sustained.

If, on every occasion of a departure for a short time, by one of the parties from the other, a divorce could be had, the marriage contract could be rescinded with great facility; it would in effect, be but an arrangement to continue during the pleasure of both parties. Such a rule could not be consistent with public morals. But whatever our own reasonings might be, we have in this class of cases, no discretionary power. The will of the Legislature, declared in Revised Statute, chap. 89, sect. 2, clause 3, is imperative. *Libel dismissed.*

BLANCHARD, *in Error, versus* DAY.

In serving a writ, which directs the officer to attach the property of the defendant, and to summon him, there should be a separate summons, even though no actual attachment be made. In such a case, the service ought not to be made by a copy or by reading the original.

An officer's return upon a writ, "that he *gave* the defendant the summons for his appearance at court," is sufficient evidence, that he *delivered to the defendant a separate summons, in form by law prescribed.*

A justice's writ may be served by the constable of a town, upon any person within that town, though such person may be an inhabitant of another town.

ERROR, to a justice of the peace of this county. Plea, *in nullo est erratum.* Day sued Blanchard, whose residence is in Belgrade, and recovered judgment on default, before the justice. The writ in that action was in the common form of a writ of attachment and summons. It was served by a constable of Augusta, whose return thereon is as follows: viz. —

"By virtue of this writ I attached a chip, as the property of the defendant, and at the same time gave him the summons for his appearance at court.

Morrill, for plaintiff in error.

The first question relates to the mode of serving the original writ. R. S. c. 114, § 24, requires that, *when goods are attached*, a separate summons should be delivered to the defendant, or left at his dwellinghouse or place of his last and usual abode. The officer's return should show there was a separate summons, and that it was delivered to the defendant or left, &c.

But the return shows neither, nor that the defendant was duly summoned. It merely shows, that the officer "*gave* him the summons." It does not show the description or character of it. "*To give*" a summons, is not to "deliver" it, or to "leave" it.

But, in this case, no property was attached. Should the service be under the 24th or under the 26th section of the statute? We submit that it ought to have been under the 26th, which requires service by a copy or by reading the original.

The second assigned ground of error is, that the original defendant was an inhabitant of Belgrade, and that the constable of Augusta had no authority to serve a writ upon him.

J. Baker, for defendant in error.

Shepley, C. J., orally, — The statute c. 114, § 23, provides, that an original writ may be framed either to attach the goods or estate, and for want thereof to take the body, or it may be an original summons, either with or without an order to attach the goods or estate.

It is provided by the 24th sect. that, when the goods or estate "are attached" on either of said writs, a separate summons "shall be delivered to the defendant" or left at his last and usual place of abode.

In this case the writ was in the common form of a writ of attachment, with directions to summon the defendant, and it

should be served by a separate summons, delivered to him or left at his last and usual place of abode.

1. It is insisted, as no property was attached, that a service should have been made according to the provisions of the 26th section, by reading the same to him, or by giving him in hand, or leaving at his last and usual place of abode, a certified copy thereof.

If the words, "are attached," were to receive a literal construction, the mode of service would not depend upon the form of the writ, but upon the use which was made of it; and, if no property could be found to be attached, that writ could not be used, but a different writ must be sued out. Such is not the true construction, as will appear by a comparison of the 23d, 24th, 25th and 26th sections. The service is to be made according to the form of the writ, irrespective of the use which is made of it.

2. It is insisted that the return of the officer does not exhibit a legal service, because he states, that he "gave him the summons for his appearance at court."

It is a well established rule, that the returns of officers, being persons unlearned in the law, are not to be subjected to a severe and critical examination, to ascertain whether there is a formal and exact use of language, in conformity to the requisitions of law, but are to be regarded as sufficient, when there appears to have been a substantial compliance with such provisions.

In this case, it is apparent that a separate summons was used for service, and not a copy. "The summons" can only refer to such separate summons; "gave him the summons," affords proof that the summons was delivered to him, and would be sufficient to enable the defendant, in the original action, to maintain an action for a false return, upon proof that it was not delivered to him.

Another objection to the service is, that it was made by a constable of the town of Augusta, upon the original defendant, described in the writ, as of the town of Belgrade.

By chap. 104, sect. 34, a constable is authorized to serve,

"upon any person in the town to which he belongs," any writ or precept in a personal action, where the damages demanded do not exceed $100. It is not necessary that the person, upon whom the service is made, should be an inhabitant of the same town in which the service is made. It is sufficient that the service is made upon him in that town.

Judgment affirmed.

MILLIKEN *& al. versus* TUFTS *& al.*

Though the construction of a paper be erroneously submitted to the decision of the jury, yet, if their decision be correct, the submission of it to them, is not a sufficient ground for a new trial.

Where a debtor, owing several debts to the same person, pays money to him, and neither of the parties make any appropriation of it, the law applies it to the oldest debt.

A creditor cannot make a valid appropriation of a payment, at a time when a controversy thereon has arisen between himself and the debtor.

EXCEPTIONS.

Assumpsit on an account. The writ was issued April 25, 1848. The account consisted of two items, viz: —

1847, October 13. To leather, $421,20
" November 23, To leather, 361,69

The plaintiffs gave credit to the defendants, as follows: — 1847, June 15, $23,88. 1848, June 27, $61,37.

On May 31, 1848, the plaintiffs received from the defendants, certain notes against other persons, which, when collected, were to be credited to the defendants; and prior to November, 1848, the plaintiffs had received upon said collateral notes, a sum, which, with the above items of credit, was a few cents more than enough to pay the charge of October 13, 1847.

The defendants contended, that, by a legal appropriation, the first item of charge was paid, and that, as to the other item of charge, the suit was prematurely brought.

The contract for the sales was made in a letter, sent by the plaintiffs to the defendants, and the letter contained the following expressions; "I have concluded not to have more than $1000 due me from one concern at a time." "If you want more, you will have to give me some collateral." The defendants relied upon some other expressions in that letter, to show that a credit of six months was given, upon each of the debit charges.

The plaintiffs also put in a note against the defendants, payable to the plaintiffs, dated March 23, 1848, for $273,54, payable at thirty days from date, and proved that, in April, 1849, they notified the defendants that they claimed to appropriate the money, which had been received upon the collateral notes, as follows: — first to the payment of the note of $273,54, and the residue to the debit item of $361,69, to which appropriation the defendants objected.

WELLS, J. ruled that if there had not been any appropriation made by the plaintiffs, (the defendants not claiming to have made any,) the law would apply the moneys to the oldest debt. He referred the letter to the jury, from which they would determine, whether the credit of six months had or had not been given.

Two other letters from the plaintiffs to the defendants, were also submitted to the jury, with a remark from the Judge, that he saw in them no evidence of an appropriation, but that, if the jury saw any, the payment should be applied in conformity to the same.

The plaintiffs' counsel requested the court to instruct the jury, that "if they were satisfied that the plaintiffs, in April last, appropriated the money received; first, to the payment of the note, and secondly, towards the item last charged, it was an appropriation within a reasonable time." The instruction was not given. The verdict was for the defendants.

B. A. G. Fuller, for the plaintiffs.

1. There was error in submitting the construction of the letters to the jury. 7 Maine, 141; 4 Maine, 159; 21 Maine, 308; 23 Maine, 90.

2. The jury erred in concluding the term of six months credit was absolute. At most, it was on condition that the defendants' indebtedness should not exceed $1,000. The amount due April 25, was $1032,55.

3. The plaintiffs had authority to appropriate the collateral notes, to such part of the debt, as they saw fit. 15 Pick. 504. The plaintiffs were to receive money on the notes, and pay it to themselves. No act of appropriation was necessary in such a case. The election made in April, 1849, was in season.

4. The Judge informed the jury, that he saw no evidence of appropriation. But there was evidence; for the plaintiffs had forborne to sue the note and to prosecute this action. 20 Pick. 343; 23 Pick. 473.

5. If no appropriation was made, the law applies the payment to the demand least secure. 10 Pick. 133; 4 Iredell's Eq. 42; U. S. An. Dig. 1848, page 297; 7 Cranch, 572; 6 Cranch, 8; 2 N. H. 196; or, according to the justice of the case; 1 Mason, 323; 1 Branch, 409; or, according to the intent of parties; 22 Maine, 298; 18 Vermont, 451.

What was the intent, except to get security for unsecured demands? And that is the justice of the case.

6. The rule laid down by the court does not apply to notes, but only to running accounts. 23 Pick. 473; 11 Metc. 174.

May, for the defendants.

TENNEY, J. — The evidence, relied upon by the defendants, to show that a credit of six months was given to them, is in letters of the plaintiffs, and also in a receipt for certain notes as collateral security; upon a proper construction of this evidence, such a credit is to be inferred. Consequently if their import should have been determined by the court, instead of being submitted to the jury, the result would be the same, and the verdict should not be disturbed for this cause.

In the appropriation of indefinite payments made by a debtor to his creditor, holding different claims, when none has been made by either party, modern decisions seem to have been in many respects uniform; although formerly it

was otherwise. The doctrine has been borrowed from the Roman law; and under its rules payments have been applied to the discharge of debts, which have been secured by mortgage, or in other ways, rather than to those, which are not; to claims which had long been payable, in preference to those which had more recently arrived at maturity. *United States* v. *Kirkpatrick*, 9 Wheat. 720; *Pattison* v. *Hall*, 9 Cowen, 747, and notes. "The whole of this doctrine of the Roman law," as expressed by the court in *Goss* v. *Stinson*, 3 Sum. 98, "turns upon the intention of the debtor, either express, implied, or presumed; express, when he has directed the application of the payment, as in all cases, he has the right to do; implied, when he knowingly has allowed the creditor to make a particular application at the time of the payment without objection; presumed, when in the absence of any special appropriation, it is most for his benefit to apply it to a particular debt." The general instruction to the jury in the case at bar was not inconsistent with these principles.

But it is insisted, that there was evidence in the case, that the creditor actually appropriated the payment made by the debtor to the note dated on March 23, 1848, and to other claims than that of the first item on the plaintiffs' account, in suit, in such a manner as to bind the defendants; and that the jury were misled by the remark of the Judge, that, "he did not see any evidence of appropriation." The case of *Allen* v. *Kimball*, 23 Pick. 473, cited by the plaintiffs upon this point, is unlike the one before us. One note of hand was the only cause of action in that suit, and it was held, that the prosecution thereof after the payment, was evidence, that the appropriation was made by the creditor to another note, which became subsequently payable. In the case before us, the prosecution after the payment may have been for the recovery of the last item of the account, after the other might have been paid. But the jury were instructed to find for the defendants, *if there had been no appropriation.* They could not have understood, that the evidence, which was before them, was intended to be withdrawn from their

consideration; and it was clearly implied, that they were to find a verdict for the defendants only in the event, they were not satisfied of an appropriation.

The notice given by the plaintiffs to the defendants, that they claimed to appropriate the amount received to other demands, than the first item of the account in suit, was without effect. The creditor cannot make the appropriation of an indefinite payment at a time when a controversy has arisen between the parties thereon. *Goss* v. *Stinson*, 3 Sum. 98.

Exceptions overruled.

FRANKLIN BANK *versus* PRATT.

In an action by an indorsee of a note against the indorser, the maker, when released by the defendant, is a competent witness for him.

In an action by the holder of a draft against the acceptor, the drawer, when released by the defendant, is a competent witness for him.

A mortgage of personal property, given to secure the mortgagee from a contingent liability as an indorser, or surety, upon negotiable paper, is discharged by a payment of such paper.

The rule of public policy, which prevents a witness from impeaching the original validity of a note, which he has put in circulation, does not preclude him from testifying to the payment of the note.

A verdict will not be set aside, on the ground of newly discovered evidence, if, at the trial, the proposed witness was precluded from testifying by reason of his interest in behalf of the party who moves for the new trial; although that interest his since been removed.

EXCEPTIONS by the plaintiffs.

Assumpsit upon a note given by one Seth Wood and indorsed by the defendant; also upon a draft drawn by said Wood and accepted by the defendant.

Wood had given to the defendant a mortgage of personal property to secure him against said indorsement and acceptance. The defendant released Wood, and offered him as a witness. He was objected to, but admitted by WELLS, J. presiding. His testimony, and the residue of the case, fully appears in the opinion of the court.

WELLS, J. — The maker of the note and drawer of the bill declared upon, was introduced as a witness by the defendant, to show, that the note had been paid, and that the bank never had a legal title to the draft.

It is contended that the witness, Seth Wood, was interested, notwithstanding the release, which he had from the defendant, because he had given to the defendant a mortgage of personal property, to secure him for indorsing the note and accepting the draft. But the release of the claim for indemnity operated as a release of all claim, which could be made by the defendant under the mortgage. Where an absolute debt, secured by a mortgage, has been paid or canceled, the mortgagee can maintain no action by virtue of it. The same result follows upon the release of the right of action, which the defendant would have against the witness, if he were holden to pay the debts. In no event, after the release, could the witness be made liable to the defendant, and the mortgage, and the liability to secure which it was given, were both at an end.

Nor can the objection, made to the testimony of the witness, on the ground of its contravening public policy, prevail. It does not tend to show, that negotiable paper, to which he had given currency, was void in its inception, through illegality in its consideration.

He said the note had been paid. That testimony pre-supposes it once had an existence, without exhibiting any taint of illegality to aid in the defence. He testified that the draft was lodged in the bank, under an agreement with one of its directors, that it should be discounted, and the money paid to the witness, but the bank declined to pay him the money for it, and he was informed, that it had been passed to his credit. The bank could not become the legal holder of the draft, without the consent of the owner of it; that consent was given upon the understanding, as he said, that he should receive the money. Without its payment according to the agreement, the title to the bill could not pass to the bank. His testimony did not indicate, that the consideration of the

draft was illegal, but that the bank did not acquire a title to it, and it is not affected by the rule as laid down in the authorities cited.

The evidence offered, as newly discovered, under the motion for a new trial, appears to have been known to the officers of the bank at the time of the trial. But one of the witnesses introduced to support the motion, was a stockholder in the bank at that time, and was not called upon to testify. He has since sold his stock to the bank. It was incumbent on the bank, if it had desired his testimony, to have caused his interest to be removed at the time of the trial, or to forego the benefit of it. And such interest may generally be removed in season, by ordinary exertion; but if it cannot be, the witness is excluded when offered, by a well established rule of law, and a subsequent removal of it does not furnish any legal ground for disturbing a verdict. It might place a party in a more favorable position to manifest his rights than he possessed while the interest remained. But that consideration does not furnish an adequate cause for granting a new trial.

Nor can we say, that the verdict is so far against the weight of evidence, as to authorize us to set it aside. It was rendered principally upon the testimony of a witness, whose credibility it was the province of the jury to determine, and it is not apparent, that they have given to it a greater effect, than that to which it was entitled.

The exceptions and motions are overruled,
and judgment rendered on the verdict.

CLARK, *Administrator*, *versus* PISHON.

In an action by one, who sues as administrator, the general issue or a plea in bar admits him to be administrator. If the defendant would deny that the plaintiff is administrator, he must plead in abatement.

In such an action, the general issue may be rejected, if it purport to reserve to the defendant a right of denying that the plaintiff is administrator.

In such an action, under the general issue, it is not allowable for the defendant to introduce the Probate records, for the purpose of showing that there were such irregularities in the Probate proceedings, as would vacate the plaintiff's appointment.

A decree of the Probate Court, appointing an administrator, is conclusive, unless appealed from.

A person to whose order money, belonging to an estate, was paid before an administrator was appointed, is accountable therefor, (without previous demand), to the administrator when appointed, although the money or the avails of it never came to his actual use.

Depositions, taken out of the State, may be received or rejected at the discretion of the court.

EXCEPTIONS from the District Court, RICE, J.

Assumpsit for money had and received. The defendant pleaded in bar that the plaintiff was not administrator. The court rejected the plea. The defendant then pleaded the general issue, with a protest that he did not waive the defence, set up in the plea in bar, but reserved the right to avail himself of it in any stage of the case. This plea was also rejected. The defendant then pleaded the general issue.

The plaintiff offered two depositions, taken out of the State. The defendant objected to them, because sufficient notice had not been given to the adverse party, and because the captions did not show that the deponents were "first sworn;" and because not taken in the presence and under the direction of the commissioner.

The depositions were received.

There was evidence tending to show that one Albert Pishon, son of the defendant, died in Ohio, unmarried and without issue; that defendant, in writing, authorized one Wright to proceed to Ohio, and collect what he could of Albert's estate; that Wright collected $60 in cash, in doing which he expended over $100, and that he had never paid any thing to the defendant.

The defendant offered to prove, by the records of the Probate Court, that, without any citation to the kindred of the plaintiff's intestate, the plaintiff was appointed administrator though he was not of said kindred. This evidence was excluded.

The court instructed the jury, that, if the defendant authorized Wright to receive said sixty dollars, and if, as defendant's agent, Wright did receive it, the defendant would be responsible in this action, although no part of it had ever been paid to him. The verdict was for the plaintiff.

H. A. Smith, for defendant.

That the plaintiff was never administrator, is a good plea in bar. It is said to belong to a class of pleas, good either in abatement or in bar. Lawes' Pl. 38; 11 Mass. 316.

The defendant could not have given the plaintiff a better writ. 21 Maine, 265. If plaintiff was not administrator, the plea is not dilatory, but in perpetual disability, and therefore an absolute bar. 1 Chit. Pl. 395, 430; Story's Plead. 192; 26 Maine, 277. This is not like the case of an administrator suing for causes of action accruing to the intestate. Here the plaintiff sues on a claim accruing to himself. Stark. Ev., title Executors and Administrators.

It was the defendant's right to plead with the protest, reserving his rights.

The depositions ought to have been excluded. The notice to defendant was too short by one day; the deponents were not first sworn, neither does it appear that they were in the presence, and under the direction of the commissioner. R. S. 133, sect. 4; 24 Maine, 171.

Depositions, taken out of the State, as well as others, must be taken "in conformity to the laws of the State." 3 Pick. 14.

The term "deposition," has a technical meaning, viz: — "testimony, taken in the mode prescribed by law." These were not depositions.

The instruction was wrong, because: —

1. Whatever was done by defendant or his agent, was prior to plaintiff's appointment. Defendant then, as heir to his son, had a right to the custody of the property, subject to a demand by the administrator. No such demand was proved.

2. The Probate Court has jurisdiction only of property, "left within the county," or "which may afterwards be found

in the county." All of the $60 was expended in the journey, and of course none of it came to this county.

The Judge of Probate had no right to appoint the plaintiff, without previously citing in the kindred of the intestate. It was the defendant's right to administer. The decree of the Probate Court is not final. R. S. chap. 106.

Lancaster, for plaintiff.

HOWARD, J., orally. — By pleading in bar, the defendant admitted the plaintiff's capacity, though in the very plea he denies it. There was an incongruity. The plea was rightfully rejected. So also was the plea containing the protest. Perhaps the protest might have been deemed surplusage, but the Judge had the right to reject the whole.

The allowance of the depositions was at the discretion of the Judge. R. S. chap. 133, sect. 22.

The Probate Court had jurisdiction in the appointment of the administrator. His decree is conclusive, except when appealed from. The evidence, offered on that point, was properly excluded. *Exceptions overruled.*

INHABITANTS OF WATERVILLE, *Petitioners for certiorari.*

A writ of *certiorari*, to quash the proceedings in the County Commissioners' Court, in the assessment, by means of a jury, of the damages sustained by an owner of land through the location of a town road upon it, is grantable only at the discretion of the court.

THE petition sets forth, *that* one Plummer, an owner of land in Waterville, had applied to the County Commissioners for an assessment of damages, sustained by the location and establishment of a town way across his farm; *that*, after certain proceedings had, a jury assessed his damages at $100, and the County Commissioners adjudged that the town pay him that sum, and also pay costs $83,92; *that*, in taking cognizance of said application and acting thereon, the Commissioners proceeded illegally, and *that* errors appear in their record, viz: —

1. It does not appear by the record, that the Commissioners had any jurisdiction of the matter they acted upon.

2. It does not appear that the selectmen had made any adjudication on the subject of the damages; nor had they in fact made any.

3. It does not appear, that any town road had been laid over the land, nor in fact was there any legally located road there.

4. It does not appear that the jury examined the land, upon which the petitioner alleged the road to have been established, nor does it appear that the damages assessed by the jury were on account of such a location.

5. The costs allowed by the Commissioners were excessive and illegal.

Smith, for the petitioners, contended, that the town had no notice of the meeting of the jury, and to show that fact, he offers to read the sheriff's return.

COURT. Unless the return be on record, we cannot hear it. The *certificate of the jury* is in the records, saying, "we *have* heard the parties, their proofs and arguments."

Smith. That certificate shows the petitioners to have been present. But they appeared only to take advantage of errors in the previous proceedings. This is what we wish to show by the sheriff's return.

COURT. That return, not being on record, must be excluded.

Smith. If then the appearance before the jury is to be inferred, I hold it may also be inferred, that the appearance was merely to show there was no reason for any further proceedings by the jury; because, in fact, there had been no decision by the selectmen on the question of damages. The jurisdiction of the court must be shown by their records. *State* v. *Pownal*, 10 Maine, 24. But the records in this case do not show it.

1. They contain nothing to show that a road had been laid out.

2. They do not show that the supposed road was laid out within a year next before the petition was filed.

3. They contain nothing to show that the selectmen, before locating, had notified the parties, nor that the town meeting was called upon seven days notice; and there are many other deficiencies. All these things ought to have been shown to the County Commissioners, and by them adjudged to have been proved, and by them put upon record.

4. The Commissioners had but an appellate jurisdiction. In this case, as to damages, there had been no adjudication by the selectmen, from which to appeal. *Craigie* v. *Mellen*, 6 Mass. 7; *Harlow* v. *Pike*, 3 Maine, 438.

The selectmen ought to have estimated the damages, to enable the town to judge on the question of acceptance, and to give the land-owner a right to appeal. That not having been done, there was no legal road, and therefore no damage was sustained.

If, at the time of establishing a road, the damage be not provided for, there is no legal road. Const. Art. 1, § 21.

It does not appear, that the jury examined the route of the road. They only examined the farm.

The selectmen, in their report, described only a line, not a road.

Morrill, for County Commissioners.

1. The respondents' counsel objects, that the Commissioners had no jurisdiction, because it does not appear that the selectmen laid a road. It is a sufficient answer to say, the petition to the Commissioners described a location. The road was in process of being made when the jury were there.

Another objection is, that it does not appear that the application was *made* to the Commissioners within the year; but that is unfounded. The petition is *dated* within the year.

Another objection is, that the selectmen have not yet determined upon the amount of damage, and that, therefore, there was nothing for this petition to rest upon.

It is the location upon our land that has injured us. It is that which gives the right to recover damage.

Morrill then called a witness, who testified that the road has been actually made by the town, and upon the route described in Plummer's petition.

Smith, in reply.

Since the filing of this petition, the selectmen and the town, finding their former proceedings were invalid, have established a road there anew. Upon this last location, damage was assessed for Plummer, the amount of which is in readiness for him.

HOWARD, J., orally, — In the proceedings for ascertaining the amount of damage, there are some irregularities as to form, but in substance there was a compliance with the provisions of the law. The jury assessed $100. We are called upon to set their verdict aside.

That adjudication, having been made in due form, must stand until good cause be shown for vacating it.

The town contends that the County Commissioners had no jurisdiction; but we think otherwise. A petition was before them, upon a matter clearly within the scope of their duties. Upon that petition they were bound to act.

If the adjudication by the jury be quashed, the road stands good, and the land-owner loses his compensation. The road has been made, and the town has the benefit of it; the proceedings in assessing the damages were substantially correct. In its discretion, the court considers that the writ of *certiorari* ought not to issue. *Petition dismissed.*

SAMUEL DUNLAP *versus* BENJAMIN GLIDDEN, JR.
SAME *versus* SAME *& al.*

The 34th rule of the court does not justify the introduction of any *papers* touching the realty, except *deeds*.

Neither can a conveyance of land be proved by parol evidence of the contents of a lost paper, unless it be proved that the paper was a deed legally executed.

In *trespass quare clausum*, no person can justify under another's title, except by showing that the acts were done under his authority.

THESE were actions of trespass *quare*. By agreement they were submitted upon the same evidence. At first the declarations described a large tract, as the *locus in quo*. Afterwards, they were limited to that part of lot No. 13, which lies east of the brook. The defendants pleaded general issue, with brief statement of title in Ebenezer Brann and Joab Harriman, and justified under them. Much testimony was introduced as to early occupations of the land, and the cutting of timber thereon.

Joab Harriman owned the land before any occupation of it. He conveyed to Bruce, who labored on it. The plaintiff levied it on an execution against Bruce.

There was evidence that the defendants cut one or more trees, on the land.

The defendants offered in evidence what they called a mortgage deed from Brann to Bruce. It did not appear to have any seal, and the subscribing witness not being called, it was rejected. They also offered to prove that Bruce, before the plaintiff's levy, had conveyed the land to Brann, under whom they justified, and that the deed was lost. The witness, called for the purpose, testified that the deed was witnessed by Jesse Harriman, a resident of the State, and that she did not see the deed executed. The evidence of the contents was rejected. Joab Harriman testified that he never gave authority to any of the defendants to do any acts upon the land. The trial was before WELLS, J.

The defendants submitted to be defaulted in both actions. But if upon the evidence, the plaintiff is not entitled to re-

cover, or if the testimony offered by the defendants and rejected by the court, was admissible, the default is to be taken off.

Allen, for defendants.

1. The mortgage deed from Brann to Bruce, offered by the defendants, ought to have been admitted. They were not a party to it, nor heirs of the grantee, nor do they justify under the grantee. Rule 34 of this court; *Woodman* v. *Coolbroth*, 7 Greenl. 181; *Wright* v. *Scanlan*, 13 Pick. 523; *Bartlett* v. *Harlow*, 12 Mass. 350.

True, the rule speaks of an *office copy*, but we offered the *original*. *Knox* v. *Silloway*, 1 Fairf. 201. The *locus sigilli* appeared to be torn off. But the paper says, "set my hand and seal." It cannot be considered unsealed. Such a question would be for the jury alone.

2. The witness was receivable to prove the execution of the other deed, lost by time and accident. She was rejected merely because there was a subscribing witness. But the subscribing witness is not the only, or even the best evidence. He can give no more authenticity than any one else. If it would be admissible when produced, we might prove its existence by another witness. The preference given to a subscribing witness, is rather to prove the existence, than the contents of a deed. But a subscribing witness is not essential to the validity of a deed. *Dole* v. *Thurlow*, 12 Metc. 157.

Lancaster and *Baker*, for plaintiff.

TENNEY, J., orally. — Defendants offered to read a paper, as an original deed. Its execution was denied, and was not proved. They also proposed to prove a conveyance, by parol evidence of the contents of a lost deed, the execution of which was not proved. Before the former deed could be read, or the evidence of the contents of the other could be received, it was necessary to prove that the papers were *deeds*. There was no such proof. The defendants claim under these deeds. Suppose them both to have been admitted, they would not show the *defendants* to be owners. Neither would they establish

the justification set up under Brann and Harriman. No one can justify under another's title, except by showing that he does the acts by his authority. No such authorization was proved. *Judgment on the default.*

SMITH, *Executrix*, *versus* FISKE.

F conveyed land to S, and also gave him an obligation, that if, at the end of a year, the land should not be worth the money he had received therefor, with its interest, he would make up the deficiency, "or otherwise pay that amount on receiving a re-conveyance." S at the same time gave to F a bond that he would, on being paid the said amount, at any time within the year, reconvey the land. *Held*, that during the first year S could have no right of action against F on the obligation, because F had the election to redeem within the year; but that at the end of the year his right of action accrued, and that therefore the statute of limitations began to run from that period.

ASSUMPSIT on a special contract. The statute of limitations was pleaded. The parties all resided in this county.

The case was submitted for the decision of the court, upon the following statement of facts: —

On the 9th of March, 1841, the defendant conveyed to Comfort C. Smith, the plaintiff's testator, a piece of land in Bangor, and received therefor $256,12, and also gave to him an obligation, that if, at the expiration of one year, the land should be of less value than the $256,12, and its interest, he would make up the deficiency; "or otherwise pay that amount on receiving a re-conveyance."

Smith at the same time gave a bond to the defendant to re-convey the land to him, at any time within a year, upon being paid said consideration money and interest. The land was not worth the said sum.

On the 28th of February, 1848, Smith tendered to the defendant a deed, re-conveying said land, and demanded said $256,12 with its interest.

The defendant expressed surprise, and wished the matter to subside, till he could send to make inquiries. The answer from his correspondent at Bangor, was not received until the

22d of March. The suit was commenced on the 28th of March, 1848.

Before Smith tendered the deed of re-conveyance, the land had been "forfeited and sold" for non-payment of taxes.

Smith, by his will, gave all his estates to the executrix, who now prosecutes this suit.

She has since redeemed the land from the tax-claim, and has brought into court a deed of it for the defendant, ready to be delivered, when he shall pay the money.

Emmons, for plaintiff.

The election, whether to take a re-conveyance, was with the defendant for one year. At the end of that period, it fell upon Smith. The only defence then must be, the "six years limitation."

I contend, that when the election was cast upon Smith, he had a reasonable time, in which to form his election. Till the end of the year, his hands were tied. He then needed time for inquiry. The land was at a distance. Its value was fluctuating.

The contract is to have a reasonable construction; to be viewed as the parties would view it. Smith's right of action, therefore, did not accrue until after such reasonable time for inquiry. Within six years from that time, the suit was brought.

It was necessary for Smith to elect and give notice prior to the suit, that the defendant might make a tender. Jacob's Law Dict. citing 1 Mod. 217; 1 Bac. Abr. 697. He did elect, and tendered a deed, February 28, 1848, within six years from the defendant's one year.

The defendant's conduct in obtaining the delay, that he might make inquiries at Bangor, was a waiver of the statute of limitations; if not so, it was a fraud, and that is a legal answer to the statute.

Bronson, for defendant.

The contract was a guaranty by the defendant, that the land should be worth $256,12, and its interest, at the end of one

year; with a further agreement, that he would pay that amount, if Smith would re-deed in said year. At the end of that year, viz. on March 10, 1842, Smith might have maintained a suit on the guaranty. Smith had the right to retain the land, and claim any deficiency in value, or to re-deed it at the end of the year, and claim the $256,12 and interest. The election was therefore with him.

But suppose the plaintiff's law to be sound, the excess of nineteen days was an unreasonable delay. Smith lay by nearly seven years, to get the benefit of any rise in value of the land.

Again, the land was incumbered by taxes, through Smith's neglect, when he tendered the re-conveyance. The tender to us was not an offer of the land, but merely of a right to redeem it. The notion of waiver and of fraud, may have the credit of novelty, but cannot receive the sanction of law.

HOWARD, J., orally. — The defendant had a right of election for one year. If he did not choose to redeem within the year, Smith's bond to him was no longer in force. Smith, at the end of that year, might have sued for the deficiency, in the value of the land.

True, the defendant had contracted to repay the consideration money, on a re-conveyance. But Smith's bond of same date, to the defendant, gave the defendant the year to choose whether to redeem or not. Thus, *within* that year, Smith had no election to re-convey. And the contract, on which plaintiff relies, as to the right of re-conveyance, extended only to a re-conveyance *within* the first year. There was not then, in Smith, *at any time*, a right of election. His election to re-convey, and his tender of the deed, February 28, 1848, were therefore of no effect.

The suit for the deficiency was not brought till March 28, 1848. It is contended he had a reasonable time for inquiry. But, as his right was only to recover the deficiency, it was not necessary that, prior to his suit, he should know the exact value. That could be shown by the evidence at the trial. His

right of action accrued at the end of the first year. From that date, more than six years elapsed, before the suit was brought. The bar is therefore effectual.

Judgment for defendant.

THE STATE *versus* REBECCA STEWART.

In a prosecution for selling liquor, in violation of the statute of 1846, ch. 205, sec. 5, it is not necessary to allege by whom the defendant made the sale.

Whether wine be a spirituous liquor, is a question, not of law, but of fact, unless the first section of said statute was designed to include it among spirituous liquors. Whether it was so designed, *quere.*

COMPLAINT for illegally selling "spirituous liquor, viz, one glass of wine." The complaint did not specify by whose hand the defendant sold the article. It was tried in the District Court, RICE, J.

The defendant's counsel requested the court to instruct the jury that, unless the defendant sold the wine by herself and not by her agent, clerk or servant, she could not be charged. This instruction was not given.

The defendant contended, that the allegation of selling "spirituous liquor; viz, one glass of wine," was self-contradictory, because wine is not a spirituous liquor. The Judge instructed the jury, that the complaint was sufficient, and would be sustained by proof that defendant sold a glass of wine.

One Brown was the witness for the State. Testimony was offered to impeach his character for truth. The jury were instructed, that the prosecution must fail, if the defendant had satisfied them, that Brown was so perfectly infamous, that not the least reliance could be placed upon him; or that he was utterly regardless of his obligation to tell the truth; or if their confidence in his testimony had been so impaired, that the government had failed to satisfy them, that the offence had been committed. The defendant excepted.

Morrill, for defendant.

1. The complaint, *in substance*, alleges that defendant *by herself* sold the wine. The statute, (1846, § 5,) draws a line of distinction between selling by one's self and selling by an agent, clerk or servant. The requested instruction was therefore wrongfully withheld.

2. The complaint is self-contradictory. It calls "*wine*" spirituous liquor. But it is not so. Mass. R. S. c. 47, § 21; 18 Pick. 228. Wine is merely fermented, not distilled. The case finds it was wine that she sold. In the statute the words, "other spirituous liquors," relate back only to the words brandy and rum.

3. There was error in the instruction as to Brown's testimony. The first and second branches of it were clearly wrong. The other was so involved with them as to confuse and mislead the jury.

Vose, County Attorney, for the State.

1. The defendant's first objection is without weight. *Qui facit per alium facit per se.*

2. Wine is a spirituous liquor; and the statute so views it. Its language is, "any wine, brandy, rum or other spirituous liquors." The complaint introduces wine under a *videlicet.* If necessary, that may be rejected as surplusage.

3. The instruction as to the testimony of Brown, gave the defendant every advantage.

WELLS, J. — The statute prohibiting a person to sell "by himself, clerk, servant or agent," does not prescribe the form of a complaint. By whomsoever the defendant sold, she was liable. In this case she sold by an agent. It was her act by the hand of another. It is not necessary to allege by whose hand she sold. The principles as to accessaries do not apply.

Another objection is, that the complaint is repugnant, in specifying that she sold spirituous liquor, viz, wine. And it is contended, that wine is not a spirituous liquor. But can that be judicially known? It was a question of fact, a jury matter, not a question of law. We understand the instruction, taken in connection with the views as to repugnancy,

urged by the counsel, to mean, that the verdict should be for the State, if they found wine to be spirituous liquor. It may be, that the statute was intended to embrace wine among spirituous liquors, but of that we give no opinion, it not being necessary.

There was no error in the instructions as to Brown's testimony. If they were deemed too rigid, the counsel should have asked for a modification.

Exceptions overruled. — Case remanded.

THE STATE *versus* GREENLEAF.

When intoxicating liquor is furnished by one party to another, it is the province of the jury to decide whether there was a sale.

In a prosecution for such sale, the declarations subsequently made by the defendant, as to his intentions, are not receivable.

In such a prosecution, the legal principle, that pay for such liquors, sold in violation of the statute, cannot be collected by law, furnishes no defence.

EXCEPTIONS from the District Court, RICE, J.

Complaint for illegally selling spirituous liquor, viz, one pint of gin. There was conflicting evidence whether it was paid for at the time of the delivery.

The defendant offered to prove, that a few days after the gin was furnished by him, he told the man who had it, that he had made no charge for it, and would take no pay. The evidence was excluded.

The Judge was requested to instruct the jury, that the offence is not proved, if no payment was made for the gin, and in the absence of proof, that any charge or claim was made for it. That instruction was not given. But the Judge did instruct, that it was for the jury to decide whether there was a sale, and so intended at the time.

He was also requested to instruct, that if nothing was paid for the gin, it could not be a sale within the statute, because the defendant was unlicensed, and therefore could not, by law, enforce any payment. This instruction was not given.

The defendant excepted.

Bronson, for defendant.

Several grounds of the exceptions have already been argued by other gentlemen, and are before the court. I may, therefore, safely omit to press them.

There was error in the exclusion of testimony, going to show that defendant, some days after furnishing the gin, refused to take pay for it, and said he had no charge for it. The evidence would have shown there was no sale. May not a man send a sick neighbor some liquor for a medicine? If not, the law is an immorality. It not only presumes a man to be guilty, but it forbids him to prove his innocence.

Vose, for the State.

SHEPLEY, C. J., orally. — The defendant's declaration, that he had not charged, and should take no pay, was after the alleged sale. It could not change the character of the act, in which other parties had acquired rights.

There may have been a sale, though never paid for. It was the province of the jury to decide that fact.

Defendant contends, as the sale was illegal, and he could not collect the pay, that therefore no offence was committed. Such a construction would repeal the statute. It is an absurdity; because, as no debt can ever be collected on unlawful sales, it would sanction all such unlawful transactions.

Exceptions overruled.

BROWN *versus* CLAY.

If an action be referred by a rule of court, which contains no restriction upon the powers of the referee, his award upon the *law*, as well as upon the *facts*, is conclusive.

COVENANT BROKEN. The action was referred to the Hon. Ashur Ware, by a rule of court, containing no restriction upon his powers, as referee.

His award was made in favor of the plaintiff, for $1548,60 damage, with costs of court, and of reference.

At the request of the defendant's counsel, the referee put into writing an exposition of the views and considerations upon which the award was founded. It was under the caption of "Mem. for counsel, in the case of *Brown* v. *Clay*." It was without signature, and the award contained no reference to it.

Evans, for defendant, moved that the award be set aside, and urged the following positions: —

1. That the "exposition" was so allied to the award, as to open to the revision of the court, the legal views upon which the award was founded, and that it was to be regarded as a submission to the court, for a correction of those views, if erroneous.

2. That those legal views were erroneous, and operated to the great injury of the defendant.

Upon this second position, the court gave no opinion. The arguments and authorities presented in support of it, are therefore omitted.

Upon the first point, WELLS, J. delivered the opinion of the court, orally.

The question presented, relates to the power of the court, over awards of referees, when said to be decided upon erroneous views of the law.

The referee, at the request of the defendant's counsel, has furnished an exposition of the legal views, upon which he acted. But it is not made a part of the award, nor adverted to in it. There are no conditions, no alternatives in the award.

It is contended that the referee erred in relation to a position in law, in construing the contract between the parties; and that that error has grievously injured the defendant.

That question of law, with the views of counsel upon it, has been fully presented to us. It seems to be a question of difficulty; one concerning which legal men might differ. Such questions must be submitted to some tribunal. The

parties have established a tribunal of their own to settle it. In giving power to the referee, there was no restriction, no reservation. His authority over the subject was supreme. Upon his decision, no tribunal known to the law, can sit in judgment. It was his to decide the law, as well as the fact.

Report accepted.

Whitmore, for plaintiff.

THE STATE *versus* BROWN.

In a complaint for an unlawful sale of intoxicating liquor, it is not necessary to allege, neither on the trial is it necessary to prove, whether it was by the defendant's own hand or by that of his clerk, servant or agent, that the sale was made.

EXCEPTIONS from the District Court, RICE, J.

Complaint for violation of the Act "to restrict the sale of intoxicating drinks." The complaint charged, that the defendant made a sale, &c. The government called a witness, who testified that he bought two quarts of rum at the defendant's store; that the defendant was not there; that a man within the counter, whom the witness did not know, drew the rum and received the pay.

The defendant's counsel requested the Judge to instruct the jury, that such a transaction would not render the defendant liable. That instruction was not given. But the jury were instructed, that if they found the person, who sold the rum was the "agent, servant or clerk" of the defendant, the defendant would be liable. Verdict of "guilty."

Bronson, for defendant.

The statute provides that no person shall sell by himself, or his clerk, servant or agent, &c.

The *complaint* ought to show whether the sale was by defendant, or by his servant. This is required by a fair construction of the statute. It is also necessary in order to enable defendant to answer the prosecution. But if such allegation be

not essential to the complaint, it ought to be shown by the proof, that the sale was by the direction or consent of the defendant. There is no proof that he knew of the sale, or consented to it, or got any pay or had any clerk, servant or agent. The jury ought to have been instructed, that there was not sufficient evidence to show that the man within the counter was a clerk, servant or agent of the defendant. The defendant might have had the liquor in his store for private uses, or the man might have been an agent for a specified purpose, or he might have sold the liquor without authority, and kept the money for himself.

Vose, County Attorney, declined making any reply.

HOWARD, J., orally. — The offence was committed, if the sale was made either by the defendant or by his clerk, or by his servant, or by his agent. Under the instructions, the jury found it was made by the hand of a person, who was either the clerk, servant, or agent of the defendant; and the evidence was sufficient for that finding. It is not necessary to find which of those positions the person held. It is not requisite in the complaint, to specify by whose hand, such a sale is made.

Exceptions overruled.

FRANKLIN BANK *versus* DENNIS.

In an action, upon a note, against the indorser, the maker, if released by the defendant, is a competent witness for him.

ASSUMPSIT on a note for $400, made by Seth Wood to the defendant, and by him indorsed to plaintiffs, waiving demand and notice.

The defendant called Wood, as a witness, to prove payment to the plaintiffs. He was objected to by the plaintiffs, and was then released by the defendant. The plaintiff still objected, because he was a party to the note; but he was admit-

ted, and testified that he paid the note, at its maturity, to Hiram Stevens, the cashier, who is now deceased.

The trial was before HOWARD, J. The verdict was for the defendant, and the plaintiffs excepted.

Allen, for plaintiffs.

Evans, for defendant.

WELLS, J., orally. — If the verdict had been against the defendant, he could have had no right to recover against Wood, because he had given him a release. Wood therefore had no interest, and was properly admitted.

Exceptions overruled.

THE STATE *versus* BROWN.

In a prosecution for selling intoxicating drinks, it is no defence that the liquor was sold and used, solely for *medicinal* purposes, if the defendant had no license.

The exception, in the first section of the Act to restrict the sale of intoxicating drinks, is sufficiently negatived by an averment that the liquor was not imported into the United States from any foreign port or place.

EXCEPTIONS from the District Court, RICE, J.

This was a complaint for violating the "Act to restrict the sale of intoxicating drinks," alleging, that the defendant "sold to one Mrs. Brown a certain quantity of spirituous liquor, to wit, one pint of New England rum, the same not being wine or spirituous liquors, imported into the United States from any foreign port or place.

The evidence was, *that* a child of two or three years of age had met an accident; *that* a regularly practising physician had prescribed the application of rum to the injured part; *that* its mother, Mrs. Brown, bought the rum for that purpose; *that* none of it was drunk; and *that* no person in the town had license to sell for medical purposes. The Judge instructed the jury that, if the evidence was believed, the charge

against the defendant was established. Verdict for the State. Exceptions by the defendant.

Bronson, for defendant.

The complaint is insufficient: — First, because it does not negative the exceptions contained in the first and in the twenty-fourth sections of the Act: —

Secondly, — Because the christian name of Mrs. Brown, to whom the liquor was sold, is not given. A conviction in this case would not bar another prosecution for the same act.

The meaning and the title of the Act is to restrict sales for drink. The Act is penal, and should receive a liberal construction for the accused. This sale was for medicinal purposes, under the order of a respectable physician. The ruling was in effect, that the intent was not to be taken into the account.

Vose, for the State.

HOWARD, J., orally. — We consider the exceptions in the first section of the Act to be sufficiently negatived in the complaint. The provisions of the twenty-fourth section have no application. The name of Mrs. Brown might not have been known to the complainant. A conviction here would bar another complaint for the same offence.

The liquor was sold for a medical purpose. It might be indiscreet to prosecute, but the defendant had no right to sell, whether for medicine, or for drinking or for any other purpose.

Exceptions overruled.

THE STATE *versus* SHAW.

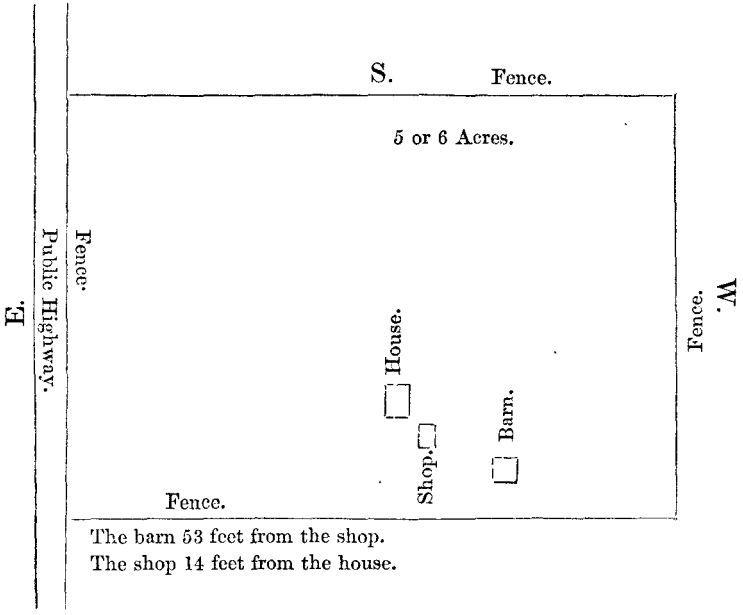
The curtilage of a dwellinghouse is a space necessary and convenient, and habitually used for family purposes, for the carrying on of domestic employments. It includes the garden, if there be one. It need not be separated from the other lands by fences.

INDICTMENT, founded on R. S. chap. 155, sect. 3. It was for setting on fire and burning the barn of one Joel Savage

being within the curtilage of his dwellinghouse, "by which said firing, the said dwellinghouse was endangered."

The trial was before WELLS, J.

The following rude diagram and description will sufficiently illustrate the localities, according to the evidence.



Distance from house to highway, "25 or 30 rods."

" " barn to west fence, "8 or 9 rods."

" " house to north fence, "6 or 7 rods."

The Judge instructed the jury, that the size of the lot, and the distance of the fences from the buildings, would not preclude them from considering the barn within the curtilage of the dwellinghouse. They rendered a verdict that defendant was guilty, and he excepted to that instruction.

Morrill, for defendant.

The indictment is insufficient. It does not show the relative position of the barn and house, and allege that it was from and by that *position*, that the house was endangered. It only alleges that the danger arose from the *fact* of *firing*

the barn. The statute makes the offence to depend upon the relative position of the buildings; the indictment makes it to depend on a fact, the fact of firing, without regard to such position.

The jury, in effect, were instructed that it was not necessary to consider any particular position of buildings, or of fences necessary, in determining whether the barn was within the curtilage. Whether within or without the curtilage, is not law for the court, but fact for the jury. The barn was 71 feet from the house, and 53 from the nearest building. The Judge ought to have instructed whether, thus situated, the barn was within the curtilage; but he virtually told them they might consider it so, if they chose. The true question was, whether the barn was within the curtilage; not whether it was so near, that the burning of it would endanger the house. Curtilage, means "yard" or "court," for the protection and security of the mansion. It is an enclosure belonging to a dwellinghouse. The law puts a higher value upon buildings within such an enclosure.

The term curtilage has a technical signification, and when made use of in a penal statute, without modification, it must be considered according to the strict signification of the term. R. S. chap. 1, sect. 3, rule 1.

When the statute imposes a penalty for burning a building within the curtilage of the dwellinghouse, it must be supposed to have regard to the particular position of the buildings, which is implied by the term; namely, that the building is within the yard of the dwellinghouse, a yard that is peculiar to the house, and not common to that and other buildings not connected with it.

To be within the curtilage, the building must be within the enclosure or yard, which is peculiar to the house, and no proximity or peculiarity of position, or situation, will make it so. If it is not within the yard, it is an out-house or out-building, and that without regard to the extent of open space, between the house and out-house. If it is immediately connected with it, then it is part of it. *Garland's case*, 2 E. P. C. 493;

Brown's case, ibid.; People v. *Parker*, 4 Johns. 424; 2 Stark. Ev. 324 and note; Roscoe's Crim. Ev. 326; 5 Day's Conn. Rep. 131; Russell on Crimes, 2, vol. 5.

A building separated by a private or public way, is not within the curtilage. Wharton's Crim. Law, title Curtilage.

Now the barn was not technically within the curtilage of the dwellinghouse. It was not enclosed, or encircled, by a yard and fence, connecting it with the house, but stood in an open field, with a fence having no *special reference* to enclosing the house, but simply as fences enclosing the common lot.

There was no court or yard enclosing the house. There was but a common fence, enclosing a general field.

Would a building situated at the remotest point within the fences, from the house, be within the curtilage? It was 26 rods.

If the size of the lot and distance of the fences, &c., could not control, by what rule should it be determined?

If the barn had been in the remote corner, it would have been as much within the curtilage, as it was in its then position, and yet it would have been so remote, as not to have endangered the house at all.

The question cannot arise in this case, whether the offence may not be committed upon a building not technically within the curtilage.

In order to present such a question, the indictment must set forth the position or connection of the building and rely upon that.

Whatever the court may think of such a question, or of the sufficiency of the proof to establish such a position, it cannot apply here, as it would not sustain the charge.

Vose, for the State.

Curtilage is defined in Johnson, to be a garden, yard or field, lying near to a messuage. Webster calls it a yard, garden, enclosure or field near and belonging to a messuage. In Bouvier's Law Dictionary, it is styled "the space situated within a common enclosure, belonging to a dwellinghouse. See also Shep. Touchstone, 94; Jacob's Law Dictionary, title, Curtilage; 7 Dane's Abr. p. 127. The statute con-

templates, that there may be buildings within the curtilage, and yet so as not to endanger the house.

TENNEY, J., orally, — The counsel for defendant contends, that the Judge ought to have defined the term, curtilage, to the jury. But there was no request of the kind. Without such request, he was not bound to do so.

Again, it is contended the barn was not within the curtilage. The curtilage of a dwellinghouse is a space, necessary and convenient and habitually used, for the family purposes, the carrying on of domestic employments. It includes the garden, if there be one. It need not be separated from other lands by fence. The ruling of the Judge was unobjectionable.

Exceptions overruled.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF OXFORD,

1850.

THACHER AND FEARING *versus* JONES AND AYER.

The fifteenth section of R. S. ch. 146, limiting to one year, the time in which actions may be brought for a forfeiture upon a penal statute, does not apply to suits brought under the 49th sec. of ch. 148, for aiding a debtor in the fraudulent concealment of his property.

In such an action, it must appear for the plaintiff, that he was a creditor, both at the time of the fraudulent concealment and of the commencement of the action, and also that he continued between said periods to be so.

But it is not essential that, during all the time between those periods, his relation to the debtor should remain unchanged. A continuing conditional liability might be sufficient.

Thus, if, at the time of the fraudulent concealment, he held the debtor's note, and afterwards negotiated the same by an indorsement, upon which he was conditionally liable, until he again became the holder, such liability would constitute a sufficient continuity of creditorship.

In an action of tort, wherein the defendants have severally pleaded the general issue, a verdict which finds one of them to be "not guilty," and is silent as to the others, may, *as it seems*, be received and affirmed.

CASE, founded on Revised Statutes, chap. 148, sect. 49, for aiding and assisting one Buck, on the 15th of August, 1846, in a fraudulent transfer and concealment of certain property, to defraud his creditors. The writ is dated August

25, 1848. The general issue was pleaded severally by the defendants, with the statute of limitations.

Evidence as to the facts alleged, was presented to the jury.

The plaintiffs, to prove themselves creditors, introduced certain notes, made by said Buck, payable to themselves or order. Upon the back of the notes, the words, "pay the within to T. Ludden, or his order. Thacher & Feering," had been written, and erased by having a line drawn through them. By whom they were written or erased, did not appear. The defendants put in two docket entries of the District Court, for November Term, 1847, viz.: — "284. Timothy Ludden *v.* Ambrose Buck and Peleg T. Jones, Trustee. Trustee discharged, and recovers no cost. 283. Peter Thacher and A. C. Feering and Ambrose Buck."

The Judge instructed the jury, *that* the plaintiffs must prove themselves to have been creditors of Buck at the time of the fraudulent transfer or concealment; *that* they have continued to be such from that time until now; *that* if, at any time, they had parted with the ownership of said notes, their remedy under the statute was gone, although they may be the owners of the notes now; *that*, if the plaintiffs had indorsed the notes and transferred and negotiated them, even if in the ordinary form, by which notes are indorsed, then the plaintiffs cannot maintain this action. He also, at the plaintiffs' request, instructed the jury that, the notes being now found in the hands of the plaintiffs, the erased indorsement upon them, and the entry of an action upon the docket, "Timothy Ludden *v.* Ambrose Buck and Trustee," unsupported by other proof, afforded no legal evidence that the plaintiffs have ever parted with their interest or property in said notes.

The jury returned a verdict that Ayer was not guilty, which was affirmed.

The plaintiffs excepted.

May and *Codman*, for the plaintiffs.

1. There was error in the instruction, that the plaintiff could not recover, if they had negotiated the notes, though by an indorsement in the common form, even if they had again become the owners.

While standing as indorsers, they were liable to pay the amount; and for aught that appears, they had been obliged to pay them upon the indorsement. This liability constituted the relation of creditors within this statute. Sect. 49; *Howe* v. *Ward*, 4 Greenl. 195.

2. The verdict was not entitled to be received. It was incomplete. It made no decision as to Jones. *Brockway* v. *Kenney*, 2 Johns. R. 260; *Bay* v. *Green*, 1 Denio, 108; *Perwitt* v. *Caruthers*, 7 How. Miss. 304; *Hannaball* v. *Spaulding*, 1 Root, 86; *Smith* v. *Raymond*, 1 Day, 189; *Grovesnor* v. *Elliott and wife*, 2 Hall, 161; *Lanesboro'* v. *County Commissioners of Berkshire*, 22 Pick. 281 and 282; *Anthony* v. *Same*, 14 Pick. 188.

How far, and under what circumstances, the courts have power to authorize a separate verdict, as to one of the defendants, in actions of tort, has been fully considered in *Moore* v. *Eldred*, 3 Hill, 104, and note *a*; see also, *McMartin* v. *Taylor*, 2 Barbour, 356; *Gilmore* v. *Bowden*, 3 Fairf. 412.

The claim of the plaintiffs is joint, and the damages are joint, and would be jointly assessed against both defendants, if both had been found guilty. The verdict, therefore, should be entire.

"It is a principle of the common law, that the jury cannot find less than the whole issue before them, and if they do the verdict will be bad, and the whole must be set aside;" and hence, if the issue whether four are guilty is submitted to a jury, and two be found guilty and two acquitted, the verdict as to the two who are guilty, cannot be set aside without affecting the validity of the finding, as to the other two. *Sawyer* v. *Merrill*, 10 Pick. 16.

Clifford and *Appleton*, for the defendants.

I. The action is barred by the statute of limitations. It is a penal action. Except for the case of *Quimby* v. *Carter*,

20 Maine, 218, we should have considered this ground decisive. But that decision was founded on another statute, and we respectfully submit, that the conclusion was arrived at by referring, through mistake, to the 34th sec. instead of the 49th sec. of c. 148. The same error seems to have influenced the case of *Philbrook* v. *Handly*, 27 Maine, 53.

II. The instruction as to the continuance of the plaintiffs' ownership of the notes is not objectionable. Their rights to recover in this suit is only of statutory origin.

It is only by virtue of being creditors, who have a just debt to be doubled, and who have been prevented from attaching or seizing the property fraudulently transferred, that they have any right of action. The moment they cease to be creditors, they cease to have ground of complaint or *cause* of action.

If the right of action once ceased, if the creditor voluntarily divested himself of all right, can he, by a purchase back of the notes regain his lost and abandoned rights? Once gone; they are forever gone.

The Judge then gave the requested instruction, as follows: — "That the notes being now found in the hands of the plaintiffs, the indorsement and erasure upon them, and the entry of an action upon the docket, "*Timothy Ludden* v. *Ambrose Buck & Trustee*," unsupported by other proof, afford no legal evidence, that the plaintiffs had *ever parted* with their interest or property in said notes, and that the mere assertion by the counsel of such fact is not evidence in the case."

This instruction was requested by plaintiff's counsel, and given as requested, and therefore furnishes no ground of complaint on their part. The verdict shows the jury acted upon and in accordance with it.

The charge, thus requested, withdrew from the jury, the question of the transfer of the notes, and is a positive instruction to the jury, that there was *no proof* of such alleged transfer.

The preceding instructions also became perfectly immaterial, because the jury *considered* the plaintiffs to have *been* con-

tinuing creditors, otherwise they would have found that *neither* of the defendants was guilty.

The plaintiffs' reply to this position is stated in the opinion.

III. The receiving of the verdict was in conformity to law.

SHEPLEY, C. J. — It is contended in defence, that this is a penal action, barred by statute ch. 146, § 15. The cases of *Quimby* v. *Carter*, 20 Maine, 218, and of *Philbrook* v. *Handley*, 27 Maine, 53, decide otherwise. It is supposed in argument, that there must have been some error committed in those cases in making reference to the thirty-fourth section of the statute ch. 148. No such error is perceived. The case provided for in the thirty-fourth section of the statute, is that of a concealment or transfer of personal property disclosed by a poor debtor upon his examination. The provisions of the forty-ninth section are sufficiently comprehensive, so far as it respects those aiding or assisting the debtor, to embrace the case specially provided for by the thirty-fourth section. There being a provision in the latter section, that payment of a judgment thus recovered should operate *pro tanto* as a satisfaction of the original debt, it was inferred, although not stated in words, as one of the reasons for the adopted construction of the forty-ninth section, that it could not have been the intention, that a payment of the judgment should so operate in one class and not in other classes if embraced by that section.

The person, who is authorized to maintain an action must, as already decided, be a creditor at the time of the fraudulent concealment or transfer. But the former cases did not decide, that he must at that time have a present right of action. He might be a creditor holding a note or bond not yet payable, and the concealment or transfer might have been designedly made to prevent an attachment, when his right of action should accrue. He might also have a conditional claim against his debtor by being a subsequent indorser on a negotiable promissory note, upon which he was a prior in-

dorser; or by being an indorser on one made by him, and the property might have been concealed or transferred to prevent its attachment on a demand anticipated as about to arise in that manner. When in such cases the right of action accrues, he may be such a creditor as the statute contemplates, and entitled to maintain an action by virtue of the statute.

He must not only be a creditor at that time, but he must continue to be a creditor. It is only in that character, that he can recover, and when he ceases to sustain that character he loses the right of action attached to it to recover double the amount of the debt or property. By becoming again the owner of the debt, he would acquire only the same rights, which any other purchaser of it would have. He could not again connect with it his character as a creditor at the time of the fraudulent concealment or transfer. After having once lost all right of action by virtue of the statute, he could not regain it by a subsequent purchase of the demand.

While he must continue to be a creditor, there does not appear to be any sufficient reason to require, that he should continue to be a creditor of the same class, or in one particular mode, or that his relations to the debtor should continue unchanged. If he preserves his character of creditor, whether by an absolute or a conditional claim or liability, so that he can when his claim becomes certain and payable, maintain an action against his debtor, he may also maintain one by virtue of the statute against those, who have aided or assisted him to conceal or transfer his property to prevent its attachment.

The instructions must therefore in one particular, be regarded as erroneous. The jury were instructed, that if they were satisfied "that the plaintiffs had indorsed the notes and transferred and negotiated them even if in the ordinary form, in which notes are indorsed, then the plaintiff could not maintain this action." The jury would be authorized to consider the ordinary form of indorsement to be such as would leave the plaintiffs liable as indorsers, and these instructions would prevent their recovery, unless they continued to be creditors in the same manner, although they continued to be such

creditors, as might be injured by the fraudulent concealment or transfer.

It is insisted, that these instructions were immaterial, for the jury must have regarded the plaintiffs as continuing to be creditors, or they would have found, that neither of the defendants were guilty.

The answer made to this argument by the counsel for the plaintiffs, appears to be satisfactory. Some of the jurors may have come to the conclusion to render a verdict in favor of the defendant, Ayer, on the ground, that the plaintiffs had not continued to be creditors, and others for a different reason, while all the jurors did not come to the conclusion, that they had not continued to be creditors, and thereby prevented any agreement with respect to the other defendant. A strong probability that this was not the case, will not obviate the difficulty. It should appear to be morally certain, that erroneous instructions have not been injurious, before the party aggrieved can be deprived of a new trial.

A question is presented, whether in actions of tort, one of two defendants, pleading separately, may be acquitted, when the jury are unable to agree, respecting the guilt or innocence of the other.

There would seem to be no doubt, that a court should allow a verdict of acquittal in such case, to be effectual, unless prohibited by well established rules and forms. The pleadings may in such actions, present different issues, to be determined by different kinds of testimony. In a case like the present, one might rely upon a plea of not guilty, and another upon a former judgment, as a bar. And there would seem to be little utility or propriety in requiring the one, who exhibited a legal bar to the suit against him, to continue to be a party to a prolonged litigation, until a jury might be able to agree respecting the guilt of the other.

It is said in argument, that although there may be different issues, there can be but one verdict, and that one must find all the issues. Neither part of this proposition can be maintained without admitting exceptions.

The well established doctrine, that one, against whom no sufficient testimony has been introduced to authorize a jury to find him guilty, may be acquitted before the case is submitted to the jury, respecting the other, disproves the position. There must in such case, be two verdicts. There is a difference of opinion, when and under what circumstances such an acquittal may take place, but none respecting the general doctrine. *Lowell* v. *Champion*, 6 Ad. & El. 407; *Moore* v. *Eldred*, 3 Hill, note a; *Domineck* v. *Eacher*, 3 Barb. 17.

If the jury find one or more of several issues submitted to them, which are decisive of the rights of the parties, and are unable to agree respecting others, their verdict may be received. *French* v. *Hanchett*, 12 Pick. 15; *Sutton* v. *Dana*, 1 Metc. 383.

In the case of the *Commonwealth* v. *Wood & als.* 12 Mass. 313, the jury agreed to find one not guilty, and could not agree respecting the others.

The objection was made, that their verdict should not be received, without a decision of the whole matter committed to them, but the court received their verdict respecting one, and ordered the indictment to be continued for a trial of the others. Greater technical accuracy is usually required in criminal, than in civil proceedings.

By allowing a verdict of acquittal of one defendant in an action of tort, who has pleaded separately, when the jury are unable to agree respecting others, the court performs an act of justice towards him, without infringing upon the rights of others. *Exceptions sustained, verdict set aside, and new trial granted.*

IRISH *versus* CUTTER.

One who purchases an unindorsed negotiable note, and afterwards writes his name with the word "holden" upon the back of it, and sells it for value, may be held as a guarantor.

But such a contract of guaranty is not negotiable. It is binding in favor of that person only, to whom he sells the note, and does not pass to subsequent holders.

It will not support an action in the name of the promisee, as plaintiff.

ASSUMPSIT, transferred from the District Court upon legal questions stated. Irish is the nominal, Severance is the real, plaintiff. One Farrington signed a negotiable note to Irish, who assigned the same, without indorsement, to Cutter, the defendant. Cutter afterwards, having written his name and the word "holden" on the back of the note, sold it, for value, to Abbot, who, afterwards and before the pay-day of the note, sold and assigned it, (without indorsing it,) to Severance, for whose use, without any authority from Irish, this suit is brought.

The legal questions presented, are; — 1st. Can an action be maintained against Cutter, whose indorsement on the note was made, as above stated, after it had passed out of the hands of Irish; — 2d. Can this suit be maintained in the name of *Irish*, as plaintiff?

A. R. Bradley, for the plaintiff.

The defendant may be held as an original promisor; or he may be considered a guarantor of the note. Story on Prom. Notes, c. 4, § 138, 139.

The indorsement of the defendant should be considered as filled by such words, as will effectuate the intent. Sec. 479 and seq.

Holders, subsequent to Cutter, might well suppose the indorsement to have been made at the inception of the note.

The indorsement being in blank, was a license to use the payee's name. *Bean* v. *Arnold*, 16 Maine, 252; *True* v. *Fuller*, 21 Pick. 140; *Champion* v. *Griffith*, 13 Ohio, 228; *Strong* v. *Riker*. 16 Vermont, 554; *Flint* v. *Day*, 9 Vermont, 345; *Stoney* v. *Beaubien*, 2 McMullen, 313; *Jordan*

v. *Garnet*, 3 Alabama, 610; *Harriman* v. *Hill*, 14 Maine, 129; *Tenney* v. *Prince*, 4 Pick. 385; *Reed* v. *Garvin*, 12 Serg. & Rawle, 100.

D. R. Hastings, for the defendant.

Shepley, C. J. — When a person not a party to it indorses his name in blank upon the back of a negotiable promissory note at the time of making, or subsequently as of that time to give it currency, and before it has been endorsed by the payee, the presumption of law is, that he designed to become an original promisor. *Moies* v. *Bird*, 11 Mass. 436; *Chaffee* v. *Jones*, 19 Pick. 260; *Austin* v. *Boyd*, 24 Pick. 64; *Martin* v. *Bird*, 11 N. H. 385; *Strong* v. *Ricker*, 16 Verm. 554; *Hough* v. *Gray*, 19 Wend. 202.

When such an indorsement is made for a valuable consideration at a subsequent time, the presumption of law is, that he intended to become a guarantor of the final payment of the note. *Ulen* v. *Kittredge*, 7 Mass. 233; *Tenney* v. *Prince*, 4 Pick. 385; *Oxford Bank* v. *Haynes*, 8 Pick. 423; *Beckwith* v. *Angell*, 6 Conn. 315; *Champion* v. *Griffith*, 13 Ohio, 228; *Camden* v. *McCoy*, 3 Scam. 437; *Jordan* v. *Garnett*, 3 Ala. 610.

In this case the indorsement was made by the defendant for a valuable consideration, received of George Abbott, after the note was made, and before it had become payable or been indorsed by the promisee, with the word holden added to his name. That word would render the liability assumed, an absolute one. *Bean* v. *Arnold*, 16 Maine, 251; *Blanchard* v. *Wood*, 26 Maine, 358.

The defendant must therefore be regarded as an absolute guarantor to Abbott, that the note shall be paid. There is no indication that he intended to make himself thus liable to any other person than the one, with whom he made his contract. The law will supply the proper words to carry into effect his contract as a guarantor, and those thus supplied, with the word holden used by him, will make his contract similar in terms to

that of the defendant in the case of *Springer* v. *Hutchinson*, 19 Maine, 359, which was decided not to be negotiable.

Neither the plaintiff, nor Severance, for whose benefit this suit was commenced, can maintain an action upon that guaranty. *Plaintiff nonsuit.*

STOWELL *versus* GOODENOW AND ROUNDS.

Positions of law, which a party may contend for at the trial, if not presented as requests for instruction, do not furnish matter of exception, unless they were directly noticed by the court, in its rulings or instructions.

Such a contract, between the holder of a note and the principal thereon, as would discharge the surety, if made *prior* to the pay-day, would have the same effect, though made *subsequently* to the pay-day.

Where the holder of a note, having made a contract with the principal for delay, relies upon an assent thereto given by the surety, the burden of proving such assent is upon the holder.

ASSUMPSIT, on a promissory note made to the plaintiff by Goodenow as principal, and by Rounds, as surety, payable at a specified day. Goodenow was defaulted. Rounds defended, and insisted that he was exonerated by means of a contract for delay, made *after the pay-day*, for value, by the plaintiff with the principal, without the knowledge of the surety.

There was evidence tending to show that the plaintiff, for a valuable consideration, had, *after the pay-day*, stipulated with the principal to give further time of payment.

Against the plaintiff's objection, Rounds was permitted to prove, and did prove that, for some length of time after the pay-day of the note, Goodenow's reputation for solvency was good, and that he afterwards became insolvent. The plaintiff, in argument, contended for certain legal positions, but did not ask for rulings or instructions upon them, and they were not adverted to by the Judge, in his charge to the jury. The Judge instructed the jury that delay of payment by the principal, and his intervening insolvency, and his removal to parts unknown, would not discharge the surety; also, that a contract between the

plaintiff and the principal, which, if made *before the pay-day*, would discharge the surety, would have the same effect, if made *after the pay-day;* and that, if Rounds had proved that the plaintiff had made such an agreement with Goodenow, to wait further time, for a good consideration, then the burden of proof was on the plaintiff to show, that the surety had knowledge of, or consented to, such agreement; and if he failed to do so, the surety would be discharged.

The trial was before HOWARD, J.

The verdict was for the defendant, Rounds, and the plaintiff excepted.

Whitman, for the plaintiff.

Gerry, for the defendant, Rounds.

SHEPLEY, C. J. — The question presented for the determination of the jury was, whether a contract had been made between the plaintiff and Goodenow for delay of payment for a stipulated time and for a valuable consideration. That question is not presented for the consideration of the court by this bill of exceptions.

The first cause of complaint presented is, that testimony was received to prove, that Goodenow was reputed to be solvent during the years 1844 and 1845, and that he afterward became insolvent.

Such testimony could not affect the rights of the parties, and its admission might have afforded just cause of complaint, if its influence had not been prevented by the instructions. But the jury were instructed, "that delay of payment and intervening insolvency of the principal and his removal to parts unknown, could not discharge the surety." Under such instructions the testimony became immaterial, and it cannot be presumed, that the jury disregarded these instructions and allowed it to have an influence upon their minds.

Positions, for which the plaintiff's counsel contended, not presented as requests for instructions, can only be noticed as explanatory of the instructions, which were given. They do

not present matter of exception, if they were not directly noticed by the court.

It is insisted, that the ruling of the court was erroneous, that a contract, which would have the effect to discharge a surety if made with the principal before the note became payable, would have the same effect if made after the note became payable. This was correct. *Hutchinson* v. *Moody*, 18 Maine, 393; *Gifford* v. *Allen*, 3 Metc. 255. The remarks made in the case of *Leavitt* v. *Savage*, 16 Maine, 72, and referred to in argument, were made with reference to a bond, to show, that its condition was defeated by such a contract for delay.

The jury were instructed, "that if the defendant, Rounds, had proved, that the plaintiff had made such an agreement to wait further time for a good consideration with Goodenow, then the burden of proof was on the plaintiff to show, that the surety had knowledge of or consented to such agreement, and if he failed to do so, the surety would be discharged."

The wrong and injury to the surety consists in a change of the contract and of the relations between the creditor and his principal debtor. It is this, which discharges the surety. When proof of it has been made, the creditor can be relieved from the effect of it upon his rights only by showing, that the surety has assented or waived all objection to it. The surety could not ordinarily be able to prove, that he did not assent to it, when made without his knowledge. The proof should come from the party, who would be relieved from the consequences of his own wrongful act; and the instructions were correct.

The other instructions are not the subject of complaint.

Exceptions overruled.

SHIRLEY *& ux. versus* CHARLES WALKER.

Neither the opinions of the Attorney General of the United States nor those of the Secretary at War, nor those of the Commissioner of Patents, are receivable by this court, when called upon to give a construction to a statute of the United States.

By the Act of Congress of June 19, 1842, the children of a widow, to whom, at the time of her death, any amount of pension was due from the United States, are entitled to their equal portion thereof, free from all claims by the creditors or legal representatives of their mother.

The administrator of the mother, when any such pension is paid to him, receives it merely in trust for her children.

Where such administrator, (prior to the Act of 22d March, 1844, securing to married women their rights in property,) had received such pension money, in trust for a feme covert, an action against him to recover the same, may be brought jointly by her husband and herself.

ASSUMPSIT for money received to the plaintiffs' use. The following facts were proved. The defendant and William Walker, and the female plaintiff, are the children of Nathaniel and Abigail Walker, both of whom are now deceased.

Nathaniel Walker was for many years, a pensioner of the United States, on account of services rendered in the war of the revolution. Upon his death, the said Abigail, his widow, became entitled to a pension under the law of the United States. At the time of her death, the amount of pension due to her was $200, which sum was afterwards paid by the United States to the defendant, as the administrator of said Abigail. The plaintiffs claim one-third part of that money, upon the ground that it belonged equally to the three children of said Abigail, and this action is brought to recover the same.

Among other proofs, the plaintiffs offered to read from the public documents, the opinions of several of the former Attorney Generals of the United States, and of a former Secretary at War, and of a former Commissioner of Patents. The defendant then proved by the Probate records that he had settled his final administration account, in which he had charged himself with the said two hundred dollars.

No administration was ever had upon the estate of Nathaniel Walker.

There was a mass of testimony as to the value of the farm, and of other property, which the defendant had received from said Nathaniel, and as to the aids which he had rendered to his parents in their lifetimes.

The case was submitted upon such portion of the facts proved, and of the testimony offered, as the court should consider applicable, they drawing inferences, as a jury might.

Hammons and *Hastings*, for the plaintiffs.

Codman, for the defendant.

1. The action is unsustainable, because brought jointly. If there be any cause of action, it pertains to the husband alone. 14 Pick. 352; 8 Mass. 230; 10 Pick. 463; 2 Conn. 143; 6 Johns. 112; 5 Conn. 141; 5 Greenl. 417; 6 D. & E. 616.

There is a rule that when the wife is the meritorious cause of action, she may join in the action, or the husband, at his election, may sue alone. But that rule is not applicable to choses in action belonging to her, or to sums of money which she, as feme covert, may be entitled to, by gift or otherwise. 10 Pick. and 8 Mass. cited above.

2. The opinions of the Attorney Generals, either as evidence or as authorities, are inadmissible. They are not judicial decisions, but merely professional opinions, of no more effect than those of other counsel, equally eminent.

3. The money was duly disposed of by the defendant, as administrator, in pursuance of a decree of the Court of Probate, to which the jurisdiction attached. If dissatisfied, the plaintiffs should have appealed from that decree. It is now in full force, until reversed. R. S. chap. 105, sect. 3, 22, 25, 26, 27 and 30; R. S. chap. 106, sect. 1; *Loring* v. *Mansfield*, 17 Mass. 394; *Rowe* v. *Smith*, 16 Mass. 308, Rand's ed. in note, and authorities there cited; *Marriott* v. *Hampton*, 7 D. & E. 269, notes * & † 1; Bigelow's Digest, tit. Action of Assumpsit, F. 67, 68.

4. This being an equitable action, the court may rightfully consider the evidence relative to the property which the de-

fendant had received from his father's estate. By PARKER, J. 5 Mass. 293; By SEDGWICK, J. 7 Mass. 336.

SHEPLEY, C. J. — The case is presented for decision on so much of an agreed statement, as may be legal testimony.

The opinions of public officers of the United States respecting the construction of acts of Congress must be excluded. All testimony respecting the property of the defendant, and that of the father, and the amount of property conveyed or given by the father to his children, and respecting the services performed by the defendant for his father and mother, must also be excluded as irrelative.

It appears, that Abigail Walker, the widow of Nathaniel Walker, was entitled to a pension under the act of Congress, approved on July 7, 1838, c. 189. That she died on Sept. 7, 1843. That on Sept. 17, 1844, the defendant, as her administrator, received from the agent of the United States, the sum of two hundred dollars due to her for arrearage of her pension. William W. Walker, and the defendant, and the wife of the plaintiff, were then her only children. The plaintiffs claim to recover one third of the money thus received, on the ground, that upon the decease of the mother it became the property of her children. This claim is resisted on the ground: — First, that it was the property of the deceased as assets in the hands of her administrator to be by him administered.

This point appears to be conclusively determined against the defendant by the act of Congress, approved on June 19, 1840. The second section provides "in case any pensioner, who is a widow, shall die leaving children, the amount of pension due at the time of her death shall be paid to the executor or administrator, for the benefit of her children, as directed in the foregoing section. The first section provides, that the amount due to a male pensioner at the time of his death shall be paid to his executor or administrator, "for the sole and exclusive benefit of the children, to be by him distributed among them in equal shares, and the same shall not

be considered as part of the assets of said estate, nor liable to be applied to the payment of the debts of said intestate in any case whatever."

The effect of these provisions is to give to each child a title to an equal share of the money so received as a distributive share of his mother's estate, free from all claim upon it by the creditors or legal representatives of the mother. The administrator receives and holds it for their benefit.

2. The second objection is, that the action cannot be maintained in the names of the husband and wife.

Legacies bequeathed and distributive shares accruing to *femes covert*, become the property of their husbands. *Shuttlesworth* v. *Noyes*, 8 Mass. 229; *Commonwealth* v. *Manly*, 12 Pick. 173; *Fitch* v. *Ayer*, 2 Conn. 143; *Whitaker* v. *Whitaker*, 6 Johns. 112; *Chase* v. *Palmer*, 25 Maine, 341.

The Act to secure to married women their rights in property, approved on March 22, 1844, did not affect the rights of the parties in this case. Those rights were determined on the death of the mother, on September 7, 1843, before that Act was in force.

The husband may sue alone to recover such a legacy or distributive share, or on a contract made with or without seal, to the wife, during coverture. *Ankerstein* v. *Clark*, 4 T. R. 616; *Templeton* v. *Cram*, 5 Greenl. 417; *Savage* v. *King*, 17 Maine, 301; *Goddard* v. *Johnson*, 14 Pick. 352.

Because he is the owner of the property and may recover it by a suit in his own name, it does not follow, that he must sue alone, and that he cannot unite with his wife. There are many cases, in which the husband may maintain an action in his own name, or in the names of himself and of his wife.

The general rule in such cases is, that the wife may be united, when she is the meritorious cause of action. It is said in argument, that she is not the meritorious cause, when she becomes entitled to a sum of money, by operation of law or by bequest, without the performance by herself of any act. She is however regarded as the meritorious cause, when the

right of her husband to maintain the action accrues to him only because he is her husband.

Husband and wife may therefore join to recover a legacy, bequeathed to her during coverture. *Rose* v. *Bowler*, 1 H. Blac. 108.

And to recover for arrearages of rent due on a lease at will of her lands, made during coverture. *Aleberry* v. *Walby*, 1 Stra. 229.

And to recover for the treble value of tithes accruing to the wife during coverture, and not set out as required by statute. *Beadles* v. *Sherman*, Cro. Eliz. 608, 613.

In *Buckley* v. *Collier*, 1 Salk. 114, it was decided, that husband and wife could not maintain an action to recover for the labor of the wife, unless it was founded on an express promise made to her.

And in *Brashford* v. *Buckingham*, Cro. Jac. 77, that they might maintain an action on a promise made to the wife for services performed to cure a wound.

They may maintain an action to recover for the rents and profits of the lands of the wife, accruing during coverture. Com. Dig., Bar. and Feme, X; *Lewis* v. *Martin*, 1 Day, 263; *Clapp* v. *Stoughton*, 10 Pick. 463.

In such cases the cause of action does not at common law survive to the wife, unless she be joined in an action with her husband by his consent.

Then, as stated in *Clapp* v. *Stoughton*, "the recovery of judgment in such a case operates as a contingent gift from the husband to the wife, to take effect if she should survive." *Oglander* v. *Barton*, 1 Vern. 396. Although it was decided in the case of *Clapp* v. *Stoughton*, that the action could not be maintained, it was not because husband and wife could not have joined to recover the rents and profits, but because no such action having been commenced and prosecuted, the wife took nothing by survivorship.

There can be no difference in principle between the right to maintain an action in the name of husband and wife, to re-

cover for rent in arrear, and for rents and profits accruing on the lands of the wife, and for a legacy bequeathed to her during coverture, and the right to maintain an action in their names for a distributive share becoming due to her during coverture, by the provisions of a statute.

This action may therefore be maintained by the husband and wife, to recover the share of pension money awarded to her by the Act of Congress.

3. It is contended, that the defendant has accounted as administrator in the Probate Court, for the money received by him, and that he is thereby protected, while those proceedings remain in force.

The administrator cannot deprive a person of his right to property, by representing that property to be the assets of his intestate, and by accounting for it as such in the Probate Court. Nor can any decree of the Probate Court upon it, as the property of the intestate, deprive the owner of his right to it, or prevent him from proving it to have been his property, and not subject to the action of the Probate Court.

Defendant defaulted.

ABERNETHY GROVER *versus* HOWARD.

The return of the officer, in a levy of real estate, that the appraisers were discreet and disinterested men, is conclusive of that fact.

In a levy of real estate, in which the levying officer was a deputy sheriff, one who is also a deputy of the same sheriff is not, on that account, incompetent to act as an appraiser.

A levy, which, with the debtor's land, also embraces a portion of another man's land, is not on that account ineffectual to pass the debtor's land.

Parol evidence is not admissible to explain or vary the effect of the language used in the return of an officer.

Where one had erected buildings upon the land of another, by the license of the owner, and the owner afterward conveyed the land to him by deed, and in the deed had conveyed the buildings as a part of the estate, the grantee cannot claim, against a levying creditor of the grantor, that his erection of the buildings made them his *personal* property.

Grover *v.* Howard.

In a levy of land an exception of "the buildings," (there being no instruction that they are to be removed, or that the occupant is to be disturbed in his possession,) will exclude from the levy not only the buildings themselves, but also the land under them, with so much adjacent land as may be necessary for their use.

WRIT of entry, to which the general issue was pleaded.

The material part of the evidence is sufficiently apparent in the opinion of the court. It was conceded at the argument, that John Grover had by leave of the defendant been in possession of the premises, ever since the demandant's title accrued.

Upon the evidence, or so much and such part thereof as may be legally admissible and competent, the court were to enter up judgment on nonsuit or default, as law and justice should require.

Codman, for the plaintiff.

The levy was void; because —

1. It was oppressive and unjust. It took the house and out-buildings, without any appraisal of the erections, which were worth $1500. Such proceedings are a fraud in law.

2. Two of the appraisers were not discreet and disinterested men. It is not enough that they are called so; they should be so in fact; they should be honest too.

3. Land not belonging to the debtor was included in the levy.

4. A small part of the front yard of the house was wrongfully excluded from the levy.

5. Two of the appraisers were deputies of the sheriff, and were incompetent to act as appraisers, because the levying officer was also a deputy of the same sheriff.

G. F. Shepley, for defendants.

There was no oppression. The plaintiff and the appraisers supposed the house belonged to plaintiff, as he had built it, and that the creditor could not hold it. Hence, they did not appraise it.

But I contend, not only that the house did not pass by the levy, but that the land under it was excepted also, with a pas-

sage way to the street. *Hoyt* v. *Sanborn*, 11 Shepl. 118; *Shute* v. *Medbury*, 7 Metc. 566.

At the commencement of the suit, the demandant, by his tenant, was in the possession, and therefore was not entitled to an action.

This case is not a question of pleading. It is to be decided, upon the evidence, "as law and justice require."

SHEPLEY, C. J. — The demandant derives his title to the premises from John Grover, by conveyances made since they were attached on a writ in favor of the tenant, against John Grover. The title of the tenant is exhibited by that attachment, by a judgment recovered in that suit, and an execution issued thereon, and by a levy made within thirty days of the judgment.

The premises are said to contain about four acres of land with two dwellinghouses and out-houses standing thereon, one denominated the new dwellinghouse, which appears to have been occupied by John Grover at the time of the levy, and it is admitted, that he has continued to occupy it since that time by license of the demandant, who claims to recover on the ground that the proceedings in making the levy were illegal and void.

1. The first objection is, that the appraisers were not discreet and disinterested men. The return of the officer states, that they were so, and that is conclusive. *Rollins* v. *Moores*, 25 Maine, 192.

2. The second is, that two of the appraisers being deputies of the sheriff, whose deputy made the levy, were not competent persons to act as appraisers.

The argument is in substance, that the sheriff being responsible for the acts of his deputies, the appraisement and other proceedings are to be regarded as made by him. The two persons, who acted as appraisers and were deputies, did not while making the appraisement act in their official character as deputies, and of course the sheriff was not responsible for their conduct. A person by becoming a deputy of the

sheriff does not become incapable of performing any other duty of a citizen not inconsistent with the discharge of his official duties.

3. The third is, that "a small triangular portion of the front yard of his house was excluded from the levy, rendering it valueless to him and to his grantee."

This objection appears to have arisen from an erroneous construction of the description of the estate taken by the levy.

It is described as "commencing at a stone post, a bound of the common, thence westerly by the road leading to the mills to lands of Rufus Skillings." The stone post stood on the margin of the common, a couple of rods or more southerly of the point, where the boundary lines of the common and of the road intersect, and the description of the levy does not state, that it was bounded upon the common from the stone post to that point of intersection. The levy, however, commencing at the stone post, and bounded westerly by that road, must necessarily be bounded by the common until it reaches from the post to the road.

4. The fourth is, that a strip of land not owned by the debtor, but by Rufus Skillings, was taken by the levy. The levy does appear to have been so made. This, however, can constitute no valid objection to it. The debtor will have no just cause of complaint, that a small strip of land, which he did not own, was included in the appraisement. The land, which could be conveyed by the levy, will be sufficiently described by including all which the debtor owned within the description. The levy will be good for what the debtor did own. *Atkins* v. *Bean*, 14 Mass. 404.

5. A more formidable objection is presented by the exception from the levy of "the new buildings now occupied by the aforesaid John Grover."

The declarations of John Grover and of the demandant, made at the time of the levy, were introduced to prove, that those buildings were the personal property of the demandant, leaving the inference, that they were excepted as such pro-

perty. If they were erected by the demandant by license of John Grover, they could not be regarded as personal property at the time of the levy, for John Grover had before that time, in a conveyance of the land, made by him to the demandant, called them his new buildings, and had conveyed them as a part of the estate. The demandant having accepted such a conveyance could establish no title to them as personal property.

A creditor cannot by making a levy change the character of his debtor's estate, and convert a part of it into personal property by taking the land under buildings and leaving them as the personal estate to be torn down or removed. If the exception can receive no other construction, than one which will exclude the new buildings without any right to have them remain upon the land for use and occupation, the levy cannot be sustained. Courts have been inclined to sustain levies often made by persons unskilled in making conveyances, when they could do so consistently with the established rules of law; and for this purpose have made somewhat of forced constructions of the langage used. For example, when an officer has returned, that a debtor had neglected to choose an appraiser, an inference has been drawn, that he had been notified to do so. When unskilful persons make use of language to convey estates, it is sometimes very difficult to determine, what the intention really was. In doubtful cases, such a construction should be adopted, if possible, as will give effect to the conveyance and preserve the rights of all the parties, in preference to one even more literal or plausible, which would operate to destroy the whole conveyance or proceedings.

Parol evidence is not admissible to explain or vary the effect of the language used in the return of the officer. Whether the intention was to exclude from the levy the new buildings without any right to the land, on which they stand, or to exclude them with the land under and so connected with them as to admit of their occupation, where they stand, may be doubtful.

In the case of *Sanborn* v. *Hoyt*, 24 Maine, 118, the owner of forty-seven acres of land with a dwellinghouse, barn and shed thereon, conveyed the land "excepting and reserving all the buildings on said premises," and the decision was, that the buildings only, without the land under them, were excepted. One reason assigned for that construction was, that there was no distinct lot particularly used in connection with the buildings, and it was said, that such a designation would seem to be necessary. That reason would be applicable in this case to show, that the buildings only were excepted. The other reason assigned, that by the language used they were "the buildings on said premises" conveyed, would not favor a similar construction in this case. The language used in this case does not represent, as in that case, the buildings to be standing on land taken by the levy, but designates them only as "the new buildings" now occupied by a certain person.

This case is more like the case of *Allen* v. *Scott*, 21 Pick. 25, in which the grantor conveyed land in mortgage, with all the buildings standing thereon, "except the brick factory." It does not appear that there was any particular lot designated and used with the brick factory. In that case, as well as in the present, the exception appears to have been immediately preceded by a clause, conveying all the buildings thereon. The conclusion of the court was, that it was intended that the mortgager should retain the same title to, and enjoy the factory in the same manner, as he had done before the conveyance.

The opinion states, that "such a right of occupation is an interest in the land, amounting to a fee defeasible, perhaps, by the destruction of the factory, but of this it is not necessary to give an opinion." "When property is granted, all that is necessary to the enjoyment of it, is impliedly granted, as an incident to the express grant; and the same rule of construction applies to an exception in a grant."

In the case of *Bacon* v. *Bowdoin*, 2 Metc. 591, it is said, by the grant or lease of a house or any other building, the land on which it stands, with the privileges necessary to its

enjoyment, passes by implication, unless the implication is rebutted by the language of the deed."

In the present case, there is nothing in the description of the premises taken by the levy, to rebut such an implication.

In the case of *Cheshire* v. *Shutesbury*, 7 Metc. 566, it was said, that "by the grant of the north part of the great barn, to the middle of the floor, an interest in the land under it, passed."

In the case of *Blake* v. *Clark*, 6 Greenl. 436, it appeared that a saw-mill, without any further description, was on the division of an estate assigned to one of the heirs, and it was decided, that the land, upon which it stood, would pass with a right of way, or other easement necessary to its enjoyment.

In the case of *Waterhouse* v. *Gibson*, 4 Greenl. 230, it was held, that the same rules of construction would be applicable to a levy, as to a deed of conveyance, and that parol evidence was inadmissible to explain the intention.

The buildings excepted from the estate taken by the levy in this case, are described as new buildings, occupied by the debtor, and there is no indication that he was to be disturbed in that occupation, or that he was expected to remove them. According to the cases already noticed, the land under them, and so much as may be necessary for their use, may pass by implication. The land in front of the buildings, between them and the highway, with a passage way from the highway to the barn or stable, may well pass with the land under them, as necessary to their enjoyment.

The demandant, being already in possession of them by his tenant, will not be entitled to maintain this action for their recovery, and to the other portions of the estate demanded, he has no title. *Demandant nonsuit.*

JOEL HOWARD, *Pet'r from a decree of the Judge of Probate.*

A guardianship, for the cause of insanity, cannot be established over the husband, upon the application of his wife.

THE wife of the appellant represented to the Probate Court,

that he was insane, and prayed that a guardian might be appointed. After inquisition and notice, a guardian was appointed. From that decree this appeal was taken. One reason given for the appeal was, that a wife could not legally be a party to such proceedings.

Bean, for the appellant.

Walton, for the appellee.

WELLS, J., orally. — The statute allows the appointment of a guardian, upon the application of any *friend* or *relative*. This applicant then is within the language of the statute. The proceedings have all been regular in form. The question arises whether it be allowable for husband or wife to apply, the one against the other, for the establishment of a guardianship. It is now considered that in legal proceedings, the husband and wife cannot act adversely, the one to the other, except in cases of violence and of divorce. This is an adversary process.

Prosecutions like this involve litigation, and must be attended with many legal incongruities. What is to be done with the bond the husband has given to the wife, to prosecute this appeal and pay costs? In the family circle too, it is easy to see that the tendencies must be of an injurious character. We think such processes could not have been contemplated by the Legislature. *Decree reversed.*

NUTE *versus* BRYANT.

Where both parties to a replevin suit, claim the property by purchase from the same vendor, his interest is balanced, and he may be received, without a release, to impeach one of the sales.

REPLEVIN for a horse. The defendant filed a brief statement of property in himself. The plaintiff replied property in himself.

One Buck formerly owned the horse. He conveyed it to

the plaintiff, and soon afterwards also conveyed it to Deane. From Deane it passed through an intermediate conveyance to Thompson. The defendant purchased of Thompson, *bona fide*, and for full consideration. To prove the sale to the plaintiff fraudulent, the defendant called Buck as a witness. He was objected to on the ground of interest, and also because it was not competent for him to impeach his own bill of sale. The defendant executed a release from himself to Buck. He also executed a release to Thompson, who was not present, and had no knowledge of it, and lodged it for Thompson in the hands of Mr. Ludden, who had no authority to receive it. The plaintiff renewed his objection, but WELLS, J. presiding, admitted the witness, who testified, that the sale to the plaintiff was without consideration, and was intended to protect the property from attachment, and also that, soon after the sale to Deane, he informed the plaintiff, and that the plaintiff did not object to it. There was also testimony tending to show, that the sale to the plaintiff was for a valuable consideration and without any fraudulent intent.

The plaintiff requested instruction, that the bill of sale to the plaintiff could not be impeached, except by a creditor of Buck. The court instructed, that the defendant might show the sale to the plaintiff to have been without consideration, and intended to defraud then existing creditors, and that such a sale would be void against subsequent purchasers for a valuable consideration. To the question propounded to the jury, "whether the plaintiff consented to the sale from Buck to Deane, they answered affirmatively." The verdict was for the defendant and the plaintiff excepts.

G. F. Shepley, for plaintiff.

Buck was not competent to show fraud in the first sale. He sold twice and received pay twice. His interest is not balanced. If his testimony prove the first sale fraudulent, he could not be compelled to pay back to the plaintiff, and thus he would keep both payments. As being conclusive on this point, I cite *Bailey* v. *Foster*, 9 Pick. 139.

The cases in Maine have not decided, that where the wit-

ness has received pay of the first vendee, he can impeach the sale. There has been nothing of that character, except the *dictum* in *Cutler* v. *Copeland*, 18 Maine, 127. The point is now for the first time presented to the court.

The releases were of no effect. That to Thompson was never delivered.

It had taken no effect when the witness was testifying, and could relieve no bias on his mind. An attorney cannot execute a valid release. *A fortiori*, a third person cannot receive one. It was strangely given to the attorney of the releasor, rather than to an attorney or agent of the releasee.

The release to Buck was nugatory. The defendant could in no event have a claim against Buck. If his title failed his remedy was on Thompson only.

Ludden, for defendant.

WELLS, J., orally. — It is not necessary to consider the validity of the releases. The case of *Cutter* v. *Copeland*, 18 Maine, 127, shows, that as between Buck and the plaintiff, the sale is valid, and that the plaintiff might recover back. To the losing party in this suit, Buck must be liable. His interest is therefore balanced.

As to the ruling that sales, fraudulent and void as to existing creditors, would be void as to subsequent *bona fide* purchasers, it is not important to examine. The finding of the jury, that the plaintiff consented to the sale to Deane, renders further inquiry on that point unnecessary.

Exceptions overruled.

TUTTLE *versus* SWETT *& al.*

A contract to employ a laborer for three years, at specified wages per day, unless it be in writing, is within the statute of frauds, and cannot be enforced.

EXCEPTIONS from the District Court, COLE, J.

Assumpsit upon a parol promise to employ the plaintiff three years, to labor for the defendant in making powder-casks, for

which they were to furnish him a dwellinghouse, and to pay him one dollar, twenty-five cents per day.

Plaintiff introduced proof of the bargain, and of defendant's refusal to employ him. He also read three letters from the defendants to him, which were in substance as follows: —

"June 12, 1847. I have concluded to hire you at your offer; shall depend on you, as you talked."

"October 10, 1847. I have talked with Jones about your coming; have concluded to keep on a year longer, without you."

"January 31, 1848. I received yours. If any thing is wrong and of damage to you, let it stand till I come, and I will endeavor to do right."

A nonsuit was ordered.

Ludden, for plaintiff.

1. The contract is not within the statute of frauds. It is a contract for the manufacture of goods. 18 Johns. 58; 1 Str. 506; 4 Burrows, 2101; 1 Dane's Abr. 238, 562; 1 Kent's Com. 505; 21 Pick. 205; 1 Taunt. 318; 19 Maine, 137.

2. The defendant's letters withdraw the case from the statute. 3 Greenl. 409; 1 Dane, 237, 240—5; 13 Mass. 87; 1 Esp. 189; 1 Com. on Con. 93, 112, 413; 6 Blackf. 367.

3. It may be considered a contract from day to day, as the wages are at a daily rate. An action might lie for each days labor. Therefore not within the statute.

4. The last letter recognizes a bargain, and promises to do right. We may prove, and have proved, by parol, what the bargain was.

Walton, for defendants.

HOWARD, J., orally. — The contract could not be performed in a year. It is an entire contract for three years service. It was not in writing. The letters prove no contract. The case is within the statute of frauds. *Nonsuit confirmed.*

Turner *versus* Putnam.

No appeal lies from a judgment upon a default in a justice's court.

When a matter is dismissed, because irregularly brought before the court, costs are allowed to the prevailing party, if the dismissal puts an end to all proceedings in the case; but are not allowed, if the dismissal leaves the case for further proceedings.

In the justices' court, the defendant was defaulted. He then claimed an appeal, which the justice allowed.

On motion, in the District Court, Cole, J., the case was dismissed with costs for the plaintiff.

The defendant excepted.

Marble, for plaintiff.

Walton, for defendant.

Shepley, C. J., orally. — An appeal will not lie for a defendant, upon a default in a justices' court.

Exceptions dismissed.

The plaintiff's counsel moved for costs.

Shepley, C. J. — In matters brought irregularly before the court, and dismissed for that cause, a rule relative to costs has already been established. When the dismissal leaves the case for further proceedings, costs are not allowed, because neither party has finally prevailed. But when it puts an end to the litigation, costs are allowed.

In this case, the judgment before the justice stands unaffected by this decision. It is not opened to let in inquiries as to the subsequent costs. Since the default, the plaintiff has been wrongfully kept in court, by an adversary process. In that process he has prevailed, whereby the whole litigation is brought to an end. He is the prevailing party, within the meaning of the statute. *Costs for plaintiff.*

WARDWELL *versus* FOSTER.

A parol promise by the maker of a note, who was a certificated bankrupt, made to the payee of a note, barred by the bankruptcy, that he would pay the same, does not pass to the indorsee.

In a suit, in the name of the indorsee of such a note, against the bankrupt, (the maker,) the plaintiff cannot avail himself of a parol promise, made by the defendant to the payee, to pay the note.

ON REPORT from the District Court, COLE, J.

Assumpsit on a note given to one Briggs, and indorsed to the plaintiff.

Defendant relied on his discharge in bankruptcy. The plaintiff proved that after the discharge, and while Briggs held the note, the defendant, by parol, promised Briggs to pay it.

Perry, for plaintiff.

Whitman, for defendant.

SHEPLEY, C. J., orally. — It has recently been decided that a promise, like the one relied upon in this case, does not pass to the indorsee. *Nonsuit.*

BUCK *versus* HERSEY.

Of slanderous words.

To charge one with drunkenness, is not of itself actionable, for the law does not inflict upon that offence an infamous punishment.

Words, not in themselves actionable, may become so when spoken in relation to the plaintiff's employment or business. But, to make them so, the declaration must allege them to have been *so spoken*, when no special damage is proved or alleged.

ON EXCEPTIONS. Slander.

Plaintiff alleges himself to be "*an able, respected and accomplished public teacher of the polite art or accomplishment of dancing.*" Yet defendant, well knowing, &c., and intending to defame and injure the plaintiff in his good name, "*and in his said art or occupation as a public, able and faithful dancing master*, did falsely and maliciously accuse the plain-

tiff of drunkenness, idleness, vagrancy and worthlessness of character, and of having raised an idle, miserable and vagrant family, whereby the plaintiff has suffered great injury in his estate, in his business, and in his *art or occupation of dancing master.*"

It was proved by the plaintiff, *that* his business was that of a farmer, but that he occasionally kept a dancing school; *that* he was keeping a dancing school at South Paris, when the defendant, at a public lyceum, in a neighboring village, (the question for discussion being the public amusements of the day,) argued against dancing, (in reply to an argument which had been offered in favor of dancing,) and, in illustration of his views, observed, that he had been credibly informed, that, "at a dancing party in South Paris, the dancing master invited all the ladies to dance with him, and they all refused, and that he was so drunk that he fell upon the floor."

The trial was before HOWARD, J., who directed a nonsuit.

Plaintiff excepted.

Codman, to whose care the action was transferred, argued for plaintiff.

The words were actionable, The effect of them was to disgrace the plaintiff, to expose him to a criminal prosecution, and deprive him of his employment. Revised Statutes, chap. 160, sect. 36; *Chaddock* v. *Briggs*, 13 Mass. 248; *Smith & ux.* v. *Wyman*, 16 Maine, 14; *Usher* v. *Severance*, 20 Maine, 9.

The place and circumstances of the speaking, evinced malice, and aggravated the wrong. *Coffin* v. *Coffin*, 4 Mass. 1.

The law presumes damage.

May, for defendant.

HOWARD, J., orally. — The distinction between words in themselves actionable, and those not actionable, is well known. As to the plaintiff, separate from his employment, the words used by the defendant were not actionable. They imputed no crime, which could be visited with infamous punishment. A fine is all that could be imposed. But the plaintiff contends

that the words were actionable, because uttered against the plaintiff in relation to his employment. The principle contended for is correct, but we think it does not apply. The declaration does not charge that the words were spoken "of and concerning the plaintiff's business." No special damages were proved or alleged. The words were not actionable, either in themselves or by reference to the plaintiff's calling.

Exceptions overruled.

CODMAN *& al. versus* CALDWELL.

An attorney at law may, by his book and suppletory oath, prove his retainer and his services rendered in court.

ASSUMPSIT by attorneys and counselors, for several term fees and for services in court, relating to the acceptance of an award. The plaintiffs offered their book with the suppletory oath of Mr. Codman. That evidence was objected to, because not the best, which the nature of the case allowed. The objection was overruled. Mr. Codman, being sworn, was asked by his counsel, whether the services were performed at the defendant's request. That inquiry was objected to, but the objection was overruled, and Mr. Codman testified in the affirmative. The verdict was for the plaintiffs. The defendant excepted. The trial was in the District Court, COLE, J. presiding.

J. Goodenow, for defendant.

1. The right to charge, *so that the book could be evidence*, must exist at the moment the services were rendered. Before their book can be admitted, the plaintiffs must prove their retainer, which constitutes their right to charge. The plaintiffs cannot in this way prove their agency. Their retainer is no part of their account. It is an independent fact not necessarily connected with the entry of their appearance on the docket. Exceptions to the common law modes of proof should not be multiplied. *Clark* v. *Perry*, 17 Maine, 179;

Amee v. *Wilson*, 22 Maine, 120; *Dunn* v. *Whitney*, 1 Fairf. 9; Starkie on Ev. vol. 2, page 130, Attorney; *Gleason* v. *Dodd*, 4 Metc. 333; *Winsor* v. *Dilloway*, 4 Metc. 221; *Eastman* v. *Moulton*, 3 N. H. 156.

2. The plaintiffs' claim was susceptible of better proof. The party's book and oath, it is believed, are not to be allowed, except when the services are of such a character as to form a presumption, that there will otherwise be a failure of proof. When that presumption is repelled, the common law proofs cannot be dispensed with. Cowen & Hill's notes to Phil. on Ev. 2, 691, 692, 693; *Leighton* v. *Manson*, 14 Maine, 208.

Codman, for plaintiffs.

WELLS, J., orally. — One objection to the plaintiffs' book and oath is that, from the nature of the case, there must be better evidence.

The book and oath of a party are often received to prove sales or services, known to other persons and proveable by them. A plaintiff may in that mode prove a sale, though his clerk knew of it, and could testify to it. So of physicians.

The cases of bulky and heavy articles, and of articles delivered to third persons, stand on a different reason. The demands of attorneys are sustainable by any mode of proof, applicable to other descriptions of persons. The objection cannot prevail.

It is further contended, that it was not competent for plaintiffs, by their book and oath, to prove that they were employed by the defendant. But a plaintiff may testify to the delivery of goods. There is much resemblance in the cases. This objection, too, is unavailing. *Exceptions overruled.*

STEPHEN GREENLEAF, JR. *versus* RACHEL HILL, *Ex'rx.*

Where A has obligated himself to pay money to another, so soon as paid to him by a third person, the taking by him of a new note of such third person, upon an extended pay-day, is to be regarded as a payment received by A.

The statute of 1844 "to secure to married women their rights in property," was prospective only.

By the common law, a note made payable to a married woman belongs to her husband.

THIS was an action against Mark Hill upon a contract of which the following is a copy.

"Whereas I hold a note signed 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 Greenleaf Hill, one-eighth of said sums when collected.

"February 23, 1837. Mark Hill."

Mark Hill having deceased, said Rachel, the executrix, took upon herself the defence of the suit.

To maintain the action, the plaintiff introduced Reuben Wing and Nathan Carver, who testified that on the 18th of January, 1837, they purchased land of Mark, and gave him the notes mentioned in said contract; that they paid the smaller note to said Mark in about three years from its date; that on the 30th of November, 1843, having previously paid the interest on said $300 note, they took it up by giving said Mark their six new notes of $50 each, the said Mark giving an extension of time; and that they had fully paid the same, the last payment having been made in February, A. D. 1847. Said Wing testified that he paid the last of the $50 notes within one month after it became payable; could not state the precise time; it might be as late as February 25, 1847.

At the time Mark Hill gave the said contract to Jane Hill Greenleaf, she was the wife of the plaintiff, having been mar-

ried to him about the middle of October or November, 1835. She died in 1846, leaving a child, which is yet living.

The note in suit was repeatedly seen in the plaintiff's possession in 1841 and 1842. The testimony also showed that the plaintiff had exhibited said note to counsel, during the lifetime of his wife.

There was no evidence to show, that Wing and Carver were unable to pay promptly, or that said Jane or the plaintiff consented to the said extension of pay-day.

The writ was dated February 17, 1847.

Upon the foregoing case the court are to enter judgment as the rights of the parties require, having power to draw inferences, as a jury might.

G. F. Emery, for plaintiff.

1. The contract, at its inception, became the husband's property. *Templeton* v. *Cram*, 5 Greenl. 417 ; *Savage* v. *King*, 17 Maine, 301.

2. But if property of the wife, it was reduced to possession by him, in her lifetime.

3. No special demand necessary. *Dodge* v. *Perkins*, 9 Pick. 368 ; *Coffin* v. *Coffin*, 7 Greenl. 298.

4. The receiving of new notes for the old one is, between these parties, to be considered as payment.

5. Annual interest is claimed from the date of the notes, up till the principals thereon were respectively paid.

Dunn, for defendant.

1. At the common law, this action is not maintainable. To entitle the husband to the personal property of his wife, he must reduce it to possession, *during coverture*. *Thrasher* v. *Little*, 22 Maine, 335 ; 3 Stew. 375.

In 2 Kent's Commentaries, 135, the law is very distinctly stated, that, "as to debts due to the wife at the time of her marriage, or afterwards, by bond, note or otherwise, and which are termed choses in action, the husband has power to sue for and recover the same ; and when recovered and reduced to possession, and not otherwise, the money becomes absolutely his. And the rule is the same if a legacy or distributive

share, fall to her during coverture." Then follows the principle that, if the wife dies before he has, by such collection, reduced to possession her choses in action, he cannot do it afterwards.

The case, *Legg* v. *Legg*, 8 Mass. 99, is decisive for defendant. It is there settled, that, if the husband does not reduce the chose to possession, by collection during coverture, he cannot afterwards. See also, as decisive, the cases of *Stanwood* v. *Stanwood*, 17 Mass. 57, and *Nash* v. *Nash*, as there cited. In *Rowland* v. *McDonald*, Law Magazine, May No. page 477, the same principle is fully laid down.

The case *Shuttlesworth* v. *Shuttlesworth*, 8 Mass. 229, does not apply here, because, in that case, the wife was living and the marriage undissolved.

2. The statutes of March 27, 1844, and August 21, 1847, are positive and clear against the plaintiff's right to recover. The suit should be brought by the administrator or heir of the wife.

Howard, J., orally. — The court is to draw inferences as a jury might. The $245 note was paid to defendant's intestate. His acceptance of the new notes was, in legal contemplation, a payment of the $300 note.

The contract now in suit was given to a married woman, who has since deceased. The question is, whether her surviving husband can maintain a suit upon it, it being contended by defendant that it should have been brought only by her administrator or heir, she having left a child which is still living.

By the common law, the contract, in its origin, belonged to the husband. In legal construction, it was made to him. The right of action upon it was his. The statutes cited do not apply. They only operated prospectively. The contract in suit was made prior to their enactment. The defence is not maintained.

Interest having been received annually by defendant's intestate, upon the two notes, till the principals were paid, annual

interest is now to be computed from the date of the notes, till the principals were paid thereon respectively.

On the amounts thus acertained, simple interest only is to be cast, and the plaintiff is to have judgment for one-eighth of the aggregate.

Defendant defaulted.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF FRANKLIN,

1850.

MEM. — SHEPLEY, C. J. was not present at this term.

KEMPTON *versus* STEWART.

In submitting to the decision of the court, an alternative award of referees, under a rule of court, it is competent for them to present, not the *evidence*, which was before them, but the *facts*, which in their opinion, were proved *by* that evidence.

Where a referee, through misapprehension of the right course, submitted, in an alternative award, not the *facts* but the *evidence*, the award was recommitted.

TENNEY, J. — The referee in his report states, that it having been agreed by the parties, that the referee should report the evidence in the case, so that either party being dissatisfied with the award, might present the questions of law in the case, for the consideration of the court, and thereupon makes an alternative report, awarding in favor of one party or the other, according as the court should decide the law to be upon the testimony reported. And annexed to the report is the testimony given at the trial.

The statutes on the subject of references, R. S. chap. 138, and those of 1845, chap. 168, do not contemplate that the

court to which the report shall be made, should consider the evidence as it was adduced before the referees; and it may well be doubted, whether it is competent for them to do so. But if the referees report a statement of facts, and expressly refer the law arising thereon to the determination of the court, the acceptance or rejection of the report is not an act of discretion, but a decision of law. *Preble* v. *Reed & al.* 17 Maine, 169. But under the Act of 1845, when the report is before this court on exceptions, it has the discretionary power, to accept, reject or recommit, according to the equity of the case, that is possessed by the District Court, so that the opinion, direction, ruling or judgment of the District Court, in accepting, rejecting, or recommitting the report of referees, shall be deemed matter of law, so far as to be subject upon exceptions thereto, to revision in the Supreme Judicial Court.

The referee not having explicitly stated the facts, which he found, but having intended to submit to the court the law applicable to them, as they existed in the evidence adduced, it is equitable that the parties should have the opportunity of presenting their case anew. In pursuance of the power given to the court, in the statute last referred to, the report is recommitted.

OTIS *versus* GAZLIN.

A promise to his creditor, made by a debtor, *after having been decreed to be a bankrupt*, and before the obtaining of his discharge in bankruptcy, that he will pay a previously existing debt, will not be impaired by the subsequently acquired discharge.

Such a new promise is held to mean, that the promisor will not set up his expected discharge to avoid the payment of the debt.

Such a promise revives the debt. It need not be declared upon as the cause of action, but may be proved as a bar to the operation of the discharge.

The statute passed August 3, 1848, c. 52, requiring such new promise to be in writing, is not applicable to actions commenced before its enactment.

WELLS, J. — This is an action of debt to recover the

amount of a judgment recovered against the defendant for a debt due in June, 1842. In Feb'y, 1843, the defendant was decreed a bankrupt, and in Jan. 1847, obtained his discharge. In December, 1846, the attorney of the plaintiff employed an agent to call on the defendant for payment of an execution, which issued on the judgment; the defendant said he could not pay it at that time, but would pay it in the course of the winter.

A new promise, to pay a debt made after the promisor has been decreed a bankrupt, is valid and binding upon the party making it, and is not affected by the subsequent discharge. *Corliss* v. *Shepherd*, 28 Maine, 550.

It is contended on the part of the defendant, that a new promise made by a bankrupt can have no effect upon a judgment, whatever it might have upon causes of action for which assumpsit is the proper remedy. But no authority has been cited in support of that distinction, and the same principle must apply to all debts, irrespective of the form of action prescribed for their recovery.

After a bankrupt has received his discharge, if he makes a new promise to pay the debt, it has the effect to revive the debt and defeat the discharge, and places the debt in the same condition, in which it was before the discharge was obtained. The new promise is regarded as a complete and full answer to the discharge, as is the case where a new promise is proved in reply to the statute of limitations, by which the bar arising from the lapse of time is removed.

In the present case, the promise was made before the discharge was obtained, but after the decree of bankruptcy; the proceedings in bankruptcy were in progress but unfinished, and the meaning of the promise must be, that the defendant would pay the debt and would not set up his expected discharge against it. Promises to pay debts made after the petition in bankruptcy and before the discharge, have been regarded in the same manner as those made after the discharge, and as leaving the debts unaffected by it. It has not been considered necessary that such promises, creating new

contracts should be declared upon, and the old debts alleged as their consideration, but their reception in evidence has been held to revive the debts. The new promise in this case must be regarded as having the same effect as if the declaration set out a cause of action in assumpsit, and as preventing the operation of the discharge upon the judgment, which in consequence of the promise remains in full force, unimpaired by the discharge.

The action was commenced before the passage of the Act of August 3, 1848, c. 52, requiring such new promise to be in writing, and it is not affected by that Act, as was decided in the case of *Spooner* v. *Russell*, 30 Maine, 454.

The exceptions disclose sufficient evidence to authorize a jury to find a verdict for the plaintiff, and the nonsuit, which was ordered, must be set aside.

Exceptions sustained.

Webster, for plaintiff.

H. & H. Belcher, for defendant.

BURNHAM *versus* HOWARD.

In dilatory pleas, "the highest degree of certainty," or a "certainty to a certain intent in every particular," is required.

They should be such as to preclude all presumption, inference, or argument against the party pleading.

They should contain that technical accuracy, which is not liable to the most subtle objection, and which excludes all such supposable matter, as would, if alleged on the other side, defeat the plea.

To a writ of entry the tenant pleaded in abatement, that, since the last continuance, a deputy sheriff for the county, having in his hands for service, an execution against the demandant, in favor of a third person, in virtue thereof ousted and disseized the tenant, and set off to the creditor the demanded premises, and delivered to him the seizin and possession thereof, which the creditor has ever since held, and still holds.

On demurrer, the plea was held to be bad.

ENTRY. The tenant prays judgment of the writ, because, as he says, after the last continuance of this cause, and be-

fore this day, that is to say, on, &c., one Joseph Shurburne, a deputy sheriff within and for said county, having an execution in his hands for collection, against the said Daniel Burnham, and in favor of one David Dyer, entered upon the premises mentioned in the writ of said Burnham, by virtue of said execution, and disseized the said Howard thereof, and ousted him therefrom, and then and there, by virtue of said execution, levied the same upon said premises, and set off the same premises to said David Dyer, and then and there delivered seizin and possession thereof to said Dyer, which the said Dyer ever since has held and still holds, and this he is ready to verify; wherefore he prays judgment of the said writ, &c.

To this plea there was a demurrer, which was joined.

Sherburne, for the tenant.

The real estate in controversy having been levied upon, by virtue of an execution against the demandant, and the tenant having been ousted, it is no longer in the power of the tenant, to render the land, and the writ abates. *Eldridge* v. *Acocks*, 2 Pick. 319; *Walcot & als.* v. *Knight & als.* 6 Mass. 418; *Walcott* v. *Spencer*, 14 Mass. 410; Stearns on Real Actions, chap. 4, sect. 18; 1 Chitty's Plead. 635.

May, for the demandant.

The plea is defective. It does not show that the execution authorized the levy. It may have issued from a justice of the peace; or from some court having no jurisdiction; it may not have run against the land; its return day may have passed; it may not have been directed to a deputy sheriff; there may have been fatal defects in the return of the levy. For these and many other omissions, which will at once occur to the mind, the plea does not show title or even actual seizin in the levying creditor, and it is fatally defective.

Sherburne, in reply.

The levy took all the title which this demandant had. The creditor was put, by process of law, in possession, so that the tenant cannot render the land.

We think the plea is sufficiently accurate. The *presumption* is, that the execution was issued rightfully, and that all

the proceedings under it were in accordance with law. The plea substantially shows all that is legally requisite.

TENNEY, J. — Under the statute of 1821, chap. 60, sect. 27, it was held, that when an execution was extended upon real estate of the debtor, who was disseized in the mode prescribed, and seizin and possession delivered by the officer to the creditor, the disseizin was purged, and the creditor became actually seized; and he could maintain a writ of entry, or an action of trespass against the disseizor, provided the right of entry remained to the debtor. *Woodman* v. *Bodfish*, 25 Maine, 317.

The statute of 1821 has been modified by the R. S. chap. 94, § 18, wherein it is provided, that where an execution is levied upon land, into which the debtor therein has the right of entry, and of which another person is 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.

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, sect. 10.

At common law, in a real action, if pending the suit, the land is recovered from the tenant, the writ abates, the tenant having no power to render the land, and the judgment against him being ineffectual. Com. Dig. Abatement, H. 54. But it is otherwise when a creditor of the tenant has levied an execution upon the demanded premises. *Eldridge* v. *Acocks & al.* 2 Pick. 319. A debtor, however, cannot maintain a writ of entry at the same time that the creditor holds that right. Whatever may be the rights of the tenant in possession, the estate of the debtor having entirely passed from him, subject only to the right of redemption, he is no longer in a condition to commence or prosecute an action for the possession.

In order, however, that the creditor should have the seizin contemplated by the provision referred to, it must be such as

would result only from a title acquired in the land, as between him and the debtor. The officer can give no seizin, excepting as a minister of the law; and if the law has not been observed in every essential particular, his acts are entirely void, and no rights are obtained under them. The execution must be issued upon a judgment duly rendered by a court of competent jurisdiction, and upon which an execution, which may be satisfied by a levy upon real estate, can issue; the execution must also be in proper form, directed to the officer who is authorized to enforce it. The proceedings of the officer must conform to the statute in making the levy.

If pending the writ of entry, the right of the demandant to recover the land has been taken away, by the recovery of a stranger from the tenant; or by a valid levy upon it on an execution against the demandant, the suit may be defeated by a plea in abatement filed as early as possible after the facts have transpired, notwithstanding there has been a continuance of the action. Stearns on Real Actions, chap. 4, § 18.

Dilatory pleas, however, having for their object, the defeat of actions upon grounds unconnected with their merits, "the highest degree of certainty," or a certainty "to a certain intent in every particular," is required. This degree precludes all argument, inference or presumption against the party pleading, and as it has been well expressed, is that technical accuracy, which is not liable to the most subtle and scrupulous objection, so that it is not merely a rule of construction, but of addition, for when this certainty is necessary, the party must not only state the facts of his case in the most precise way, but add to them such facts, as to show, that they are not to be controverted, and, as it were, anticipate the case of his adversary, (1 Chit. Pl. 238,) and exclude all such supposable matter, as would, if alleged on the opposite side, defeat the plea. Gould's Pleading, chap. 3, § 57.

The plea in abatement, filed in the case before us, is not such as the rules which have been referred to require. Many of the facts alleged therein would be unavailing to give a

seizin to the creditor, who attempted to extend his execution upon the demanded premises, if they were accompanied with other facts, not inconsistent with those alleged in the plea. There is nothing, which shows that the judgment referred to was rendered by a court having jurisdiction of the subject-matter or of the parties, or that it was one upon which an execution could issue, and authorize the levy on real estate, or that the execution, extended against the lands of the debtor. The particular steps of the officer, in causing the appraisers to be selected and qualified, their appraisal, and his return upon the execution are not alleged, neither is it stated in general terms, that all the proceedings were according to legal requirement. Whether the execution was returned and recorded, the plea does not allege. If it were not, and there were fatal omissions, or positive errors in the acts of the officer which rendered the levy void, the creditor was at liberty to waive the levy, and resort to any other remedy for the satisfaction of his judgment. R. S. chap. 94, § 22.

All the facts alleged in the plea in abatement, which the demurrer confesses, may be true, and the creditor in the execution against the demandant have obtained nothing by the levy attempted to be made. *Respondeas ouster.*

JAY BRIDGE CORPORATION *versus* WOODMAN.

The power, given to incorporated companies, to establish by-laws not repugnant to the laws of the State, does not authorize a by-law by any corporation, which confers upon it the right to recover, in an action against a stockholder, the amount of any assessment, or balance of any assessment, made upon his shares.

The decision in *Kennebec and Portland Rail Road Company* v. *Kendall*, 31 Maine, 470, affirmed.

ASSUMPSIT.

The defendant became, by purchase, the owner of nineteen shares in the plaintiff corporation, which was chartered in 1834. An assessment was afterwards laid upon them, and,

to enforce the payment of that assessment, they were sold by the company. The proceeds of the sale were insufficient to pay the assessment, and this suit is brought to recover the balance. The plaintiffs' charter conferred the power of establishing by-laws, for regulating their affairs, not repugnant to the laws of the State.

Their second by-law provides that sales of shares may be made to enforce the collection of assessments, and that, "*if such sale shall not raise a sufficient sum to discharge such assessment, the corporation shall have the further right of recovering by civil action against such delinquent proprietor all such deficiency.*"

A verdict was found for the plaintiffs, which is to be set aside, and a nonsuit to be entered, if, upon the whole case, the plaintiffs are not entitled to recover.

Sherburne and *May*, for the defendant.

No action of this nature can be maintained, except upon some statute provision expressly authorizing it, or upon the express promise of the party sought to be charged. *Andover and Medford Turnpike Corporation* v. *Gould*, 6 Mass. 40; *Same* v. *Hay*, 7 Mass. 102; *New Bedford and Bridgwater Turnpike Corporation* v. *John Q. Adams*, 8 Mass. 138; *Taunton and South Boston Turnpike Corporation* v. *Wm. P. Whiting*, 10 Mass. 327; *Middlesex Turnpike Corporation* v. *Samuel Swan*, 10 Mass. 384; *Salem Mill Dam Corporation* v. *Joseph Ropes*, 6 Pick. 23; *Ripley* v. *Sampson*, 10 Pick. 371; *Cutler* v. *Middlesex Factory Co.* 14 Pick. 483; *Franklin Glass Co.* v. *White*, 14 Mass. 286; *Bangor Bridge* v. *McMahon*, 1 Fairfield, 478; *Bangor House* v. *Hinckley*, 3 Fairfield, 385.

There is neither statute provision, nor express promise to support the action. The by-law of the corporation is impotent for any such purpose.

It is repugnant to the laws of the State. *Sargent & al.* v. *Franklin Insurance Co.* 8 Pick. 90; *City of Boston* v. *Shaw*, 1 Metc. 130; *Vandine, Petitioner, &c.*, 6 Pick. 190; The matter of the *Long Island R. R. Co.* 19 Wend. 37; *Dun-*

ham v. *Trustees of Rochester*, 5 Cowen, 462; *Commonwealth* v. *Turner*, 1 Cush. 493.

It is an assumption of extraordinary power, and is unauthorized. 19 Wend. 37, and 5 Cowen, above cited, 462.

It is unreasonable, giving the majority of a corporation, unlimited power over the rights and property of the minority. Corporations have, in every variety of form, attempted to usurp this power, and although the courts have in every case denied it, still the legislative authority has never to this day interfered. Our Revised Statute, chap. 76, sect. 6, in which the Legislature undoubtedly attempted to re-enact what was then the law of the State, including the common law upon that subject, negatively excludes any such authority. 19 Wend. 37, and cases there cited; *Commonwealth* v. *Worcester*, 3 Pick. 462.

H. Belcher and *R. Goodenow*, for the plaintiffs. The by-law is valid. It was authorized by the charter. It is a necessary provision for the regulation of the company affairs, and is not repugnant to the laws of the State.

The right to assess would be of no value, unless connected with a right of action, in case of deficiency in the avails of the sales. Though a mode of collection, by selling the shares, is prescribed, it does not exclude other modes. The remedy by a sale of the shares is merely cumulative.

To confirm the by-law, would not injure the defendant inasmuch as the proprietors are liable for corporation debts.

The cases cited from New York are inapplicable. The law there is different from ours. It provides a forfeiture.

The defendant, by becoming a member of the corporation, assented to be bound by its regulations. The by-law was a mere regulation to operate only among the members. Its purpose was to effectuate equal justice between them, and to ensure the great object which all had in view. 6 Humph. 241 and 515; 3 Grat. 215.

TENNEY, J. — It appears from the report of the case and the documents therein referred to, that the defendant held nine-

teen shares of the capital stock of the corporation, by assignment from Ephraim Woodman, who was the owner of the same shares as an original stockholder. After the transfer to the defendant, they were sold for the purpose of raising the amount of the assessments thereon. The avails of the sale being insufficient to cover the assessments and the costs of the sale, this action is brought for the recovery of the balance.

For the maintenance of the action, the plaintiffs rely upon the Act of incorporation, sect. 1, whereby the company have the power to "make by-laws for regulating their affairs, not repugnant to the laws of the State," and upon the by-laws, article 2.

It is not denied by the defendant, if the provision of the by-law referred to is of binding obligation upon him, that it confers the right to commence and maintain this action. But it is insisted, that it is repugnant to the laws of the State, as contained in the Revised Statutes, chap. 76. The sixth section of that chapter provides, that all corporations instituted in this State, may by their by-laws, when no other provision is specially made, determine the mode of selling shares for the non-payment of assessments.

In the case of *the Kennebec and Portland Rail Road Company* v. *Kendall*, 31 Maine, 470, this court decided, that a provision in the by-laws, substantially similar to that under which this action is attempted to be sustained, was not authorized by the charter, which empowered the company to make and collect such assessments on the shares of said capital stock, as may be deemed expedient, in such manner as shall be prescribed in their by-laws, and that it was repugnant to the laws of the State, in chap. 76, sect. 1, R. S. The clause in the first section of the plaintiffs' charter, relied upon, confers no greater power, than that possessed by the company in the case cited. It was settled in the same case, that the unauthorized vote of the corporate members had no effect upon a contract by the corporation with one of them to his prejudice, and that he was not bound by a by-law, which was re-

pugnant to the general laws of the State, notwithstanding he was a stockholder at the time the by-law was adopted by the company.

But it is insisted that the defendant's assignor, by subscribing the by-laws, was bound thereby in the nature of a contract to pay assessments upon his shares, in the mode prescribed in the by-laws, article 2; and that the defendant, being his assignee of the same shares, is equally liable. We are not called upon to determine what would have been the legal obligations of the defendant's assignor, if he had made no transfer of his stock, by virtue of his assent to a provision of the by-laws, which the charter did not contemplate. Whatever were his liabilities to pay assessments under a contract specially entered into, and which was one that the corporation could not impose upon him, by a corporate vote, they were in their nature personal, and could not be passed to his assignee by the assignment alone.

There is nothing in the charter, the by-laws, or the contract of assignment, which can create any obligation on the defendant, upon the ground that he agreed to assume the liabilities of his assignor. He made no contract with the corporation, and did not bind himself in any manner, touching assessments to be made upon the shares. He would be bound by the by-laws, which the corporation had power to make, and by no other. He is not therefore bound to pay assessments in any mode, which the charter did not authorize, whatever might be the rights of the company to enforce the payment against his assignor, under his contract, if any he made.

The plaintiffs not being entitled to recover against the defendant, according to the agreement of the parties, the verdict is to be set aside, and a nonsuit entered.

INHABITANTS OF STRONG *versus* COUNTY COMMISSIONERS.

Certiorari, on the petition of a town, to quash the doings of County Commissioners in locating a town way, will not be granted, unless the same were injurious to the petitioners.

THIS is an application for a writ of *certiorari* to quash the proceedings of the County Commissioners in establishing a town way in Strong. It appears by the Commissioners' record, *that* some inhabitants had petitioned the selectmen to lay out a town way on a specified route; *that* the selectmen had refused to lay it; *that* the petitioners then applied to the County Commissioners to cause it to be located; *that* the Commissioners adjudged the refusal of the selectmen to be unreasonable; and *that* the Commissioners then proceeded and located a part, (about one-third,) of the road prayed for. The record does not show *that* the Commissioners estimated any damages, done by the location; or *that* no damages were sustained; or *that* they returned the names of the owners of the land, over which the road was laid; or *that* such owners were unknown.

Stubbs, in behalf of the town.

1. The jurisdiction of the Commissioners in the establishment of town and private ways is given by statute, chap. 25, sect. 32. It authorizes them to cause a town way or private way, prayed for, to be laid out or altered. In this case, they could alter no road, for there was no road to alter. Their power was limited to the laying out of a road, and *that must be the road prayed for.*

In petitions, originally addressed to the Commissioners for public highways, they may establish the whole or a part, for such is the statute provision. But they have not such power in relation to town ways or private ways. In such cases their jurisdiction is merely appellate. They can establish the whole of the road, or none of it. They cannot establish a part without establishing the whole. There is no midway course. The road which they located was not the road which the selectmen were requested to locate. It was not the road which

the selectmen refused to locate. It was never asked for by any body. The petition to the selectmen was for a specified road, an entirety. They refused to lay it. The Commissioners *decreed* that refusal to have been unreasonable. They then nullified their own decree, by practising the same sort of refusal. They did not lay the road, which they considered it unreasonable in the selectmen not to lay. For the selectmen never adjudged it unreasonable to lay a part of it. *State* v. *Inhabitants of Pownal*, 10 Maine, 24; *Livermore* v. *County Commissioners*, 11 Maine, 275; *Commonwealth* v. *Cambridge*, 7 Mass. 158; *Hallowell* v. *Goodwin*, 12 Maine, 271.

2. There was error in the omission of the County Commissioners to estimate the damages, done by their location, or to decide that none were sustained; also, as to returning the names of the land owners, or that they were unknown.

The inconveniences and injustice, flowing from said omissions, were discussed by the counsel.

Tripp, County Attorney, *contra.*

1. The petition assumes that there is error in the record. I see none. The road, so far as it was located, was on the route prayed for. In petitions, originally to the Commissioners, they may lay a part and refuse the residue. 19 Maine, 338. No reason is perceived why they may not do so, in appealed matters. But I contend the town has no right to take this point. They have no sufficient interest in the subject. 26 Maine, 353.

2. This application is to the discretion of the court. They will not yield to it, unless gross wrong be made to appear. Here no wrong has been done. The town seems unwilling to pay for a portion of the road, and complain that they are not made to pay for the whole of it.

Stubbs, in reply.

The case cited by the county attorney is favorable to the petitioners. The town is injured. They are compelled to make the part of the road which is located. By the statute they are not compellable, under the appellate power of the

Commissioners, to make that part, unless the residue was of a character to be laid out and made at the same time with it.

WELLS, J., orally. — The petitioners allege certain irregularities and wrongs in the doings of the County Commissioners. That allegation we have not found it necessary to consider.

A *certiorari* can be issued only for the relief of some injured party. The town brings this process. And they object: —

1st. That no damage to the landholder was assessed. It does not appear that the town owned the land, and they cannot be injured in that respect.

2d. That only a part, instead of the whole road prayed for, was laid out. But that course is more favorable to the town, than if the whole had been laid out. They have less road to make, and less damage to pay. To grant this petition would be a palpable violation of the rule, that such complaint, except made by a party injured, cannot be sustained.

Certiorari denied.

AMMIDOWN *& al. versus* WOODMAN.

In a note payable in a specified time after date, the day of the date is to be excluded. In a town where is no bank, a demand was made upon such a note, at three o'clock in the afternoon of the last day of grace, to which the maker replied, that he would never pay it, and thereupon a suit was *immediately* commenced. — *Held*, that the suit was not prematurely brought.

The interest of a witness, as indorser of the writ, may be removed by a deposit of a sufficient sum to pay the defendant's costs, though the deposit be made by a stranger to the suit, and without authority from the plaintiff. The clerk is the proper depositary.

ASSUMPSIT, on a note payable six months after date. It was dated, Dec. 9, 1847. The action was commenced on June 12, 1848. The plaintiff then offered John L. Cutler, Esq., as a witness. He was objected to on the ground of interest, being indorser of the writ, and the plaintiff being resident out of the State. Thereupon a third person, in the absence and without the knowledge of the plaintiff, volun-

tarily, of his own money, deposited with the clerk a sum which was admitted to be sufficient in amount, to be appropriated to pay the costs, if the defendant should prevail.

If that testimony was admissible, it is to be considered proved in the case, that the defendant's residence, at the making and at the maturity of the note, was in Wilton, and at the distance of thirty miles from any bank; that on Monday, the 12th day of June, 1848, "about or a few minutes before three o'clock in the afternoon," the note was presented to the defendant for payment, who refused to pay it, and said he had no recollection of giving such a note, and would never pay it. Whereupon the writ was immediately dated, and delivered to the officer, and an attachment made. It was objected that the action was brought too early. The trial was before SHEPLEY, C. J., who ruled that it was not prematurely brought. The defendant excepted.

H. Belcher, for defendant.

Mr. Cutler's testimony was inadmissible. He indorsed the writ and was liable for costs.

The deposit by a third person, having no interest, was ineffectual. It is like a tender, made by a stranger, which is invalid. *Kincaid* v. *School District*, 11 Maine, 188; Law Reporter, vol. 10, 136. The depositor might recall the money. There was no valid consideration, upon which the clerk could withhold it. He might return it or might waste it. His bond would not cover it.

The suit was premature. The pay-day was the 10th of June, excluding the day of its date. The statute gave (grace,) 3 additional days, so that the 13th instead of 12th of June, was the last day of grace. 2d Barr, Penn. 495, is directly in point.

But, if it can be held that the note was payable on the 12th of June, the suit was commenced too early. The maker of the note was entitled by statute, not by conventional indulgence, to three days, three full days grace. *Thomas* v. *Shoemaker*, 6 Watts & Sargent, 179; *Bevan* v. *Eldridge*, 2 Miles, 353; *Osborn* v. *Moncure*, 3 Wend. 170.

Even where grace is given by commercial usage, and not

by statute, the party is entitled to the uttermost convenient time allowed by the custom of business of that kind, in the place where the note is presented. 2 Kent's Com. 101, 102.

There being no bank at Wilton, nor within thirty miles, the defendant was not restricted to bank hours, within which to pay his note, and it being there, as in other country places, usual to receive payment of notes certainly until dark, the defendant was entitled to that time in which to pay his note. But even if the defendant was restricted to bank hours, the writ was made and placed in the officer's hands, before the expiration of those hours.

J. L. Cutler, for plaintiff.

HOWARD, J., orally. — 1. Was the interest of Mr. Cutler, the witness, discharged? We think one, though a stranger to the case, may volunteer to make the requisite deposit. He could not withdraw it. There was sufficient consideration for withholding it from him; for another person's rights had been affected by it.

The clerk was the rightful depositary. When with him, the fund was in the custody of the law.

2. If there be several notes of the same date, some payable in six months, some in six months from date, and some in six months after date, they all have the same pay-day. In all of them, the day of the date is excluded. If dated December 9, they would, with the grace, become payable June 12. The note in suit was dated December 9, at six months after date. Its pay-day was June 12. It was sued on that day. Was the suit premature? It was demanded at three o'clock that day. Defendant said he would never pay it. If no demand had been made, he was entitled to the whole day. If hastened by a demand, made upon that day, he was still entitled to a convenient length of time. In this case, the defendant was allowed that time. That was all that the law gave him. *Exceptions overruled.*

WARREN BULLEN *versus* HARRIET C. ARNOLD.

It seems, a sale of real and of personal property, by a *quitclaim* deed, gives to the grantee no title to reclamation, as to the personal property, though the title to it should fail.

If a paper, without being submitted to the court, be handed to the witness, *as a release*, and he is allowed to testify, without objection made to its sufficiency, it is to be presumed the opposing party waived any objection, which might have been made to it.

Where a deposition purports, in its caption, to have been taken and subscribed by a magistrate, his official character and the genuineness of his signature, in the absence of any proof upon the point, are to be presumed.

It is no defence to a writ of entry, that the tenant owns a building upon the land, which he had erected by the landlord's consent. For even after a recovery against him, he is entitled to reasonable time, in which to remove it.

If the owner of such a building have conveyed it in fraud of creditors, the right of his administrator is simply that of selling it.

To make up the six years, necessary to give a right to betterments, the occupation by the administratrix cannot be added to that of the intestate.

ENTRY. General issue, with claim for betterments. Joseph Bullen purchased the land in March, 1842. There were then no buildings upon it. A house and other structures were erected upon it by the tenant's husband, who occupied the same till his death, in the spring of 1847, and since that time the tenant has continued to occupy them. The land, without the buildings, is worth $90; with them, $850. In March, 1848, Joseph Bullen conveyed the land to the demandant, by a deed of quitclaim.

The demandant offered Joseph Bullen as a witness. On a preliminary inquiry, he testified that he, by the quitclaim deed, sold the buildings, as well as the land, to the demandant. He was then objected to on the ground of interest, but the court ruled the witness to be admissible. Though thus adjudged to be admissible, a paper called a release was then handed to him. The defendant still objected to the witness, and contended that his interest was not removed by the release. But the witness testified in the case.

The demandant offered a deposition. The defendant objected to the reading of it, until it should be proved that the

signature of the person, who purported to have taken it, was genuine; and that said person was a magistrate.

The deposition was admitted without such proof.

The tenant is administratrix of her husband's estate. The estate is insolvent. The report of the commissioners of insolvency has been made, but the estate is not settled. The premises were "occupied" by the husband for less than six years, but the occupation was continued by the tenant, for a period amounting in the whole to more than six years before this suit.

"There was also evidence tending to show, that the land and buildings really belonged to the intestate, at and before the time of his decease, and that they were held by Joseph Bullen, by some conveyance, in fraud of the creditors of said intestate.

"There was also evidence tending to show, that the conveyance by Joseph Bullen to the demandant was collusive; and it was claimed by the counsel for the tenant, that, if such facts should be established, the defence would be made out.

"There was also evidence tending to show, that the occupation was in submission to the title of said Joseph Bullen; and there was also evidence from which it was argued that, notwithstanding the declarations of said intestate, and those claiming under him, he in fact occupied, claiming title, and that this was with the knowledge of said Joseph Bullen.

"There was also evidence from which it was contended by the tenant, that the new house, built upon the premises, which is, and at the commencement of this action was, occupied by the tenant, was built by the intestate, in 1845, on his own account, and for himself, upon this land, and with the implied assent of Joseph Bullen. There was no evidence of any notice or request to remove the house.

Thereupon the court was requested to instruct the jury; *that*, if the intestate erected the house in 1845, for himself and on his own account, on land owned by Joseph Bullen, and by said Joseph's consent, then such house was not the property of Joseph Bullen, but the property of the intestate; and *that* the tenant cannot be ejected in an action like the present, un-

til after *reasonable notice* shall have been given, to remove the building; and *that*, since no such notice has been proved, the demandant is not entitled to their verdict for *that* new house.

"This instruction was refused, and the court instructed the jury, that under the pleadings, no such issue was presented; and if the house was so erected, and was the property of said intestate, the fact, that no notice to remove it had been given, would not constitute a defence."

The court was further requested to instruct the jury: —

1. That if the demanded premises were in possession of the tenant and of her late husband, for six years or more, prior to the commencement of this action, then the tenant is entitled to betterments.

2. As to the character of such possession, — if, in fact, the premises were so occupied by the intestate, really claiming the same *as his own*, regarding the same as *his*, and *this* with the assent of Joseph Bullen, then the tenant is entitled to betterments, *although* Bullen and the intestate may have united for *any other purpose*, in declarations and acts, not consistent with such occupancy.

Both these requested instructions were refused.

The trial was before SHEPLEY, C. J. Verdict was for the demandant, and the tenant excepted.

Abbott and *Currier*, for the defendant.

1. Witness, Bullen, was inadmissible. He testified, on the *voir dire*, that he sold the buildings to the demandant. The buildings being personal property, he was an implied warrantor of the title.

The so called release was of no effect. The court did not pass upon it. It was never submitted to the court, and its contents cannot now be ascertained.

2. The deposition was improperly received. Whether the whole thing is a fiction, made up without any *genuine* signature, is unknown; or, if not so, how is it found, that the person who took it was a magistrate? The court cannot officially know, who are magistrates, or what signatures are genuine.

In analogous cases, there must be evidence on these points. If the objection be taken, there must be proof.

3. The building was once the property of the tenant's husband. We offered to show that his conveyance, if he made one, to Joseph Bullen, was in fraud of creditors. The tenant, as administratrix, represents creditors. The conveyance being collusive, she is rightfully in possession, (R. S. chap. 106, sect. 41,) and bound to charge herself with the income. What if the husband and J. Bullen did both partake in the fraud? The tenant would be in the better position. *Potior est, &c.*

4. If one build and reside on land by consent of the owner, a writ of entry cannot be sustained, except on previous notice to quit.

5. The first requested instruction as to betterments ought to have been given. The case was precisely within the statute, chap. 145, sect. 23. The request was in the language of that provision. The instruction ought to have been given in that language, or as the law may have been modified by construction.

The second requested instruction ought to have been given; that if, *in fact*, the premises were so occupied by the intestate really claiming the same as his own, regarding the same as his, and *this* with the knowledge and consent of J. Bullen, then the tenant is entitled to betterments, although the intestate and Bullen may have united, *for any other purpose*, in declarations and acts inconsistent with such occupancy." Their confederacy to cheat others, did not deceive Bullen, one of the parties to it. The true question to be decided was, "what was the real character of the intestate's occupation."

May, for demandant.

WELLS, J., orally. — 1. As to the admissibility of Bullen, the witness: —

He had given to the demandant a quitclaim deed, under which the premises are claimed in this action, and, on the *voir dire*, stated that he had sold the buildings to the demandant.

We understand this sale to have been included in the deed.

Suppose he did not own the buildings, and yet gave a quit-claim deed of them, would he be liable? The general principle is that, under such a deed, no reclamation can be had, though the title should fail, as to the land or as to the buildings.

But if his sale of the buildings was fraudulent, he was competent as a witness, for he was released. It is said, however, that the court did not pass upon the release. Still it was called a release; the trial went on; no objection to its sufficiency was made; and we must presume the opposing party waived all objection to it.

2. As to the admissibility of the deposition: — In such cases it is the usage to presume the genuineness of official signatures. *Prima facie*, they prove themselves. The *onus* is on the objecting party. Such documents are deemed authentic, in the absence of controling proof.

3. The buildings were erected by the intestate, with consent of the landlord. It is now claimed that they belong to his administratrix. But no such question arises upon the pleading. And if the matter were, as is alleged, it would not follow that the demandant cannot recover the land. For whether he did or did not recover, she would have a reasonable time, in which to remove them.

4. It is contended that, against the fraudulent conveyance of her intestate, the administratrix can hold the property for creditors. But she could not controvert the title to the land; she could not sue a writ of entry. The law gives her simply the power to sell.

5. As to the claim for betterments, under an adverse possession: —

The two occupations could not be united to make up the six years. In order to tack one possession to the other, the title must pass by some contract from the former to the latter occupant. In this case, no title passed to the administratrix. A holding by one, under the grantee to whom he has conveyed in fraud of creditors, is not adverse.

Judgment on the verdict.

APPENDIX.

CUMBERLAND, 1850. — At this term, WILLIAM H. VINTON, Esq., of Gray, was admitted a Counsellor of this Court.

ALLEN *& al. petitioners, versus* HASKELL.

Costs for defendants in chancery cases must, except for special reasons, be taxed within one year from the judgment.

THE petition shows that the petitioners were originally defendants in an equity suit, brought by Haskell, the respondent; that, in 1845, they recovered judgment for costs; that Haskell had caused a docket entry to be made, "To be heard in costs;" that, in 1849, the clerk was requested to tax their costs from minutes furnished by the petitioners and from the papers in the case; that the clerk had referred the petitioners to the court upon the subject. Wherefore they prayed that the clerk be directed to tax their costs, &c.

Notice to Haskell having been given, the parties appear and are now heard before the court.

No particular cause for the delay was shown.

TENNEY, J., orally. — The 21st rule of chancery practice is to govern in the taxation of costs. The taxation ought to be made up within some fixed time. Applications for that purpose, made more than a year after judgment, are considered too late, except for causes not appearing in this case.

The petitioners can take nothing by their petition.

SEWALL *versus* WEEMAN.

ASSUMPSIT by an indorsee, on a note. The action had been continued to be defaulted. When it was called, the defendant moved to have the docket entry stricken out. The court observed that a motion to remove the default, might afterwards be made. The default was entered. At a subsequent day, the defendant made affidavit that he had given a note like the one described in the declaration, and had consented that the action should be continued to be defaulted, only because he supposed it was brought upon that note;

that he has since paid that note and taken it up, and now finds the one offered in evidence by the plaintiff, is a copy or a counterfeit of that which he had signed, and taken up. Both notes were exhibited to the court. *The default was struck off.*

W. P. Fessenden, for plaintiff.

A. Belcher, for defendant.

ANONYMOUS.

Two joint defendants had recovered judgment against the plaintiff, in a statute complaint, for flowing his lands. He petitioned for a review. Pending the petition, one of the defendants died. The plaintiff moved for a continuance, that an administrator might be appointed. The court observed that no judgment could go against the administrator and the other defendant jointly. The continuance was not granted.

W. P. Fessenden, for the surviving defendant, moved for costs in the original suit.

PER CURIAM. Costs go of course. The clerk may bring the action forward; and if satisfied, by proof, that one of the defendants is dead, he may make up costs and issue execution for the survivor.

THE clerk makes application to the court for an allowance, from the public treasury, for his fees, (amounting to $28,) in making up the voluminous record of a case of petition for partition, in which the petitioner was nonsuited, and the respondent recovered costs.

The COURT observed that in no case have they the power to charge non-litigant parties with costs; and that, in this stage of the matter, they must decline to express an opinion whether the clerk has any remedy against the party. *Application refused.*

THE minutes of testimony, taken by counsel upon the trial of an action in which he is retained, belong to himself and not to his client

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LINCOLN, 1850. { BURBANK *versus* INHABITANTS OF AUBURN. GOLDER, *Adm'r*, *versus* SAME.

THESE suits were commenced October 16, 1848, to recover for injuries sustained by defects in the highway of Auburn.

On the 23d of July, 1849, an Act was passed, the first section of which is, "No action shall hereafter be maintained against any city, town or plantation, for any injury or damage by reason of any defect in any highway or bridge, except in the county in which said town is situated."

The second section authorizes the transfer of any such action to the county in which the defendant town is situated. But that (second) section, by Act of August 7, 1850, was restricted to actions brought on or after December 1, 1849.

J. Goodenow, for defendants, moved to dismiss the actions in virtue of said first section. *Thayer* v. *Seavy*, 11 Maine, 284.

Foster, for plaintiffs. The word "maintain" in the first section, has the import of "brought."

PER CURIAM. — The Acts referred to, do not apply to these cases.
Motion overruled.

JOSEPH FARWELL *versus* FARWELL.

LIBEL for divorce.

Stevens, for libelee, reads her affidavit of innocence, of sickness, and of destitution, and moves that the libelant advance money, to enable her to defend.

For that purpose it was

Ordered by the court, that the libelant advance to her $60, thirty days before the next term of the court.

KENNEBEC, 1850. — AN action was referred by rule of court. The referees awarded "that the plaintiff recover nothing of the defendant, and that each party shall pay his own costs up to this time, and that each party shall pay half of the referees' fees for this hearing, which referees' bill is taxed at eleven dollars." Said report was accepted by the court.

It appeared that said defendant paid to the referees the whole amount of their fees, and the court, RICE, J. presiding, ordered judgment to be entered up on said report, against said plaintiff in favor of said defendant, for the sum of five dollars and fifty cents, being one half of the referees' fees, paid by said defendant.

To which last mentioned direction and judgment of the said court, the plaintiff excepted. *The court overruled the exceptions.*

IN an application for a writ of *mandamus*, that the respondent be "commanded to appear," &c., the court suggested that that command was unnecessary, and that the writ should be so amended, as merely to require the respondent to make return in writing, &c.

A PETITION for a writ of *mandamus* was entered, and notice ordered. At the return term, the respondents appeared. The petitioners withdrew the process, and the respondents' counsel moved for costs.

The petitioners' counsel resisted the motion, believing that, under the circumstances, the matter of costs being at the discretion of the court, they could not equitably be allowed.

PER CURIAM. — Upon the withdrawal of the bill, the rule is, to allow costs, unless it be shown that respondent was in fault.

Afterwards, in the term, costs were adjudged for the respondents.

FOUR lads were convicted of breaking and entering a store, and stealing therefrom. The prosecuting officer suggested that there were mitigating circumstances.

PER CURIAM. — It is in the power of the County Attorney, to *nol. pros.* as to the breaking and entering, and thereby leave the defendants punishable for the simple larceny only. It was accordingly so done.

PETITION FOR PARTITION. John Stevens appeared at the District Court, and resisted the partition. It was, however, ordered ; and he appealed. The defendants recognized as his sureties in the appeal.

In the S. J. Court, the judgment was, that partition be made, and commissioners were appointed, who made the partition, and their report was accepted.

This action is brought upon said recognizance.

The question was whether the defendants were liable for the appellees' expenses in procuring the partition to be made, and up to the final judgment accepting the report.

Held, they were liable only for the costs accruing *in court* after the appeal, and not for the expenses of the partition.

OXFORD, 1850. — ON a petition for a writ of *mandamus*, the court sitting in this county, ordered notice to the respondent, returnable in another county. The notice was ordered to be served fourteen days prior to the return day. It was so formed as not to require the respondent to appear at court, but merely to show cause, &c.

A DEFENDANT had been tried and convicted upon an indictment for an aggravated offence. He excepted and was committed for want of sureties to appear at the law term, at which the exceptions were to be heard. Meanwhile, he escaped. His counsel proposed to argue the exceptions. But the court declined to hear the case, until the defendant should be again in custody.

FRANKLIN, 1850. — A PETITION was presented for the appointment of commissioners to establish the divisional line between two towns.

The petitioners' counsel inquired in what mode the notice should be given to the respondent town.

The agent of the respondents proposed to take notice. Whereupon a certificate of the town-agency was filed, and the court appointed commissioners.

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TENANT IN COMMON.

1. Where one tenant in common has received the rents and profits of the common property, he is accountable, in assumpsit, to a co-tenant for his share. *Buck* v. *Spofford*, 34.

2. In such an action, to recover the plaintiff's share of the avails received by the defendant, for the use of a grist-mill, in which both parties, and a third person were co-tenants, it is no defence, in whole or in part, that the defendant has incurred expense in repairs upon the mill, unless such repairs were made pursuant to the provisions of the Revised Statute, chap. 86. *Ib.*

3. If he has been reimbursed out of the joint profits, to the extent that repairs were necessary to make the property serviceable, he will be accountable to his co-tenant for his share of the surplus, if any. *Ib.*

4. In such an action by one of the co-tenants against the other, the defendant, in order to prove the legality of the mill owners' meeting, may use another of the co-tenants as a witness. *Ib.*

5. If, in tort, the plaintiff be but a tenant in common with others, of the pro-

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ERRATA.

PAGE 196, first word of the abstract, for "If," read *Of.*

" 393, tenth line from the bottom, for "knowing," read *showing.*

" 400, first line, for "*formane,*" read *formam.*

" 547, first line, for "instruction," read *intimation.*