REPORTS

OF

CASES IN LAW AND EQUITY,

DETERMINED

BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

By ASA REDINGTON,
REPORTER TO THE STATE.

MAINE REPORTS,

VOLUME XXXII.

HALLOWELL:
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1852.

JUDGES

OF THE

SUPREME JUDICIAL COURT,

DURING THE PERIOD OF THESE REPORTS.

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HON. SAMUEL WELLS,
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} ASSOCIATE JUSTICES.

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CASES

REPORTED IN THIS VOLUME.

MEMORANDUM.

It may be noticed that, in this and in the next preceding volume, there is a somewhat more frequent insertion of opinions given orally, than in the earlier volumes. This change is the result of recent legislation, and is believed to have given much satisfaction to the profession, as, without occupying much space, it secures the knowledge of many legal principles which, under the previous arrangement, were in danger of being forgotten or misrecollected.

ERRATA.

Page 188, in the abstract, for "*notifying*," read *ratifying*.
279, omit the words, "*The case comes into this court by appeal.*"
576, in abstract, for "*entered*" read "*ordered.*"

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF SOMERSET,

1850.

PRESENT:

HON. ETHER SHEPLEY, LL.D. CHIEF JUSTICE.

HON. JOHN S. TENNEY, LL.D.
HON. SAMUEL WELLS,
HON. JOSEPH HOWARD.
} ASSOCIATE JUSTICES.

THOMAS J. FOOTMAN *versus* STETSON.

Where judgment has been recovered upon a note, for its full amount, the debtor, after having paid the execution, is precluded by the judgment from maintaining an action, brought to recover back the illegal interest, which he alleges to have been included in the note.

ASSUMPSIT to recover back money, paid for illegal interest, upon certain notes given by the plaintiff to the defendant, and signed also by Orrin Footman as surety, dated in 1834.

The plaintiff offered Orrin Footman, as a witness, who was objected to, because a party to said note, but was admitted. It appeared that judgment upon the note, including the illegal interest, was recovered against this plaintiff in Oct. 1845, which was paid by him on execution in the spring of 1846. This writ is dated Feb'y 1, 1847.

The defendant pleaded, by brief statement: — 1. That no part of the plaintiff's claim accrued within one year. 2. That no part of it accrued within six years. 3. That the plaintiff is estopped by the judgment from maintaining this suit. The case was submitted to the court for an appropriate judgment.

Hutchinson, for the plaintiff.

Orrin Footman was but a surety, and the debt had been paid. That he was admissible as a witness, is decided in *Webb* v. *Wilshire*, 19 Maine, 406.

The statute gives this action. It is that, "whoever shall pay, on any loan of money, in *any manner*, a greater sum or value than is by law allowed to the creditor, may recover of the creditor the excess so received." R. S. c. 69, § 5.

D. D. Stewart, for the defendant.

Tenney, J. — The case shows, that the payment of what is alleged as being usurious interest, was made in the spring of the year 1846. This action to recover the same was commenced on Feb'y 1, 1847. The statute of limitations which the defendant relied upon, R. S. chap. 69, § 8, is inapplicable.

It was objected, that Orrin Footman, who was allowed to testify for the plaintiff in the case, was incompetent, on the ground that he was upon the note in which illegal interest was reserved. It appears by the case, that he signed the note as surety for the plaintiff, and had no other interest therein. The judgment recovered upon the note was satisfied fully by the plaintiff. By the authority of the case of *Webb* v. *Wilshire*, 19 Maine, 406, this did not render him incompetent.

A more material question involved in the case, is whether an action can be maintained to recover back illegal excess paid by the debtor upon a judgment rendered in a suit upon the note containing the usurious interest.

It is a well established principle of the common law, that a judgment cannot be impeached directly, indirectly or collaterally. While it remains unreversed, it is conclusive upon the parties in every respect. *Loring* v. *Mansfield*, 17 Mass. 394; *Homer* v. *Fish & al.* 1 Pick. 435; *Whitcomb* v. *Wil-*

liams, 4 Pick. 228; *Weeks* v. *Thomas*, 21 Maine, 465. To this general rule a judgment obtained upon a contract where usurious interest has been reserved or taken, is not an exception. In the case of *Thatcher* v. *Gammon*, 12 Mass. 268, it is said by the court, that no distinction is to be found in the books between this and any other defence. The court say further, in the same case, "the judgment is in all cases considered conclusive evidence of the existence and justice of the demand, and unless voidable for error, it cannot be impeached, except for matter going in discharge of it *ex post facto*."

But it is insisted for the plaintiff, that this doctrine of the common law has been modified by the R. S. chap. 69, § 5, wherein it is provided that, "whoever on any such loan shall in any manner pay a greater sum or value, than is allowed to the creditor, may, or his personal representatives may, recover of the creditor or his representatives, by action at law, the excess so received by such creditor, whether in money or other property." The counsel for the plaintiff contends, that the terms "in any manner pay," &c. will embrace all payments of illegal interest, not excepting those made in discharge of a judgment rendered on a contract tainted with usury, when no such defence was set up, while the action was pending. This construction is contended for as being the literal meaning of the language used. If the terms employed are to be thus interpreted, they will equally well apply to the payment of a judgment, when the defence of usury was set up at the trial, and upon that issue a verdict was rendered for the plaintiff for the full amount appearing upon the face of the contract to be due, inasmuch as the statute has not made the right to recover back the excess over lawful interest to depend upon the issue presented at the trial.

But it is believed that the language of the statute itself, whether construed literally, or according to its spirit, will not so clearly sustain the views taken for the plaintiff, as to render it certain, that the rule of the common law was designed to be changed. When the *manner* in which a payment is

made, is spoken of, it is not supposed to refer to the kind of *obligation*, by which the payment is secured, demanded or enforced, or the *mode* of enforcing it, but to the species of property or valuable thing in which payment is made. In a contract to give a consideration for something received, the *manner* of paying that consideration, would have reference particularly to that in which the consideration consisted, whether money, labor or goods, and not to the instrument, which may be the evidence of indebtedness, such as a note, bond or recognizance, or a judgment which may be obtained upon any such evidence. By the statute, the one who borrows money, afterwards paid *in any manner*, may recover the usurious excess of the lender, whether the latter received it in money or other property. The manifest intention of the Legislature was not to restrict the right of reclamation to cash payments. The statute has carefully provided, that its meaning should be understood, and that it should not be evaded by payments actually made or by contracts stipulating for payments, other than those in money. The language "so received by such creditor, whether in money or other property," was obviously used as explanatory of the previous words, "whoever shall *in any manner pay*," &c. This construction secures to the borrower the fullest opportunity of recovering back money paid as interest above the legal sum, before a judgment has been obtained on the contract. It takes from him no right of availing himself of a defence upon the ground of usury, and at the expense of the creditor if the usury is established. But by the construction contended for by the plaintiff's counsel the one who has entered into an usurious contract, may omit defending a suit thereon, and afterwards institute a new suit to obtain the excess, which he has paid upon the judgment; thus unnecessarily creating the right of an additional action, and allowing a judgment standing unreversed to be impeached in its effect by parol evidence. That such was the design of the authors of the statute, to be gathered from the terms employed, cannot be admitted. *Plaintiff nonsuit.*

McLaughlin *versus* Whitten.

Where a mother has recovered judgment upon a previous adjudication, that the putative father of her illegitimate child should pay to her a sum of money, she is entitled to have execution running against his body; notwithstanding he may have been discharged, on taking the poor debtor's oath, from an imprisonment, which had been ordered upon his refusal to give bond for the performance of the original adjudication.

Exceptions from the District Court, Redington, J.

The defendant at a former term, in a prosecution by plaintiff against him, had been adjudged the putative father of her bastard child; and was ordered to give certain bonds according to the statute.

Not complying with the order, he was committed to jail on the 20th day of July, 1844, that being the day on which said complaint was tried.

He was discharged from imprisonment on taking the poor debtor's oath, as authorized by statute, on the 7th day of November, 1844.

One of the instalments, ordered by the court to be paid to the plaintiff, became payable after said commitment, to wit, on the 1st day of August, 1844.

This action was brought on said order to recover said instalment, and judgment therefor was recovered.

The court, on motion of the plaintiff, though resisted by the defendant, ordered the execution to be issued against the body of the defendant, and to that order he excepted.

Abbott, for the defendant.

Having been once liberated by taking the oath, the defendant is not liable to be arrested on the same subject matter.

The instalment, on which this execution is claimed, had become payable before that oath was taken. A further arrest would be against the policy of the law, and against the Acts for the relief of poor debtors. 1 U. S. Dig. 407, 3d ed; *Hellings* v. *Amory*, 1 Wharton, 43, 63.

Noyes, for the plaintiff.

TENNEY, J. — The commitment of the defendant was by the direction of court on his failing to comply with its order, in procuring the bonds according to the provisions of the statute ; and not for the refusal or omission to pay any sum of money at the same time awarded to the plaintiff.

At the time of a judgment of filiation under the statute for the maintenance of bastard children, (R. S. chap. 131, § 9,) orders are made by the court, which, if not complied with, may be the foundations of actions of debt to be subsequently brought. The putative father cannot be arrested and imprisoned by virtue of an order, which may never be a charge against him. The child may die before the expense for its maintenance provided for in an order, may be incurred. Neither can his liberty be restrained on account of an instalment which has not become payable, though the mother may have incurred a part of the expense, which the instalment was intended to cover by the order.

If the mother should recover judgment after the liberation of the father of the child, from the imprisonment caused by his neglect to provide the bonds, according to the order, she is not limited by the statute, giving her the remedy, in the use of all the means to which resort may be made to enforce the payment of judgments in ordinary cases. R. S. chap. 131, sect. 13. No other statute has provided in terms, that the oath taken to procure liberation from imprisonment so ordered, shall be an immunity from arrest, upon a judgment subsequently obtained, for a cause not existing at the time of the order. R. S. chap. 148, sect. 32, provides that after the debtor has obtained the certificate referred to in the next preceding section, his body shall be free from arrest on the same or on every subsequent execution, to be issued on the same judgment or any judgment founded thereon. This provision was obviously intended to secure a debtor from a second arrest upon the same cause on which he had been arrested and had taken the poor debtor's oath, and had obtained a certificate ; and it cannot extend to another cause, which did not exist at the time of the first arrest, or imprisonment.

The commitment of a party adjudged to be the putative father of an illegitimate child is made at the time of the judgment, as the means of enforcing the orders of the court, by obtaining the bonds provided by the statute. If the commitment is effectual for this purpose, the bonds are the security of the mother for the partial maintenance of the child, and of the town to which the child may become chargeable as a pauper. If these bonds should be broken, and judgments be rendered in suits thereon, the obligors would be subject to arrest by their authority, and they could be discharged in no other manner than in that provided for the liberation of debtors, arrested on executions generally. And no good reason can be seen for releasing the putative father from the like liability, when a judgment has been obtained upon the order of court instead of a bond, for the cost of maintenance of the child, arising after the order upon the judgment of filiation is made, and at a time so long subsequent to the taking the oath by the defendant, that no presumption of continued inability can arise.

Exceptions overruled.

SMITH *versus* SMITH.

On motion to reject an award of referees, the affidavit of the party is not evidence, that he was fraudulently induced to enter into the submission.

It is not essential to the validity of an award, that it should contain a statement of the referees' fees.

AWARD OF REFEREES. Defendant moved to set it aside, because: —

1. He entered into the submission, induced only by the deceptive contrivance of the plaintiff and his counsel.

2. One of the referees had prejudged the case, and previously expressed his opinion.

3. The referees did not agree upon the award.

4. They did not report the amount of their fees.

In support of the first ground of objection, the defendant

offered his own affidavit, which the court, RICE, J., rejected.

As to the second, there was some testimony. But the Judge did not consider that it proved the allegation made by the defendant.

Relative to the third, one of the referees testified that he did not agree to the award, but signed it, because told by the other referees, he would not otherwise be entitled to fees, and that his signature would not add to the validity of the award.

The award did not state the amount of the referees' fees. But they were inserted in an unauthenticated paper, made up by plaintiff's attorney, which was returned to the court in the same envelope with the award.

The award was accepted. The defendant excepted.

Hutchinson, for the defendant.

That the referees did not agree upon the award, is proved by the testimony of one of their number, disclosing the management, corruption and ignorance of the others, and that is good cause for setting aside the award.

The court has power to reduce the compensation of referees. R. S. chap. 138, sect. 11.

The amount of their claim should therefore be stated in their award. Proof *aliunde* is inadmissible.

Abbott, (to whose care the suit in this court was transferred,) for plaintiff.

SHEPLEY, C. J., orally. — The defendant's affidavit was inadmissible. The prejudication by one of the referees was not proved. It is to be considered that two only of the referees concurred in the award. But that circumstance alone does not invalidate it. The insertion of their fees in the award was mere matter in the discretion of the referees. They were not called upon to do it. No one appears to have been injured by the omission. It might perhaps be ground for recommitment. But that is not asked.

Exceptions overruled.

TIBBETTS *versus* BAKER.

In debt on a judgment in another court, if there be introduced two copies of the record duly authenticated, and yet variant from each other; *it seems*, the plaintiff must fail because of the uncertainty in his proof.

In such case; *it seems*, the certifying officer or any person, who has compared the copies with the original, may testify which is the true copy.

In such a case, if the defendant, in offering to introduce an authenticated copy, also embrace in his offer the proof of facts extraneous to the record, it is not erroneous to reject the whole offer.

DEBT on judgment, recovered before a justice of the peace. Plea, *nul tiel record.* The plaintiff offered what purported to be a copy, duly authenticated by the justice. The defendant objected to it, and offered to prove, by another authenticated copy of the same record, and by a *certificate* of the justice, that the first, through his misapprehension and mistake, was erroneous.

This evidence was excluded, and the copy offered by the plaintiff was received, which corresponded with the declaration.

The defendant then offered to prove, that the copy offered by plaintiff was procured by the misrepresentation of his counsel. This evidence was excluded. A default was entered by consent, and the case was then reserved for a legal disposition by the court.

Abbott, for defendant.

If no evidence can be allowed to show that the copy, imposed upon the court, was a false one, the law of the case is neither the perfection of reason or of justice, but a perversion of both.

On a trial of this case in the District Court, the Judge allowed the justice's original record to be introduced, to control the plaintiff's copy. But his decision was overruled on exceptions. How then shall the truth be elicited? Is this court the lone spot in the universe, where error must find eternal protection? Are mistakes in copying, so sacred? We offered to prove that the plaintiff's copy was obtained by the misrep-

resentation of his counsel. We contend that such fraud would vitiate a judgment; *a fortiori*, it would vitiate a mere copy of a judgment. 12 Pick. 352 and 388.

TENNEY, J. That could be done only on plea of fraud.

Abbott. How could we plead fraud, before it was known or suspected that a false copy would be offered?

Leavitt and *Brown*, for plaintiff, decline arguing.

SHEPLEY, C. J., orally. — The remarks now to be offered have no reference to foreign judgments.

The document introduced had the requisite authentication, and was sufficient for the plaintiff. But errors are incident to all human affairs. They may occur by fraud or by mistake; and there should be a remedy. If the question before the court related to its own record, they could reform it. But in this case, we cannot inspect the original. On *certiorari* a true exemplification might be obtained.

If two variant authenticated copies are shown, it could not, *by them*, be discovered which is the true copy, and the plaintiff's proof, for that reason, would fail, for want of the requisite certainty.

We think, in such a case, the certifying magistrate might be examined on oath to testify, *which* is the true copy. And if he could not be obtained, another person, who had compared a copy with the original, might give the testimony.

That course would not contradict a record; it would merely ascertain which was the true copy.

If the defendant had offered merely to introduce another authenticated copy, it must have been received. But he did not so do. He included, in his offer, proof of other things, such as misapprehension and mistake. It was an attempt to put in extraneous facts, and those not verified by oath. That could not be allowed, and the offer was therefore rightfully rejected. *Judgment on the default.*

LOWE *versus* DORE *& al.*

In suit upon a poor debtor's bond, the decision of the justices of the quorum is conclusive as to the correctness of the notice to the plaintiff of the time, place and intent to take the poor debtor's oath.

DEBT upon a poor debtor's bond. The trial was before TENNEY, J. The defence was that the debtor had taken the statute oath. That defence was resisted on the ground, that the plaintiff had not been duly notified. He offered evidence to prove that fact. The evidence would show that the notice was served on the plaintiff's attorney; that though the plaintiff at the commencement of his action, resided in Massachusetts, yet prior to the issuing of the notice, he had removed into this State, and that the place of his residence in this State was known to the debtor. Several documents were referred to, none of which came into the Reporter's hands. The case was presented for decision upon so much of the evidence as was admissible.

Hutchinson, for plaintiff.

The proceedings were illegal and void. The creditor was alive and within the State. The citation was served upon the plaintiff's attorney.

The service of the citation must be upon the creditor, if alive and within the State. R. S. c. 148, § 23.

The fact that the creditor was alive and within the State, may be proved by parol. It could be proved in no other way. *Williams* v. *Burrill*, 23 Maine, 144.

The acts of the justices where they have no jurisdiction, may be avoided by plea or evidence. *Haskell* v. *Hazen & al.* 3 Pick. 404.

The original citation, with the officer's return thereon, is the foundation of the proceedings of the justices, is part of the record with them remaining, and admissible in evidence. *Slasson* v. *Brown*, 20 Pick. 436, and cases there cited.

The certificate is not conclusive evidence, where it appears that the justices had not jurisdiction. *Granite Bank* v. *Treat*, 18 Maine, 340.

It must appear that the justices were selected according to law. In this case it does not so appear. R. S. c. 148, § 46.

The justices have no power to legalize the service of the notice upon strangers, nor to take jurisdiction without service upon him, whom the law requires to be notified.

Abbott, for defendant.

SHEPLEY, C. J., orally. — By statute, chap. 148, sec. 25, and the decisions under it, the justices are required to adjudicate upon the correctness of the notice.

If they adjudge it correct, they are to proceed further; otherwise, their action is at an end.

After the plaintiff had removed into this State, and his residence had been made known to the defendants, the notice was served, not upon the plaintiff, but upon his attorney. Was that a correct notice? That very question was before the justices for their decision. They considered the notice correct. That decision is conclusive. It is not examinable here. This has often been ruled. *Plaintiff nonsuit.*

SAWYER *versus* FISHER.

The statute invalidating unrecorded mortgages of personal property does not extend to liens.

When the common law *itself* raises a lien, the possession must be continued.

Liens may be created by contract.

Such contract may stipulate the mode in which the lien shall be effectuated, continued or rescinded.

If it appear in a written contract, that the parties intended to establish a lien, *that intent is to prevail*, unless prohibited by the rules of law.

When it is stipulated, in the contract of sale of personal property, that the vendor shall retain a lien till payment, *there is no rule of* law to defeat that stipulation.

TROVER for 500 mill-logs.

A contract had been made between the plaintiff and M. Hildreth as follows: —

That the said Sawyer has sold, or agreed to sell said Hildreth

a certain lot of mill-logs, cut by the said Sawyer the past winter on Day's Academy Grant, surveyed by Dan'l S. Webb, as follows, viz: — 2906 logs marked A, to make 501,960 ft. at 9,00=$4517,64. For which said Hildreth has given said Sawyer notes of hand as follows, viz: —

One dated Dec. 26, 1848, payable in 6 months, for $1505,88
One " " " " " " 9 " " 1505,88
One " " " " " " 12 " " 1505,88

4517,64

"It is further understood by said parties, that said Sawyer shall retain and hold a full and perfect lien on said logs and lumber manufactured therefrom, as collateral security for the aforesaid notes, and said Sawyer has, or will turn the logs out of the lake free of expense to said Hildreth, and said Hildreth is to pay all expenses below the lake." The notes are unpaid. Some of the logs had been floated down the river to a place of market, and the defendant had purchased 199 of them from Hildreth, and converted them to his own use.

The case was submitted to the court. If the action is maintainable, it is to go to a jury; otherwise a nonsuit is to be entered.

Hutchinson, for plaintiff.

The sale was conditional; if not, it was but a contract to sell. *Tibbetts* v. *Towle*, 12 Maine, 341; *Oaks* v. *Moore*, 24 Maine, 214; *Whipple* v. *Gilpatrick*, 19 Maine, 427; *Porter* v. *Foster*, 20 Maine, 252; *George* v. *Stubbs*, 26 Maine, 243; *Jones* v. *Baldwin*, 12 Pick. 316.

The word "lien," is not used in the common law sense; but, in connection with "collateral security," it imports a conditional sale.

Contracts will be construed according to the subject-matter and the situation of the parties. 20 Pick. 150; 19 Maine, 399; 25 Maine, 401; 26 Maine, 531.

It was not a mortgage. If so, it would have been differently expressed. The property was always in the plaintiff.

Abbott, for the defendant, contended that there was a perfected sale from the plaintiff to Hildreth. He received negotiable notes in payment. He delivered the logs, by turning them out of the lake. Nothing remained to be done to make them marketable. Logs, when in the river, are at market.

The plaintiff's pretended lien was invalid. It only claimed to be collateral security. It was never recorded. To give it effect, would rescind the statute relative to the recording of mortgages of personal property, and take away all safety from purchasers.

The case cited by plaintiff's counsel, *Oaks* v. *Moore*, 24 Maine, 214, will, on examination, be found with us.

Bronson, in reply.

The plaintiff once owned the logs. There is no evidence that he ever parted with the possession, until defendant took them. Till then, the plaintiff held them in the usual mode. Even if the contract was a mortgage, there was such a possession in the plaintiff, as dispensed with a registry. The contract gave to Hildreth no authority to take possession. It imported that, if Hildreth should pay, the logs were to be his; otherwise, not; and that meanwhile he should hold them for the plaintiff. He had no power to sell. A possession and sale by him would have been tortious, until his notes were paid.

Shepley, C. J., orally. — The question is, whether the property passed absolutely, so that a purchaser, who had no notice, could hold as against the plaintiff. It is obvious that it was not the purpose of the parties, that the plaintiff should fully part with his property till payment. The title was intended to pass, subject to incumbrance, subject to a "full and perfect lien." That intent is to prevail, if the rules of law will permit. When the common law *itself* raises a lien, possession must be continued. The law, though it raises the lien, does not continue it. But that law does not prohibit parties from making a lien by contract, and stipulating the mode of retaining it and of rescinding it.

It is contended, however, that this contract was a mortgage,

and that it is void by the statute, because not recorded. The statute does not embrace liens. If this view exposes innocent purchasers to loss, it is but like various other laws. Many persons have an apparent right to sell property, who could convey only a defective title. Purchasers must explore the history of the property. If the law of *caveat emptor* be unsuitable, it is for the Legislature alone to alter it.

Action to stand for trial.

BATES *& al. versus* CHURCHILL.

A written agreement by a debtor, that in consideration of his indebtedness he will let his creditor have certain specified articles at a time and place specified, at the market price, is a valid contract, evidencing a legal consideration, and imposing on the debtor the duty to set out the articles for the creditor at the time and place agreed.

ASSUMPSIT on the following contract. "In consideration of what I am indebted to Bates & Selden, I hereby agree to let them have fifteen tons of good hay at my barn, the fall and winter coming, at the market price. July 22, 1842."

At the trial before TENNEY, J. the defendant offered to prove, that at the pay-day named in the contract, he had sufficient hay in his barn to pay it. It was never called for by the plaintiffs, and it was never set apart by the defendant for paying the note. The evidence was rejected, and a default was entered. The case, by agreement, was then reserved for a legal disposition by the court.

Abbott, for plaintiffs.

Foster, for defendant.

TENNEY, J., orally. — The plaintiffs consider this to be a note, payable in specific articles. The defendant contends it was but an arrangement preliminary to a contract of sale; that, before the plaintiffs could have any rights under it, there were acts to be done by them. The parties must have had

some design. The plaintiffs were to have something beneficial. But, on the defendant's construction, they could not be benefited. For on a non-fulfilment by defendant, they could have recovered no damage. In a suit, the hay must have been valued at its current price; the price which they would have to pay to others. There was then no object in such a trade.

It is objected, that there was no consideration for the promise. We think otherwise. There was an implied contract by plaintiffs to forbear payment.

Again, it is said, this paper, not being negotiable, did not discharge the old debt. But that does not disprove a consideration.

If the agreement was not executory, the plaintiffs had no further acts to do. They need not go for the hay or demand it. Unless the defendant had set it apart, they could not take it without a trespass. Merely to have the hay was not a fulfilment by the defendant of his contract. He was, by a sound construction, to set it out for the plaintiffs at the time and place agreed. *Judgment on the default.*

CLARK *versus* JOSEPH VILES AND ISAIAH JENKINS AND RUFUS VILES, *trustees.*

In relation to a note, given since the statute of 1844, and made payable to a married woman, the party, who would establish title in her, takes the onus of proving that it did not, in any way, come from the husband.

In a trustee suit, the holding of a chose in action, belonging to the defendant, will not charge the holder as trustee. A note, belonging to a husband, though made payable to his wife, is a chose in action.

THE District Court, RICE, J. presiding, had charged Jenkins, as trustee, and discharged Viles, upon their disclosures.

The case came up on exceptions to those adjudications.

Webster, for plaintiff.

Getchell, for trustees.

SHEPLEY, C. J., orally. — Jenkins discloses that he had collected money, upon a note, which one Bunker had given to the defendant's wife; and that, since service of the trustee process, he had given a check for the money, payable for her use.

This payment, by means of the check, being subsequent to the service, can give him no protection. If the money belonged to Joseph Viles, the trustee is liable. Prior to the statute of 1844, for "securing to married women their rights in property," such a note would clearly belong to the husband. Upon the disclosure in this case, that statute has not affected or changed the ownership of this note, for the evidence does not show that the property in it came to the wife by any legacy, or in any other way, than by or through her husband. The decision of the District Judge was correct.

The exceptions filed by Jenkins are overruled, and he is adjudged trustee.

Rufus Viles discloses, that the defendant and his widowed daughter left this part of the country in 1846; that, among the papers which they had left with the trustee, there was found a note of $300 payable by Bunker to the defendant's wife; that he, the trustee, wrote to her, and received a reply that Bunker had paid about $150, and that she wished him to get payment of the residue, and transmit to her a draft for it, drawn by T. W. Smith upon the Suffolk Bank; that he sent the note to Bunker by Jenkins to be collected, and the avails transmitted as she had desired; and that, in a few days afterwards, the trustee process was served upon him.

Upon this disclosure it does not appear that the trustee had any goods, effects, or credits of the defendant. The note was but a chose in action. It might never be collected.

The ruling of the District Court was correct.

The exceptions filed by the plaintiff are overruled, and the trustee is discharged.

ELLIS *versus* HIGGINS.

Parol evidence is not receivable to prove that a deed, absolute and unrestricted on its face, was intended merely to convey an estate in trust; nor to reduce such a deed to a conditional one.

The R. S. c. 161, § 2, which imposes a penalty upon the parties to a fraudulent conveyance, has not, *as between the parties*, rendered such a conveyance void.

WRIT OF ENTRY. Trial before TENNEY, J. General issue and claim of betterments.

The demandant read a deed of warranty to him from the tenant, conveying the premises.

The tenant offered to prove, by parol, that he owed the demandant upon a note, and that said conveyance was made to secure the note, which he has since paid. The evidence was rejected.

He then offered to prove, that the deed was made, and was recorded, *fraudulently*, to secure the land from his creditors. The evidence was rejected.

He then offered to prove his claim to betterments. With a view to settle all questions of fact, the evidence was received.

The case was submitted for a legal decision; and a referee was agreed upon to estimate the betterments, &c., if occasion should require it.

Bronson, for the demandant.

Abbott, for the tenant, argued that the second ground taken in defence was not inconsistent with the first. The first ground was that of a trust; the second of a fraud. The second ground is, that the demandant holds only in trust; that the tenant is his *cestui que trust*, having the equitable title; and that a trustee cannot recover title against his *cestui que trust*. The evidence offered in proof of the fraud having been rejected, it is to be regarded as if the fraud had been proved. We contend that R. S. chap. 161, sect. 2, has attached new consequences to a fraudulent conveyance.

Before that enactment, such deeds were void only as to creditors and purchasers. But the new provision condemns them

as absolutely void, as to all persons. Any act done in violation of a *penal* statute is void. A multitude of cases have established this doctrine.

To the act of knowingly taking a fraudulent deed, fine and imprisonment are now united.

Such an act, then, is utterly void. It is void, not as to particular classes of persons, and for their benefit, but as to all people, and for the benefit of the whole community. It is so from motives of high and controlling public policy. The Sabbath law, under a penalty, prohibits certain acts upon a *particular* day. And acts so done are void. The statute on which we rely prohibits certain acts upon *any* day. Why, then, are not such acts void?

It can make no difference that the tenant was partaker in the fraud. He does not come into court claiming under it. It was an act, rendered by the statute void and ineffectual, and he merely resists its operation. *Potior est conditio defendentis.*

The case of recent decision, *Bullen* v. *Arnold*, 31 Maine, 583, depended upon facts which took place before the statute, on which we rely.

Shepley, C. J., orally. — The evidence offered would reduce an absolute to a conditional deed, to a mere mortgage title. It is not competent to effect such a change by parol testimony.

It was also contended that the demandant holds in trust, for the benefit of the tenant. And it is proposed to prove this by parol. But such proof would be in violation of the best settled rules.

The tenant then proposed to prove his own fraud, whereby to defeat his own deed. And it is contended that the R. S. chap. 161, sect. 2, has introduced a new principle, and that the deed, being in violation of a penal statute, was therefore void. And the case is likened to agreements made on the Sabbath, which have been declared void. But the counsel does not notice the distinction between *executed* and *executory* contracts.

If a contract was executed and the property passed, on a Sunday, the sale would be valid.

Between parties to fraud the law renders no aid to either. The title, though by a fraudulent deed, passed from the tenant to the demandant. The statute does not declare it to be void. If it had been a contract to convey, it could not have been enforced. It was an actual conveyance. It passed the title without any aid from the courts.

As to the claim for betterments, the case shows clearly that the tenant held in submission to the demandant's title. They cannot be allowed. *Defendant defaulted.*

WARREN *versus* HOMESTED.

After the nonsuit of an action, a second suit upon the same demand may be stayed by the court, until the defendant's costs in the former action be paid, notwithstanding the second suit is brought by an assignee, who, when purchasing the demand, had no knowledge that it had previously been put in suit.

ASSUMPSIT.

SHEPLEY, C. J., orally. — A former action for the same cause was nonsuited. The plaintiff afterwards became bankrupt, and this demand was sold by his assignee. The purchaser brought this new action upon it. On motion of the defendant, the court had ordered that the proceedings be stayed, unless the defendant's cost in the former suit should be paid. The plaintiff in interest now moves, that that order be rescinded. The R. S. c. 115, § 89, provides, that in such a case, the court shall stay all proceedings, until such costs be paid; and may dismiss the suit, unless the same be paid at such time as the court shall appoint. In this case the motion is pressed, upon the ground that the real plaintiff is a different person, without knowledge of the previous judgment for cost. But the statute regards no such distinction. The purchaser must take subject to all the equities, embarrassments

and infirmities connected with the claim. This is no new principle. On any other construction, after nonsuits on negotiable notes or in land actions, new purchasers might come in with new suits, in their own names, and the statute be wholly evaded. *Motion refused.*

RICKER, *petitioner for habeas corpus.*

A prosecution for unlawfully selling spirituous liquor may be by civil action, or by complaint in criminal form.

In case of a conviction of such offence, it is not necessary that the justice wait forty-eight hours to give opportunity of appeal. It may be made after commitment.

The penalty for a second offence belongs to the State. That the justice awarded one half of it to the prosecutor, furnishes to the offender no just ground of complaint.

Costs may be awarded, in addition to the penalty.

In a mittimus, it is not necessary to copy the complaint, or to state the proofs before the justice.

IN April, 1849, Ricker was convicted of unlawfully selling spirituous liquor, and was sentenced to pay a fine.

In May, 1850, he was convicted before a justice of the peace, of a like offence, committed more than a year after the first, and was sentenced to pay a fine of $20, one half to the use of the town and the other half to the use of the prosecutor, together with costs, $14,92, and also to give a bond to the town as prescribed in the Act of 1846, c. 205, § 8. With this sentence he refused to comply, and was therefore, by a mittimus, in the form commonly used in criminal prosecutions, committed to jail upon the same day on which he was convicted. The petitioner presented no evidence, except a copy of the mittimus and of the officer's return thereon.

He now prays for a writ of *habeas corpus*, that he may be discharged from prison; alleging, —

1. That the mittimus for his commitment was irregularly, improperly and illegally issued: —

2. That the conviction was improper: —

3. That he claimed an appeal from that conviction, and within 48 hours tendered surety to prosecute the same with effect, and that the justice refused to allow the appeal.

Webster, for petitioner.

1. The suit was merely a civil action. The process should have been, not by complaint and mittimus, but by writ and execution.

2. The conviction and the commitment were upon the same day, whereby the right of appeal was taken away.

3. The justice's adjudication was erroneous, in assigning half the penalty to the town and half to the prosecutor. The whole belonged to the State.

4. The justice exceeded his authority in imposing costs, in addition to the highest penalty he could inflict. For the penalty and cost, taken together, he could award no more than twenty dollars.

5. The first conviction was more than a year prior to the second.

6. It does not appear by the mittimus that the justice had jurisdiction; it does not show how the convictions were proved.

7. Nothing is to be presumed in favor of the jurisdiction of inferior tribunals.

TENNEY, J., orally. — 1. It has been settled that, in a case like this, the process may be by action or by complaint.

2. The law provides that, if the appeal be not made within 48 hours, it shall not be allowed. It does not prohibit a commitment within that time. The petitioner claimed no appeal, but if he had, how should he be disposed of during the 48 hours? He must be in custody somewhere. He may make his appeal after commitment.

3. It is true the penalty accrued to the State, but the error, as to the appropriation of it, did no injury to the petitioner.

4. The practice of imposing costs, in addition to the penalty, has ripened into a principle, now in legal force.

5. The limitation, to one year, of prosecutions for penalties,

is confined to cases where the penalty goes in whole or in part to the prosecutor. Such is not this case. One of the grounds, taken by the counsel, is, that it goes wholly to the State. R. S. c. 146, § 15.

6. It is not usual or necessary to insert, in a mittimus, a copy of the complaint, or to state the mode of proving the facts before the justice. The subject-matter was within the cognizance of the justice. *Petition dismissed.*

BENSON *versus* SOULE *& al.*

In a complaint by one for flowing land claimed to be his, if the defendant does not controvert the title, it is to be considered in the complainant.

Though a dam may have flowed land more than twenty years, a prescriptive right, set up by the defendant, is not established, unless the occupation was by himself or some person under whom he claims.

COMPLAINT for flowing plaintiff's land by means of a mill-dam. The defence set up was, that defendants, by user, had obtained the right to flow. It appeared that the dam had stood more than twenty-five years before the complaint was filed ; that it was as high in 1823 as at any later period, but by tightening it, the flowage had been greater.

The defendants showed title to the dam and mills derived from Thatcher in 1836. They also introduced two mortgage deeds from Williamson to some third persons, executed in 1823, and proved that Williamson, being in possession of the land flowed, assisted in erecting the dam. The complainant introduced assignments to third persons, of those mortgages and of the notes secured by them.

The court, TENNEY, J. directed a verdict for the complainant.

The defendants excepted.

Abbott, for the defendants.

Currier, for complainant.

TENNEY, J., orally. — As the defendants have not controvert-

ed the title to the land flowed, it is to be considered in the complainant.

The right in the defendants to flow is not made out.

Though the flowing has continued for more than twenty years, the defendants have shown no connection with it, beyond the year 1836, either by their occupation, or that of any person under whom they claim. *Exceptions overruled.*

THE STATE *versus* JACKSON AND HASKELL.

An indictment cannot lawfully be found in the District Court for an offence, which can be tried in this court only, unless the accused had been previously committed or bound over to the District Court upon recognizance.

An indictment was found in the District Court against two persons for an offence, which could be tried only in this court, into which the indictment was transferred. One of the persons had neither been committed to prison, nor recognized for his appearance. The other had been bound over; *Held*, the indictment was irregular as to the former, but that that circumstance did not impair its validity as to the latter.

An indictment found in the District Court, charging an offence of which this court alone has jurisdiction, is not invalidated, merely because the recognizance, which preceded it, did not specify the offence, charged in the indictment.

INDICTMENT, found in the District Court, against the two defendants for having counterfeit money with fraudulent intent, &c.

One of them had recognized to appear there, but the recognizance did not specify for what offence he was to answer.

The other defendant had neither recognized nor been committed. The indictment had been transferred to this court. The counsel for the defendants now moves that it be quashed.

SHEPLEY, C. J., orally. — The defendants' counsel contends that the offence, charged against them, was not cognizable before the grand jury of the District Court, and also, that because only one of them had been bound over to that court, the indictment was unauthorized and void as to both.

The fact thus stated is admitted to be true. The form of

a recognizance is of no consequence, except as to the liability of the conusors, in an action upon it. It cannot take away the right of the grand jury to inquire freely into all offences. The objection is untenable.

For matters which can be tried in this court alone, the grand jury of the District Court cannot indict, unless the accused has been committed, or bound over. Stat. 1842, chap. 27, sect. 1. The indictment was therefore unauthorized, as to that defendant who had neither been recognized or committed, and he must be discharged, but that irregularity cannot impair the validity of the indictment as to the defendant who was under recognizance.

Webster, for the defendants.

Coburn, County Att'y, for the State.

NOTE. — The prosecuting officer afterwards entered a *nol. pros.* as to the defendant who had neither recognized or been committed; and the action was continued for the trial of the other.

WARE *versus* WEBB *& als.*

In an action by the indorsee of a negotiable note, if the plaintiff allege the indorsement, he need not allege a promise to himself. By operation of law, the original promise was to him.

The second count in a writ need not allege, that it is for a cause of action "*other*" than that of the first count.

The statute of limitations does not, of its own force, cut off claims, unless it be presented to the court, as a defence. It is not necessary in the declaration, to allege that the cause of action accrued within six years.

Neither is it necessary to allege that the note was witnessed.

SPECIAL DEMURRER to declaration. The writ was dated in 1849. There were two counts; one in common form of *indebitatus assumpsit*, for $1000, money had and received; the other upon a note, dated August 19, 1841, promising Eben H. Niel to pay him or order $500 on demand and interest. The count then proceeded as follows, "and there afterwards, on the same day, said Niel by his indorsement of said note,

value received, ordered the contents thereof to be paid to one Sally Fletcher accordingly, who there afterwards, on the same day, by her indorsement of said note, ordered the contents thereof to be paid to the plaintiff accordingly."

For causes of demurrer, the defendants say: —

1. No promise to the *plaintiff* is alleged in the first count.

2. No promise is alleged to have been made to any one, within six years.

3. The writ and declaration show that both counts are for the same cause of action, and the first count shows that the promise, if any, was not made within six years.

Joinder in demurrer.

Webster, for defendants.

The first count is fatally defective, because it does not allege any promise to the *plaintiff*.

A demurrer is equivalent to a call for a bill of particulars, which, upon such call, must be produced; and beyond such a bill, the plaintiff can give nothing in evidence. 28 Maine, 492; 3 Esp. 168; 2 B. & P. 243; 4 Esp. 7.

Time is of the essence of the contract declared on. A renewal of a promise, is a new contract. R. S. chap. 146, sect. 19 and 20.

If there have been a new promise, it is necessary to declare upon it.

The present law has swept away the *shadow* of pretence for declaring on the old contract.

The demurrer admits the debt, but denies the right to recover under R. S. chap. 146, sect. 1.

The note is not declared upon as a *witnessed* note. Such would be a specialty. R. S. chap. 147, sect. 7.

Attestation is as material as a seal. 4 Pick. 422.

It changes a general contract, into a particular one. It changes the plaintiff's remedy. It should therefore be noticed in the declaration.

Abbott, for plaintiff.

TENNEY, J., orally. — The promise to pay one or his order,

is a promise to pay to any person who may hold the note by indorsement.

The first count is good.

That the common money count is good, is much too late for question. It has long been settled that a note, in the hands of an indorsee, may be introduced as evidence, under such a count.

But it is said the two counts are for the same cause of action. If so, there would be nothing demurrable. But that fact does not appear. There is no need to allege that the second count is for a cause different from that of the first. It is also objected that the cause of action is not alleged to have arisen within six years. Such an allegation is not necessary. The statute of limitations does not, of its own force, cut off claims, unless it be presented to the court as a defence. It furnishes only a rule of evidence. It defeats the remedy upon old promises, only when its benefits are invoked by the defendant. Neither is it necessary to allege that the note was witnessed. *Declaration adjudged good.*

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF PISCATAQUIS,

1850.

PRESENT:

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

DENNETT *versus* GOODWIN.

The exception, in favor of *witnessed* notes, in the statute of limitations, applies only to notes made *payable in money*.

A witnessed note, made payable in money *or* in mechanic's work, is not within the exception, although the *election* whether to take the money or the work, was in the *payee*.

Thus, one gave a witnessed note payable in *one year* in money, or *on demand*, if called for in *blacksmith's work; Held*, the limitation bar applies, although the payee, by not calling for the work and by bringing suit upon the note, elected to take the money.

ASSUMPSIT on a note dated in 1833, promising the plaintiff to pay him forty dollars in one year, or on demand, if called for, in blacksmith's work. The writ is dated in 1848.

The defendant relied upon the statute of limitations.

The case was submitted for a legal decision.

C. A. Everett, for plaintiff, cited 1 Metc. 21; 1 Kelley, 319; 7 Metc. 588.

J. Crosby, for defendant.

HOWARD, J. — The plaintiff declared on an instrument in writing, in tenor as follows: — "Milo, December 9, 1833. For value received, I promise to pay Daniel Dennett, or order, forty dollars in one year, and interest, or payable on demand if called for in blacksmith's work at cash price.

"Thomas J. Goodwin.

"Witness, P. P. Furber."

The suit was commenced January 17, 1848, and the defendant pleaded the general issue, and the statute of limitations, but admitted, that the note was duly executed. This was all the evidence in the case, presented by the agreed statement of facts.

The limitation of six years, prescribed by the statute of 1821, c. 62, § 7, is relied upon in defence, as a bar to the action. But the plaintiff attempts to avoid the bar presented, under the provisions of § 10, of the same statute, which are: "That this Act shall not extend to bar any action hereafter brought upon any note in writing, made and signed by any person or persons, and attested by any one or more witnesses, whereby such person or persons has promised, or shall promise to pay any other person or persons, any sum of money mentioned in such note, but all actions upon such note or notes, brought by the original promisee, his executor or administrator, shall and may be maintained as if this Act had never been made, any thing herein contained to the contrary notwithstanding."

This instrument, though denominated a note, in common parlance, does not contain a promise to pay *money absolutely and unconditionally*, and is not a promissory note in the sense of the commercial law. Story on Promissory Notes, § 1, 17, 18, 19; Chitty on Bills, c. 12, p. 516; Bayley on Bills, c. 1, § 1, 3, 4; 2 Black. Com. 467; 3 Kent's Com. p. 74, (5th Edition.)

Nor do the provisions of the 10th sect. of the statute referred to, embrace notes of this description, which are payable in money, or other things, in the alternative, although attested

by a witness. *Gilman* v. *Wells*, 7 Greenl. 25; *Commonwealth Ins. Co.* v. *Whitney*, 1 Metc. 21.

The action is, therefore, barred by the statute, and the defendant is entitled to judgment upon the statement of facts.

MOORE AND WIFE *versus* INHABITANTS OF ABBOT.

To maintain a suit against a town for the recovery of damage, sustained through a defect in its highway, it must be proved, *that* the highway was not safe and convenient; *that* the plaintiff exercised ordinary prudence and care; and *that* the injury was occasioned by the defect in the highway *alone*.

In such a suit, if it appear that the injury was occasioned jointly by a defect in the highway and a delinquency in the plaintiff's horse, carriage, or harness, rendering the same unsafe or unsuitable, the plaintiff cannot recover, although he had no knowledge of such deficiency, and was in no fault for the want of such knowledge.

When an injury is occasioned by the united effect of a defect in the way, and some other cause, the party, bound to keep the road in repair, is not liable.

In order to a recovery, it must be proved that the injury was occasioned solely by the neglect of the defendants, and not by the neglect of the town combined with another cause, for which they were not responsible.

An injury cannot be held to have been caused by a defect in the highway, when some other cause contributed to it.

CASE, for an injury sustained by the female plaintiff, through a defect in the highway of the defendant town. She was riding on the highway in a wagon.

Evidence was introduced to the jury by the respective parties, as to the existence of the defect, the happening of the injury by means of it, and as to the care and prudence used by the plaintiffs. Some evidence tended to show the breaking of a ring in the harness, at, or just prior to the accident.

Among other legal positions, SHEPLEY, C. J. presiding, instructed the jury, *that* they should be satisfied, before they could find a verdict for the plaintiffs, that the highway or bridge was not, at the time, safe and convenient; *that*, if satisfied there was such a defect, they should also be satisfied,

that the plaintiffs exercised ordinary care, in providing the horse, wagon and harness, and in the management of the horse; *that* the accident occurred, and the injury was occasioned by the defect in the way or bridge alone, and not by the joint effect of the defect in the way and a defect in the harness and wagon or either of them; *that* if they should be satisfied the accident happened by the joint effect of a defect in the wagon and a defect in the harness rendering it unsuitable or unsafe, although such defect in the harness was not known, and the plaintiffs were not in fault for want of knowledge, the plaintiffs would not be entitled to recover. To these instructions, the plaintiffs excepted.

J. Appleton, for the plaintiffs.

The second instruction required ordinary care on the part of the plaintiffs. The law recognizes a distinction between *ordinary care, a slight degree of care* and *a high degree of care*, and correlative degrees of neglect.

Ordinary care is not inconsistent with the *slightest degree of neglect.* They may co-exist.

Extraordinary care, summa diligentia, is not required. If ordinary care has been used, though in connection with slight neglect, the plaintiffs are entitled to recover.

Travelers have a right to consider the road in good repair, and to drive accordingly. "They are not required to be constantly on the lookout for difficulties, which they have a right to presume will not occur." *Thompson* v. *Bridgewater*, 7 Pick. 188.

Negligence, then, to deprive the plaintiff of his right of action, in all cases means "want of ordinary care." Consequently, extraordinary diligence, *exactissima diligentia,* is nowhere required, nor does the plaintiff fail, though guilty of a *very slight fault* or neglect, *levissima culpa.*

If the law be not thus, then is ordinary care and extraordinary care the same.

The third instruction to the jury was that, before they could find a verdict for the plaintiffs, they must be satisfied that the accident happened, and the injury was occasioned, by

the defect in the way *alone*, and not by the joint effect of the defect in the way and a defect in the harness and wagon or either of them.

We respectfully submit, that this instruction was erroneous.

The statute gives the right of action for an injury "*through any defect or want of repair.* "To that statute, the Judge added the word, "*alone.*" This is a word of great intensity; it excludes all other co-operating causes, even an accident, or the slightest possible degree of negligence, although ordinary care was used. But the law is otherwise. 41 E. C. L. R. 422; 31 E. C. L. R. 536.

The great question is, what was the efficient cause, *the causa causans*, of the injury.

If the plaintiff, *over a good road*, might have proceeded with safety, driving precisely as she drove over this road, is it not manifest that the *defect* in the road was the *cause?*

If there was care enough for a good road, surely the injury was caused by the defect. 18 Maine, 286. If both causes, the defect in the road and that in the harness, combined to produce the injury, it would not have occurred, except for the defect in the road. The state of the harness did not affect the state of the road; the state of the road affected the harness.

The fourth instruction was, that if the accident happened by the *joint* effect of a defect in the way and a defect in the harness, rendering it *unsuitable* or unsafe, although such defect *was not known*, and though the plaintiffs were in *no fault* for want of knowledge, they would not be entitled to recover.

This instruction requires not merely *ordinary* but *extraordinary* diligence. It exonerates the town from liability, although the road be ever so bad, and that, while the plaintiff is entirely *without fault.*

The preceding instruction required ordinary care, this requires extraordinary care, nay more, it makes the plaintiff insurer, not against good roads, but against the worst possible roads. It annihilates the rule of ordinary care.

The plaintiff, according to this instruction, might have had a harness, defective it may be, but amply sufficient for a good

road, yet the instruction is peremptory, that if it was not sufficiently strong to stand the worst defects, he must fail.

The instruction itself pre-supposes there was ordinary care, which is all that the law requires, and it precludes a plaintiff from ever recovering, though no omission or act of commission, for which, on any principle of law, he is responsible, contributed to the injury.

The Vermont statute is like ours; its words are, "by means of any insufficiency, or want of repair." Verm. Stat. 432, sect. 13.

Under that statute, the decisions of that State are essentially at variance with the rulings in this case. 9 Verm. 411; 16 Verm. 231; 15 Verm. 711.

One of the very objects of safe and convenient roads is the protection of travelers, and to lessen the dangers resulting from fright, and from accidental causes, but if this be the law, what protection does the statute afford? When its need is greatest, its protection ceases.

S. H. Blake, for the defendants.

SHEPLEY, C. J. — The female plaintiff received a bodily injury while traveling on a highway, which the defendants were by law obliged to make safe and convenient. The statute c. 25, § 89, provides, if any person shall receive any bodily injury "through any defect or want of repair" of such way, he may recover "the amount of damage sustained thereby."

Persons may be injured while traveling on the highways without being blame-worthy and without the fault of those who are required to make the ways safe and convenient, or of others. In such cases the risk is their own. They must bear their own misfortunes. They cannot call upon others as insurers of their safety.

They may also suffer injury, while traveling upon highways, which are not safe and convenient, and the injury may not be occasioned by the want of repair, or by their own want of ordinary care to avoid it. In such case it would be

quite clear, that they could not recover damages of those, who were in fault by neglecting to keep the way safe and convenient. The statute was not designed to relieve them from damages thus occasioned by making those responsible, whose duty it was to have repaired the ways.

An injury may also be occasioned by the united effect of a defect in the way and of some other cause, and in such case the party injured cannot recover of those whose duty it was to keep the way in repair, because he does not prove, that the injury was occasioned through or by reason of such want of repair. To enable him to recover he should prove that the injury was thus occasioned, that is, that it was entirely occasioned through such want of repair; for the statute was not intended to impose upon towns the burden of making compensation for injuries not occasioned by their own neglect of duty; was not intended to make them assume any portion of the risk of traveling not occasioned by their neglect. An injury cannot be determined to have been occasioned by a defect in the way so long as it remains certain, that some other cause contributed to produce that injury. Such is the law, when the injury is alleged to have been occasioned by the negligence of another person. And numerous cases show, that the same rule is applicable, when the action is brought against a town to recover damages for an injury occasioned by a defect in a highway.

In the case of *Knapp* v. *Salsbury*, 2 Camp. 500, Lord Ellenborough instructed the jury, "if what has happened arose from inevitable accident or from the negligence of the plaintiff, to be sure the defendant is not liable."

In the case of *Plushwell* v. *Wilson*, 5 C. & P. 375, the jury were instructed, "that if the plaintiff's negligence in any way concurred in producing the injury, the defendant would be entitled to the verdict."

In the case of *Williams* v. *Holland*, 6 C. & P. the jury were instructed, "if the injury was occasioned partly by the negligence of the defendant and partly by the negligence of the plaintiff's son, the verdict could not be for the plaintiff."

In the case of *Lynch* v. *Nurdin*, 1 Ad. & El. N. S. 30, the servant of the defendant had left his horse and cart in the street unattended for half an hour. The plaintiff, a boy under seven years of age, got upon it, and while he was getting off the shaft, another boy started the horse, and the plaintiff fell, the wheel passed over and broke his leg. Lord Denman, in delivering the opinion, makes a remark, which if alone considered would lead to a different conclusion, but when considered in connexion with the instruction to the jury, and their finding, and with other remarks in the same opinion, can be regarded only as an *obiter dictum*. While commenting upon the case of *Bird* v. *Holbrook*, 4 Bing. 628, he observes, "and so far is his lordship from avowing the doctrine, that the plaintiff's concurrence in producing the evil debars him from his remedy, that he considers *Ilott* v. *Wilkes*, 3 B. & Ald. 304, an authority in favor of the action." If this were to be considered as presenting the law of that case, it would be opposed to the whole current of authority in that country and in this, that when the injury is occasioned by the negligence of the defendant and the want of ordinary care on the part of the plaintiff, he will not be entitled to recover.

But such does not appear to have been the law of that case as held by the presiding Judge or by the court in bank. Mr. Justice WILLIAMS left it to the jury to decide, "whether that negligence occasioned the accident." And lord Denman in his opinion, while speaking of defendant's servant, says, "he has been the real and only cause of the mischief"; and says, "it was properly left to the jury, with whose opinion we concur."

In the case of *Bird* v. *Holbrook*, referred to by his lordship, the defendant had set a spring gun in his garden; the plaintiff passed over the garden wall without license to get a fowl, that had strayed, without knowing that a spring gun was there, and stepped upon the wire attached to it, by which the gun was discharged and the injury occasioned. The only blame imputed to the plaintiff was, that he went into the garden without leave. It was not pretended, that such unlawful act

contributed to discharge the gun. He does not appear to have been charged with negligence in stepping upon the wire.

Is the reason for the rule so thoroughly established, that the plaintiff cannot recover when the injury was occasioned by the neglect of the defendant, and by his own want of ordinary care, that he is estopped by his want of ordinary care? By no means; for then he could not recover, if he was not in the exercise of ordinary care although it did not in any degree contribute to cause the injury. The rule deducible from the decided cases is stated in the case of *Kennard* v. *Burton*, 25 Maine, 39; "if the party, by the want of ordinary care, contributed to produce the injury, he will not be entitled to recover. But if he did not exercise ordinary care, and yet did not by the want of it contribute to produce the injury, he will be entitled to recover." The last position is correct, because in such case, the sole cause of the injury is imputable to another, who cannot complain of the negligence of the plaintiff, which occasioned no injury, produced no effect.

And for the like reason, if the sole cause of the injury was not imputable to another, the plaintiff would not be entitled to recover, although it might not be imputable to his own negligence, but to "inevitable accident."

In the case of *Smith* v. *Smith*, 2 Pick. 621, PARKER, C. J. gives the true reason, why one not in the exercise of ordinary care, cannot recover against one guilty of negligence; he says, "and where he has been careless, it cannot be known, whether the injury is wholly imputable to the obstruction, or to the party complaining."

The conclusion cannot therefore be avoided, that the plaintiff must prove, that the injury was occasioned by the default of the defendant alone, and not by that default and some other cause, for which the defendant is not responsible, without a disregard of the whole class of cases, which decide that the plaintiff cannot recover, when the injury is occasioned by the default of the plaintiff, and of defendant.

The doctrine, that the plaintiff can only recover when the injury complained of did not happen by inevitable accident,

or by the want of ordinary care on the part of the plaintiff, or by a combination of these with the want of repair of a highway, appears to be the only one consistent with sound reasoning, and to have been generally received and acted upon. It is difficult to perceive how any other doctrine can be received, without producing the effect to make towns liable to pay damages for injuries not proved to have been occasioned by their neglect. No proof can establish that fact, so long as it appears that some other cause contributed to produce the result. It was accordingly decided in *Libbey* v. *Greenbush*, 20 Maine, 47, that "the plaintiff had not fully established his right to recover, so long as this question was left in doubt."

The necessity, that the injury should be proved to have been occasioned by the neglect of the defendants alone, and not by that combined with another cause, for which the defendants were not responsible, has been the more carefully considered, because it would appear from the cases cited by the counsel for the plaintiffs, that a different rule has received the approbation of a court entitled to such high respect and approbation, as the court of Vermont.

In the case of *Adams* v. *Carlisle*, 21 Pick. 146, it is said, that two things must concur, first, that the highway was out of repair, and secondly, that the party complaining was driving with ordinary care and skill. It is obvious, that another element of proof, not then requiring the consideration of the court, was necessary. Proof that the injury was occasioned by a want of repair of the highway.

The cases of *Bird* v. *Holbrook* and *Lynch* v. *Nurdin* decide no more, than the admitted doctrine, that a plaintiff, who has been in fault or negligent, may recover, when such fault or negligence has not contributed to occasion the injury.

If the jury had found in this case, that the highway was not safe and convenient, that the injury was not occasioned solely thereby, but by that and defects in the wagon and harness, which rendered them unsuitable and unsafe, without blame being imputable therefor to the plaintiffs, and the case

had upon such finding been submitted to the court, to render judgment according to the rights of the parties, the accuracy of the instructions would be tested by the judgment to be rendered. And it could not be entered against the defendants without making them responsible for an injury partly occasioned by an unavoidable accident, and partly by their neglect. And such a judgment would make the town, when its ways were not in repair, an insurer against injuries, not occasioned by its own negligence, but partly by inevitable accident.

It is alleged in argument, that the instructions made the plaintiffs responsible for the exercise of more than ordinary care; that the utmost caution and watchfulness was required. The fallacy of the argument consists in the omission to distinguish between the liability of the plaintiffs to suffer from inevitable accidents, or such as were occasioned without their own fault, and not wholly by the fault of the defendants, for which they can recover no compensation, although in the exercise of the utmost possible care; and those accidents which are occasioned by the fault of the defendants alone, for which they may recover, unless their own want of ordinary care contributed to produce the injury. The instructions required of the plaintiffs the exercise of ordinary care only, while they protected the defendants from the payment of damages, occasioned by a combination of causes, for some of which they were not responsible. They held the plaintiffs liable to suffer, without obtaining compensation for damages occasioned by inevitable accident arising from defects in the harness and wagon, or by such defects contributing in combination with defects in the highway, to their injury.

The whole merits of the case, and the accuracy of the instructions depend upon a decision of the question, whether the defendants are liable to make compensation for an injury occasioned not alone by a defect in the highway, but by such defect and other causes, for which they are not responsible; and that question has not only been already decided in this State, but the principle, upon which all the cases rest, that determine, that a plaintiff cannot recover, when the injury has

been occasioned partly by his own negligence, and partly by the negligence of the defendant, forbids any change of that decision. *Exceptions overruled.*

THE STATE *versus* INHABITANTS OF MILO.

An indictment against a town cannot be maintained upon an allegation, that there is a highway extending into several towns, and that the same *or* that part of it which lies within the defendant town is defective.

INDICTMENT for defects in a highway.

After verdict against defendants in the District Court, they moved in arrest of judgment. The motion was overruled, and the case was brought into this court by exceptions.

Everett, for defendants.

TENNEY, J., orally. — The indictment alleges the highway to extend into three towns, and that "the said road or that part of it in Milo" is out of repair. This alternative form of allegation is insufficient. The indictment may all be true, and yet Milo be in no fault. The defective part of the road may be in the other towns. No fine could be ordered.

Judgment arrested.

CRAGIN *& als. versus* TARR.

When goods have been obtained by false representations, it is allowable, in order to establish the fraudulent intent, to prove that false representations, *with the fraudulent intent*, were made by the same party about the same time to other persons.

TROVER for goods. The plaintiffs are merchants resident in Boston. In 1847, they let one Brown have the goods, and they now allege it to have been by fraudulent pretences that Brown obtained them, and that the defendant, with a knowledge of that fact, converted them to his own use.

The plaintiffs proved, among other things, that Brown, about

the time of obtaining the goods, made fraudulent representations to other traders in Boston, with a view to obtain goods, and that Tarr was present assenting to the same. It did not appear that Brown made any representations to the plaintiffs, otherwise than that one Foster, when introducing him, stated to the plaintiffs' salesman, in Brown's hearing, the representations which Brown and Tarr had made at another store.

The defendants contended, that no other persons were deceived by Brown's representations, and requested the court, SHEPLEY, C. J., to instruct the jury that, if the representations made to others did not deceive them, those representations could not be used as evidence against the defendants. This the court declined doing, but instructed the jury, that if there was a formed design, on the part of Brown, to get goods, by false and fraudulent representations, from any person from whom he might be able to obtain them, then, and not otherwise, the representations made to others, about the same time, might be used to show that they were so obtained from the plaintiffs; and that, if the goods were obtained by the fraudulent representations, the plaintiffs might regard the goods as continuing to be their property.

The verdict was for the plaintiffs. To the instruction and the refusal to instruct, the defendant excepted.

Bell, for defendant.

The plaintiffs were not influenced by any representations of Brown. He made none to them of any kind.

The representations made to others had deceived nobody, and therefore ought not to have been admitted in evidence. No case in this State, it is believed, sanctions such admission. *McKinney* v. *Dingley*, 4 Greenl. 172, and *Hawes* v. *Dingley*, 17 Maine, 341, do not support it. In both those cases, goods had been obtained from others by the false representations allowed to be proved. And that fact was the reason why the proof was allowed.

J. Appleton, for plaintiffs.

TENNEY, J., orally. — The plaintiffs, in order to recover,

must show that in parting with the goods, they were influenced by false pretences, and that, in the making of such pretences, there was a fraudulent design. The objection urged by the defendant is, that fraudulent representations, made to traders, other than the plaintiffs, were allowed to be proved. The objection is not well founded.

When the false representations have been successful, the fraudulent intent may be proved from other sources. Among the sorts of evidence, tending to that effect, is the proof that the same party, about the same time, made use of false representations to others, with the fraudulent intent. This is in full accordance with decided cases in this and in other States.

Exceptions overruled.

THE STATE *versus* INHABITANTS OF MILO.

In an indictment against a town, for not maintaining a bridge upon one of its highways, it is not necessary to allege that the highway had been opened for travel; or that the time allowed for opening it had expired; or that it was practicable or necessary to build the bridge; or that the safety and convenience of travelers required the bridge.

INDICTMENT, found at the March term of the District Court, 1847. It alleges that, in Milo, there was a public road or common highway, leading across Pleasant river at Snow's ferry; and that, from November, 1846, there had not been, across said river at said ferry, any bridge upon which the citizens could pass without danger to their lives, limbs and goods, contrary to the form of the statute; "and that said defendants, the highway aforesaid, so as aforesaid being dangerous to pass and repass, by reason of there being no bridge across the river aforesaid, are obliged by law to build and construct a bridge, when and so often as it should or shall be necessary for the safety and convenience of travelers."

After conviction, defendants moved in arrest of judgment, for the following causes: —

1. It is not averred, in the indictment, that the road had

been opened for travel, or that the time allowed for opening it had expired.

2. It is not averred that it was practicable to build a bridge at the place aforesaid.

3. It is not affirmatively alleged that it was the defendants' duty to build a bridge there. The duty, if it be one, is left merely to inference.

4. It is not averred that, prior to the finding of the indictment, there was any obligation to build such bridge.

5. It is not averred that a bridge there was necessary, or that the safety and convenience of travelers required it.

The District Court, HATHAWAY, J., presiding, overruled the motion, and the defendants excepted.

Blake, for defendants.

The indictment is fatally defective. Archbold's Crim. Plead. 643.

Some indispensable allegations are wanting; viz. *that* it was the defendants' duty to keep the road in repair; *that* it was out of repair; *that* they refused to repair it, contrary to the form of the statute; *that* the building of the bridge was practicable, and *that* a bridge was necessary.

Before rendering judgment against the defendants, the court must conjecture the bridge to be necessary, and the maintaining of it practicable, thus invading the province of the selectmen and of the town.

The place, at which the duty was to be performed, is not sufficiently set forth.

Robinson, County Attorney, for the State.

SHEPLEY, C. J., orally. — The allegation that there was no bridge, upon which the citizens could pass, without danger to their lives, limbs and property, quite sufficiently sets forth the defect.

The practicability or the necessity of the bridge, need not be proved or averred in this prosecution. They are both included in the adjudication made by another and a competent tribunal.

The liability of the town to build the bridge, is sufficiently averred. It is a part of the highway. The second use of the word "bridge," may be deemed surplusage.

The defendants, if they were bound, on the day of finding the indictment, to repair, must also have been under a previous obligation to do it.

By keeping in view both parts of the description in the indictment, the place of the bridge cannot have been misunderstood. *Exceptions overruled.*

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF PENOBSCOT,

1850.

PRESENT:

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

INHABITANTS OF BANGOR *versus* INHABITANTS OF READFIELD.

Desertion by a minor child from his father's home, with vagrancy and crime, does not constitute emancipation, so long as the father has not relinquished his right of control, nor consented that he should act for himself independently of the father.

Supplies, furnished by a town to a minor child, without the knowledge or consent of the father, *while the father is of ability to support the child*, will not prevent the father from gaining a settlement by five years residence, under the sixth clause of the first section of R. S. c. 32.

ASSUMPSIT, for supplies furnished to Julia Packard, the legitimate child of Silas Packard, whose settlement was formerly in Readfield, but who had afterwards resided in Levant for the term of five years ending in Dec. 1848.

Julia deserted her father's house in Dec. 1845, without his consent or knowledge, and lived in vagrancy and crime, and

though she once returned and remained two days at his house, she refused to make her home there or to stay there any longer. She was several times committed to the house of correction in Bangor, and there received the supplies, for which this suit is brought.

The case was taken from the jury by consent, and submitted to the court for a legal decision.

D. T. Jewett, for the plaintiffs.

Supplies furnished to minor children are supplies furnished to their father, so as to affect his settlement. 3 Greenl. 136, 205; 5 Greenl. 143; 26 Maine, 167; 19 Maine, 441; 4 Greenl. 47.

Minor children cannot have a settlement distinct from that of their father, unless emancipated. 1 Greenl. 93, 196; 18 Maine, 376; 19 Maine, 447.

This child was not emancipated. But if she was, she gained no new settlement of her own. She cannot be *so far* emancipated, that supplies furnished to her will not prevent her father's gaining a new settlement in Levant, and yet *not so far* as to prevent his new settlement taking away her derivative one.

Ingersoll, for the defendants.

Emancipation and abandonment are different things, and have not the same effect upon questions of settlement. 2 Fairf. 190; 3 Greenl. 205; 27 Maine, 489.

This was not a case of emancipation. Parental control was never relinquished. It was a case of desertion or abandonment by the child. The father was of ability to support her, and was desirous to support her at his own home. The supplies were furnished without his knowledge or consent; and he was never called on for re-payment.

Such supplies, so furnished, cannot affect the question of his settlement. 19 Pick. 480; 13 Pick. 303.

Jewett, in reply. The cases cited on the other side relate to supplies furnished, not to the children, but to the wife. The wife *must* follow the settlement of her husband; but

children, if emancipated or abandoned, *may acquire one for themselves.*

WELLS, J. — It is admitted, that Silas Packard, the father of Julia Packard, the pauper, had a settlement in Readfield in 1821, that he had resided in the town of Levant for five years successively, terminating December 17, 1848, and that she is a minor. Legitimate children follow and have the settlement of their father until they gain one of their own. If the daughter had been emancipated before her father acquired a new settlement in Levant, she would not have followed the new settlement of her father, but would have retained that, which she derived from him in Readfield, until she gained one in her own right. Emancipation confers upon a minor the power of acquiring a settlement in the same manner as if the minor were of full age. But it does not appear that the daughter was emancipated. The father never relinquished his legal right of control over her, nor consented that she should act for herself independently of him. She would therefore take any new settlement, which he might acquire during her minority.

But it is contended, that the supplies, furnished to the daughter, were in contemplation of law furnished to the father, as a pauper, and prevented him from gaining a settlement in Levant by a residence there for the term of five years.

It does not appear that the father was unable to support his daughter. The parental and filial relations were not sundered. She was not under his roof when she received the supplies, but his legal control over her remained, and had never been relinquished. He had not abandoned her, but without his knowledge, and in his absence, she had left his house and family.

It being understood that he was able to support his child, would the supplies furnished to her be considered as furnished to him indirectly as a pauper, within the intention of the statute? If he had been unable to relieve her, when she fell

into distress and was supported by the town, they would have been viewed as furnished indirectly to him, according to the cases of *Garland* v. *Dover*, 19 Maine, 441, and *Clinton* v. *York*, 26 Maine, 167.

It is said in the former case, that "he is a pauper, who is unable to provide necessary food and clothing for his minor children, and leaves them to be aided by the town." When a father, who has not received supplies for himself, is of sufficient ability to provide for his minor children, he cannot in any correct sense be denominated a pauper. A child, whose father possesses a large estate, when at a distance from home, may fall into distress, and be relieved by a town. The statute makes it the duty of the town, where the child may happen to be, to render the aid. But such aid does not convert the parent into a pauper, and thereby prevent him from gaining a settlement. The town, which renders such support, has a remedy for it against the town where the child has a settlement, and the latter against the parent, who is under legal obligations to support such child.

The father's ability in this case to support his daughter is not controverted, and the conclusion is, that the aid rendered to her by the plaintiffs did not affect his right to acquire a settlement in Levant, which he obtained by a residence there for the period of five years.

The defendants are not liable for the expenses incurred subsequently to December 17, 1848, at which time Silas Packard gained a settlement in Levant, but are for those which accrued prior to that time. *Defendants defaulted.*

SHEPERD *versus* ADAMS.

If a person purchases land, (from one who had previously conveyed the same in mortgage,) and then sells the same at different times in separate parcels to several purchasers, *it may be*, that, *in equity*, the portion last conveyed, if of sufficient value, will be chargeable with the whole mortgage debt.

In this case, the *last sold* portion was of sufficient value to discharge the mortgage, and the purchaser thereof bought in the mortgage debt, and took an assignment of the mortgage, and foreclosed the same. He then, under a claim of title to the whole tract, released to the purchaser of the *first sold* portion, his, (the assignee's,) right in this portion, upon being paid by said purchaser, a sum of money therefor. *Held*, that said releasee could not, in an *action at law* against the releasor, recover back the money, though paid under a belief that the releasor, when giving the release, had title to the whole tract.

Whatever may be the *right* of the releasee, his remedy is *at equity* alone.

Carr, for the plaintiff.

J. Godfrey, for the defendant.

TENNEY, J. — Amasa Stetson being the owner of lot No. 143, on Pine street, in Bangor, conveyed it to one Stephen Goodhue, on June 1, 1822, taking back a mortgage from his grantee at the same time of the premises conveyed, for the security of a note therein described. On December 1, 1825, Goodhue conveyed the premises to John N. Mayhew, who on September 22, 1829, conveyed to Nathaniel Lincoln. On September, 1829, the plaintiff received from Lincoln a deed of the northerly half of the lot, undivided, and he conveyed the same by a warranty deed to John A. Wallis, dated July 9, 1845. On December 29, 1829, Lincoln conveyed the southerly half of the lot to Rufus Banks, and the same passed through several *mesne* conveyances to the defendant on July 17, 1843.

The mortgage from Stephen Goodhue to Amasa Stetson was assigned to Charles Stetson on July 7, 1842, and by Charles Stetson to the defendant on July 25, 1843, who is the holder of the note secured thereby. The mortgage became foreclosed on June 15, 1847. The defendant received the sum, which he was satisfied to take as a consideration of a release of the northern half of the lot, on August 7, 1847, which release he contracted to execute to John A. Wallis or such other person as he should order, whenever he should make out a deed and present to the defendant for signature. It was shown in evidence, that the value of the southern half of the lot, was equal at least to the sum remaining due

upon the note referred to in the mortgage at the time, when Lincoln conveyed it to Rufus Banks. It is insisted by the plaintiff, that the evidence shows that the sum paid to the defendant, was done under the belief, that the defendant had acquired a perfect title to the land by virtue of the mortgage and its foreclosure, when in fact, by a well settled principle in equity, the mortgage upon the northern half of the lot was fully discharged before the foreclosure. This action is brought for the recovery of the money so paid by mistake.

The mortgager having conveyed the northern prior to the southern moiety of the lot, it is contended by the plaintiff, that the latter portion, exceeding in value the sum due upon the mortgage, was charged with the entire amount unpaid, and that the grantee of the mortgager of the part last conveyed, having notice of the former conveyance, is in the same condition of his grantor; and that this charge attached afterwards to every grantee, having notice of the facts. Such a principle has been recognized in equity, and has been acted upon in certain cases, to which it was supposed to be applicable. *Gill* v. *Lyon*, 1 Johns. Ch. 447; *Clowes* v. *Dickenson*, *& al.* 5 Johns. Ch. 235; *Holden* v. *Pike*, 24 Maine, 436; *Cushing* v. *Ayer*, 25 Maine, 383. Judge Story, in his Commentaries on Equity Jurisprudence, sect. 1233, a, considers this doctrine as highly reasonable, as to the original incumbrances, but expresses doubts, whether the position as between subsequent purchasers and incumbrances, is maintainable on principle.

Upon the assumption, however, that the doctrine is well established in equity, in its fullest extent, and the facts in this case are such that it is applicable in a proper suit, we think there are obstacles to the maintenance of the present action, which are insurmountable. It will be sufficient to consider one of them.

"If several estates are mortgaged by one mortgage, and the mortgager afterwards conveys the estates separately to different persons, although each owner of the separate estate may

redeem, yet it can only be allowed by the payment of the whole mortgage debt. And the party so redeeming will be entitled to hold over the whole estate mortgaged, until he shall be reimbursed what he has thus been compelled to pay beyond his due proportion. He is considered as assignee of the mortgage, and stands after such redemption, in the place of the mortgager, in relation to the other owners of the property." *Gibson* v. *Crehore*, 5 Pick. 146.

After the defendant became the assignee of the mortgage from Goodhue to Stetson, and the holder of the note, described in the condition thereof, and before foreclosure of the mortgage, he was entitled to hold the estate, unless the party claiming the northerly half resorted to measures authorized by the law, to relieve that portion from the incumbrance. The one having the mortgager's interest in this part, could resort to the process provided by the statute, for the purpose of ascertaining whether any part of the sum due upon the note, was a charge upon it; and if so, what proportion of that sum, in order that it might be paid, and the land discharged; and if there was no charge upon that moiety of the land, it would be important that it should be judicially established. R. S. chap. 125, sect. 16, 17 and 18. The principle invoked, it is believed, has never been applied in suits at law. A party cannot be affected thereby excepting in equity proceedings. One who has purchased of the mortgager a part only of the estate encumbered by a mortgage, and placed himself by the assignment in the position of the mortgagee, can have no claim upon the owners of the residue of the mortgager's right, for contribution, it being optional with the latter to redeem the land, or suffer it to be forfeited. But if they should wish to redeem, they can enforce their right to do so only in a bill in equity, in the manner provided by law, no suit at law being open to them. *Hill* v. *Payson & al.* 3 Mass. 559; *Carle* v. *Butman*, 7 Greenl. 102. The plaintiff having paid the money to the defendant by a mistake of the law or the facts, cannot be the means of allowing him the benefit of

the principle he relies upon in a suit at law, when without the mistake, it could be available only in a suit in equity.

Plaintiff nonsuit.

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

HOBBS *versus* CLEMENTS.

Sales of the land of *resident* proprietors, made by a collector, for the non-payment of taxes assessed thereon, are invalid, unless it appear from the advertisements for the sale, that nine months from the date of the assessment had already elapsed.

Where lands, belonging to a *non-resident proprietor*, are taxed to the tenant in possession, though the tax may rightfully be collected of the tenant, yet, per TENNEY, J. *quære*, if, for the collection of the tax the land can be sold, as land of a resident proprietor.

WRIT OF ENTRY for possession of a house and lot in Bangor.

The case was submitted for nonsuit or default upon a report of facts. The demandant claims under a sale made to him by a collector of taxes. One Marshall had mortgaged the property, and the tenant had become assignee of the mortgage. The right of redeeming had been fully foreclosed in 1842. Still Marshall occupied the whole of the premises till 1843, and of one half till the early part of May, 1844, at which time he removed from the State. The State, county and city taxes on the demanded premises were assessed to Marshall, for the years 1840, '41, '42, '43 and '44. Bowman was collector of the taxes of 1844, and received the taxes of that year, except $4,10. To collect that balance, on the 8th of May, 1846, he advertised as is stated in the opinion of the Court, and at the time appointed therefor, June 22, 1846, he sold and deeded the premises to the demandant, he being the highest bidder. The tenant's residence in Bangor commenced "in the winter of 1846."

Hobbs, for the plaintiff.

Did the collector, in his proceedings correctly treat this real

estate as that of a resident proprietor under Act of 1844, c. 123, § 10?

He did, if the estate was rightly assessed. It appears to have been sufficiently described and rightly taxed to Marshall, as tenant in possession, by virtue of R. S. c. 14, § 51, 54. Being "legally assessed," the Act of 1844, c. 123, § 10, created a lien on it.

The term "*resident proprietors*," is a technical one, used in a popular sense, as contra-distinguished from "*non-resident proprietors*;" the usual designation of the tax acts and tax books of the State. It is equivalent to the term occupant, who as such, has a possessory interest, or proprietary for purposes of taxation. This section has received a *legislative* construction in the Act of 1849, c. 131, § 1, where the term "resident proprietor" is, for purposes of personal notice, called "owner or occupant."

Any other construction would render it impossible, in many cases, particularly in cities, where property is rented largely by owners resident therein as well as elsewhere, to collect the taxes.

The collector's warrant is his only guide. The lists committed to him are denominated "residents" and "non-residents." The law points out a duty distinctly as to each. If the collector is to look out of his warrant to determine the question of proprietorship of land, he must settle the title correctly at his peril, or the tax cannot be collected.

Where shall the collector go for information? If to registry of deeds, he may find conflicting claims between residents and non-residents.

Who shall aid him? Must he file a bill of interpleader? He finds no tribunal having jurisdiction.

It was not intended by the Act of 1844, to repeal R. S. c. 54, § 51, 54. If this Act is in force, then the terms "occupant" and "tenant in possession" and of "resident proprietor" must be construed as having the same signification for the purposes of the tax acts.

Cutting, for defendant.

TENNEY, J. — The land in controversy was mortgaged by John E. Marshall to the Penobscot Mill Dam Company, on September 10, 1834; and this mortgage was assigned to the tenant, in July, 1835. A publication to foreclose the mortgage was duly made and recorded as early as November 4, 1839. A writ of possession was issued on February 19, 1844, upon a judgment in favor of the tenant against Marshall, recovered at the term of the Supreme Judicial Court, begun and holden in the county of Penobscot, on the fourth Tuesday of October, 1843. Marshall was in the occupation of the premises, during the years 1840, 1841, 1842 and 1843, and the taxes thereon for each of those years were assessed to him as a resident; and also for the year 1844. The tenant resided in Mount Desert till some time in the winter of 1846, when he removed to Bangor. On January 9, 1844, he gave a written lease of the whole of the premises to one Chapman, who went immediately into the occupation of one-half the lot, and one-half the house standing thereon, and Marshall continued to occupy the other portion, till the early part of May, 1844. The demandant claims title to the land by virtue of a sale to him by the collector of taxes, for the city of Bangor, made on June 22, 1846, to obtain a balance of the taxes thereon, so assessed to Marshall for the year 1844.

On May 8, 1846, the collector posted up written notices to the resident owners and proprietors of land and real estate in the city of Bangor, whose taxes thereon had not been paid, that the same, which was particularly described, including that in dispute, were taxed for city, county and State taxes, in lists committed to him, for the year 1844, and that unless the taxes and intervening charges should be paid on or before the twenty-second day of June, 1846, so much of the real estate described, would be sold at auction, as would be sufficient to pay the taxes and charges; but the notices gave no information of the date of the assessment, or for what period after the date thereof, the taxes had remained unpaid.

The land was advertised and sold as belonging to a resident proprietor, and not otherwise; it is therefore insisted that the

sale and the collector's deed, cannot be effectual to pass the title to the demandant. By the tenth section of chap. 123 of the statutes of 1844, a lien is created upon real estate belonging to resident proprietors, for all taxes legally assessed thereon; which lien shall continue in full force until the payment of the taxes. By R. S. chap. 14, sect. 51, the assessors are at liberty to assess improved lands to the tenants in possession or to the owners, and by the 54th section, if the assessors shall continue to assess any real estate to the person, to whom it was last assessed, the assessment shall be valid, though the occupancy or ownership may have been changed, unless previous to the last assessment notice of such change shall have been given. The tax upon real estate may therefore be legal, notwithstanding the person to whom it is assessed, may have been only a tenant in possession, or may have parted with all his interest in the land taxed, before the assessment; but whether a lien is created by a tax upon land belonging to a non-resident, assessed after the removal from the possession, of the person to whom it was properly assessed at a previous time, does not necessarily depend upon the validity of the tax itself. It may as a tax be valid, and may be collected of the person against whom it was assessed, and still one which cannot be legally enforced in all the modes provided by the statute for the collection of taxes. This lien extends to land *belonging* to resident proprietors, and the provision of the statute does not in terms embrace other lands.

When the lands of non-resident proprietors are taxed as such, the modes of advertising the sale for the collection of the taxes are very different and intended evidently to convey actual notice to the owners, though living in other towns and at a distance from the premises; but the notices of sales, for the purpose of obtaining payment of taxes assessed to resident proprietors, are not required to extend beyond the limits of the town where the land is situated. From the language of the statute it may well be doubted, whether land actually owned by a non-resident proprietor at the time of the assessment of the tax thereon, though legally taxed to a person

who is resident in the town, can be transferred by a sale made under the statute providing the mode for making effectual the lien upon resident proprietors. But it does not become essential to the final disposition of the case, that this question should be decided.

To constitute a valid sale for the non-payment of taxes, all the steps required by the statute must be taken. The provision under which the sale in this case was attempted to be made, is in these words, "if any such tax shall remain unpaid for the term of nine months from the date of the assessment, the collector may give notice of the same, and of his intention to sell so much of the real estate, on which said tax was assessed, as may be necessary for the payment of the tax and all charges, by posting notices thereof," &c.

In order that the sale and the deed made by the collector should pass the title to the land, before the notices required can have effect, it is necessary, that there should be a tax upon the land sold, that nine months should elapse after the date of the assessment of that tax, and that it should then remain unpaid. Without all this, the collector cannot legally proceed in any of the measures to make effectual, in the collection of the tax, the lien, which may be upon the land of a resident proprietor. But if they do all exist, "the collector of taxes may give notice of *the same*, and of his intention to sell," &c. Can it be said, that the notice may be limited to any one of these facts, or to more than one and less than all? If the reference is not to all, to which does it apply? No satisfactory answer it is believed, can be given, excepting, that the notice must state affirmatively each of these particulars.

The manifest purpose of this requirement was not only to let the party charged with the tax know, that there was such a tax against him, and unpaid, but that his delinquency had continued so long after the date of the assessment, that the law authorized proceedings, in the manner prescribed, to obtain the sum required, from the land, upon which the tax was based. Without such notice, which is of substantial utility to the person, against whom the tax remains undischarged, he is

not informed, in the manner which the Legislature have provided, that he is exposed to the costs, which will arise from an attempt to obtain the tax from the land itself. The notices posted up, previous to the sale, in this case, were defective in omitting to state that which the statute has made a prerequisite to a legal sale, and the title did not pass to the purchaser.

Plaintiff nonsuit. Judgment for defendant.

NOTE. — WELLS, J. being engaged in court in another county, did not sit in the hearing of this case, and took no part in the decision.

McPHETRES *versus* HALLEY'S *Executor.*

If, upon a promissory note, a demand of payment was seasonably made on the maker, and the indorser afterwards promises to pay it, having full knowledge whether notice of the maker's default had or had not been given to him, the legal inference is, that the notice was duly given.

Of the proofs, which might properly authorize a jury to find that the indorser had such knowledge.

In computing the four years, in which suits may be brought against an executor, the period is not to be reckoned, during which his official action is suspended by an appeal from the decree appointing him to that office.

ASSUMPSIT, upon a negotiable note, dated in 1833, payable at four months, brought by the indorsee against the executor of the indorser.

Under the general issue, testimony was offered and submitted to the consideration of the court, with power to draw inferences as a jury might.

There was also a plea of limitations under R. S. c. 120, § 23, and c. 146, § 29. The facts pertaining to both pleas are presented in the opinion of the court.

Washburn, for the defendant.

There was no proof that the testator, when making the promise, if any, had *knowledge* of the want of notice to himself; and the law cannot infer such notice. He might have

erroneously supposed notice to have been left at his house. 18 Maine, 137; 6 Metc.

His engagement at the time of the indorsement, with his subsequent declarations, can amount to no more than a waiver of demand and notice, *upon a proviso* that, *after a failure to collect of the maker*, there should be a seasonable and proper demand and notice.

The action is barred by the statutes of limitation. The original decree was confirmed; the bond and the notice and the perpetuation of it, were held valid. No new decree or new requirements were made by the upper court. The efficacy of the bond was never suspended. Suits against this same testator were adjudged to last, and to carry cost, during the proceedings under this appeal. *Hydes* v. *Webster*, and *Hobbs* v. *Webster*, not reported.

Where an action may be legally brought against one as executor, and where he continues liable to the suit, the statutes of limitation must begin to run at the date of the writ. In this construction there is no chance for wrong. If the decree be confirmed, all is well; if not confirmed, new suits must be brought.

Wilson, for the plaintiff.

SHEPLEY, C. J. — The first question presented for consideration is, whether the action is barred by the statutes of limitation, chap. 120, sect. 23, and chap. 146, sect. 29, which provide that no executor or administrator, who has given bond and notice of his appointment according to law, "shall be held to answer to the suit of any creditor of the deceased, unless it shall be commenced within four years from the time of his giving bond as aforesaid."

The facts as presented by the report are, that the will of the testator was approved, and that letters testamentary were granted by the Probate Court on January 9, 1838; that the defendant filed his bond, bearing date on November 16, 1837, and gave notice of his appointment on January 9, 1838, which was perpetuated on the last Tuesday of the same month. An

appeal was claimed and the reasons assigned therefor were filed on October 3, 1838, which was regularly entered in this court, and continued until its October term in this county, in the year 1844, when the decree of the court of probate was affirmed. The case was brought forward on the docket of the June term, next following, and a similar entry was made. This suit was commenced on September 17, 1846.

If the regular course of proceedings had not been varied by statute provisions, an appeal from a decree approving a will could only be made immediately, and no letters testamentary could be granted, or bond taken, until the appeal had been determined, and the case had been remanded for further proceedings. In such case, the four years would commence from the time of giving the bond. The statute having authorized an appeal by any person aggrieved, within thirty days after the decree, and by any such person beyond sea, or out of the United States, having no attorney within the State, within thirty days after his return or appointment of such attorney, the court of probate cannot be informed, whether an appeal will or will not be made ; and it must proceed to grant letters and to take a bond in the usual course. The validity of these must depend upon the decision of the appellate court. By an affirmance, the whole prior proceedings become valid and effectual. No new bond would be required or taken. By a reversal, the proceedings before the appeal become invalid so far, as they are not confirmed by the provisions of the statute, chap. 106, sect. 44. During the pendency of the appeal, the prior proceedings remain in suspense.

If a construction should be adopted, that the statutes of limitation commence to run only from the time, when the decree has been affirmed, the result might be that an executor, who had waited for the four years to expire, and had then closed his duties under a decree for a distribution of the balance in his hands, might be subjected to suits by creditors of the testator ; for it might happen, that a person beyond sea, or out of the United States having no attorney within the State, might, after the term of four years had expired, appear and claim and

prosecute an appeal, and thus afford an opportunity for the commencement of suits, which would not be barred by the statutes of limitation until four years after the decree had been affirmed. If a construction should be adopted, that the words of the statute "from the time of giving his bond aforesaid," must under all possible circumstances limit a creditor to the commencement of his suit within four years after the bond was actually given and approved by the Court of Probate, when the executor had given notice according to law, the result would be that the plaintiff, in this case, and others similarly situated, could never have safely commenced an action against the executor to recover a debt justly due from the testator. Suits should not be commenced within one year after the executor is authorized to act. Before that time had elapsed, an appeal had been claimed and prosecuted, which operated by statute, chap. 105, sect. 32, to suspend all further proceedings, in pursuance of the decree approving the will, until the appeal was determined.

If the decree of the Court of Probate had been reversed the defendant would have ceased to be executor, and any suit commenced against him during the pendency of the appeal would have been defeated.

It must be obvious, that the Legislature never intended to produce such results as either of the supposed constructions might not unfrequently exhibit. The intention is clearly perceived to have been to allow an executor or administrator one year after his appointment, to ascertain the amount of assets, and to pay or adjust demands without incurring the expense of suits, and to allow the creditors three years after that time, and no more, except in case of the death of a party as provided for in c. 146, § 13, for the commencement of suits, when there had been legal notice given of the appointment of the executor or administrator.

In cases of appeal, under the provisions of the statutes, these intentions can be carried into effect only by considering, that in estimating the four years named in the statutes of limitation, the time, during which the official action of the execu-

tor or administrator is suspended by an appeal, is not to be reckoned. By this construction the intention of the Legislature will be carried into effect and the rights of all parties as designed to be regulated by statute will be preserved. This construction being adopted, the action in this case is not barred by the statutes of limitation.

It remains to consider the case upon the merits. The testator appears to have been indebted to the plaintiff by note given for the purchase money of a piece of land, and to have induced him to surrender it, and to accept the note in suit with his indorsement in blank upon it, stating to him, "that if he did not collect it of Butler, he would pay it."

Whether a demand was legally made, must depend upon the credibility of the testimony of Butler. In his deposition, regularly taken, he says, "the first demand was made by James McPhetres on the day the note fell due. He had it with him and showed it to me." An affidavit of the same witness was subsequently taken by the defendant without notice to the other party, in which the witness says, "it was presented to me in the spring after I gave it, but by whom I do not now recollect. I do not remember at what time in the spring it was. I do not now recollect, that said note was presented to me at any other time." This affidavit can have no other operation, than to affect the credibility of the testimony contained in the deposition. The witness does not state, that he was in error, when he formerly testified, or that he wished to correct any statement then made. The language used in the affidavit is peculiar, that he does not now recollect the material facts stated in the deposition, that the note was presented to him by the plaintiff on the day, when it became payable. The opposite party had no opportunity to know, under what circumstances it was obtained. When the credibility of testimony is to be impaired or destroyed by a contradictory statement made by the witness, it ought to appear to have been made to correct the former testimony, or that the witness was as favorably situated to recollect and state the facts, as he was when he testified.

If the demand be considered as proved, there is no proof, that notice was given to the indorser. There is proof, that the testator, long after the note became payable, and when he must have known whether he had received notice of non-payment, repeatedly promised to pay the note. There is testimony also, from which a jury might be authorized to infer, that the testator, when these promises were made, knew the whole facts respecting demand and notice, for he appears to have had a conversation with the maker after the note had become payable, and to have urged him to pay it, stating to him, that if he did not, he should have to pay it, as he had agreed to make it good to the plaintiff. A promise to pay, with a knowledge of all the facts, would bind the indorser, although there had been no legal demand or notice.

It is further insisted in defence, that there is proof, that the note has been paid. The only proof on this point is, that the plaintiff, when examined on oath as a poor debtor in the latter part of the year 1840, or in the former part of the year 1841, stated, that he had no notes or accounts against any persons.

Butler, the maker, states, that he never paid it. It appears, that the testator had not, as indorser, paid it as late as the spring of 1837, and he appears to have died during the autumn of that year. The plaintiff appears to have been the holder of the note in the years 1837 and 1844. He might have been at those times the holder and owner of the note, and yet not have been the owner of it, when he was examined in 1840 or 1841. His declaration on oath may have been true and the note may not have been paid. There is, therefore, no satisfactory proof of payment.

Defendant defaulted.

SARGENT *versus* INHABITANTS OF HAMPDEN.

An action at law cannot be sustained upon an award of referees, made under a submission of the parties, in the form prescribed in R. S. c. 138, § 2.

The remedy is only by pursuing the course, specified in the submission itself.

DEBT upon an award of referees, rendered upon a submission made in the form provided in R. S. c. 138, § 2. The referees awarded that the plaintiff should recover $500, damage, with cost.

By a written agreement, the report of the referees was made to *this court*, instead of the *District Court*. The case was dismissed by this court for want of jurisdiction. 29 Maine, 70.

The year, allowed in the submission for returning the award to the District Court, having expired, this action is brought as upon a submission and award at the common law.

Knowles, for the plaintiff.

The award is good at common law.

The form of a submission at common law is immaterial. It may as well be that prescribed by statute as any other.

The condition of acceptance may be rejected as surplusage.

But here was a written agreement of the parties, waiving the right which either had of having the award returned to the District Court, and agreeing to have it returned to a court having no jurisdiction. This is equivalent to an agreement not to have the award returned to any court, leaving the plaintiff to his remedy at common law.

This waiver destroys the character of the submission, as a statute submission. The agreement is effective for a certain purpose. One party should not have the sole benefit from it, while the other party suffers. It was never intended by the parties to destroy the award. Should not, then, the plaintiff have the benefit of the situation in which the award is left, by the mutual and *concurrent* acts of the parties?

Appleton, for the defendants.

HOWARD, J. — The report of referees, on which this action

is founded, was made to this court, and rejected June term, 1848. *Sargent* v. *Hampden*, 29 Maine, 70.

The facts of that case are facts in this. It was there held that this court had not the power, even by the consent of the parties in writing, to receive and accept an award of referees, made under a submission entered into before a justice of the peace, conformable to the Revised Statutes, chap. 138, sect. 2.

The agreement of submission was duly executed on April 27, 1846, and provided that the report of the referees, "being made within one year from this day, to the District Court for said county of Penobscot, the judgment thereon shall be final." Their report was never made to the District Court, and, of course, no action has been taken upon it in that court, either to "accept, reject, or recommit the same for further consideration," or to enter judgment thereon. R. S. chap. 138, sect. 2, 9. After the lapse of one year from the date of the agreement, it ceased to be binding upon the parties, and the proceedings under it, not having been matured, or conformable to the statute, became inoperative and void.

The report cannot be treated as an award at common law, without annulling the agreement of the parties, and substituting in its place a new and different contract. As an award at common law, it would not be subject to the supervision of the District Court; nor could the parties avail themselves of the right to object to its acceptance for any cause, or to except to the directions of that court, respecting it. All these were positive rights, secured to the parties under their contract of submission, which the law must regard and protect. *The Inhabitants of Deerfield* v. *Pliny Arms*, 20 Pick. 480.

Plaintiff nonsuit.

SUTHERLAND *versus* JACKSON.

Where a plan, made by a proprietor of land, delineates a street with lots adjoining the same, and he conveys one of the lots by its number, the *fee* which the purchaser takes is limited to the lines of the lot, as exhibited on the plan, and does not embrace any part of the street.

Such a conveyance, however, gives to the purchaser, by implication or estoppel, a *right of way* in the street. Any erection made upon the street, by which his use of it for a passage way is obstructed, is an invasion of his right.

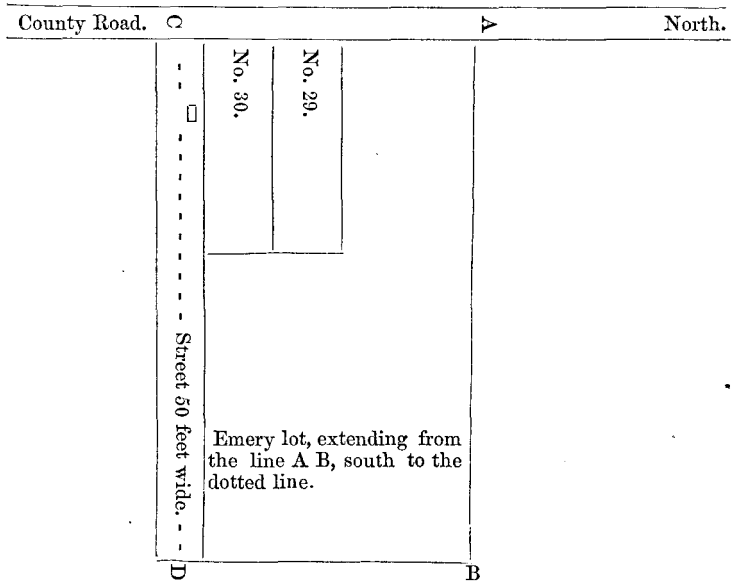
Until an easement in the street has been acquired by the *public*, through the act of the municipal authorities or otherwise, he may treat such invasion of his right, as a private nuisance, and maintain an action for the damage.

In such an action, the defendant, by his pleadings, *may* bring the plaintiff's title into question.

The action may therefore be brought originally into the District Court, with a recovery of full costs, though the damage recovered should not exceed twenty dollars.

CASE, for obstructing a passage way, to the injury of the plaintiff.

The following diagram may be of use in illustrating the points discussed.



The plaintiff purchased lots No. 29 and 30, by the plan

being part of the fifty acre Emery land. In his deed, lot No. 30 was described as commencing at the distance of 25 feet from the south line of the Emery lot. The plan exhibits a space 50 feet wide, reserved for a street, on the south of No. 30, having been laid, half on the Emery lot, and half on the adjoining lot. The deed described the lots No. 29 and 30, as being each 54½ feet wide, and the plan so represents them, exclusive of any part of the fifty feet marked for the street.

The *defendant* purchased the fifty acre Emery lot, "excepting the two small lots," No. 29 and 30, which the *plaintiff* had formerly purchased. After the space, marked on the plan for the street, had been used a few years by the plaintiff and others for a passage way, the defendant erected a house upon that part of it which lay, (north of the dotted line,) within the exterior limits of the original Emery lot. The case was submitted upon the *evidence;* judgment to be rendered according to legal rights.

Kelley and *McCrillis*, for the plaintiff.

1. The fee in the plaintiff extends to the centre of the street. 19 Pick. 250; 20 Pick. 291; 2 Metc. 457; 21 Pick. 292; 13 Maine, 329.

2. But if not so, he had a right of way there. 10 Pick. 138; 17 Mass. 413; 20 Wend. 149; 3 Kent, 433; 18 Maine, 76.

A. W. Paine, for defendant.

1. If the plaintiff had the fee to the centre of the street, his action is misconceived. It should have been trespass. *Fenner* v. *Shelden*, 11 Metc. 526.

2. The description in the deed expressly excludes the street, by commencing 25 feet from the line. *Howard* v. *Hutchinson*, 1 Fairf. 347 and 348; *Tyler* v. *Hammond*, 11 Pick. 213.

Though a deed refers to a plan, yet if the description is partly given differing from the plan, this will vary the plan accordingly. *Howard* v. *Hutchinson*, *supra*; *Parker* v. *Framingham*, 8 Metc. 266.

In cases of conveyance by number on a plan, the fee of the street remains in the former owner. 39th *Street*, 1 Hill, 191; 29th *Street*, *ibid.* 189.

"The fee," says Kent, "remains in vendor." 3 Kent's Com. 433, note.

The fee in the street did not pass by the description. If it passed at all, it was as being appurtenant. But land cannot pass as appurtenant to land, though a right of way may. *Tyler* v. *Hammond*, 11 Pick. 214; *Jackson* v. *Hathaway*, 15 Johns. 447.

A deed of land adjoining a street, with the *appurtenances*, does not pass the *fee* of the street. *Jackson* v. *Hathaway*, *supra*; *Harris* v. *Elliot*, 10 Pet. 25.

The doctrine that the fee of a street passes by a deed of land bounded by it, or laid down on a plan, is only applicable to highways. Passage ways and private ways do not come within the principle. *Johnson* v. *Anderson*, 18 Maine, 76; 3 Kent's Com. 433 and 434; 21 Pick. 292.

Neither did the plaintiff, by his deed, take any *right of way*.

1. It was not necessary, as his lot was accessible from the county road, to which it was contiguous.

2. The appropriation of the street, indicated by the plan, was a dedication to the public. It is then the right of the public, which has been invaded, and the remedy, (if any,) should be by indictment.

WELLS, J. — One of the grounds, upon which the plaintiff claims to maintain this action, is that by the deed of the proprietor under which he holds, he obtained title to the centre of the street or way. In this State a grant of land bounded on a highway carries the fee to the centre of it, if there be no words to show a contrary intent. *Johnson* v. *Anderson*, 18 Maine, 76. The exact width and length of the two lots are specified in the deed, and it does not appear, that lot numbered thirty extends into the street, allowing to it the full width named in the deed. But the lots are conveyed by a

plan, and by the copy of the plan, furnished to us, it does not appear that the lot last mentioned embraces any part of the way. The southern line of the lot separates it from the way. Whether that is regarded as the line of the lot, or the line of the way, or both, it clearly delineates the limits of each, and a conveyance of the lot by the plan does not carry the fee to the centre of the way, for in order to have that effect, the grant must extend beyond the southern line of the lot as laid down on the plan. The boundary of a lot by a wall or fence would limit the grantee to it, although it might also be the boundary of a road. The same rule of construction must apply to a line on a plan.

But a street is laid down on the plan adjoining the plaintiff's land, and the conveyance is according to the plan. The fair construction of the deed must be, that the proprietor intended the street for the use of the grantee, and those who might purchase land adjoining it. He exhibited to the purchaser the advantages attendant upon the grant, and not only sold him the land, but the land as it is described upon the plan, where there appears to be a street, in which it would not have been unreasonable for him to have understood, that he was to have an easement. And such appears to be the fair interpretation of the language employed in the conveyance. This case falls within the principle, which was decided in *Van O'Linda* v. *Lothrop*, 21 Pick. 292, where it was held, that a grant of land bounded on a street, the soil of which belonged to the grantor, though it did not convey the fee in the street by the terms of the grant, yet the grantee acquired a right of way in the street by implication or estoppel. In that case, the deed described the land as bounded on the street, in this it is conveyed according to the plan, which represents the land as adjoining the street, and the plan is in contemplation of law a part of the deed. So also in New York, if a lot be sold bounded on a street as designated on a map of the city, or of the owner's land, the purchaser takes the lot with the indefeasible privilege of a right of way in the street as an easement.

The fee of the street remains in the vendor, but subject to the easement, and the value of his fee is but nominal. 3 Kent's Com. 433, and cases there cited; 1 Hill, 189 and 191. The plaintiff must be considered as entitled to a right of way in the street delineated on the plan as adjoining his land.

It follows necessarily, that if the plaintiff has a right of way he may exercise it. When the municipal authorities may think proper to open the street, whether the vendor or his grantee of the fee of the street can recover damages, or whether the sale would, under the circumstances, be considered a dedication of the street to the public so far as to prevent a recovery of damages, it is not now necessary to inquire. The proprietor may at any time open the street, but if he does not do so, and it is not done by the public authorities, the purchaser is not precluded from the use of the easement, but may exercise the right as soon as it has accrued to him, if there be no restraint imposed upon him in the deed.

But as the plaintiff's right consisted in the use of the way, no detriment could arise to him until he was obstructed in such use. The defendant claiming under the proprietor could cultivate the land designed for a street, or devote it to any lawful purpose, without being liable to the purchaser while he manifested no disposition to use it. When the plaintiff undertook to use the street, he had the right to do so without obstruction, and such obstruction would constitute his ground of injury and claim for damages.

When this case was presented to the consideration of this court at a prior time, upon exceptions to the rulings of the Judge of the District Court, it then appeared by the exceptions, that the street had never been opened or used. But by the testimony now presented it does appear, that the street or a part of it, had been used several years before the defendant erected his house upon it, and, as we understand, the plaintiff and others had participated in its use. The house built by the defendant was from fifteen to eighteen feet wide, and twenty-eight feet long. No one can doubt that such a house would very materially obstruct the ordinary and daily

use of the street, and impede the plaintiff in the actual use of his right of passage. The evidence does not disclose very clearly the degree of the injury done to the plaintiff, but it is to be inferred from it, that he sustained some.

For the injury done to the plaintiff by obstructing his passage over the way, he can maintain an action and recover damages. It is a mere private nuisance. *Shaw* v. *Cummisky*, 7 Pick. 76; *Kent* v. *Waite*, 10 Pick. 138; *Parker* v. *Smith*, 17 Mass. 413. If the way was a public one, so that its obstruction would be a public nuisance for which an indictment would lie, the plaintiff could sustain no action without proof of particular and special damages not common to others. Coke Lit. 56, a; *Herbert* v. *Groves*, 1 Esp. 148. But the way in the present case is a private one, and according to the case of *State* v. *Sturdivant*, 18 Maine, 66, no indictment could be sustained for obstructing it, and the plaintiff would have no remedy in a court of law unless he could maintain an action for damages.

From the want of more definite proof in relation to the amount of damages, it is apprehended, that the principal object of the plaintiff in bringing the action is to have the question of his right to the use of the way settled; they will therefore be but nominal.

According to the agreement of the parties, a default must be entered, and the damages are fixed at one dollar, but according to the decision of this court in the case of *Morrison* v. *Kittridge*, 32 Maine, 100, the plaintiff will be entitled to full costs.

Wilson *versus* Hobbs.

Whether a writ has been indorsed, must be determined by an inspection of the writ itself, if to be found.

In a suit against one as indorser of a writ, the docket entry, together with the extended record of the original action, both stating that the defendant indorsed the writ, is not sufficient evidence of that fact.

Suit against the defendant, as indorser of a writ, brought

by one Taylor against this plaintiff, upon which costs had been recovered against Taylor. The officer's return upon the execution proved the avoidance and the inability of Taylor.

The plaintiff introduced, though objected to, the docket entry and the record of the suit, *Taylor* v. *Wilson*, by both of which it appeared that Hobbs had indorsed said writ. The writ itself, introduced by the plaintiff, showed the name, not of the defendant, but of another person, as indorser.

The clerk of the court then testified for the plaintiff, that a new indorser on the writ, *Taylor* v. *Wilson*, had been ordered by the court, and that, immediately, before the cause was opened to the jury, Mr. Hobbs said he would become the indorser, and that thereupon he, the clerk, made the entry upon the docket, without any special order so to do.

Wilson, for the plaintiff.

Hobbs, for the defendant.

TENNEY, J. — The indorsement of a writ, when required, must be made before the entry of the action in court. R. S. chap. 114, sect. 16. Whether it was indorsed or not, must be determined by inspection of the writ itself, if it is to be found. If pending any suit, the indorser should, in the opinion of the court, be insufficient, they may require that a new indorser should be furnished, who is sufficient. If the order of court, that a new indorser should be furnished within the time given, is not complied with, the suit is to be dismissed with costs for the defendant. R. S. chap. 114, sect. 20. The evidence that the new indorser has put his name upon the writ, must be the same as that of the original indorsement. The proceedings of the court on the question, whether a new indorser should be ordered or not, should be recorded. But it is not important that the fact, that the indorser who was offered and deemed sufficient, has actually made the indorsement upon the writ, should be made a subject of record. A time may be given by the court, extending beyond the adjournment of the term without day, in which it may be done; and the indorsement may be made out of court, and when the

clerk or court may have no knowledge of it, and if made, is effectual. A record of this fact, not being necessary for its validity, the statement of it upon the record book is not that high species of proof, which is understood in its technical sense to be record evidence, and such as is conclusive, not subject to explanation or contradiction. The party sought to be charged as an indorser, notwithstanding this statement, is allowed to require proof by inspection of the writ itself, that his name is upon the writ, and if it purports to be there, that it is his genuine signature, or authorized by him.

In this case, the writ being introduced by the plaintiff, was found not to have the indorsement of the defendant upon it, but that of the original indorser, and the action is not maintainable. *Judgment for the defendant, for his costs.*

Thompson *versus* Towle.

A vendor of personal property impliedly warrants the title.

As a general rule, he cannot be a witness, in support of a suit, in which his vendee is attempting to recover for the value of the property against a third person.

His interest is not balanced, although such third person, in a suit by himself against the witness, had, without the consent of the witness, given credit for the property, and taken his judgment only for the balance of his claim.

Exceptions from the District Court.

Assumpsit to recover for a bonnet, alleged to have been sold to the defendant.

The plaintiff offered Mrs. Page as a witness. Though objected to, she was admitted. Her testimony was *that*, as agent for the plaintiff, she sold the bonnet to the defendant; *that* it was the plaintiff's property; *that*, in 1846, she purchased articles of the plaintiff, among which was this bonnet, in her own name and on her own credit; *that*, in 1847, she mortgaged the same property to the plaintiff to secure the purchase money; *that* she was, in the mortgage, appointed

his agent to sell the goods; *that* this suit is brought by his direction; *that* she is the wife of Samuel Page, with whom she lives, and who permits her to do business for herself and to use his name when necessary; and *that* the mortgage was signed by herself in her own name and also in *his* name with his *consent*. The mortgage was received in evidence by consent.

The defendant proved that, after the service of this writ upon him, he sued said Samuel Page on an account, in which he credited Page for this bonnet, and recovered judgment for the balance only.

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

Wilson, for the defendant.

Kelley and *McCrillis*, for the plaintiff.

WELLS, J. — According to the case of *Paine* v. *Tucker & al.* 21 Maine, 138, the authority of Mrs. Page to execute the mortgage, it being an instrument under seal, and not made in the presence of her husband, Samuel Page, could not be proved by parol evidence. Her testimony would not be sufficient to show a valid execution of the mortgage. But the defendant subsequently offered it in evidence, and by the agreement of the parties it was received. Her testimony therefore respecting its execution was rendered immaterial. But aside from the question of her authority to make the mortgage, her evidence tended directly to establish the title of her husband to the property embraced in it. In the sale of personal property there is an implied warranty of title on the part of the vendor, and he cannot be a witness for his vendee in an action involving the title, on account of his interest to sustain it. As the husband could not be a witness for the plaintiff to sustain his title to the property, neither could the wife, because they have a community of interest.

The title having passed to the plaintiff by a mortgage, does not make the witness any the less interested, for if the plaintiff recovers, then the debt, to secure which the mortgage

was given, is satisfied *pro tanto*, and if he fails of recovering on the ground that the mortgager did not own the property, the debt would remain unpaid to that extent.

But it is contended by the plaintiff's counsel, that the interest of the witness is balanced. There does not appear to be any claim made, except for one item, the other having been returned. After the commencement of this suit, the defendant brought an action against Samuel Page, gave him credit for the article in dispute, without having purchased it of him, and took judgment against him for the balance due on account, by default.

If the plaintiff recovers, the defendant will not be at liberty to commence an action against Samuel Page to recover back the amount of the item credited. That credit must remain until the judgment is reversed. And the defendant having commenced his suit and voluntarily given the credit, with a full knowledge of the plaintiff's claim, and without any fault on the part of Page, would probably find it difficult to obtain a review of that action, and an amendment, by striking out the item credited in his account. The liability of Page to the plaintiff, if he fails in his suit, owing to a defect in the title of Page, is certain, but if the defendant fails, it is not equally so as to him; it is in reality altogether uncertain, for it would depend upon the success of the defendant in obtaining and prosecuting a review. The interest of the witness was not therefore balanced, and she was incompetent. And as a new trial must be granted for this cause, it becomes unnecessary to consider the other question in the case, in relation to the refusal of the Judge of the District Court, to entertain the motion made concerning an indorser of the writ.

Exceptions sustained, and new trial granted.

LEWIS *versus* PRESIDENT, &c. OF THE EASTERN BANK.

The directors of a bank have authority, in behalf of the corporation, to release a person, whom they propose to call as a witness.

The cashier of a bank, being released, is a competent witness for the bank to prove, that through a mistake, he had given too large a credit to a depositor, in the bank book, made for him by the cashier.

ASSUMPSIT. The plaintiff was a depositor in the defendants' bank. He introduced his bank book, in the handwriting of the cashier, in which he had been credited on deposit $604,61; but a few days after that credit had been given, the cashier altered its amount to $504,61, when having occasion to make a new entry on the book.

This suit is brought to recover the difference, $100. The directors, in behalf of the bank, discharged the cashier, without any consideration, by giving him a release under the seal of the corporation, and he was admitted as a witness, against the plaintiff's objection, and testified, that in making the first entry, he, by mistake, credited the plaintiff too large a sum by $100.

If the cashier was rightfully received as a witness, the plaintiff agreed to become nonsuit; otherwise the defendants to be defaulted.

A. W. Paine, for plaintiff.

The cashier being really the party in interest, is not admissible. 1 Greenl. Ev. § 395. Nor is he made so by the discharge, introduced, because it is void, the directors having no authority to grant it.

The cashier's bond is given for the benefit of the stockholders and depositors, and the directors have no power to discharge it, either wholly or in part, without a full consideration. They have no right to make donations or misappropriate the funds of the bank in violation of law and its rules. R. S. c. 77, § 24; *Frankfort Bank* v. *Johnson*, 24 Maine, 502; *Salem Bank* v. *Gloucester Bank*, 17 Mass. 29, 30; *Wyman* v. *H. & A. Bank*, 14 Mass. 63.

They cannot authorize the payment of money which they do not owe. Angell & Ames on Corp. 294, c. 9, § 9, 2.

The question of admissibility is to be determined by the facts existing in proof at the time the witness is offered. In this case, plaintiff had proved his claim. Against this claim the stockholders and depositors had a full indemnity in the cashier's bond. This was of value, and could no more be given away than a note of hand or bag of coin.

The directors are *quasi* trustees, charged with the trust of controlling and guarding the money of the bank and superintending its profitable investment. Their powers are necessarily limited to the means of effecting this object. Whatever is inconsistent therewith they have no right to do.

The cashier had an interest in the judgment.

Even though the witness be admissible, the evidence which he offered is not. The entries on the bank book are conclusive, and cannot be contradicted. By no other rule can there be safety. 4 Johns. 377.

Peters, for the defendants.

WELLS, J. — The question presented in this case is, whether the cashier of a bank is a competent witness for the bank, to testify to a mistake made by him in entering a deposit in the plaintiff's bank book for too large a sum.

It is agreed, that the witness before testifying, received a discharge, duly made under seal, granted him by a vote of the directors of the bank, without any thing having been paid by him for it.

It is contended on the part of the plaintiff, that the directors have no power to authorize a release of the witness, without the consent of the stockholders.

The directors have the care of the financial affairs of the bank, within the scope of its charter and the provisions of the statute. They can direct the prosecution or defence of suits involving its interests. Having such power, they possess all that is incident to it, and can judge of the mode and manner of exercising it. It became their duty to determine as to the

course most proper to be pursued, in relation to the interests of the bank, in defending this suit. They must either release the witness, with a reasonable expectation that his testimony would enable the bank to recover, or allow the case to take its ordinary course, and have the question of his admissibility settled by law, and if a decision should be adverse to the bank, then commence a suit against the witness, when they were also probably satisfied, that he had acted honestly, but had merely made a mistake. They did not give away the property of the bank, but elected what was best, in their judgment, to be done to protect it from loss. And in our opinion, they have not exceeded their power.

The entry in the bank book is substantially a receipt, by which the bank acknowledges the reception of the money on deposit, through the agency of its cashier. It is now well settled, that receipts are open to explanation by parol evidence. This case falls within that principle, and the testimony is admissible for that purpose.

It does not become necessary to decide the question of the admissibility of the witness if no release had been given to him. *Plaintiff nonsuit.*

CALEF *versus* FOSTER.

A proprietor of lands who had sold certain lots, for which the pay was still due to him, and who had also contracted to sell some other lots, granted a power, authorizing his attorney "to collect and receive all sums of money due to him for said lands from purchasers, and to execute all such contracts as the sales may require." *Held*, that the power did not authorize the attorney to make *new* contracts for the sale of *other* lands.

COVENANT BROKEN, brought on a sealed contract to convey a lot of land in Garland, if the plaintiff should pay therefor a fixed price, in several specified instalments. The contract was executed in the name of the defendant, by one Bartlett, as his attorney.

The only question in the case relates to the authorization of

Bartlett to make the contract. His authority, if any, was by virtue of a power of attorney, under seal, in the language of the defendant, appointing "Bartlett to be my lawful attorney, and in my name to superintend and take care of my lands, in the town of Garland; to demand and receive, sue for and recover satisfaction for all trespasses committed, or which may be committed on any of said lands, or at his discretion to compromise therefor; to collect and receive all sums of money due to me for said lands from purchasers or from trespassers, and to make, execute and acknowledge all such contracts as the sales, suits at law, or compromises may require, and to pay the taxes assessed on said lands, and I hereby ratify and confirm whatever my said attorney, Nehemiah Bartlett, shall lawfully do or cause to be done in the premises, by virtue of this letter of attorney."

If said power of attorney authorized the making of the contract in suit, the defendant is to be defaulted; otherwise plaintiff is to become nonsuit.

A. Sanborn, for the plaintiff.

A. W. Paine, for the defendant.

Shepley, C. J. — The question presented for decision is, whether the power of attorney made by the defendant on January 20, 1840, authorized Nehemiah Bartlett to make a contract with the plaintiff for the sale of the land described in that contract. He is not expressly authorized to sell the lands in the town of Garland, or to make contracts for their sale, or to make conveyances of them.

Such power to sell can only be implied or inferred from the authority conferred "to collect and receive all sums of money due to me for said lands, from purchasers or from trespassers, and to make, execute and acknowledge all such contracts as the sales, suits at law, or compromises may require."

This language shows, that sales had been already made, and that payments therefor were to be made by purchasers. And the attorney is authorized to make, execute, and acknowledge all such contracts as "the sales" may require. The words

"the sales" have reference to the sales already made, being the ones, on which money was to be collected of the purchasers.

When the amount due had been fully paid, he would be authorized to make, execute and acknowledge a contract, providing for an absolute conveyance of the title. There is no indication of an intention to confer an authority, to make new and further sales of the lands, or contracts for such sales.

It is said, that the presumption is, that the defendant made an agreement with the plaintiff for the sale of the land, and that his attorney executed the contract, to carry that agreement into effect.

The sales referred to in the power, were such as were then known to have been made by some contract, on which payments were expected to be made.

No presumption can be made, that a parol contract, wholly inoperative, was thus made as the foundation of this contract. Such a presumption might as well be made in all cases, as in this one ; and if made, it would give the attorney an unlimited power to sell the lands. *Plaintiff nonsuit.*

DOLE *versus* WARREN.

An action brought by one co-surety to recover against another a contribution for money, paid *after* the defendant's discharge in bankruptcy, is not barred by that discharge, although the original obligation, on which they were co-sureties, was payable *before* the defendant petitioned to be decreed a bankrupt.

The defendant's exposure *to become* indebted to the *plaintiff* was so contingent and uncertain, that it could not have been proved in the court of bankruptcy as a claim against the bankrupt's estate.

Where, in a suit upon such a bond, the obligee struck out the name of one of the defendant co-sureties, upon a suggestion being made of his bankruptcy, and recovered judgment against the principal and another co-surety, the former co-surety is not relieved from contribution, by the obligee's omission further to prosecute the suit against him.

ASSUMPSIT, by one co-surety to recover contribution against another co-surety.

The plaintiff and defendant and two others, in 1836, became sureties for one Lancy, as a collector of taxes.

In November, 1842, the defendant petitioned to be declared a bankrupt. An action on the bond was commenced against all the obligors, upon the 12th of December, 1842. On the 13th of the same December, the defendant was decreed to be a bankrupt, and on the 30th of January, 1844, obtained a bankruptcy discharge.

During the progress of the suit on the bond, and after said discharge had been obtained, the obligee struck out the name of the defendant, and of another of the sureties, upon suggestions being made of their bankruptcy; and afterwards, in 1845, recovered judgment against the principal and the two other sureties, of whom the present plaintiff was one, amounting to $1490,41. The amount of the judgment was paid by a levy upon the plaintiff's real estate. This suit is brought to recover one-fourth part of that payment.

Upon these facts, a legal judgment was to be entered by the court.

Jewett and *Crosby*, for the plaintiff.

Hobbs, for the defendant.

1. The plaintiff's cause of action, if any, arose upon the default of Lancy, which was prior to the defendant's petition in bankruptcy. The defendant's discharge in bankruptcy, is therefore, a bar to this suit. This plaintiff might have paid the debt before the defendant petitioned in bankruptcy, and then proved his claim for contribution in the bankruptcy court.

2. The discontinuance, by the obligee in the bond, as to the defendant, was a legal discharge from all liability on the bond.

When the defendant was thus exonerated from the bond, he could be under no liability to the co-sureties.

TENNEY, J. — The facts reported in this case bring it within the principle of the cases of *Woodward* v. *Herbert & al.* 24 Maine, 358, and *Ellis* v. *Ham*, 28 Maine, 385. The claim

of the plaintiff was one, which might, by possibility, exist at a future time, when the defendant filed his petition to become a bankrupt, and when he was decreed to be such; but it was then so uncertain, that it could not have been proved as a claim against the bankrupt's estate, and was not discharged by his certificate.

The voluntary discontinuance as to Warren by Whitman in the suit, upon the bond against Lancy and his sureties, cannot relieve him from liability to contribution. This discharge from the action was the act of one, who was fully empowered by the statute to make it, on the payment of costs, and could not have been controlled therein by the plaintiff. The obligation of the defendant to the plaintiff now sought to be enforced, arises under a contract entered into at the time the bond was executed. By becoming sureties on the bond, each impliedly promised all the others, that he would faithfully perform his part of the contract entered into by the obligors, pay his proportion of loss arising from the total or partial insolvency of the principal, and to indemnify them against any damage by reason of his neglecting to do so. *Howe* v. *Ward*, 4 Greenl. 195. This contract between the sureties was entirely unaffected by the omission of Whitman to prosecute the suit against the defendant. As long as he was able to obtain a judgment against the principal, the plaintiff and another of the sureties, and upon that judgment received a payment from the plaintiff, the event had happened, in which the defendant had failed to fulfil his promise to the plaintiff and to his damage. Whether the defendant would have been still liable on the bond, after the suit was discontinued, for any balance, which might remain due, is not a question that we are called upon in this action to decide. The plaintiff having paid money, or its equivalent, on account of his joint suretyship with the defendant, is entitled to recover one quarter part of the same from him, according to the agreement of the parties. *Defendant defaulted.*

LARRABEE *versus* LUMBERT.
SAME *versus* SAME.

Where, upon a promissory note, the plaintiff has received from the defendant interest above the rate of six per cent. per annum, the defendant in the suit upon the note, or in the suit upon the mortgage given to secure such note, is entitled to have such excess deducted.

Where, in either of such actions, such a deduction has been procured by proof introduced by the defendant, the plaintiff is *not*, but the defendant *is*, entitled to recover cost.

Where insurance against fire has been effected upon mortgaged real estate, and the mortgagee has received the insurance money for loss occasioned by fire, he is to account for it, in the same manner as for rents and profits.

If several notes, payable at different times, were secured by the mortgage, and have become overdue, such insurance money is to be appropriated first to the payment of interest on all the notes, and the surplus is to be applied, so far as it will go, to the payment of the principal of the notes, in the order of their respective pay-days.

THE first of these two actions is a WRIT OF ENTRY upon a mortgage, made by the tenant to the demandant, to secure the payment of his four promissory notes, of different pay-days.

The other action is ASSUMPSIT upon the note, last payable, which was for $1000.

In both cases, the *evidence* was submitted to the consideration of the court, by whom judgments were to be entered, according to the legal rights of the parties. The facts which the court deduced from the evidence, are sufficiently stated in the opinions.

Peters, for the plaintiff.

Rowe and *Bartlett*, for the defendant.

In the action of ASSUMPSIT upon the note, the opinion was announced by

HOWARD, J. — The defendant gave the plaintiff several promissory notes, payable at different dates in the months of October and November, 1847, and secured the payments by a mortgage of land and mills. The note now in suit was last payable. The plaintiff received $1000, on a policy of insurance, March 27, 1849, for destruction by fire of a part of the

mortgaged property. He is willing to allow the nett proceeds of this sum, amounting to $965,38, after deducting the cost of collection, $4,62, and $30, paid by him, in October, 1847, "to keep the policy alive;" but claims the right, which he asserted at the trial, to appropriate it to the payment of the interest due on each of the notes, at the time of its reception, and then to the payment of the principal of the note first payable, which now remains unpaid. The defendant claims the right to make the appropriation of the sum thus received, to the payment of the note declared on in this suit. No question, therefore, arises in this case, as to the right of the mortgagee to charge for insurance effected by him upon the mortgaged property, or to retain the amount received, as his own money. *White* v. *Brown*, 2 Cushing, 412.

If this could be regarded as an independent payment by the defendant, he would have the right to direct the application, under the general rule of law; but it cannot be so regarded. It was not paid by him or by his directions. It was not his money or money under his control, when received by the creditor, but was the proceeds of the property embraced by the mortgage, and for which the mortgagee may be chargeable as for rents and profits. R. S. chap. 125, sect. 23. If the defendant had instituted a bill in equity to redeem, the sum thus received by the plaintiff for insurance must have been accounted for as profits obtained from the estate, and could not have been regarded as payment in any other mode. It would be payment in the sense, only, in which all rents and profits are payments. If the mortgager or his assignee cut timber from the estate, the mortgagee may recover the value. *Bussey* v. *Page*, 14 Maine, 132; *Frothingham* v. *McKusick*, 24 Maine, 403. In such case, if the mortgager redeem, the mortgagee must account for the amount as profits. So, when the mortgagee seized timber, cut from the estate, he was held to account for the proceeds. *Gore* v. *Jenness*, 19 Maine, 53. So, if he received the value of a dwellinghouse, removed from the premises, he must account for it as profits. *Smith* v. *Goodwin*, 2 Greenl. 173. When the mortgagee had the power

to sell, and the estate was in part sold, the proceeds were treated as profits to be accounted for. *Whittick* v. *Kane*, 1 Paige, 202; *Holdridge* v. *Gillespie*, 2 Johns. Ch. 33.

If then, when the mortgager brings a bill to redeem, the money received for insurance must be accounted for as profits, the court would adopt the same rule of appropriation, upon the same state of facts, in making up such a judgment on the mortgage note, as on payment, would authorize a discharge of the mortgage. And so would be the rule in awarding a conditional judgment in a suit for possession for breach of the conditions of the mortgage. R. S. c. 125, § 7, 9; Act of 1844, c. 104, § 1.

From the sum received for insurance, should be deducted the cost of collection, and the amount paid for premium, which would leave $965,38, to be appropriated as profits received by the mortgagee. This sum should be applied to the payment of the interest due on all the notes described in the mortgage, (except the first, which has been collected,) on March 27, 1849, and the balance must be appropriated to the payment, *pro tanto*, of the principal of the unpaid note first payable. *Gould* v. *Tancred*, 2 Atk. 534.

It is proved that, when the note in suit became due, the plaintiff received $37,50, on an agreement for delay of payment, and it results, that he has received that amount, from the defendant, above the legal rate of interest.

The defendant claims, that such sum should be deducted from this demand of the plaintiff, as usurious interest. To that deduction he is entitled by statute. R. S. c. 69, § 2.

The plaintiff is entitled to judgment for the balance of his note and interest, after making the application, and deduction of payments, as herein directed, without costs.

The damages being reduced by proof, that more than legal interest has been taken by the plaintiff, on the note in suit, the defendant may recover costs. Stat. of 1846, c. 192.

In the action upon the MORTGAGE, the opinion was also announced by

HOWARD, J.—The demandant is entitled to a conditional judgment for possession of the premises demanded, for breach of the conditions of the mortgage. R. S. c. 125, § 7; Stat. of 1844, c. 104.

It is proved, that about the time when the notes described in the mortgage became due, the demandant received under an agreement with the mortgager, the tenant, for forbearance of payment one year, $37,50, on each thousand dollars, amounting, in the aggregate to $150, on the claim now under consideration; and that he received, at the same time, by payment of interest on his own notes to Johnson, the further sum of $180, advanced by the tenant. These sums amounting to $330, should be deducted from the amount claimed to be due, as payments made at that time. It also appears, that the demandant received, for insurance, $965,38, on the 27th of March, 1849. This sum we have held, in the preceding case, is to be accounted for as profits received by the mortgagee; and that it must be applied to the payment of the interest due on the unpaid notes described in the mortgage, on March 27, 1849, and that the balance should be appropriated to the payment, *pro tanto*, of the principal of the unpaid note first payable. Making the appropriation of these sums as directed, the amount, for which the conditional judgment must be entered, will be ascertained.

The demandant having taken more than legal interest, and the damages in the conditional judgment being thereby reduced, in the language of the statute, 1846, c. 192, he "shall recover no costs, but shall pay costs to the defendant."

MORRISON *versus* KITTRIDGE.

In an action for breach of warranty, in the conveyance of land, the defendant, by his pleadings, *may* bring the title into question.

In such a suit, brought originally in the District Court, the plaintiff, if he prevail, is entitled to full costs, although the damage which he recovers, do not exceed twenty dollars; the court not being authorized to decide that

the action, within the meaning of Rev. Stat. chap. 151, sect. 13, "should" have been brought before a justice of the peace.

COVENANT BROKEN.

SHEPLEY, C. J. — The action was brought upon the covenants contained in a deed conveying real estate, which had been before conveyed in mortgage. The mortgagee had not taken possession, and the plaintiff had not paid any part of the debt secured by the mortgage. He recovered nominal damages only. The question presented is, whether he was entitled to recover full costs.

It is provided by statute, chap. 116, sect. 1, that justices of the peace shall have original and exclusive jurisdiction of all civil actions, wherein the debt or damages demanded do not exceed twenty dollars, excepting certain enumerated actions, "and all other actions, where the title to real estate, according to the pleading or brief statement filed in the case, by either party, may be in question."

The second section provides, that when the sum demanded does not exceed twenty dollars, in the excepted cases, a justice of the peace shall have jurisdiction concurrently with the District Court.

The third section provides, that when it shall appear in either of the ways before mentioned, that the title to real estate is concerned or brought in question, the case shall, at the request of either party, be removed to the District Court.

The action might therefore have been safely brought before a justice of the peace, with an *ad damnum* of twenty dollars or less, and if the defendant had denied the execution or validity of the mortgage by his plea or brief statement, it might have been removed to the District Court. The plaintiff must be considered to have known the facts, which would have made a *prima facie* case, and the law applicable to them; and to have known, that he could at most recover only nominal damages. But with this knowledge, he had the election to bring his action before a justice of the peace, or in the District Court. He might have commenced his action in the

District Court with an *ad damnum* of less than twenty dollars, and have maintained it there.

It is provided by statute, chap. 151, sect. 13, if it shall appear on rendition of judgment in an action originally brought before the District Court, that the action should have been originally brought before a justice of the peace, the plaintiff shall not be entitled to recover for costs, more than one-quarter of the amount of debt or damage, so recovered.

The right to recover full costs does not therefore depend upon the amount recovered, or upon the fact that the title to real estate was concerned or brought into question, but upon the fact whether the action ought to have been originally brought before a justice of the peace. The court cannot determine, that it ought to have been so brought, when it might at the election of the plaintiff have been originally brought in the District Court. *The exceptions are sustained and full costs allowed.*

Morrison, for the plaintiff.

Rowe and *Bartlett*, for defendant.

MOORE, *Administrator*, *versus* PHILBRICK.

There is a want of jurisdiction in the Judge of Probate of any county to grant administration upon the estate of a person, whose domicil, at the time of his decease, was within the State, but not within such county.

Such want of jurisdiction, if it appear in the same record which exhibits the grant of administration, is decisive against the validity of the grant.

In a case, presented for decision upon a statement of facts, without any stipulation that the decision should be influenced by the pleadings, the defendant is to have judgment, if the facts would verify any plea, which would be a bar to the action.

In such a case, the pleadings do not require examination.

ASSUMPSIT to recover a debt alleged to have been due to Benjamin Moore. The case was submitted on facts agreed.

G. M. Weston, for plaintiff.

Morrison, for defendant.

WELLS, J. — By statute, c. 105, § 3, a Judge of Probate has power to grant administration upon the estate of a person, who, at the time of his decease, resided in the county, within which the Judge has authority to exercise his jurisdiction. And where it is granted, upon the estate of one who had his domicil in this State at the time of his decease, in a county where he did not reside, such administration is void. If a Judge of Probate has no jurisdiction over the case upon which he undertakes to adjudicate, his proceedings by the common law are *coram non judice*, and have no binding force upon any one. *Holyoke* v. *Haskins*, 5 Pick. 20, 9 Pick. 259; *Cutts* v. *Haskins*, 9 Mass. 543; *Sigourney* v. *Sibley*, 21 Pick. 101.

The plaintiff was appointed administrator upon the estate of Abraham Moor by the Judge of Probate for the county of Penobscot, and by the same record it appears, that the deceased, at the time of his death, resided in the county of Piscataquis. The Judge of Probate therefore for the county of Penobscot had no authority to make the appointment.

A recovery in this case would not protect the defendant from an action brought by a rightful administrator.

The twenty-second section of the statute before mentioned, which prohibits the jurisdiction of Judges of Probate from being contested in certain cases, excepts from its operation those in which "the want of jurisdiction appears on the same record."

Such want of jurisdiction appearing on the same record, which exhibits the appointment of the plaintiff as administrator, is decisive against his right to maintain this action.

It is contended on the part of the plaintiff, that the objection made by the defendant should have been taken in abatement. The case is presented for decision upon a statement of facts, without any stipulation, that it shall be made to depend upon the pleadings, or that their effect shall be controlled by them.

In such position of the case, the rule, as laid down in *Gardiner* v. *Nutting*, 5 Greenl. 140, is, that "in an agreed state of facts, the principle is, if there be no special limitation in the statement, that the defendant is to have judgment, if the facts would verify any plea, which would be a bar to the action."

But the facts in this case do show a bar to the action, and might be received in evidence under a plea in bar. *Stearns* v. *Burnham*, 5 Greenl. 261; *Langdon & al. Admr's* v. *Potter*, 11 Mass. 213; 1 Chit. on Plead. 485. The plaintiff has no cause of action against the defendant either on this or any other writ, and such ground of defence is properly pleadable in bar. *Jewett* v. *Jewett, Adm'x*, 5 Mass. 275. We do not mean to say, that the pleas, which were filed, were inappropriate to the defence, but that the case does not require their examination.

According to the agreement of the parties, a nonsuit must be entered. *Plaintiff nonsuit.*

ELDER *versus* TRUE.

If the mortgager of land, or his assignee, convey the same by deed of warranty, he no longer is entitled to redeem against the mortgage.

His grantee is under no obligation to redeem.

If the mortgage be foreclosed, the measure of damages to be recovered by such grantee, on the covenant of warranty, is the value of the land at the time of his eviction, with interest from that time.

If the covenantee have made improvement, since the taking of the deed, the value of them is to be included as part of the value of the land.

COVENANT BROKEN. The opinion of the court sufficiently presents the facts. By agreement, the court was to determine the measure of damage.

Kelley and *McCrillis*, for the plaintiff.

The damage to be assessed is the value of the land at the time of the eviction under the mortgage, with interest.

2 Greenl. on Ev. 242, 200; 8 Pick. 546, 547; 11 Pick. 462; 12 Mass. 304; 2 Green, N. Jersey, 48; 3 Metc. 81.

It was not the plaintiff's duty to redeem; he might well repose upon the covenants. The object of taking covenants is to obtain that repose.

Cutting, for the defendant.

Whose duty or privilege was it to redeem? Was it the plaintiff's or the defendant's?

In relation to these very premises, this court decided that True, after conveying to the plaintiff, had no right to redeem. *True* v. *Haley*, 24 Maine, 297.

Elder then succeeded exclusively to True's rights.

It was, then, the duty of Elder to redeem. He knew of the mortgage. The registry also was constructive notice to him. *Cushing* v. *Ayer*, 25 Maine, 393.

If, as was his duty, Elder had redeemed, then instead of resorting to the covenants of the defendant, he should have sought for a reimbursement out of the estate embraced in the Remick mortgage, which Remick had conveyed to Lowell, as the case finds, subsequently to his said conveyance to Sturgis, the defendant's grantor.

The Lowell tenement or estate was liable for the payment of the balance due on the mortgage, as between Lowell and Sturgis and his grantee, provided the Lowell estate was sufficient in value to pay that amount, about which there is no doubt, since the consideration, as expressed in Lowell's deed, was $1400. And Lowell could not claim a contribution.

In *Clowes* v. *Dickinson*, 5 Johns. Ch. R. 242, Chancellor Kent says, "The subsequent purchaser took only such right as the mortgager had in the remainder of the mortgaged premises; and the mortgager was bound to apply the land, he had retained, to discharge the mortgage debt and not to suffer the debt to fall upon the portion of land he had sold; and so discharging the mortgage debt, he would have no right of contribution against his own vendee. The subsequent purchaser under him, could not be in any better situation as it respected

the prior purchaser." And cites *Gill* v. *Lyon*, 1 Johns. Ch. R. 447; *Allen* v. *Clark*, 17 Pick. 55.

Thus Elder, by clearing off the mortgage, if Lowell neglected to do it, might have been reimbursed out of Lowell's part. And Elder, having succeeded exclusively to the legal rights and equities of True, cannot be permitted, after having neglected to enforce them, now, to resort to the defendant's covenants, for the recovery of any damages whatever.

True, in the former controversy, did all that man could do; he arose early and retired late. He made a tender. He filed his bills, both original and supplemental. He knocked at the doors of chancery loud and long, and no relief could be found there.

But if this position be found untenable, and if the plaintiff be entitled to recover at all, the measure of damage cannot exceed the amount due on the mortgage. *Norton* v. *Babcock*, 2 Metc. 516; *White* v. *Whitney*, 3 Metc. 89.

TENNEY, J. — The covenant alleged in the plaintiff's writ to have been broken, is in a deed of the defendant to the plaintiff dated May 20, 1839. The breach relied upon is a paramount and absolute title acquired by Joel Haley, on May 25, 1842, by virtue of a mortgage given by Jacob G. Remick, (from whom the defendant derived his interest through Edward G. Sturgis,) to Mark Haley on Sept. 30, 1834, assigned to said Joel Haley on the same day, and a foreclosure of the same. Joel Haley obtained a conditional judgment on that mortgage for possession; and the condition not having been fulfilled by the payment of the sum of $333,90, the amount found due upon the mortgage at the time of the judgment, a writ of possession was taken out, which was executed on May 25, 1839; and the premises were occupied by the tenants of Joel Haley; they paid rent to him, and one of these tenants was the defendant. After the mortgage of Remick was given, he conveyed a portion of the premises to said Sturgis, on Oct. 19, 1835, for the consideration of $2200, and Sturgis, on Oct. 26, 1835, conveyed the same

to the defendant for the consideration of $1000, and on Dec. 10, 1835, Remick conveyed the residue of the premises to John Lowell for the consideration of $1400. After an unsuccessful attempt of the defendant to redeem the premises by a resort to a bill in equity in his own name alone, he was permitted to amend his bill, by adding the name of Lowell as a party plaintiff, but the bill was dismissed at the hearing after the amendment.

The defendant denies the right of the plaintiff to recover damages; but if damages are recoverable, it is contended, that their amount should be limited to the sum, which was due upon the mortgage at the time of the eviction.

It is insisted, that under our statute, as determined in the case of *True, in Equity*, v. *Haley*, 24 Maine, 297, the defendant not being able to maintain a suit in equity, for the redemption of the premises, after the alienation of his interest therein, that his grantee was compelled to remove the incumbrance, or to forfeit the estate without remedy upon his grantor under the covenants in the deed. And it is further insisted, that if he had removed the incumbrance, he would have stood in the place of the mortgagee and held the entire estate, unless the owner of the part subsequently conveyed by the mortgager to Lowell, being of greater value than the amount due upon the mortgage, had reimbursed him the whole sum paid in the redemption.

If the amount of the debt secured by the mortgage, had been paid by the plaintiff previous to the foreclosure of the same, it would have been in the power of Lowell, by taking the proper steps, to have caused the discharge of the incumbrance upon the part of the premises held by him; whether by the payment of the whole debt or such proportion thereof, as his part of the premises bore to the whole, is a question not now presented for consideration, and one, which we cannot legally decide, inasmuch as the parties to be affected by such a decision are not now before us; and we cannot in a suit at law, consider the equities, which may have existed among the several owners of the right of redemption.

Was the plaintiff bound to make the advance for the removal of the incumbrance, or forfeit absolutely the estate held under the defendant, without recourse to him, as his warrantor for indemnity? The contract in the covenant in the deed was, that the premises were free from all incumbrances, at the time of the execution; that the grantor would warrant and defend the premises against the lawful claims of any persons. The import of this language is plain. There is nothing equivocal or ambiguous therein. The value of the estate, as it was represented in the deed, is supposed to have been given by the grantee. If the land was in fact incumbered, the grantor agreed to make it, what he had covenanted, that it was. The grantee is not presumed to have ascertained with certainty what incumbrances existed, at what time they would ripen into an indefeasible title, and what sum would be required for their removal, and to have contracted to remove them himself, when the grantor declares in the very covenant, that the premises are free from all incumbrances. Instead of being presumed to ascertain all these facts, the grantee is supposed to have taken his deed relying upon the covenants therein, that no lawful claim to the land, should be preferred against his title. If his duty and his obligations, were such as it is contended for the defendant they were, the result is, that he advanced to the grantor, the sum necessary to remove the incumbrances, (as he paid the value, as the land is described to be,) who had no right to it, and could be called upon for its restoration, only upon its payment, again by the grantee, to the party to whom it did belong. A more simple process would seem to be, to receive a deed of the grantor's right only, for a proper consideration, without covenants, if with them, the same burdens are legally imposed upon him.

The obvious meaning of the language of the covenants cannot be annihilated or changed by the difficulty, which the covenantor may find in causing a removal of the incumbrances, which he has undertaken. The duty, which he has contracted to perform, although attended with embarrassment, and met by obstacles, which may not be removed without

unexpected expense, cannot materially alter the intention of the parties, disclosed by the deed, and throw a burden upon the party, who did not undertake to bear it, and relieve the other from all damages, on account of a supposed inability to place the former, in the position, which he had engaged he should hold. The law, which precludes the defendant from maintaining a bill in equity in his own name, for the redemption of the estate, cannot absolve him from his liability on a covenant, that no incumbrance existed, when it turns out to be otherwise.

The statute of Massachusetts, revised in 1836, c. 107, § 13, has a provision substantially the same as that in the Revised Statutes of this State, c. 125, § 6, under which the case of *True* v. *Haley*, before referred to, was decided. In the case of *Norton* v. *Babcock*, cited for the defendant, it is said by the court, *arguendo*, "there is an outstanding mortgage, and the mortgagee is about to foreclose and oust the grantee. He must redeem or be evicted. If he is evicted, he will have a remedy on his covenants."

If the plaintiff had preferred the estate to the value of it, he could have removed the incumbrance; but not having so elected, he is not thereby barred of his remedy against his covenantor, upon his covenants.

The plaintiff not being bound to redeem in order to maintain an action upon his covenants, it follows, that he is entitled to such damages, as he has sustained by the breach of the defendant's engagement. The authorities very clearly give the rule, that the damages, which the covenantee shall recover, is the value of the land at the time of the eviction and interest; and if improvements and erections have been made by the covenantee, since he received his deed, the value of these may be properly estimated. *Babcock* v. *Norton*, 2 Metc. 510; *White* v. *Whitney*, 3 Metc. 81.

Defendant defaulted.

JEWETT *& al. versus* WADLEIGH *& al.*

An attorney at law, has no authority, *in virtue of his general employment*, to discharge an execution in favor of his client, unless upon payment of its whole amount.

Notwithstanding an engagement, made by an attorney with an execution debtor, to discharge the execution upon the payment of certain securities, which the debtor had lodged in his hands, amounting to a part only of the sum due on the execution, still the execution would not be discharged by the payment of the securities.

Even after the payment of the amount due on the securities, the creditor would be entitled to collect of the debtor upon the execution *at least* that portion of its amount, which was uncovered by the securities.

Where, upon such an engagement, the execution debtor should contract to pay *to the attorney* the balance of the execution, uncovered by the securities, in case they were not punctually met at their respective pay-days, such a contract would be without consideration, and could not be enforced.

ASSUMPSIT, submitted upon facts agreed.

The plaintiffs, as attorneys at law, had recovered a judgment and execution in favor of one Wilson, against the present defendants and another person, for $541,77, of which the costs were $18,14.

To discharge that execution, the defendants paid to the plaintiffs, $100, and gave them their two notes, with a surety, each for $150, made payable to the *plaintiffs*, one in one year, and the other in two years.

At the same time, the defendants gave to the plaintiffs a memorandum, in which it was stipulated that the execution should be discharged, if they paid said notes within thirty days from their pay-days; and that, if the notes should not be so paid, the defendants would pay *to the plaintiffs* the balance, $141,77, with interest. The first of the notes was not paid within the thirty days from its pay-day; but it was paid before the second note became payable. The second note was paid prior to its pay-day.

This suit is brought upon said memorandum, because of the delay in the payment of the first note.

The plaintiffs, pro se.

The plaintiffs were payees of the notes. They had a lien

on the judgment. They had power to discharge the judgment. That discharge was a good consideration for the notes. 14 Johns. 466; *Ib.* 378; 3 Burr. 1673; 12 Wend. 381.

On a contract, not under seal, made with an agent in his own name, for an undisclosed principal, either the principal or the agent may bring suit. 5 B. & Adol. 395. The condition as to prompt payment not having been performed by the defendants, their agreement to pay the balance of the execution became absolute. Time was of the essence of the contract. 2 Penn. 454. The promise involved no forfeiture. It was but a promise to pay a just and legal debt.

Sewall, for the defendants.

Wilson's judgment against the defendants is undischarged. Neither had the plaintiffs authority to discharge it, except upon full payment. There was, then, no consideration for the promise on which this suit is brought. The plaintiffs suggest their lien right. But they had received cash $100; being four or five times the amount of the whole bill of cost.

By accepting payment of the first note, the plaintiffs waived the delay in its payment. Money, not time, was the essential of the contract.

HOWARD, J. — It does not appear that the plaintiffs had any interest in the execution described in the agreement of the defendants, or in the judgment on which it issued, other than as attorneys to the creditor in the original suit. The argument for the plaintiffs assumes that the agreement was made with them solely; and this is in accordance with the evidence, and consistent with, if not the necessary import of, the terms of the agreement.

As attorneys of the creditor, it was competent for the plaintiffs, being intrusted with the execution, to collect it, and to discharge it upon the receipt of payment, but not to discharge it upon the receipt of a less sum than the amount due, unless specially authorized. They could control the remedy, but not release the debt. The powers and duties of attorneys

in this country, are much discussed in *Jenney* v. *Delesdernier*, 20 Maine, 183; *Lewis* v. *Gamage*, 1 Pick. 347.

The import of the agreement of the defendants was, that as they had settled the execution of Wilson, (the creditor,) against themselves and Purington, by payment of a portion in cash, and giving their own notes with surety, payable on time, to the plaintiffs, as the case shows, for a less sum than the amount of the balance of the execution, by $141,77, if those notes were paid within thirty days from the time they became due, "it was to be in full discharge of said execution," otherwise the defendants were to pay the balance of the execution to the plaintiffs. There is no evidence that the creditor knew of this arrangement, or that he authorized or ratified it. There is no proof that the execution has been discharged; on the contrary it is apparent, from the terms of the agreement, that it was not to be discharged, unless the notes were paid, as stipulated in the contract. The agreement to accept a smaller sum in satisfaction of the judgment, supposing such agreement to have been made, as the parties assume, was executory, and conditional, and the condition was not complied with. The execution was not, therefore, discharged, and the judgment is still in force for the amount now claimed, at least; even if the amount of the cash, and of the notes, which have been paid since the commencement of this suit, should be appropriated in payment, *pro tanto.*

Assuming that the plaintiffs, in their capacity as attorneys for the creditor, could have discharged the execution, under the circumstances, there is no proof that it has been done, and we cannot infer it from the evidence. And if it may be considered as paid in part, by the money and notes received by the plaintiffs, still the judgment may be enforced by the creditor, for the amount claimed under the agreement, in this suit. As no consideration has been shown for this agreement, it cannot be enforced.

Plaintiffs nonsuit.

ALDEN *versus* NOONEN.

Of the construction of the boundaries of lands.

The north line of B. & D's land is 100 rods and 6 inches north from the public road. A levy was made of land, described to lie north of B. & D's land, and commencing at a tree 85½ rods north from the road, and thence extending northwardly 72½ rods; thence east 14 rods; thence south 72½ rods to the N. E. corner of B. & D's land; thence west on their north line to said tree. The tree cannot be found. *Held*, that the south line of the levy is at B. & D's north line.

WRIT OF ENTRY, to recover a small lot, (20 by 50 feet,) of land. It is a part of a large tract formerly owned by one Greenleaf. Blake and Dix had owned a piece of land, extending northwardly to a point 100 rods and 6 inches from the road.

Sewall made a levy on Greenleaf's land, described, (so far as material to this case,) as beginning at a tree, 85½ rods north from the road, and lying north of Blake and Dix's land, and extending from said tree north, 72½ rods, and for its southern boundary, extending from the north-east corner of Blake and Dix's land west, along their north line, to said tree. The demandant has title under this levy. The tree cannot be found. If Sewall's levy is construed to begin at a point 85½ rods from the road, it will not cover the demanded premises, and the demandant is not entitled to recover. But if Sewall's levy be construed to commence at the north line of Blake and Dix's land, it will embrace the demanded premises, and the demandant will be entitled to recover. In that case, however, the levy will extend a few rods farther north than Greenleaf ever owned.

Cutting, for the plaintiff.

Moody, for the defendant.

WELLS, J. — The demandant claims title under Joseph Sewall and others, by virtue of a levy made in their favor against Samuel Greenleaf, to whom Catherine Haynes conveyed two parcels of real estate, extending from the county

road, in a north course, one hundred and sixty-three rods. There were three levies made on Greenleaf's land. The first was in favor of Stephen Higginson and another, commencing on the county road and extending north thirty one rods, eight feet and nine inches. The second was in favor of Martin Blake and two others whose name was Dix, beginning on the northeast corner of the land set off to Higginson and another, and reciting its distance from the county road, thence running north sixty-eight and a half rods. The extent of these two levies from the road is one hundred rods and six inches. The third is that of Joseph Sewall and others, and is described as follows: — "beginning at a small hemlock tree, marked, standing eighty-five and a half rods from the county road, on the east line of land owned by John Barker, and lying north of land set off from Samuel Greenleaf to Blake and Dix, thence running north by land of John Barker seventy-two and a half rods to a stake and stones, thence east fourteen rods to the west line of land owned by Allen Gilman, thence south seventy-two and a half rods to a stake and stones on the west line of said Gilman's land, and on the north-east corner of land of Blake and Dix, thence west fourteen rods by the north line of Blake and Dix's land to a hemlock tree, being the first mentioned bounds, containing six acres and sixty-five rods."

If the third levy commences at the north line of the second, then the demandant is entitled to recover, but if it commences eighty-five and a half rods from the road, then the tenant is entitled to recover. The location of the hemlock tree and the stake and stones cannot be ascertained. No witness is produced, who is able to testify to their existence. The levy of Blake and Dix is referred to as a boundary three several times in that of Sewall and others, and there could be no difficulty in finding its northern limits by running from the county road. It is quite apparent that it was intended to make the third levy contiguous to the second, but not to interfere with it. And it is more probable that the hemlock tree was in fact at the north-west corner of the Blake and Dix lot, than fourteen and a half rods south of it. The error might have originated by

assuming, without an admeasurement, the distance of the Blake and Dix north line from the road. In *Pride* v. *Lunt*, 19 Maine, 115, land set off on execution, when found to exist as described, was regarded as a monument.

Assuming the second levy to be a monument, the limits of which can be clearly ascertained, then the levy under which the demandant claims, being the third one, must be bounded by it, and the line, eighty-five and a half rods from the road, must yield to the monument as more certain evidence. If the location of the hemlock tree had been found, not in the northern line of the second levy, then there would be two monuments incompatible with each other, and it would have become necessary to determine which of them should prevail, as in the case of *Lincoln* v. *Wilder*, 29 Maine, 169. But it cannot be found, and the place where it stood is declared in one part of the levy by a length of line merely, and in another part by the northern line of the second levy, and the places are not coincident. It is more satisfactory to believe, that the two monuments, which, to meet the intention of the parties, ought to coincide, did so in fact, rather than that they were several rods apart. Viewing the case as if no tree had been mentioned, the southern boundary of the demanded premises is well defined by the northern line of the second levy. The fact, that the demandant's land, if it commences at the second levy, would by its length of lines extend nine rods beyond the land of the judgment debtor, is evidence of some weight in favor of the tenant, but not sufficient to control the boundary by the second levy. So also the declarations of the demandant, that his land embraced a part of that, which lay within the limits of the second levy, cannot be regarded of much importance, for there was no location of the dividing line between the parties, nor any agreement in relation to it, and it is manifest that they were made under a mistake. *Gove* v. *Richardson*, 4 Greenl. 327.

According to the view taken of the case, the demandant is entitled to recover, and he claims three-fourths of the demanded premises. He does not disclose a title to but one-fourth.

It is agreed between the parties, that he might introduce at the argument, any other deeds to show his title. One is mentioned in the argument from two of the execution creditors to Joseph Sewall, but it is not found among the papers. Upon the exhibition of it to the court by the demandant, he can have judgment for three-fourths of the premises.

The right to betterments does not appear to be contested. There was but one witness, who testified to them, and to the value of the premises. The former he estimates at one hundred and fifty dollars, and the latter to be worth from twenty to twenty-five dollars, and a medium would be twenty-two dollars and fifty cents. The parties must be governed by the estimate made by the witness, which was upon the whole lot, as to the proportion, which the demandant must pay or receive, in the same manner as is provided by the statute, if those sums had been found by a jury.

Judgment for the demandants.

DWINEL *versus* BARNARD *& al.*

When parties each have a real interest in carrying forward an enterprise, (though the interest of one may be distinct from that of the other,) and the one agrees to pay the other a proportion of the expenses incurred by that other in sending a number of men from their place of residence to a distant point to protect the enterprise, "and of all expenses in connection therewith," the wages and expenses of the men *while returning*, (if they return immediately after having performed the service,) are within the contract.

The agreed portion of such expenses may be recovered under the contract, although the plaintiff who *incurred* them, has not actually *paid* them. His *liability* to pay is a sufficient ground of action.

THIS case was before the court on a former occasion. 28 Maine, 554.

The plaintiff had made a canal or cut, to unite the waters of the Allegash with the upper waters of the Penobscot, and given permission to the defendants to run their logs through, for which they promised him, *inter alia*, to pay one half of

all expenses, incurred by him in bringing up to said cut from Bangor about fifty men to protect and guard said cut, "and all expenses in connection therewith."

The plaintiff proved, that he employed the men and paid them their bills in part, and is liable to pay them the residue. This suit is brought to recover one half of their wages and expenses, while on their way to the cut and while returning from the same.

The defendants contended, that the plaintiff is not entitled to recover for any of the wages or expenses, which he had not *actually paid.*

The defendants further contended, that they were not liable for the wages or expenses of the men, while returning from the canal to Bangor.

The instructions to the jury were, that if the plaintiff had incurred the expenses, and was liable therefor, it was no defence, that he had not actually paid them; and that if it was either expressly or impliedly, agreed by the plaintiff with the men, that their wages and expenses should be paid while returning, and they did return immediately after the defendants' logs had been passed through the canal, their wages and expenses might be regarded as "connected with the bringing up the men to guard the cut," and be recovered for in this suit. To these instructions the defendants excepted.

Ingersoll and *Washburn*, for the defendants.

1. The liability of the defendants does not depend on the agreement which the plaintiff may have made to pay the wages and expenses of the men while returning, but whether such an agreement was a necessary or a reasonable one.

2. Until the plaintiff shall have *actually paid* the expenses he can maintain no suit for reimbursement. His mere liability to pay is not a legal ground of action.

Rowe, for the plaintiff.

Howard, J. — This case has been presented to us before, on a report of the evidence, *Dwinel* v. *Barnard & al.* 28 Maine, 554. It was then held, that the plaintiff was entitled

to recover upon the contract; and the amount of damages, which were then unsettled, have since been determined by verdict. The cause is now presented on exceptions to the instructions given to the jury at the trial.

By the written contract, the defendants were to pay, in addition to two shillings for every thousand feet of their timber "run through the plaintiff's cut," "*one half of all expenses incurred by said Dwinel in bringing up to said cut, from Bangor, about fifty men to protect and guard said cut, and all expenses in connection therewith.*" The controversy is now, principally, respecting the construction of that portion of the contract last above quoted.

What were the expenses incurred by the plaintiff, and whether they were within the meaning of the contract, as interpreted by the court, were questions which the presiding Judge properly submitted to the jury. Whether the plaintiff has paid, or is liable, only, to pay those expenses, cannot operate on his right to recover of the defendants. They are not affected by his independent contract with others, either in the breach or observance, but their liability arises from their own contract, and is to be measured in this particular by the expenses incurred. The instructions in this respect were correct.

The defendants contended, that the plaintiff, under the contract with them, had no right to charge and recover for the time and expenses of the return of the men employed. But the instructions to the jury were, that the plaintiff could not recover for the wages of these men, for guarding the cut after the defendants' logs had passed through it, and, that he might recover for the expenses and wages, while returning, of those men who returned immediately after these logs had passed the cut, and for such expenses and wages, thus incurred, as the plaintiff was bound to pay, either by an express or implied contract; but that for the expenses and wages of such as he had a right to discharge at the cut, and such as remained there, and went into other business, he could not recover.

Whatever expenses the plaintiff was bound to pay, under his engagement with the men employed for the purposes mentioned, would seem to be incurred in "connection therewith," and were within the terms and meaning of the contract with the defendants. The expenses claimed are such as might ordinarily result from the nature of the employment in a distant, and comparatively uninhabited territory, and such as the defendants would be likely to understand were embraced in the provisions of their contract. That contract does not limit the expenses, to be paid by the defendants, to the mere expenses of "bringing up" the men, but includes the expenses incurred by the *plaintiff*, in "bringing up" the men, for the purposes specified, and such other expenses as he might incur in connection therewith.

What expenses the plaintiff did thus in fact incur, was a question for the jury; and, in our opinion, that question was forcibly presented by the instructions.

Exceptions overruled. Judgment on the verdict.

DWINEL *versus* SOPER.

In levying an execution against two joint debtors upon real estate held by them in common, it is not necessary to appraise each one's share separately.

In making such a levy, the taking of land to an amount greater, by one cent and three mills, than the creditor was entitled to, will not vacate the levy.

Such a case comes within the rule, "*de minimis lex non curat.*"

In such a levy, one of the debtors lived upon the land, and the other within a half a mile of it, and the officer, in his return, certified that, at ten o'clock in the forenoon, he left at the dwellinghouse of each, a written notice, stating that he had seized the land, and requesting them to choose an appraiser, to assist in the appraisement to be made at five o'clock in the afternoon of the same day, and that that was a reasonable notice. *Held*, that, *if* the officer's return was not conclusive, the *court* could not decide that the time allowed, to the debtors to choose an appraiser, was not a sufficient one.

WRIT OF ENTRY against Henry R. Soper.

The demandant claimed title under a levy made upon an execution in his favor against this tenant, and William N. Soper. The tenant contended that the alleged levy was invalid. The case was submitted for nonsuit or default, as the rights of the parties may require.

Hilliard, for the defendant.

1. The estate of each of the tenants in common should have been appraised separately. Their estates may have been in unequal shares; or one may have had a fee and the other but a life-estate. Upon this point, R. S. c. 94, § 11, is peremptory. The object relates not only to the mode of redeeming, but it is to show, as between the debtors, how much each one has paid. 3 Greenl. 288; 3 Pick. 250; 2 Black. Com. 191.

2. Too much land in value was taken, by one cent and three mills. This vacates the levy. The case is not within the rule "*de minimis lex non curat.*" 5 Mass. 367; 2 Greenl. 375; 8 Metc. 136; 22 Pick. 297; 4 Greenl. 298; 26 Maine, 277.

3. There was not sufficient notice to the debtors to appoint an appraiser. Both of them were absent from home. 6 Greenl. 162.

Peters, for the plaintiff.

1. The statute requiring separate appraisals, applies only to cases where there is some tenant in common, other than the execution debtors. In this case, the debtors owned the whole, and owned it in equal shares.

2. The tenant contends that land was taken of too much value by one cent and three mills. The law has wisely provided a rule, that such insignificant variances shall not vacate titles. 8 Conn. 45; 9 Conn. 573; 1 Fairf. 108.

3. The notice to one of the debtors and co-tenants was sufficient. To the one of them, who lived on the land, the notice was seasonable, and so it is believed was the notice to the other. 6 Greenl. 162. The officer's return specifying what notice was given, and that it was a reasonable notice, is conclusive.

SHEPLEY, C. J. — The title of the demandant depends upon the validity of a levy made upon the premises.

The objections to it are: —

1. That reasonable notice was not given to the debtors to choose an appraiser.

The return made by the officer states the facts respecting the notice, and that it was a reasonable one.

The statute, chap. 94, sect. 5, requires, that a debtor should be allowed a reasonable specified time within which to appoint an appraiser. The return states, that one of the debtors resided upon the premises, and the other within half a mile of them. That he left written notices at their respective dwelling-houses, at ten of the clock in the forenoon, to choose an appraiser, to make the appraisement at five of the clock in the afternoon of the same day. If the return of the officer were not conclusive, the court could not decide, that there was not a reasonable time allowed.

2. The second objection is, that the share of each debtor in the common estate was not appraised separately.

There is nothing in the levy, which could have the effect to change the character of the estate, when redeemed. Both portions of the estate being united in the creditor, the tenancy in common would cease, when it was not redeemed. Equal shares of a common estate must of necessity be of equal value.

3. The third objection is, that the value of the estate exceeded by the sum of one cent and three mills the amount of the debt, costs and fees.

In the case of *Boyden* v. *Moore*, 5 Mass. 365, it was said, "if any sum large enough to be discharged in the current coin of the country is a trifle," "it will be difficult to draw a line, and say how large a sum must be, not to be a trifle." This was said in a course of reasoning to show that forty-one cents could not be disregarded as a trifle. And in the same case it is said, that a verdict would not be set aside to relieve a party against an error of forty cents, and this term appears to have

been used to designate the error before named, of forty-one cents.

In the case of *Huse* v. *Merriam*, 2 Greenl. 375, the taxes assessed exceeded by eighty-seven cents the amount authorized by law, and the decision was, that the excess did not fall within the maxim *de minimis non curat lex.* The case of *Boyden* v. *Moore* was referred to with approbation.

In the case of *Huntington* v. *Winchell*, 8 Conn. 45, the title depended upon the validity of levies made to satisfy two executions. The value of the estate exceeded the amount to be paid, in one, ten cents, and in the other, seventeen cents. The maxim was considered to be applicable to these sums, and the levies were held to be valid.

In the case of *Spencer* v. *Champion*, 9 Conn. 537, the value exceeded by fourteen cents the amount to be paid, and the levy was sustained.

In the case of *Pickett* v. *Breckenridge*, 22 Pick. 297, the value of the estate exceeded by three dollars the amount to be paid, and it was decided to be invalid.

An amount, which cannot be paid in any legally current coin of the country, must of course be disregarded.

A literal application of the maxim would authorize the court to disregard also in the estimate of value one of the least of the current coins. *Tenant defaulted.*

SOPER *& al. versus* VEAZIE.

When the plaintiff in aid of his book account, testifies that the article in controversy was delivered, not to the defendant, but to another person for the defendant's use, the book is to be excluded, unless there also be other proof that such third person was in the agency of the defendant.

EXCEPTIONS from the District Court, HATHAWAY, J. They were taken to that ruling, by which the plaintiffs' book of account was excluded as evidence.

Hilliard, for the plaintiff.

Peters, for the defendant.

TENNEY, J. — It appears by the exceptions, that after all the testimony of the witnesses, and the evidence contained in the depositions were adduced, the plaintiffs offered their book of accounts, and the suppletory oath of the plaintiff, William R. Soper. The oath being administered, he stated, that none of the articles charged, were delivered to the defendant, but to Joseph L. Smith, Hiram Smith and Van Rensalaer Colson, whose testimony was in the case. Upon objection of the defendant, the book was excluded.

The book would not have been objectionable, on account of the articles therein charged, not having been delivered to the defendant personally, if there had been evidence tending to show, that they were received by any one, who was his agent authorized for that purpose. *Mitchell* v. *Belknap*, 23 Maine, 481. But it does not appear, that any article charged, was taken by one, whose agency is attempted to be shown by the least evidence in the case, and the book, if suffered to go to the jury, could have had no legitimate effect.

Exceptions overruled.

SMITH *& ux. versus* CANNELL.

Where land is conveyed with covenants of general warranty, and, *at the same time*, is re-conveyed *in mortgage*, with like covenants of warranty, no action upon the covenants in the *mortgage* can be maintained by the *mortgagee* or his *assignee*.

Thus, where such deeds were given, it was *Held*, that the assignee of the mortgagee could not recover, upon the mortgager's covenants, for an eviction under a judgment for dower recovered against such assignee by the widow of the mortgagee.

COVENANT BROKEN.

Richard F. Bartlett conveyed land, by deed with covenants of general warranty, to the defendant, who at the same time, and as a part of the same transaction, re-conveyed the same to Bartlett, *in mortgage*, with like covenants. Bartlett, at

the time, had a wife, but she did no act, whereby to bar her right of dower. Bartlett entered, according to law, for a foreclosure, and before the end of three years assigned the mortgage. After the foreclosure was perfected, the assignee of the mortgagee conveyed the land, which, by several subsequent and connected conveyances, became vested in the female plaintiff.

Bartlett died insolvent, and his widow, in a suit at law, recovered dower against these plaintiffs. The dower was assigned, and the plaintiffs afterwards purchased it of the widow.

This action is brought upon the covenants, contained in the *mortgage* deed, given by the defendant to Bartlett. The case was submitted for legal adjudication.

Hilliard, for the plaintiffs.

The defendant's covenants in his mortgage deed were broken by the widow's recovery of dower. 2 Stark. Ev. 435; *Sprague* v. *Baker*, 17 Mass. 589.

Such covenants run with the land, though the intervening conveyances be by quitclaim deed only. 24 Maine, 383; 8 Greenl. 233; 6 Metc. 439; 28 Maine, 497; 4 Hill, 345.

The plaintiffs are not estopped by the covenants in the deed made by Bartlett to the defendants. 28 Maine, 497; 12 Metc. 459. Those covenants might bind heirs, but not assignees for value.

Estoppels are to avoid circuity. Here could be no circuity, because Bartlett's estate is insolvent, and the claim should go before the commissioners of insolvency.

Cutting, for the defendant.

Bartlett could not have maintained suit against his grantee, on an allegation that his own wife had an inchoate right of dower, in the very estate which he had warranted to the grantee.

His assignee could take no greater rights than the assignor had. There has been a mistake of parties. It is the grantee, the defendant, and not the grantor, the mortgagee, or his assignee, who is entitled to actions upon the covenants. 24 Maine, 525; 10 Conn. 422; 10 N. H. 33.

If the defendant's covenants run with the land, so did his grantors. But, if the defendant's covenants were broken at all, they were broken before the assignment of the mortgage, they were broken the moment when given, and did not run with the land. 22 Pick. 447.

TENNEY, J. — An absolute deed and a mortgage of the same land given at the same time by the grantee to the grantor, to secure the consideration, are regarded as one transaction; but the law will adjudge priority of operation, for otherwise the tendency would be to defeat, rather than to carry into effect, the intention of the parties. *Hubbard* v. *Norton*, 10 Conn. 422. When both such deeds contain covenants of warranty, the covenants are not considered to be mutually acted upon, each by the other, and their operation thereby destroyed; those in the mortgage do not estop the party claiming to recover upon those in the absolute deed. *Ibid.* *Brown* v. *Staples*, 28 Maine, 497.

The grantor in the absolute deed has sold the land; the mortgagee has pledged it only, for the security of the purchase money. By the sale the grantor received a consideration, and is bound by his covenants to indemnify the grantee for all defects in the title, and for incumbrances existing at the time of the conveyance.

As between these parties, the purchaser really pledges nothing but the interest, which he obtained under the deed to him, and is answerable to him for no imperfection in the title, existing before the conveyance. *Haynes* v. *Stevens*, 11 N. H. 28.

If the mortgage is redeemed, it has discharged its office as security, and ceases to be operative. If it is foreclosed, the title, which passed by the absolute deed, is restored to the grantor, or those who claim under him. And the one having the mortgagee's right after foreclosure of the mortgage, cannot be allowed to recover damages for a breach of the covenant therein, made by the mortgagee, or existing at the time of his conveyance; for the effect of such recovery would be, to obtain

all that he parted with in the conveyance, and the value of the incumbrance, which he is relieved from removing by the foreclosure. Such consequences would be unjust.

An inchoate right of dower is an existing incumbrance on the land, within the meaning of the covenant against incumbrances. *Porter* v. *Noyes*, 2 Greenl. 22; *Shearer* v. *Ranger*, 22 Pick. 447.

At the time Bartlett sold and conveyed to the defendant, Frances S. Bartlett being then his wife, the covenant in that deed against incumbrances was broken, and in an action therefor, it would have been no defence, that the defendant had given a mortgage to Bartlett at the same time with a similar covenant.

The plaintiffs claiming under an assignment of that mortgage, and several mesne conveyances, they can trace their supposed right to recover in this action only through that assignment. Each person, while he held the interest of the mortgagee, could equally with the plaintiffs maintain the action for the breach of this covenant. If any one, so holding the interest, had released the covenant, no subsequent grantee could make the breach thereof available. And if for other reasons, any one in the chain of title under the mortgage is precluded from maintaining an action for the same cause, his grantee could acquire no right superior to that, of him from whom he derived his title. The mortgagee having no ground of action for the breach, which he had covenanted against, could not impart to any one a right, which he did not possess.

Neither the insolvency of Bartlett's estate, which would render a claim against it of little or no value; nor the lapse of time, which might prevent its allowance, can have the effect to take away the defence, which was once open.

Plaintiffs nonsuit.

MORTON'S *Adm'r versus* HODGDON.

A disavowal, (by the owner,) of any title to personal property, will not preclude him from setting up his ownership, even as against the party to whom the disavowal was made, *unless* the conduct of such party was influenced by it, and *unless* it was made for the purpose of having such influence.

Personal property, under mortgage, and remaining by the contract in possession of the mortgager, is not attachable as the property of the *mortgagee.*

Property, which the officer had no right to attach, cannot be retained by him for the purpose of enforcing a reimbursement of money, which he may have paid to discharge a prior lien upon it.

REPLEVIN of a yoke of oxen, which had been attached as the property of Cyrus S. Clark, and placed by the officer in the hands of the defendant for safe keeping. When attached, they were found at the barn of one Tebbetts, who claimed to have a lien upon them for their keep. The creditor's attorney paid that claim, and the amount was refunded to him by the attaching officer. The other material facts are stated in the opinion. The *evidence* was submitted to the court, by whom judgment was to be rendered according to the rights of the parties.

Rowe and *Bartlett*, for the defendant.

Evidence of property in plaintiff's intestate is inadmissible. The taking and detention were induced solely by the statements of the intestate. His representative, therefore, is estopped to deny the truth of those statements. *Gregg* v. *Wells*, 10 Ad. & El. 90; *Tufts* v. *Hayes*, 5 N. H. 453; *Gosling* v. *Birnie*, 7 Bing. 339; *Chapman* v. *Searle*, 3 Pick. 44; *Stephen* v. *Baird*, 9 Cow. 277; *Dezell* v. *Odell*, 3 Hill, 215, and cases there collated by BRONSON, J.; *Copeland* v. *Copeland*, 28 Maine, 525, 539; *Rangely* v. *Spring*, 21 Maine, 130.

Defendant is entitled to judgment for a return. The oxen having been rightfully attached, the money paid to Tebbetts was rightfully paid. Such payment operated as a transfer of Tebbetts' lien, and the property would be held to satisfy that

lien, even though it was not wanted to answer the attachment. *Townsend* v. *Newell*, 14 Pick. 332.

If defendant is not entitled to a return, he is at least entitled to damages, to the amount of the lien paid Tebbetts, and interest.

Defendant is entitled to a return, because the plaintiff had no right to his action of replevin, and the property was wrongfully taken from defendant. *Collins* v. *Evans*, 15 Pick. 63, 65, and cases cited; *Dillingham* v. *Smith*, 30 Maine, 370.

Courts refuse a return only where the general property is in plaintiff, or the law has disposed of it during the trial. *Wheeler* v. *Train*, 4 Pick. 168; *Whitwell* v. *Wells*, 24 Pick. 33; *Ingraham* v. *Martin*, 15 Maine, 373.

The officer is liable to Clark 's assignee for the oxen. They should therefore be returned to him, or to the defendant, his bailee.

Kelley and *McCrillis*, for the plaintiff.

WELLS, J. — The plaintiff 's intestate, Abraham Morton, was the owner of the oxen replevied, and in January, 1842, conveyed them in mortgage to Cyrus S. Clark, but by an agreement between him and Clark, he was to keep them until the expiration of the time of payment, in September then next following. They were subsequently attached on a writ in favor of Prescott & Josselyn, as the property of Morton. That attachment was released upon the declaration of Morton, that the oxen were not his property, but were the property of Clark; that he had sold them to Clark for sixty dollars, as payment towards a piece of land in Wellington; that he was to have the use of them that spring, if he kept them well, and that fall he was to drive them to Wellington or Brighton where Clark owned some farms. This communication was made to the attorney of Prescott & Josselyn, and he acting upon the information withdrew their attachment, which, having terminated, can have no connection with the subsequent one.

The same person, who was the attorney of Prescott & Josselyn, was also the attorney of Jenness, and caused the oxen to be attached in a suit brought by Jenness against Clark, as the property of Clark. And it is contended, that the plaintiff is barred from maintaining this action by the declaration made by Morton. But before one can be conclusively bound by a declaration made in relation to his interest in property, such declaration must be designed to influence the conduct of the person to whom it is addressed, and must have that effect. Morton had no knowledge of any intention on the part of Jenness or his attorney to attach the oxen as the property of Clark, and could not therefore have designed to influence him in that respect. If it had been communicated to him, he might have then stated the existence of the mortgage, and the particular provisions of it. There could have been no wilful purpose to mislead Jenness or his attorney, for he did not know that Jenness had any demand against Clark, nor that Jenness needed or had any occasion for information on the subject. What he said cannot operate as an estoppel under the circumstances of the case. 1 Story's Eq. Juris. sect. 393; *Welland Canal Co.* v. *Hathaway*, 8 Wend. 480; 28 Maine, 525; *Reynolds* v. *Loundsbury*, 6 Hill, 534; *Dewey* v. *Field*, 4 Metc. 381. But when such declaration has not the effect of an estoppel, so as absolutely to conclude the party making it, still it is evidence to be weighed in connection with other testimony, and to have such force as it may deserve. *Tufts* v. *Hayes*, 5 N. H. 452; *Wallis* v. *Truesdale*, 6 Pick. 455. In looking at the evidence, it does appear that Clark had a mortgage of the oxen, and by law his interest is not attachable, while the plaintiff had the possession and the right of redemption. The undisputed facts of the case outweigh the effect of the declaration of Morton, and the oxen cannot be considered so far the property of Clark, as to justify their attachment as his property, and the taking them out of the control of Morton, or the hands of Tebbetts, where they had been placed.

It is not certain there was a fraudulent purpose on the part

of Morton towards any one. Assuming that his language is correctly given, he might then have considered the mortgage as conveying the property to Clark in such manner as to authorize it to be called his property. No inquiry was made of him as to the mode of transfer, and no statement in relation to it.

It is further contended, that there should be judgment for the defendant, and a return of the property, because there was an existing lien in favor of Tebbetts, and that it was discharged by Jenness, through the agency of his attorney. By statute, chap. 117, sect. 38 and 39, personal property mortgaged or pledged may be attached by tendering to the mortgagee, pledgee, or holder, the amount of the debt, for which it is mortgaged or pledged, and when sold on execution the officer may apply the proceeds of the sale to the payment of the sum so paid or tendered. If the property is not held by the attachment, there is no power in the officer to make such application of the proceeds. The statute applies to cases where the property is attached by a creditor of the mortgager or pledger, and is sold as such on the execution. The officer cannot keep property, which he had no authority to attach, and sell it on execution, merely to reimburse a creditor for what he has paid to discharge a lien upon it.

Whether such payment would transfer the mortgage, or pledge, or lien to the person paying the money, in the same manner as if an assignment were made by the party holding it, when the attachment is invalid, it is not necessary in this case to determine. There was no arrangement between Tebbetts, who claimed the lien, and the officer, that the officer should hold as his servant, as was the case in *Townsend* v. *Newell*, 14 Pick. 332, but the money was first paid by the attorney, and afterwards to him by an agent of the creditor.

The oxen not being attachable as the property of Clark, the officer is under no official obligations to him or his assignee in bankruptcy, and cannot have a return of them.

Judgment for the plaintiff.

PAINE, *Adm'r*, *versus* MCINTIRE.

The remedy for an administrator *de bonis non*, upon an unsatisfied judgment, recovered by the original administrator, is by *scire facias*. Debt will not lie.

DEBT, brought by an administrator *de bonis non* upon an unsatisfied judgment recovered by the original administrator against this defendant.

Jewett and *Crosby* for the defendant objected: — 1st. That the action must be in the name of the former administrator or his executor or administrator.

2d. That the remedy is not by action of debt, but by *scire facias*.

A. W. Paine, for the plaintiff, cited R. S. c. 113, § 18; 6 Metc. 197; 1 B. & C. 150; 8 Cowen, 333; 15 Mass. 374; 1 Chit. on Pl. 15; 3 Rand. 287.

HOWARD, J. — By the common law, an administrator *de bonis non* cannot execute a judgment recovered by a former executor, or administrator, but may maintain a new action. *Snape* v. *Norgate*, Cro. Car. 167; *Yaites* v. *Gough*, Yelv. 83; *Barnhurst*, Yelv. 83; *Ket* v. *Life*, Yelv. 125; *Turner* v. *Davies*, 2 Saund. 149; *Grout* v. *Chamberlain*, 4 Mass. 611, 613; *Dale* v. *Roosevelt*, 8 Cowen, 333.

In England the law has been changed by an act of parliament, 17 Car. 2, c. 8; but here the modification has been made by our own statutes, 1821, c. 52, § 20; R. S. c. 120, § 8. These statutes furnish a remedy for the administrator *de bonis non* by *scire facias* only, on a judgment rendered for a prior administrator. He may pursue that remedy, but cannot maintain an action of debt on such judgment, under existing laws. *Plaintiff nonsuit.*

NOTE. — WELLS, J. took no part in this decision, having, at the time of the argument, been engaged in jury trials in another county.

HASTINGS *& al., Appellants, versus* DANIEL CLIFFORD *& ux.*

By the R. S. c. 95, a widow who elects to take the provision made for her in her husband's will, has no right also to dower in his estate, unless it plainly appear by the will to have been the testator's intention that she should have both.

When not entitled to both, she will be considered as accepting the provisions made in the will, unless, within six months from the probate of the will, she waives such provision.

A delay of more than six months to make the election, is to be considered an acceptance of the provsions made for her in the will, and constitutes a bar to her right of dower.

But if she "be deprived of the provision made for her by the will," she is entitled to dower, as if no such provision had been made. R. S. c. 95, section 14.

To confer such right of dower, it is not necessary that there be a total privation of the provision made for her in the will. It is sufficient, if there be a privation of a substantial part of it.

But whether, in case of a failure in the provision made for her by the will, she be entitled to dower, if, before the expiration of said six months, she knew of such failure, and made no election to claim the dower, *quære?*

APPEAL from a decree of the Judge of Probate, assigning dower to Hannah Hastings, the widow of James Hastings, and also an allowance of $465, out of the personal estate. Said James Hastings made a will, which was duly approved on the last Tuesday of March, 1847. On the thirtieth day of May, 1848, said Hannah was appointed executrix of said will. On the same day, in the Probate Court, she waived the provisions made for her in the will, and claimed dower in the real estate, and also petitioned for an allowance out of the personal estate, more than she would be entitled to as her distributive share. After preliminary proceedings duly had, the Judge of Probate caused dower in the real estate to be assigned to her, and also made her an allowance of $465, out of the personal estate. All the other facts, necessary to a full understanding of the case, are contained in the opinion of the court.

The reasons stated for the appeal are —

1st. That the Judge erred in allowing said sum out of said

personal estate, because the said Hannah did not, within six months after the probate of the will of the said James Hastings, elect to waive the pecuniary provision made for her by said will.

2d. That said Judge erred in allowing the said Hannah Hastings to have dower as aforesaid, because the said Hannah did not within six months after the probate of said will make her election to claim said dower.

WELLS, J. — It does not appear by the will of James Hastings, the testator, that he intended that his wife should receive the bequests in his will, in addition to her dower. It must so appear, by our statute, which has altered the rule of the common law, to entitle her to the provision in the will, and her dower also. It is not contended on her part that she has a right to both, but that she is not barred of her dower, although she made no election within six months from the probate of the will.

The statute, chap. 95, sect. 13, provides "where any such provision shall be made in the will of a husband, for the widow, she shall within six months after probate of the will, make her election, whether to accept it or claim her dower; but shall not be entitled to both, unless it appears by the will, that the testator plainly so intended." It does not say what shall be the consequence if she makes no election.

By the statute of 1783, chap. 24, sect. 8, "the widow, in all cases, may waive the provision made for her in the will of her deceased husband, and claim her dower," &c. This act has been construed to require an election by the widow before she can be entitled to her dower. *Reed* v. *Dickerman*, 12 Pick. 146.

The statute of 1821, chap. 38, sect. 15, enacts, that "the widow in all cases may waive the provision made for her in the will of her deceased husband, and claim her dower," &c. This language implies that the claim of dower depends upon the waiver of the provision in the will.

And it is not probable that the Legislature intended to

change the law in that respect by the Revised Statutes. If such intention had existed, it would be expected that it would have been expressed in terms different from those employed. The widow takes the provision in the will, unless she renounces it, and as she cannot have both the provision and the dower, without some act of renunciation, she must be understood as relinquishing her claim to dower. Such construction was given to a similar statute in Massachusetts. *Thompson* v. *McGaw*, 1 Metc. 66.

The delay of the widow to elect would constitute a bar to dower, unless her case falls within the provisions of the fourteenth section of chap. 95. By that it is enacted, that "if a woman be lawfully evicted of lands assigned to her as dower, or settled upon her as a jointure, or be deprived of the provision made for her by will, or otherwise, in lieu of dower, she may be endowed anew in like manner, as though no such assignment or provision had been made." By this section, if she has been deprived of the provision made for her by will, she may be endowed anew. The law confers no power upon its tribunals to direct a pecuniary equivalent to be paid to the widow, even if the estate were sufficient to authorize its exercise, for the provision of which she may have been deprived, but remits her to her dower. An actual or implied acceptance of the provision, which subsequently fails, or of which she is deprived, lets her into her claim of dower. She may be deprived of it by the insolvency of the estate, or want of title to it on the part of the testator, or by a different disposition made of it by him in his lifetime. If the husband should give to his wife by will a note for a thousand dollars, against a third person, and before his death should collect the note, he would thereby deprive her of what he had given to her. There would be ostensibly a provision made for her, but in reality none.

By his will, James Hastings gave to his wife with other bequests, "two notes of hand, one against the town of Brewer, dated June 24, 1831, of three hundred and eighteen dollars and twenty-two cents, signed by Watson Holbrook, treasurer,

the other against Thomas Drew, as principal, and F. and I. S. Whitman, sureties, of six hundred dollars, dated March 9, 1834." The notes returned in the inventory of the estate were, one against the town of Brewer for one hundred dollars, and one against Thomas Drew for one hundred and seventy-six dollars and thirty-eight cents, and it does not appear that there were any other notes belonging to the estate. The appraisers estimate the value of the note against Drew at fifty per cent. The notes inventoried fall short in amount to those named in the will, in the sum of six hundred and forty-one dollars and eighty-four cents. There was then a very material deficiency in this part of the provision made for the wife, and she was deprived of what was expressly given to her in the will. There was not an entire failure of the provision in the will, but of a substantial part of it. Her implied acceptance must be presumed, in the absence of any proof to the contrary, to have been made upon the belief, that the will truly expressed the provision made for her. No proof has been adduced, that she had any knowledge of the deficiency within six months from the probate of the will. The will was approved in March, 1847. The widow was appointed executrix in May, 1848, and at the same time returned the inventory of the estate, and waived the provision made for her in the will.

The inventory bears date, July 2, 1847, but it does not appear, that the widow had any knowledge of it, until she returned it to the Probate Court. She was under no obligations to procure it to be made before she was appointed executrix. What agency she had in it does not appear, nor that she took any part personally in having it made, nor had within six months from the probate of the will any information of its contents. Her acceptance by implication of the provision in the will must therefore be viewed, as having taken place under a misapprehension as to what she was to receive, a mistake arising not from any fault on her part, but from the exhibition in the will of a provision, which could not be obtained. She does not appear to have been guilty of any neglect in waiving the provisions made for her in the will

and claiming dower, after obtaining information of the deficiency, and she must be considered as entitled to her dower. 2 Story's Eq. Jur. § 1098; *Kedney* v. *Coussmaker*, 12 Ves. Jr. 136; *Wake* v. *Wake*, 1 Ves. Jr. 335; *Thompson* v. *McGaw*, before cited; 1 Roper, Husband & Wife, 584.

The Judge of Probate made an allowance to the widow of four hundred and sixty-five dollars out of the personal estate. As she can take nothing under the will, the personal property, not disposed of by it, exceeds the amount of the allowance, and the Judge had power by the statute, c. 93, § 15, to make such allowance to her. What was allowed to her is not wanted for the payment of debts. The whole of the real estate is valued in the inventory at eleven hundred dollars, and its income by the commissioners appointed to set off her dower at one hundred dollars a year. The one third of the real estate would not furnish her with sufficient means of support, and the allowance cannot be considered as unreasonable under the circumstances of the estate.

The decrees of the Judge of Probate are affirmed, and the case is remitted to that court for further proceedings.

Hobbs, for the appellants.

A. Sanborn, for the appellees.

HATHAWAY *versus* PERSONS UNKNOWN.

The court, in acting upon a report of commissioners appointed to make partition of land, cannot properly perform its duty, without ascertaining whether persons, known to be concerned and within the State, have had sufficient notice of the time and place of making partition, to enable them to be present at the partition, for the protection of their rights.

The commissioners' return, that they have given sufficient notice, is not conclusive upon the court.

They should state *what* they have done, and whether any, and what persons, (if any,) were known to them to be concerned, and resident within the State, and what notice was given to each of them.

PETITION for partition of real estate, representing that the

petitioners were seized of undivided portions of the land "with persons to the petitioners unknown."

Cyrus S. Clark was a part owner of the land and a resident of this State, at the time of filing the petition and during the whole pendency of the proceedings. At the return of the award, he appeared and objected to its acceptance, because the award does not show that any notice was given to him, or what sort of notice was given to any of the part owners. The report, however, was accepted, and Clark filed exceptions.

Kelley, for the excepting party.

Peters, contra.

SHEPLEY, C. J. — The return of the commissioners appointed to make partition, as amended, states, "we also gave sufficient notice of the time and place and purpose of our meeting for making said partition to all concerned, who were known and within the State, that they might be present at the meeting."

The statute, c. 121, § 23, provides, that the commissioners shall give sufficient notice of the time and place for making partition, to all concerned, who are known and within the State, that they may be present at the making thereof.

The rights of part owners not residing within the State and not notified are preserved to them by the twenty-seventh section, while the partition is made conclusive upon the rights of those residing within the State, except under certain circumstances. It is therefore of importance, that the part owners last named should be notified. The proceedings of the commissioners are to be returned to the court appointing them, to be confirmed, recommitted, or rejected.

The court could not properly perform this duty, without ascertaining whether persons known to be within the State and to be concerned, had been notified in such manner as to enable them to be present for the protection of their rights. It could not have been the intention of the Legislature to make the return of the commissioners, that they had given sufficient no-

tice, conclusive upon the court, without affording it any knowledge of the facts, upon which such a return had been made. The whole proceedings of the commissioners, and not matters of form only, are to be subjected to the revision of the court, for confirmation. The commissioners should therefore state, what they have done, and whether any, and what persons, if any, were known to them to be concerned, and to be resident within the State, and what notice was given to each one of them.

The former statute of 1821, chap. 37, sect. 7, which provided, that "due notice" should be given, received such a construction in the case of *Ware* v. *Hunnewell*, 20 Maine, 291. The substitution of the word "sufficient" for the word "due," is rather indicative than otherwise, of an intention to have the sufficiency of the notice presented for the consideration of the court, when called upon to confirm their proceedings. *The report is recommitted.*

DAKIN *versus* GODDARD.

Where a creditor, holding land by levy of an execution, subject to the debtor's right of redemption, has leased the same, the debtor, after redeeming, cannot recover of the *lessee* for the use and occupation prior to the redemption.

Neither, after redeeming, can the debtor, claiming to be, (by operation of law,) the assignee of the rents and earnings under the lease, recover of the lessee for any of the rents or earnings, which accrued prior to the redemption.

ASSUMPSIT for use and occupation of the plaintiff's land, and also for the third instalment of rent, payable under a lease of said land, made by one Southard to the defendant.

The case was submitted to the court upon an agreed statement of the facts.

Cutting, for the plaintiff.

1. The land, which was leased to the defendant on the 10th of May, 1842, was redeemed on the 10th of Nov. 1842, and on the next day the defendant was notified to pay the rent to the plaintiff.

The plaintiff's title having thus become perfected on the last day of the second quarter, he was entitled to the rents subsequently accruing under the lease, for the defendant was *then* holding under the plaintiff, either at sufferance or under the lease, at the plaintiff's election.

The defendant, by continuing to occupy after the notice to pay rent to the plaintiff, must be considered as assenting to be accountable to the plaintiff.

That the defendant so understood it, is shown by the payment he made to the plaintiff of the fourth instalment. His only fault was in not paying to the same party the third instalment, for which this suit is brought.

But the law of this case is already settled. *Southard* v. *Parker*, 26 Maine, 214, relating to this very lease. In that case the lessor sued the assignee of the lessee for this same third instalment, but was not permitted to recover. Unless this suit can be maintained, that assignee keeps the whole instalment, $512,50, without any consideration.

2. This action may well be maintained on the count for use and occupation.

The relation of landlord and tenant existed between these parties. *Curtis* v. *Treat*, 21 Maine, 525.

"Where the premises have been occupied *without* the knowledge or consent of the owner, the state of landlord and tenant does not exist between him and the occupant, and an action for use and occupation cannot be sustained."

"It is, however, competent for the parties to waive the tort; and if the tort be waived by them, the owner may have his remedy in assumpsit."

In this case the premises have been occupied *with* the knowledge and consent of the owner, and the defendant has already paid a part of the rent, viz. the last quarter's rent to the plaintiff.

Peters, for the defendant.

1. In no event can the plaintiff recover *in this form of action*, which is assumpsit. The remedy, if any, is in trespass for mesne profits. This was incidentally decided in 26 Maine, 214. There was no privity between these parties. There was no attornment to the plaintiff, and the notice to pay to the plaintiff raises no implied promise. It is said, the defendant's payment of the fourth instalment was a recognition, that he was *then* holding under the plaintiff. By the same reasoning his paying the third instalment to the assignee of the lessor is an admission, that he was, when that instalment accrued, holding under the lease.

2. The defendant was rightfully occupying under the lease until the redemption was made, Nov. 10, 1842. By that time, as the parties have agreed, more than three fourths of the whole year's earnings had accrued. They were, therefore, rightfully payable to the assignee of the lease, to whom they have been fully paid. If the plaintiff can recover in this suit, it must be for occupancy prior to the redemption.

Shepley, C. J. — The case is presented for decision upon facts agreed. It appears, that an execution in favor of Edward R. Southard and Myrick Emerson, against Gershom B. Weston and others, was levied on certain real estate, on November 22, 1841. Southard having acquired the interest of Emerson, leased a part of that estate to the defendant, on May 10, 1842, "to hold for the term of one year" from that time, "unless said premises shall be redeemed from said set-off." The lessee promised "to pay said rent to said lessor or his order, in four equal instalments, the first the fifth day of August, the second the fifth day of September, the third the fifth day of October, and the fourth the first day of December next.

John N. Gossler and the plaintiff became the owners of the estate, subject to the levy, and redeemed it on November 10, 1842; and on the following day gave notice to the defendant, that the rent, "except the two first quarters," was not to be paid to the lessor, but to the owners of the estate.

The defendant continued to occupy the estate, until May 10, 1843; and he paid the three first instalments of the rent to Oliver Parker, to whom the lease had been assigned on May 18, 1842. The third instalment was not paid until December 12, 1842. The fourth instalment was paid to Gossler and Dakin.

This action has been commenced to recover the amount of the third instalment, already paid to Parker, or to recover for the use and occupation of the estate, after it was redeemed, so far as the defendant has not paid therefor to Gossler and Dakin.

The tenancy under the lease was terminated on November 10, 1842, by the determination of the estate of the lessor at that time. The three first instalments of rent had become payable before that time, and their payment might have been enforced. Such payments, if they had been made, would have been legally made, and the defendant could not have been required to make them to any other person than the lessor or his assignee.

The lease did not become void by the termination of the tenancy. It continued to be a valid contract between the parties to it, and the lessor or his assignee could compel the defendant to perform all the duties, which he ought to have performed before the estate was redeemed, unless he was relieved from their performance by the termination of the estate, or by the terms of the lease. The estate was leased for one year for a certain sum, which was made payable on certain days named, having no correspondence to quarterly payments. The lessor or his assignee was entitled to collect and receive the rents, which had accrued before the estate was redeemed. The amount, which had accrued, must be determined by the lease and the facts agreed. The lease provided, that, if the premises should be redeemed, the lessee should pay "only a fair proportion of said rent." It is agreed, that "the occupation of said mill from May 10 till November 10, was more than three-quarters in value of the lease for a year from said 10th of May." By paying the third instalment to

the assignee of the lessor, the lessee paid no more than he was obliged by his lease to pay for the use of the premises, before they were redeemed; no more than a fair proportion of the yearly rent.

The right of the plaintiff to recover in this suit may be exhibited in a different manner. He can claim to recover only as assignee of the lease, by operation of law, or for use and occupation of the premises. Should his right to represent the lessor as assignee not be denied, he could only enforce the lease according to its terms; and the three first instalments of rent would be payable to the lessor as being the owner of the estate, when they became payable. Should he attempt to recover for the use and occupation of the estate, after it had been redeemed, he must be met by the fact agreed, that the occupation during the first half of the year was worth three-fourths of the whole year's rent; and it follows, that the occupation for the last half of the year was worth no more than one-fourth of that rent, which has been already paid to him.

The argument for the plaintiff alleges, that the rent accrued quarterly, and that a different decision will be at variance with the decision in the case of *Southard* v. *Parker*, 26 Maine, 214. In that case the facts do not appear to have been correctly presented, or if they were, to have been stated with entire accuracy. The opinion incorrectly states, that the premises were leased "at an annual rent payable quarter yearly," and the reasons assigned for the decision are based upon that erroneous exhibition of facts or position. The decision itself appears, as the facts are now exhibited, to have been correct, admitting the contract of September 2, 1842, to have been in force, and to be entirely consistent with the present. That was an action of assumpsit, containing a count for money had and received by Parker, to the use of Southard, who could not recover without proof, that the money received of the defendant was his property. This proof he failed to make, because he had agreed on September 2, 1842, to receive the rents "up to and including the fifth

of September instant," and to make no claim for rents after that time. If this contract was in force, and the estate was redeemed by virtue of its provisions, it disproved his right to any rent payable after the fifth of September and to the money in the hands of Parker, received for the third instalment of rent.

Gossler and Dakin by their settlement with Southard respecting the rents and profits of the estate might have recovered from him the amount of the third instalment if he had received it. Or they might have recovered it from any other person, in whose hands it was found, unless he had, before the estate was redeemed, acquired from Southard some right to it, which would prevent Southard from conveying it to them. *Plaintiff nonsuit.*

McLaughlin *versus* Shepherd.

A conveyance of land, and a bond, made at the same time, by the grantee, to re-convey upon the performance of conditions, constitute a mortgage.

An offer to perform the conditions defeats the conveyance.

Such a bond, though unrecorded, will be operative as against an attaching creditor of the grantor, who attached prior to the Revised Statutes, and who, at the time of the attachment, had notice, either *express* or *implied*, of such a bond.

An attaching *creditor* is chargeable with notice in the same manner and with the same effect, as a subsequent *purchaser*.

When proposing to purchase land, of which some person, other than the grantor, is in possession, it is the purchaser's duty to inquire into the state of the title.

The presumption of law is, that upon such inquiry, he ascertains the true state of the title.

Unless he make such inquiry, a presumption arises of a fraudulent intent in making the purchase.

A continued, uninterrupted possession by the grantor in such a case, is sufficient evidence from which to infer notice to one who purchased prior to the Revised Statutes, that such a bond existed.

The right of a mortgagee of land is not attachable or subject to a levy, as *his* property.

Entry. — Case for the plaintiff.

In June, 1838, the defendant conveyed the land to one Wellington, by a deed recorded in the same month, in consideration of three notes of $700 each, given by Wellington to him.

In October, 1838, a creditor of Wellington attached the land, and on obtaining judgment in 1846, levied it as the property of Wellington, and in 1847 released it to the plaintiff.

Case for the defendant.

Wellington, on taking the deed, gave to the defendant a bond, that if, within three years, the defendant should re-deliver the notes, or the part of them which might be unpaid, together with cash to the amount which might have been paid, with its interest, he would re-convey the land.

Within the three years, the defendant did offer to Wellington the notes, and requested the re-conveyance.

The defendant, at the time of making the deed, and ever afterwards to the time of the trial, was in possession of the land, residing upon it and occupying it exclusively.

Some controversy arose relative to the sufficiency of the attachment.

J. Godfrey and *J. & M. L. Appleton*, for plaintiff.

The plaintiff's record title must prevail unless invalidated. The deed and bond did not amount to a mortgage. 1 Fairf. 197; 15 Maine, 104.

Notice to the attaching creditor could not be *implied* from the possession in Wellington's grantor. 3 Pick. 155; 8 Johns. 105; 12 Johns. 453; 8 Greenl. 98; 3 Metc. 405; 11 Shepl. 29; 10 Shepl. 170; 26 Maine, 484; 23 Maine, 165; 3 Wend. 208; 8 Peters, 30.

Such possession raises a presumption, that the grantor was merely a tenant under the grantee. *Sherburne* v. *Jones*, 20 Maine, 70.

But if notice could be *implied* from such possession, it would be insufficient; for the Revised Statutes, c. 91, § 26, requires the notice to be *actual.*

Cutting, for defendant.

I. The bond and deed constituted a mortgage.

The condition of the bond was performed by the offer to Wellington of his notes and the request for a re-conveyance.

By that performance, the conveyance by defendant was defeated.

II. The statute of 1821, as to recording such a bond, is to govern in this case. By that statute, it was immaterial *when* the bond should be recorded.

III. The occupation by the defendant dispensed with the need of a registry of the bond. It was, of itself, sufficient notice of such a bond. 23 Maine, 233; 6 Maine, 256; 5 N. H. 181.

HOWARD, J. — The tenant owned and occupied the demanded premises, consisting of a house and lot in Bangor, and conveyed them by an absolute deed to Wellington, June 2, 1838. He took from Wellington a bond under seal, of the same date, and executed at the same time, to re-convey the premises within three years, upon the surrender of the notes, then given for the consideration of the conveyance, and upon a re-payment of such sums and interest as might have been paid by the grantee.

The deed was recorded June 30, 1838, but the bond was not recorded until November 20, 1843. Wellington did not enter into the possession of the premises, but the tenant and his family resided on, and occupied them, some time prior to, and ever since June 18, 1838.

A creditor of Wellington attached the premises in a suit on a demand accruing, and due, before 1838; obtained judgment and execution, and levied upon them, January 12, 1847, and conveyed his title and interest to the demandant.

Wellington did not pay any portion of his notes for the consideration, but the tenant, within the three years, requested of him a re-conveyance, offering to give up the notes specified in the bond, and in compliance with its conditions.

The deed and bond, being a part of the same transaction, constituted a mortgage between the parties, but whether it

can be regarded as such, against the attaching creditor, is the question presented by the report.

A subsequent purchaser of real estate, who had notice at the time of his purchase, of a prior unregistered deed, cannot, upon the strength of his prior registry, defeat the unrecorded deed. The notice to him has all the effect of a prior registry, and is alike effective, whether it be express or implied. This doctrine has been so fully discussed in English and American courts, and so frequently affirmed, that it may be considered as established law.

It has been held that possession by one, of an improved estate, under an unregistered deed, is notice to a subsequent purchaser, of the prior conveyance; and that such possession, is sufficient to put the subsequent purchaser upon an inquiry into the title, which he is about to purchase from a person who is not in possession. If he make the inquiry, the presumption of law is, that he ascertains the true state of the title; or if he neglect it, and purchases, there arises in either case, the presumption of a fraudulent intention in effecting the purchase. *Webster* v. *Maddox*, 6 Greenl. 258; *Matthews* v. *Demerritt*, 22 Maine, 312; Trowbridge's reading of the Province Law, of 9 Will. 3, chap. 7, 3 Mass. 573; *Farnsworth* v. *Childs*, 4 Mass. 638; *Norcross* v. *Widgery*, 2 Mass. 508; *Davis* v. *Blunt*, 6 Mass. 489; *Prescott* v. *Heard*, 10 Mass. 60; *McMechan* v. *Griffing*, 3 Pick. 152; *Curtis* v. *Mundy*, 3 Metc. 405, where it is held, under the Revised Statutes of Massachusetts, which provide that no unrecorded conveyance of real estate shall be valid and effectual, except against the grantor, &c., "and persons having *actual notice* thereof," that it is not necessary, in order to render such conveyance valid against a subsequent purchaser, that he should have positive and certain knowledge of its existence; but that the notice would be sufficient if it be such as men usually act upon in the ordinary affairs of life. *Pomroy* v. *Stevens*, 11 Metc. 244; *Jackson* v. *Sharp*, 9 Johns. 168; *Jackson* v. *Burgott*, 10 Johns. 471; *Day* v. *Dunham*, 2 Johns. Ch. 190; *LeNeve*

v. *LeNeve*, 3 Atk. 654; *Taylor* v. *Stibbert*, 2 Ves. 440; *Hiern* v. *Mill*, 13 Ves. 120; 1 Story's Com. on Eq. Juris. § 397; 4 Kent's Com. 169—174.

The statute, 1821, chap. 36, § 3, provides, "that no title or estate in fee simple, &c., of any lands, &c., within this State, shall be defeated or incumbered by any bond or other deed, or instrument of defeasance, in the hands or possession of any person, but the original party to such bond, deed, or other instrument or his heirs, unless such bond, deed, or other instrument of defeasance, be recorded at large in the registry of deeds, in which the original deed referred to in the said bond, deed, or other instrument of defeasance shall have been recorded." The *first* section of this chapter provides for the recording of *deeds*, and it has been construed in conformity with the doctrine and principles already stated; but the *third* section has not been so directly the subject of discussion, or of judicial interpretation. As the instrument of defeasance affects the title of the parties to the conveyance, there would seem to be the same necessity for recording it as for recording the deed, and for the like purpose of giving notice. Such, undoubtedly, was the object of the Legislature in framing the law. By analogy, this section should receive a similar construction, in reference to unrecorded instruments of defeasance, with the first section of the statute, in respect to unregistered deeds. A subsequent purchase, therefore, from the grantee, with knowledge, express or implied, of an unrecorded bond of defeasance, would not be valid against the mortgage. The subsequent purchaser would be chargeable with notice of the unregistered deed or instrument of defeasance, upon like evidence. *Newhall* v. *Burt*, 7 Pick. 159.

The case of *Fuller* v. *Pratt*, 1 Fairf. 197, has been cited, as advancing doctrine at variance with the views now indicated, on the subject of notice. But in that case it was determined that the instrument, taken by the grantor, did not constitute a defeasance; and although the Chief Justice remarked, in his opinion, that, if it had been a defeasance, it could not have operated as such, against any person but the original par-

ty to it, while unrecorded, yet this remark was merely incidental to the point upon which the decision was made ; and the effect of possession by the obligee was not then discussed by the court, and does not appear to have been there directly considered, or decided.

An attaching creditor is chargeable with notice in the same manner, and with like effect, as a subsequent purchaser. *Matthews* v. *Demerritt*, 22 Maine, 317.

In this case, the evidence was sufficient to put the creditor upon the inquiry into the nature of the title of his debtor; and if the inquiry had been instituted, it cannot be doubted that it must have resulted in his ascertaining the true state of the debtor's interest. The open, continued, and exclusive possession and occupation of the house and lot, by the tenant and his family, after his conveyance to Wellington, are facts from which notice might be inferred that he was in possession by right, and under the title which he actually had. *McKecknie* v. *Hoskins*, 23 Maine, 233; *Taylor* v. *Stibbert*, 2 Ves. 440.

Wellington's interest was only that of a mortgagee, and it was not attachable, or subject to a levy of execution. *Blanchard* v. *Colburn*, 16 Mass. 345; *Eaton* v. *Whiting*, 3 Pick. 484; *Smith* v. *People's Bank*, 24 Maine, 185.

The objections to the sufficiency of the attachment becoming immaterial to the result, are not considered.

Demandant nonsuit, according to the agreement of the parties.

KNOWLTON *& al. versus* SANFORD *& al.*

If, in a river, there be a common and known passage way for vessels to a wharf, there is, *ordinarily* no right in any person to obstruct it by anchoring a vessel upon it, or so near to it as to expose another vessel to danger, by compelling her to depart from the passage way.

In case of *absolute necessity*, however, a vessel may lawfully anchor upon such passage way, remaining no longer than the necessity exists.

In any such case of necessity, it is the master's duty to exercise reasonable skill, prudence and care to give all others their just rights of navigating the river. Whether he performs that duty, is a question of *fact* for the jury.

Though the distress of the vessel were *not* so stringent as that she *could* not have been stopped and anchored elsewhere than in the passage way, it is still matter, not of law for the court, but of fact for the jury, to determine whether the master, *under the circumstances*, performed his duty to others in occupying the passage way.

Even if, *without necessity*, a vessel should have anchored in such passage way, *that* would not authorize neglect in any other vessel, attempting to pass upon such passage way. Such other vessel is bound to the use of ordinary care and skill, though the first vessel was in the wrong. If, through want of such care and skill, on the part of the vessel attempting to pass, a collision should occur, her owners would be liable to the owners or shippers of the anchored vessel, for their damages.

Where a steamer, by user, has acquired the right to pass upon a particular passage way to a wharf, it is for the jury to decide whether other navigators are bound, *under the circumstances*, to know that there *is* such a passage way, and *where* it is.

CASE. The plaintiffs shipped goods on board the schooner Brandywine, bound from Boston to Bangor. When arrived in the Penobscot river, the schooner anchored, one evening, in Bucksport eddy. While there at anchor, the next morning, she was run into and sunk by the steamer Penobscot, owned by the defendants. To recover for the damage thereby done to the plaintiffs' goods, this action is brought. In relation to the extent of the damage, the parties submitted to the decision of referees, stipulating, however, that the submission should have no influence upon the question of the right of action. The referees estimated the plaintiff's damage at $779,13. At the trial, evidence was offered with a view to show, *that* the defendants had, from the year 1836, owned and occupied a wharf in Bucksport, for a steamboat landing; *that* they had for all that period, been accustomed to pass to their wharf in a particular course or passage way, and had the right, whenever their occasion should require it, to pass along that passage, unimpeded by vessels at anchor there; *that* the schooner was lying in that passage way; *that* so soon as she was discovered to be there, the officers and crew of the steamer used all due efforts, though unsuccessfully, to avoid

the collision; *that* the collision occurred without any fault on their part, but wholly by the fault of the officers and crew of the schooner; *that*, on the part of the officers and crew of the schooner, there was a want of skill and care by which the collision was produced.

On the other hand, evidence was offered to show, *that* by reason of adverse winds, and through injuries sustained by the schooner, in her sails and rigging, her officers and crew had lost the control of her; *that* only one sail was in any condition to be used, and that was much torn; *that* they could not proceed with her up the river, but were compelled to anchor at that spot for repair; *that* the steamer seasonably discovered her position, and might easily have avoided the collision; *that* the injury was occasioned wholly through the want of skill, care and prudence of the officers of the steamer; and *that* the officers and crew of the schooner used all requisite skill, diligence and care.

With a view to affect the question of damages, some evidence was offered, as to the character and soundness of the schooner, and as to the conduct of the master and others after the collision.

The jury were instructed *that* all vessels, when navigating our rivers, have common and equal rights; —

that every person is bound so to use this right as not to infringe the rights of others; —

that, if there is a common and known channel in the river, or a common and known passage way to a wharf, no person ordinarily has a right to occupy it by anchoring his vessel upon it, or so near to it as to compel another vessel to encounter danger by departing from it; —

that, however, in case of *absolute necessity*, a vessel may lawfully anchor there and remain there so long as the necessity exists, and no longer; —

that, if the schooner had met misfortune, and the master could not use another sail, (than the one impaired,) and could not go to a safe place to anchor, then he would be justified in anchoring, and be entitled to remain as long as that necessity was upon him, and no longer; —

that, in such case, however, it was the master's duty to exercise reasonable skill, prudence and care to give others their just rights of navigation, and whether he performed that duty was a question, not of *law* for the *court*, but of *fact* for the *jury*;

that, if he could have stopped and anchored elsewhere, it was still for the jury to consider whether he performed his duty or not; —

that, if the place of the schooner's anchorage was in the common passage way of the steamboat since 1836, as contended by the defendants, the jury should determine whether navigators should be held to know that there was such passage way, and where it was; —

that, if there was *no* necessity for anchoring there, or if the schooner remained longer than she should have done, *that* would not authorize neglect on the part of the steamer; *that* she would be bound to use ordinary care and skill, even if the master of the schooner was in the wrong; and *that*, if the collision happened through the want of such care and skill, on the part of the steamer, the defendants are liable; —

that, (on the question of damages,) the character and soundness of the schooner and what took place in the conduct of the master and crew *after the collision*, it was unnecessary for the jury to consider, as the amount had been adjusted by referees on that point.

The trial was before SHEPLEY, C. J. The verdict was for the plaintiff; and the defendants excepted to the instructions given to the jury.

J. Appleton, for the defendants.

1. The Brandywine had no right to anchor across the known track of the steamer, unless from absolute necessity.

"The party, who sets up necessity as an excuse for a violation of the statute, must make out the *vis major* under which he shelters himself, so as to leave no reasonable doubt of his innocence." *Brig Struggle* v. *U. S.*, 7 Cranch, 22.

"The necessity, which will excuse a violation of a law of trade, must be such as will produce a *well grounded appre-*

hension of the loss of *vessel, cargo or crew* on the mind of a skilful mariner." *New York*, 3 Wheat. 59.

Now whether it be a law of trade or a *law of way*, or the legal rights of passage, it matters not, the necessity, in *all* cases, which will justify a violation of the law of the State and the legal rights of others, must be a case of *stern, stringent* and pressing necessity. *The Scioto*, Daveis' R.; *Strout* v. *Foster*, 1 Pet. U. S. Rep. 89.

As a matter of *law* or *fact* the plaintiffs were under no inevitable, unavoidable, urgent necessity of stopping in the track of the steamer, and thus of obstructing the right of navigation.

It is not the abstract necessity of stopping — but of stopping in a *particular place.*

The jury were instructed, that it was for them to determine if the schooner was conducted *with a reasonable degree of care* to give others a fair use of navigation.

The position of the schooner, is in no respect a question of care, *or of degree of care*, but of *necessity* and of that alone.

Reference by the court to *care* or *degrees* of care, served to distract the jury from the real issue before them.

Another instruction to the jury was, that if the place of the schooner's anchorage was in the *common track* of the steamboat since 1836, it was *for them to determine* whether navigators should *not* know it.

Whether or not this was the common track of the steamboat is a *matter of fact*, and for the jury.

Whether or not navigators *were bound* to know it, if it had existed so long, is a question of *law*, and *for the court.*

If the track of the steamer has been uniform since 1836, then, as *matter of law*, navigators *were* or *were not* bound to know that fact.

But by their verdict, the jury must have decided that navigators *were not* bound to know it; *then*, unless this be the law, we are entitled to a new trial.

A most material question of law is submitted in the alternative to the jury, and they have decided that the navigators

are *not* bound to know the *track* of a steamboat, though it may be of fourteen years continuance.

Another instruction was that, if the schooner met with misfortune, and the master could not use another sail, and *could not* go to a *safe* place to anchor, *then* he would be justified in anchoring, and would be entitled to remain *as long* as that necessity was upon him and *no* longer.

This instruction was utterly disregarded by the jury. The evidence on the part of plaintiffs most completely and conclusively negatives such necessity.

The jury were instructed that, if the master of the schooner could *have stopped and anchored elsewhere*, it was for them to consider *whether* he has performed *his duty or not.*

This is erroneous.

It is for the jury to determine "if he could have stopped and anchored elsewhere;" if he could, *then* the law applies itself to that state of facts, and fixes *the duty of the master.*

The court do not determine what the duty of the master is, but submit it to the jury.

Suppose the jury found the *fact* to be, "that he might have stopped and anchored elsewhere," and that as matter of *law*, it was *not* his duty so to do; it is obvious that while right, as to the fact, they are *wrong* as to the law.

The law in the *alternative* was submitted to them, and the verdict shows it to have been erroneously settled by them.

Another instruction was that, even if the schooner was under no necessity of anchoring where she did, or if she remained longer there than she should have done, that would not authorize neglect on the part of the steamer. She would be bound to use ordinary care and skill, even if the master of the schooner was in the wrong; and if the collision happened through the want of such care and skill on the part of the steamer, the defendants are liable.

By this instruction, it is immaterial whether the plaintiff is in the *right* or *wrong*, is guilty of the grossest negligence, or has used ordinary care. The same care, skill and prudence

are required of the defendants, *irrespective* of the misconduct and negligence of the plaintiff.

If this be the law, the plaintiff is relieved from proving ordinary care. He may be as negligent as he chooses, and thus, by *his own misconduct*, impose new and onerous duties upon the defendant, and by throwing them on the defendant, he may *relieve* himself from the obligations which the law imposes upon him. *Rathburn* v. *Paine*, 19 Wend. 401.

The true rule is, that to authorize a recovery, proof of ordinary care should be required, from the *plaintiff*. Here the Judge erroneously required that proof from the *defendants*.

Kelley, for the plaintiffs.

Howard, J. — The plaintiffs shipped a quantity of goods, at Boston, on board the schooner Brandywine, to be delivered at Hampden, on the Penobscot river. While the schooner lay at anchor in the harbor and bay of Bucksport, on the river, the steamer Penobscot came into collision with her, producing a breach in her side, and causing her to sink, with all her cargo on board, in fifteen or twenty minutes. The schooner and cargo were afterward raised, and the plaintiffs, and other owners of the cargo, submitted, in writing, the question of damages to the appraisal of three men, mutually selected by themselves and the owners of the steamer; "each party protesting that it does not hereby compromise any legal rights; and the owners of said steamer protesting that they do not hereby admit themselves in any way to be liable for said damage, or for said collision. All parties are to be bound by the decision of the appraisers aforesaid, as to the amount of the damage." The damages sustained by the plaintiffs' goods were appraised at $779,13.

This presents a case of collision, in which damages are claimed by the shipper and owner of goods, on board the schooner, as resulting from the negligence of the defendants, as owners and managers of the steamer.

To the instructions given to the jury by the presiding Judge, as to the burden of proof, — the rights of vessels afloat, and passing on navigable waters, and the respective du-

ties of those managing them, so to use their own as not to impair the rights of others, — and the general right of a vessel to anchor in a passage way for vessels, only in cases of necessity, and then, no longer than the necessity required, the exceptions have not been presented in the argument.

The jury were instructed that they might determine from the evidence, "if the schooner was conducting with a reasonable degree of care to give others fair use of navigation;" and it appearing that she was anchored at the time of the accident, nearly, if not precisely in the line or track of the steamer, they were further instructed that they might determine in like manner, whether, if this was the common track of the steamboat since 1836, as contended by the defendants, navigators should not know it. "If so, then for a vessel to place herself at anchor across the steamer's track, would be to exercise a right to which she was not entitled, if she might find other places of safety for anchorage. If the schooner met with misfortune, and the master could not use another sail, (than the one impaired,) and could not go to a safe place to anchor, then he would be justified in anchoring, and be entitled to remain as long as that necessity was upon him, and no longer. If he could have stopped and anchored elsewhere, it is for you to consider whether he has performed his duty, or not."

To these instructions, exceptions were taken, and are pressed in the argument for the defendants. (1.) Because the position of the schooner was not a question of care, or degree of care, but of necessity alone. (2.) Whether that was the common track of the steamer since 1836, was a question of fact for the jury, but whether navigators should have known it, was a matter of law, and improperly submitted to the jury. (3.) If the master of the schooner could have stopped and anchored elsewhere, the law applies itself to the state of facts and fixes his duty.

Though the master of the schooner might have been impelled by necessity to anchor in the passage way of vessels to the wharf, or where anchoring would not be justifiable, ex-

cepting under stress of circumstances, controling the ordinary rights and duties of navigators, yet he would be required, even under those circumstances, to exercise at least a reasonable degree of care and skill in taking and occupying such position. Not even necessity would justify a reckless disregard of the rights of others. Whether the conduct of the master was such as was required, in conformity with these principles, was a matter for the jury, and properly submitted to them. And whether navigators would know, or be required to know, the track of the steamer, would depend upon the facts proved to the satisfaction of the jury. Not only whether it had been used by the steamer, since 1836, but in what manner it had been used, in what seasons of the year, and how often, and whether or not it was varied by the season, wind, current, or tide. These were facts for the consideration of the jury. The instructions in this respect, we apprehend, are sufficiently stringent upon the master of the schooner. For they do not admit of his justification for anchoring and remaining in the track of the steamer, whether he knew it or not, unless from necessity, resulting from misfortune, and not from carelessness. Taken together they hold him to strict rules of care and skill even in his necessities. Of this the defendants have no cause for complaint.

If the master of the schooner could have anchored elsewhere, the law would not absolutely and imperiously require him to do so, if, in the exercise of reasonable care and skill, prudent and skilful navigators upon those waters would have deemed it hazardous and unsafe to do it. The line of duty, in this respect, cannot be pressed to the verge of possibilities. The inquiry would not be, what the master *could* have done, but what, in the exercise of reasonable care and skill, he should have done, under the circumstances. On this point, therefore, the instructions were not exceptionable.

The next instructions were that, "if there was no necessity for anchoring there, or if the schooner remained longer than she should have done, that would not authorize neglect on the part of the Penobscot. She would be bound to use

ordinary care and skill, even if the master of the schooner was in the wrong." The attention of the jury was then called to the evidence, and they were directed to determine thereby, whether "the master of the Penobscot was in the exercise of ordinary care and skill," or whether "the accident was the result of the course she was compelled to take, by reason of the vessel lying in her course. The question then returns, was there want of skill and care on the part of the master of the Penobscot, or was it the result of accident, considering the course she was compelled to pursue, from the position of the schooner; if the former, the defendants are liable, if the latter they are not. If the accident was the result of fault on the part of both, then the plaintiff is not entitled to recover."

It is a general principle of maritime law, that a vessel under sail must avoid one at anchor; so one that can command her movements must give way to one that is not under control. A vessel propelled by steam, is considered, in the application of this principle, as under sail, and with the wind at all times, and must give place accordingly. *The Shannon*, 2 Hagg. 173; *Luxford* v. *Large*, 5 Carr. & Payne, 421.

If a collision of vessels takes place by the fault of one of the vessels, without any fault of the other, or if the fault of the latter did not contribute to the injury, the former is responsible for all the damages. *The Ligo*, 2 Hagg. 356; *The Thomas*, 5 Robinson, 345; *Vanderplank* v. *Miller*, Moody & Malk. 169; *Sills* v. *Brown*, 9 Carr. & Payne, 613; *The Scioto*, Daveis' R. 359, (U. S. Dist. Court, Maine, Ware, J.)

If the collision happened by accident, and without any fault on the part of either vessel; or if it do not appear which is in fault, or if both were in fault, and contributing to the injury, the misfortune must be borne by those on whom it falls, and damages are not recoverable by either party, at common law. But in admiralty, if the collision were occasioned by a want of care or skill on both sides, the loss would be apportioned, or divided equally between them, as having been produced by the fault of both. *The Wood-*

rop Sims, 2 Dods. 83; Abbott on Shipping, 302, (5th Amer. ed.); 3 Kent's Com. 230, 231; Story on Bailments, § 609 and notes.

As in cases of collision of carriages on land, so of vessels on water, the party who sues for damages occasioned by the collision, in order to support his action, must prove that the defendant was in fault, and that there was no want of ordinary care which contributed to the injury on the part of the plaintiff. The fault of one will not justify the fault of the other. Each must exercise, at least, ordinary care and skill for himself: — *Imperitia culpae enumerantur.* Owners of vessels, are responsible for the negligence and want of skill of masters, while acting within the sphere of their employment. The instructions were in accordance with these principles, and could not, we think, have been misunderstood by the jury.

On the subject of damages the jury were informed that, "as to what took place after the collision, and as to the conduct of the master, and as to the soundness of the vessel, you may lay that all aside, as having nothing to do with the case. The rights of the parties depend upon what took place before and at the time of the collision, and not after." To this the defendants except, as misleading the jury on the question of damages.

While it is true that the subsequent conduct of the party injured, and the condition of the damaged vessel, might not contribute to the occurrence of the accident, yet they might materially affect the amount of damages. A party injured in his character, person or property, cannot, by his own misconduct, or negligence, enhance the damages for which he claims compensation from another. But in this case, the *amount* of damages had previously been determined by the appraisers, selected by the parties, and the question of amount, did not properly arise at the trial. These instructions were therefore correct.

From a careful examination of the testimony reported, we cannot say, that the jury have erred in their conclusion.

There was evidence from which they might properly determine, that the injury was occasioned without any fault of the plaintiffs or their agents, and that it was caused by the want of ordinary care and skill of the defendants. Though, in some respects, the testimony was conflicting, yet it was submitted to the jury under proper instructions, and in our opinion, their verdict is neither against the evidence, nor the weight of evidence. *Exceptions overruled.*

LEVANT *versus* ROGERS.

Parol testimony is inadmissible to prove the allegation of a plea in abatement, that after an appeal had been taken, the writ had been altered, without leave of court.

DEBT, brought before a justice of the peace.

In the District Court, the defendant pleaded in abatement, that since the appeal was taken, the plaintiff, without leave of court and without motion therefor, had inserted in the writ the words, "*now commorant of Levant in said county.*" The plaintiff's replication traversed the allegation of the plea, and tendered an issue to the country. The defendant offered to prove, by parol, the allegation of the plea. The District Judge, HATHAWAY, rejected the evidence. The verdict was for plaintiff, and the defendant excepted.

CURIA. — The parol proof was properly rejected. Copies, authenticated by the justices, were the only admissible evidence. Such copies were introduced by the plaintiff. They were conclusive. *Exceptions overruled.*

EMERSON, *Appellant from a decree of the Judge of Probate.*

Of the compensation to be made to guardians for their services.

THE appellant is guardian to a minor. In a guardianship account he presented the following claim: —

"1847, Sept. 28th. To my own services and responsibility in the charge committed to me of the real estate of my ward, its careful and prudent management, and overseeing repairs and improvements for three years next preceding this date, in addition to usual commissions on personal assets, at $500, per year, $1500."

The Judge of Probate disallowed the claim. From that adjudication this appeal is taken.

A. W. Paine, for appellant.

COURT. — SHEPLEY, C. J., TENNEY, J., and HOWARD, J., per SHEPLEY, C. J., orally. — It was said in the argument that the Judge of Probate disallowed the charge, because he supposed the statute had fixed the highest rate of compensation. We think there is no such limitaton as to preclude an allowance of the character claimed in this case.

The guardian may have compensation for services; and it may be much beyond the amount of commissions. A rule different from that would tend to prevent faithfulness and care.

In this case, the amount charged is large. Most estates would soon disappear under such allowances. No specifications are furnished us. Without further information as to the items, we think so large a claim cannot be allowed.

Decree affirmed.

MANSFIELD *versus* ROUNDS.
ROUNDS *versus* DAVIS.

No appeal lies to the Supreme Judicial Court from a judgment of the District Court, upon an agreed statement of facts, in a suit commenced before a Municipal Court or a justice of the peace.

THE first suit was a libel, commenced in the Municipal Court, upon the impounding of a cow. One Hill was the impounder. Defendant was the pound keeper. The case comes

into this court by appeal, from the judgment of the District Court, on agreed facts.

Peters, for the plaintiff.

Sanborn, for defendant.

TENNEY, J., orally. — Our advice, if it were offered, would be unfavorable to the maintenance of the libel, because it is not brought in the name of the impounder. R. S. chap. 30, sect. 16. But we can only dismiss the case. It is not rightfully in this court. It was commenced in the Municipal Court, and by appeal carried into the District Court. From the judgment of that court, upon an agreed statement of facts, an appeal to this court was taken. From a judgment so rendered in a suit, appealed from a Municipal Court or justice of the peace, a further appeal does not lie. Exceptions would have been the proper course. *Appeal dismissed.*

THE second suit was replevin of a swine which had been impounded, having been found going at large. An objection was taken to the impounder's certificate, because it did not allege that the swine was found going at large "*without a keeper.*"

The case was commenced in the Municipal Court, thence appealed to the District Court, and comes here upon an appeal taken to the judgment of the District Court, upon an agreed statement.

TENNEY, J., orally, — after expressing an impression unfavorable to the defence of the suit, because of the omission to allege that the animal was "without a keeper," directed, for the reasons mentioned in the preceding case, that

the action be dismissed.

EDWIN D. GODFREY *versus* HENRY M. CODMAN.

A plaintiff's book is not competent evidence to prove a sale of goods, unless he can testify, or in some other way prove, a delivery.

ASSUMPSIT for a bill of goods sold.

Plaintiff introduced letters from defendant, ordering certain goods to be sent by the rail cars, and then, together with his suppletory oath, introduced his book, containing a charge of articles conforming to said order. On cross-examination, he testified that he could not recollect to whom he delivered the goods, or in what manner they were sent. There was no other evidence. The defendant requested the District Judge to instruct the jury, that the book was not *competent* evidence of the delivery. This was refused, and the defendant excepts, the verdict being against him.

Cutting, for defendant. A delivery must be proved either by oath of plaintiff or by some other evidence. But here is no proof of any kind as to the delivery. Unless the plaintiff testifies to a delivery, the book and oath, without further proof, are not *competent* to prove the sale.

J. Godfrey, for plaintiff. The point has been settled for plaintiff. *Belknap* v. *Mitchell*, 23 Maine, 475.

Cutting, in reply. That case proved a delivery at the place as ordered. It is therefore a case in point for us. Here no delivery was proved.

TENNEY, J., orally. — In *Belknap* v. *Mitchell*, it was proved that the goods were delivered to one or the other of the defendant's agents, and at the place ordered. In this case, it is not shown to whom the delivery was made. It does not therefore appear that either the defendant or any agent of his had the articles. A plaintiff's book showing that he made a delivery to *somebody* is not *competent* evidence to charge a particular person.

Exceptions sustained.

Ayer *versus* Sawyer.

A surveyor of lumber is not bound to keep a record of his surveys. His minutes are not of themselves evidence.

Exceptions.

Assumpsit for the price of mill logs. Plaintiff called one Averill, who testified that he was a surveyor, chosen by the town; that he surveyed and measured the logs, and made a record thereof.

Defendant objected to witness' testifying as to the quantity, and insisted that the survey book was the rightful evidence. The objection was overruled, and the witness testified upon that point.

Defendant excepts.

Cutting, for defendant, adverted to R. S. chap. 66, sect. 28, 29.

The surveyor's record is the best evidence. *Dole* v. *Allen*, 4 Maine, 527.

Peters, for plaintiff.

Wells, J., orally. — The witness was properly admitted. The statute does not require a surveyor to keep a record. What minutes he did make for convenience, or otherwise, the parties had no right to require. They are not evidence.

Exceptions overruled.

Ebenezer G. Patten *versus* John Ellingwood.

Of new promises by bankrupts, respecting debts discharged by the bankruptcy.

Exceptions from the District Court, Allen, J. presiding.

Assumpsit. Under an appropriate brief statement, defendant proved his discharge in bankruptcy. Plaintiff proved that during the pendency of the bankruptcy proceedings, the defendant told him, "*as you have used me well, you shall not*

lose a cent by my going into bankruptcy. I expect to get through this season, and will pay a part of it next fall, and the rest as fast as I can." In a subsequent conversation, defendant told plaintiff, "*I have got through — cannot pay now — will pay as soon as I can.*"

There was evidence on both sides as to the defendant's ability to pay. The Judge ruled the foregoing promises to be conditional, and that plaintiff, in order to recover, must show the defendant's ability to pay.

HOWARD, J., orally. — The rulings were right.

Exceptions overruled.

Kelley, for plaintiff.

Mudgett, for defendant.

SACKETT *& al. versus* LOWELL.

A purchase of goods by the defendant is not completed by his agreeing to buy them at a fixed price and permitting them to be charged in account, if there be no term of credit agreed on, and if he do not receive the goods, nor order them to be forwarded.

Testimony *that* the plaintiff made a sale of goods to the defendant, at a stipulated price, and charged them, (in his presence,) in account; *that* nothing was said as to the length of the credit; *that* defendant did not take the goods, nor direct them to be forwarded, will not sustain an action for the price of the goods, although the plaintiff forwarded them by express to the city of defendant's residence; there being no proof that he received them.

ASSUMPSIT for a small bill of jewelry, $32,25, submitted on the evidence contained in the deposition of the plaintiffs' clerk; the court to render such judgment as law and justice require.

The deposition stated, in substance, *that* the plaintiffs are jewelers in co-partnership, resident in New York; *that* deponent is their clerk; *that* he showed the articles to defendant and told him the price; *that* he sold them to defendant and charged them on plaintiffs' book, and defendant saw the

charge; *that* nothing was paid; and *that* nothing was said about the length of credit; *that* he did not again see the defendant; *that* defendant did not receive the articles or give any direction about their being sent; and *that* deponent sent them by Harnden's express, directed to Bangor, the residence of defendant.

Peters, for plaintiff. Usage fixes the term of credit at six months. A sale and a forwarding were proved. In the absence of direction, as to the sending, custom justifies the course taken. Even if never received, defendant would be liable for the price. Plaintiffs would have been liable to defendant in trover.

In its principles, though not in its facts, this case is like *Merrill* v. *Parker*, 24 Maine, 89.

Sanborn, for defendant.

Howard, J. orally. — There was no delivery of the articles, nor order to send them; and no evidence, that defendant received them. Nothing was paid or agreed to be paid. The evidence is insufficient. *Nonsuit.*

Mudge *versus* Pierce.

Where the quantity of lumber is in question, though the witness at first testify from his recollection of the scale bill, yet if he have knowledge of the quantity, irrespective of the scale bill, he may testify to the quantity, without the production of the scale bill.

If the defendant propose to read a letter to himself from the plaintiff and one from himself in reply, it is not ground of exception, that he was required to read first the one written by himself.

Assumpsit. Lumbert had an interest in a lot of land. The plaintiff owned an adjoining lot. They arranged that one Bachelder should cut and haul timber from said land at a fixed rate per thousand feet.

Bachelder entered upon the work but soon quit it.

From his cutting and hauling from the Lumbert lot, the

plaintiff derived no benefit; and he contended that he could owe very little, if any thing, for the operations by Bachelder on his, the plaintiff's, land, because there was very little, if any, timber cut and hauled therefrom.

Bachelder obtained from the defendant his supplies for the operation, on a credit; and in order to pay for the same, he requested the plaintiff to remit to the defendant whatever sum the plaintiff might be owing to Bachelder for the cutting and hauling of the timber. The defendant wrote a letter to plaintiff, containing, among other things, a request that the money should be forwarded to him. The plaintiff accordingly remitted to the defendant $200, for which the defendant accounted to Bachelder. The plaintiff now contends that he was not owing Bachelder; that he paid the money through a mistake, and brings this suit to recover it back from the defendant. The defendant contends that the plaintiff contracted with Bachelder to pay him for operating on the Lumbert lot as well as on his own.

Evidence upon all these matters was presented to the jury.

The defendant requested instruction to the jury that the letter from the defendant to the plaintiff, (of which the Reporter finds no copy among the papers,) did not prove a contract upon which the plaintiff can recover in this suit. There were other instructions. But by the verdict they are rendered immaterial.

The instruction was that if, in fact, the plaintiff was not indebted to Bachelder, but paid the $200 to the defendant under an erroneous belief that he owed that sum to Bachelder, and for the purpose of discharging that indebtedness, then that payment was a good consideration to support the defendant's promise, *if he made one*, to refund the money.

E. R. Mudgett, for plaintiff, testified to the quantity of lumber which Bachelder cut, and that it was wholly from the land of Lumbert; that that was the amount on the scale-bill. The defendant objected to the testimony. Mudgett then testified that he had searched for the bill, without find-

ing it; but supposed it was still in his possession. He then further testified as to the quantity.

At the trial, the defendant offered to read a letter from the plaintiff to the defendant, with the defendant's answer. The Judge ruled, that the letter from the plaintiff might be read, but not until after the letter from the defendant should be read. Neither letter was read.

The verdict was for the plaintiff, and the defendant excepts.

Rowe, for plaintiff.

Ingersoll, for defendant.

HOWARD, J., orally. — The objection as to Mudgett's testimony cannot prevail, because he testified finally as to his knowledge of the quantity of timber, irrespective of the scale bill.

The instruction, that the letter from the defendant should be first read was correct.

The defendant requested instruction, that the plaintiff could not recover except upon some contract by the defendant to refund the money. The ruling was that as the defendant had received the $200, that was a sufficient consideration, if the defendant had promised to repay. We consider the letter to contain such a promise. *Exceptions overruled.*

NOTE. — WELLS, J., at the time of the argument, was holding the jury term at Piscataquis county, and took no part in this decision.

BROWN *versus* DODGE *& al.*

If a grantor, after deeding his land, make to a third person a bill of sale of certain trees standing on the land, in pursuance of a verbal contract, entered into before the deed, the vendee of the trees takes nothing by his purchase, although the grantee of the land, knew of such contract, before he took his deed.

B agreed verbally to sell certain trees on his land to the defendant. C knowing of that agreement, purchased the land of B, by deed in common

form. B then gave to defendant a bill of sale of the trees, pursuant to said agreement. *Held*, that the bill of sale imparted no rights.

TRESPASS for entering plaintiff's land and cutting and removing ash trees.

The case is submitted on agreed facts. Bell and Healy owned the land. Chamberlin was their agent. By a verbal contract, he sold to Dodge the growing ash timber. Bell and Healy afterwards conveyed the land to Chapin, without any reservation in their deed.

While the land was thus owned by Chapin, Chamberlin took of Dodge a note of $50, and, in his own name, gave him a bill of sale, (without seal,) of the ash. Chapin then conveyed the land to plaintiff. Chamberlin testified that at the purchases by Chapin and by plaintiff, he notified them of Dodge's claim, and "considered them to assent to it."

The defendant, Dodge, with his servant, the other defendant, afterwards cut and carried away the ash trees, for which this suit is brought.

Kelley, for defendants.

Neither Chapin or the plaintiff paid for the ash. Its value was deducted from their payments. The bill of sale was ratified by Bell and Healy, and it gave to Dodge a title, in writing, before the plaintiff purchased. The plaintiff's assent, at the time, was a license irrevocable. But if not so, it was operative, till revoked. The sale of standing trees, gives authority to enter and take them.

SHEPLEY, C. J., orally. — The transaction with Dodge was verbal, unexecuted, and without any consideration. So the thing stood when Chapin took. The ash passed to him as a part of the realty. Neither Bell and Healy, or Chamberlin, at that late day, had any right to sever it. The giving of the note by Dodge and the bill of sale to him, were subsequent to Chapin's purchase. No rights accrued therefrom. By the deed from Chapin, the whole title passed to the plaintiff. The conversation, had, when plaintiff purchased, was quite too

loose to show the plaintiff's consent that Dodge, or any one under him, should take the ash. *Defendant defaulted.*

Rowe, for plaintiff.

HODGDON *& al. versus* CHASE.

A promise, not in writing, made by a debtor, (in consideration of a pay-day extended,) that he will not take advantage of the statute of limitations, will not support an action brought upon the breach of such promise.

ASSUMPSIT. The declaration, in substance, alleges *that* the defendant owed the plaintiffs on account; *that* their right of action had existed nearly six years; *that* the defendant was then called upon for payment; *that* he asked further delay, and verbally promised, if delay could be granted, "that, in the trial of any action or suit, subsequently commenced by the plaintiffs against him on said demand, he would waive the statute of limitations and never take any advantage of the same, or plead the same in bar of said action;" *that* he still neglected to pay; *that*, after the six years had expired, the plaintiffs brought suit against him on the account; *that* he pleaded the statute of limitations and prevailed; recovering costs to the amount of $40,14 against the plaintiffs." The plaintiffs claim to recover, in this suit, the said amount of costs and also the original debt and the costs by the plaintiffs incurred in said action, amounting in all to $136,71.

The defendant demurred to the declaration.

Cutting, for plaintiffs.

"A promise, in consideration of the forbearance of a suit for a certain time, is good; for that is for the benefit of the defendant, though the action is not discharged." 1 Com. on Contracts, 11.

"If there be any benefit or prejudice, however trifling, it is deemed a sufficient consideration." *Ib.* 14.

The defendant invokes R. S. chap. 146, sect. 19, which provides that, "in actions of debt or upon the case, founded

upon any contract, no acknowledgment or promise shall be allowed, as evidence of a new or continuing contract, whereby to take any case out of the operations of the provisions of this chapter, or to deprive any party of the benefit thereof, unless such an acknowledgment or promise be an express one, and made or contained in some writing, signed by the party chargeable thereby."

Now, I contend, that an agreement to waive the statute of limitations, or never to take advantage of the same or plead it in bar, is not within the letter or spirit of that section.

It is neither an *acknowledgment of a debt* or a *promise to pay a debt.* This latter language when used verbally and previously to the Revised Statutes had been held sufficient, not only as evidence of indebtedness, but also to take the case out of the statute of limitations.

Courts had decided, in the first place, that there must be a promise to pay.

Afterwards, that doctrine was modified and extended to an acknowledgment of indebtedness, the court holding that that implied a promise to pay.

The books are full of decisions as to *those two points.* And inasmuch as evidence of *verbal* admissions was admissible, under the former law, that law became subject to abuse.

The Legislature of 1841, undertook to remedy that evil and that only.

They not only declare that the acknowledgment or promise shall be in writing, but an express one, in contra-distinction to the adjudicated implication.

And when that acknowledgment or promise is an express one, reduced to writing and signed, it becomes plenary proof of the original debt, as well as a bar to the statute of limitations.

Can it for a moment be contended, that the Legislature or the codifiers of the law ever designed any other alteration, than to substitute *written* for *verbal,* and an *express* promise instead of an *implied* one, which embraced the subject-matter

of every decision up to that time? See also sect. 20. Agreement to waive could not affect a joint original promisor, even before that section was enacted.

At that time, there had been no adjudicated cases upon any agreement or contract to waive the statute of limitations, or not to plead it in bar, which language is no acknowledgment of a legal claim, or a promise to pay a cent. And even under the old law and decisions, as liberal as they were, such words could have no force or effect upon the original debt, as evidence.

And even the original action, referred to in the case at bar, was in no way affected by this contract. The original action and cause of action has been lost; of that I do not now complain, but of the violation of the defendant's promise, which *caused that loss. Hodgdon & al.* v. *Chase*, 29 Maine, 47, where this court say, "whether an action could be maintained upon the promise, which it is contended has been proved, it is unnecessary to determine."

There is nothing in that decision which militates in the least against the plaintiffs' right to recover in this action; but on the contrary the doctrine there advanced is favorable to their recovery.

The doctrine there advanced is precisely what I have been contending for, to wit, in the language of the court, "The Legislature must have intended to change the existing law, and not to trust to the memory of witnesses in testifying to a *new promise or acknowledgment of indebtedness.*"

The court have not said, that an express contract to waive the statute of limitations, when not in writing, is invalid. But they have said, that such a contract is not within said 19th section of chapter 146. *Warren* v. *Walker*, 23 Maine, 453.

"Where a new promise is relied on as an answer to the plea of the statute of limitations, the declaration is founded on the original cause of action." *Barrett* v. *Barrell*, 8 Maine, 353.

And such a promise, under the 19th section, *now* must be in

writing, in which event the original cause of action, and not the new promise, is the foundation of the suit.

In this case I do not contend that the agreement to waive the statute of limitations continued or revived the original claim.

But the plaintiffs were obliged to sue the original demand in order to ascertain whether or not, the defendant would violate his subsequent agreement.

Had the agreement then to waive the statute been in *writing and signed by the defendant*, the plaintiffs could not have relied on said 19th section in support of their original action, for the agreement was, as this court have decided, neither an *acknowledgment* of the debt, or a *promise* to pay. Thus clearly showing that the agreement to waive, &c., is not embraced in said section.

If the plaintiffs then could not have relied on the said section in their original action, can the defendant now do it? *And this I say, supposing the agreement to waive had been in writing.*

Can that section then be construed to be more comprehensive at one time than at another? Or can the same agreement be shut *out* at one time, and shut *in* at another?

Again, the word, "*whereby*" in the 19th section, may be denominated the copula which connects the subject that precedes with the predicate that follows. The *predicate* cannot enlarge the *subject.*

So in this case, to the "acknowledgment or promise," which has been decided to be an acknowledgment of indebtedness or promise to pay, there cannot be added an *agreement to waive the statute of limitations*, for it would be an addition to, and an enlargement of the subject, and a third and additional proposition brought in on the wrong side of the "*whereby*," which stands "*in media via*" and like a faithful sentinel permits no one to pass without the countersign. The Legislature has not given the countersign; it has only selected two soldiers and invested *them* with the pass-word, while the third is shut out and left to inhabit the castle of his ancestors.

The contract declared on, is then a valid contract, at common law, and it is not embraced within the letter or spirit of the 19th section of chapter 146, and consequently is not affected by it.

Knowles, for defendant.

SHEPLEY, C. J., orally. — This is an action of singular type. It has been argued by the plaintiffs' counsel with much ingenuity and force. But we think the reasoning cannot prevail. To maintain such an action would render the statute inoperative, except to change the form of actions from assumpsit to case or tort. *Demurrer held good.*

REED, *in error*, *versus* TAY.

In a justice's court, a denial to allow costs to the exact amount claimed, when a smaller amount is allowed, is not error.

TAY brought an action against Reed in a justice's court. Judgment was rendered on nonsuit for the defendant, Reed, who taxed his costs at $14,11. The justice rendered judgment for costs, $4,87. To correct that judgment, and to recover his whole bill of costs, Reed brings this writ of error.

J. Hodsdon, for plaintiff in error, cites 5 Mass. 389; 7 Mass. 453; 12 Mass. 379.

Peters, for defendant.

WELLS, J., orally, — No error *of fact* has been assigned. No fact, extra the record, has been proved. We must therefore regard the charge as an error *of law*. A denial to allow costs to the exact amount claimed, when some amount is allowed, is not error in law.

Judgment of the justice affirmed.

Dexter *versus* Field *and trustees.*

If mortgagees of personal property, when summoned as trustees to the mortgager, would rely upon a foreclosure of the mortgage, they must, in the disclosure, show what were the conditions of the mortgage, and state that a foreclosure had occurred.

Howard, J. orally. — This case is upon exceptions, which relate only to the liability of the trustees.

The disclosure shows a mortgage of goods made to the trustees by the defendant in Sept. 1848. The trustee writ was served on them in Nov. 1848, more than sixty days after the mortgage was given. On an examination made after Nov. 1848, there was in the trustees' hands a balance of forty or fifty dollars, the avails of the mortgaged property, over the amount for which the mortgage was collateral. The counsel for the trustees contend the mortgage had been foreclosed before the service of the trustee writ. But the disclosure itself does not show what were the conditions of the mortgage, nor does it state that a foreclosure had been had, or any measures taken to effect one. They have not discharged themselves.

Brown and Appleton *versus* Samuel P. Strickland.

Administrators *de bonis non,* cannot, in that capacity, maintain a real action.

Writ of entry. General issue with claim for betterments, submitted to the court for nonsuit or default.

Several deeds, with much other evidence, were offered as to title, boundaries and betterments. The plaintiffs claim under the will of one Billings. By that will, the plaintiff, Brown, and one George Starrett were constituted executors and trustees, and in case either of them should die, the Judge of Probate was authorized to appoint some person as the successor, "to the end that there may be and continue two suitable persons, in whom the trust estate, hereby created, shall be vested, and on whom the execution of this will and the perform-

ance of the trusts may devolve." Starrett died. The Judge of Probate appointed Mr. Appleton, administrator *de bonis non*, who as such gave the bond, published the notices and took the oath thereof, as required of administrators *de bonis non*.

WELLS, J., orally. — A demandant in a real action must prove his title. Under the will the title was vested in two persons, executors and trustees. Provision was made in the will for the appointment of a substitute, if one of them should die.

One of them died. Thereupon Mr. Appleton was appointed and qualified, and gave bond, not as a trustee, but as administrator *de bonis non*. In his commission, nothing is said in reference to rights or duties as a trustee. The offices and the requisite bonds are very distinct.

In administrators *de bonis non*, the title to the testator's real estate does not vest. They can maintain no real actions. We think no title vested in Mr. Appleton, upon which to maintain this suit.

There are other questions of magnitude in this case, but it is unnecessary to discuss them. *Demandants nonsuit.*

J. Appleton and *D. T. Jewett*, for plaintiffs.

Cutting and *Kelley*, for defendants.

WEBB *versus* FLANDERS.

If a mortgage, (which was made to secure the performance of a bond,) be assigned, the mortgagee can maintain no action upon it, unless he have also some interest in the bond, for he could have no conditional judgment.

ENTRY, submitted for decision upon facts reported by a commissioner.

A father conveyed the land to the defendant, his son, taking a bond, (with a mortgage for its performance,) for the maintenance of the father. While these deeds were unrecorded, and before any breach of the bond, the father deeded

with general warranty to the plaintiff, who had knowledge of the former conveyance.

By the Court. — 1st. The plaintiff's deed, having been taken in fraud of defendant, cannot entitle him to an absolute judgment against the defendant.

2d. The deed to the plaintiff perhaps transferred the mortgage. It was a mortgage to secure performance of a bond. The bond was never assigned to plaintiff. Therefore he can have no conditional judgment. *Nonsuit.*

Ellsworth, *in equity, versus* Starbird.

The obtaining of a conveyance of land upon a verbal promise, that the purchaser would subsequently secure the purchase money by a mortgage, and a refusal afterwards to give such mortgage, do not constitute a sufficient ground for enjoining the purchaser from selling the land, unless some *fraudulent* or *deceptive* practice was used to obtain the conveyance.

The bill prays that the defendant may be enjoined from selling a described lot of land, and for relief.

It alleges in substance that the plaintiff is a poor man; that he had owned the land; that he conveyed it to defendant upon an agreement that defendant should secure the value to the plaintiff by a mortgage; that afterwards defendant fraudulently refused to re-convey the land, or pay for it, or give the mortgage, or any other security.

J. E. Godfrey, for plaintiff.

Shepley, C. J., orally. — The allegations amount only to this, that the plaintiff voluntarily conveyed the land, trusting to the defendant's mere verbal promise to give security for it. It is not stated that the security was to be given at the same time with the plaintiff's conveyance, or that any deception was practiced to obtain the conveyance.

Injunction refused.

SMITH *versus* RINES.

In a suit to recover for money paid by the plaintiff, as surety to the defendant in a replevin bond, it is no defence, that the plaintiff, when signing the bond, knew that the replevin suit was groundless and malicious.

ASSUMPSIT for money paid by plaintiff as surety on a replevin bond.

Pillsbury attached goods on a writ against Stover Rines, who procured them to be receipted for. After demand, the receiptors were sued, and *their* goods were attached. The defendant replevied the last mentioned goods, furnishing the plaintiff and two other persons, as sureties on the replevin bond. After judgment, by consent, for a return, judgment on the bond was recovered against the defendant and his sureties, and it was satisfied by a levy upon the plaintiff's real estate. To recover the amount thus satisfied on said judgment, the plaintiff brings this suit.

At the trial, the defendant proved that he never had even a color of title to the goods replevied, and that the plaintiff, his surety, well knew that fact; that there was a concert between them to use the replevin suit for the purpose of procuring more time for Stover Rines, in which to settle his debt to Pillsbury.

It was ruled that that proof furnished no defence to this suit.

The defendant excepted.

Ingersoll, for defendant.

The replevin suit was a groundless and malicious prosecution. The parties are in *pari delictu*, equally *tort feasors*. In such cases, the law furnishes no relief between the parties.

1. This defendant is liable to an action for malicious prosecution. *Stone* v. *Swift*, 4 Pick. 392; *Farnham* v. *Moor*, 21 Maine, 508; *Noyes* v. *Wells*, 12 Pick. 324; *Ives* v. *Bartholomew*, 9 Conn. 309; *Revenga* v. *McIntosh*, 2 B. & C. 693.

2. The replevin bond was an essential part of that process. All the signers of it were principals in the wrong, and equally guilty of a fraud. 8 Smedes & Marshall, 305.

3. Among joint *tort feasors* there is no implied indemnity. 2 Greenl. Ev. sect. 115. This case is within the *rule*, not the *exception*. It was not an innocent act. It was to try no right. *Merriweather* v. *Nixan*, 8 T. R. 186 ; *Fairbrother* v. *Ansley*, 1 Camp. 343 ; *Wilson* v. *Milnor*, 2 Camp. 450, 452.

Cutting, for plaintiff.

Howard, J., orally. — If the giving of the bond was a fraud, it was one of singular character, for it indemnified the intended victim. This suit is not brought upon any illegal contract. There is no ground, in law or equity, why the plaintiff should not recover. *Exceptions overruled.*

Foster *versus* Pennington.

A declaration upon a contract for a specified quantity of an article, though laid under a *videlicit*, is not sustained by proof of a contract for a larger quantity.

Exceptions from the District Court in Aroostook county.

Assumpsit on an alleged contract to deliver to the plaintiff "a certain large quantity of oats ; viz. 600 bushels." The proof was of a contract for 1000 bushels, of which the defendant had delivered 207. The defendant's counsel objected to the variance ; but the Judge instructed the jury, that a contract to deliver 1000 bushels would sustain the declaration.

Verdict for plaintiff.

Kelley and *McCrillis*, for plaintiff, relied on 2 Hill, 126. They contended that, under a *videlicit*, much latitude is allowed ; that the quantity alleged under a *videlicit* is but surplusage. *Bristow* v. *Wright*, 1 Smith's Leading Cases.

The declaration was amendable, and substantial justice has been done.

HOWARD, J., orally. — The instruction was erroneous. It made a contract for 1000 bushels to sustain a claim upon one for 600. The *videlicit* can have no such effect. There was a variance, and it was a material one.

Exceptions sustained.

John Hodgdon, for defendant.

GEORGE *versus* NICHOLS.

In a notice for the taking of a deposition, if there be a defect as to the place of the taking, it is waived by the attendance of the party notified.

In depositions, taken out of the State, it is not essential that the magistrate be a commissioner, appointed by the authorities of Maine.

EXCEPTIONS from the District Court, HATHAWAY, J.

The defendant had been notified to attend the taking of a deposition at the office of *Henry W. Fuller* in Boston. It was in fact taken at the office of *Henry H. Fuller* in Boston.

It was offered by the plaintiff, and objected to by defendant, for the foregoing reason, and also because the magistrate was not a commissioner, appointed by the Governor and Council of Maine, to take depositions. The presiding Judge admitted the deposition, but gave the defendant an election whether to take a continuance or to proceed to trial with the deposition in evidence. The defendant elected to proceed, and the deposition was used by the plaintiff. To its admission the defendant excepts. The caption of the deposition shows that defendant was present by himself and counsel at the taking. The case was submitted without argument.

TENNEY, J., orally. — The first objection was obviated by the defendant's attendance at the taking.

It is not requisite that the magistrate should be a commissioner. It does not appear that he was not authorized by

the laws of his State to take depositions. Depositions taken out of the State may be received at the discretion of the court. R. S. c. 133, § 22. *Exceptions overruled.*

LEVANT *versus* VARNEY, *Appellant.*

The seventh section of the Act of 1846, for restricting the sale of intoxicating drinks, requires the defendant, appellant, to "advance the jury fee and all other fees that may arise after the appeal." By the "other fees" there spoken of, are intended only such fees as arise for the services of the clerk of the court.

ACTION OF DEBT for violation of the Act of August 7, 1846, "to restrict the sale of intoxicating drinks." By the seventh section it is enacted that a defendant, appealing from the judgment of a justice of the peace, "shall be held to advance the jury fees and all other fees that may arise after the appeal."

The defendant having taken such an appeal, and entered it in the District Court, was there ordered, on motion of the plaintiff, to advance the fees for the plaintiff's witnesses. Upon his refusal to do so, it was then ordered, that the justice's judgment be affirmed. To those orders, exceptions were taken. And the exceptions were sustained; the court observing, that the only fees which the defendant was bound to advance, were the jury fee and such fees as arise for the clerk.

GRAY *versus* GARNSEY.

This Court has no power to draw from another court an original paper. The register of deeds is the proper officer to certify the copy of the records of a levy on execution.

DEBT on poor debtor's bond given by one Hills, as princi-

pal, and defendant, as surety. The verdict was for plaintiff, and defendant excepted.

SHEPLEY, C. J., orally. — The only exception is that the plaintiff, in order to increase the damages, was allowed to use in evidence a copy, (certified by the register of deeds,) of a levy of land, from a third person to the said Hills.

1. It is contended that the original paper, being better evidence, should have been produced. But it does not appear that the execution was issued from or returnable to this court. From another court we have no right to draw an original paper. No court is authorized to do that, except that the court of Chancery in England may issue *scire facias*, to draw a document before them. *Hammett* v. *Emerson*, 27 Maine, 309, is decisive on this point.

2. It is contended that the clerk, and not the register, is the proper certifying officer. It is true that the document, after being recorded in the registry, is to be filed in the clerk's office. But the clerk has no record of the levy; he is not required to make one. He is not to certify, except copies of judicial proceedings. The practice has been uniform to receive the register's certificate. He alone has the record, and he alone can certify it. *Exceptions overruled.*

Kelley and *McCrillis*, for plaintiff.

J. E. Godfrey, for defendant.

WILLIAMS *versus* ROBBINS.

The Act of this State, passed August 3, 1848, provides, that no action against a bankrupt, for a debt due prior to his bankruptcy, should be "brought and maintained upon any new promise, unless the same be in writing."

In such an action the defence of bankruptcy is defeated by an unconditional promise to pay, made *prior* to that Act.

ASSUMPSIT, submitted on agreed facts. The defendant, prior to December, 1842, owed the plaintiff fifty dollars on

account. On March 21, 1843, he was decreed a bankrupt on his own petition, dated Dec. 16, 1842, and obtained a final discharge Aug. 27, 1844. In 1845, the plaintiff's agent presented him the bill for payment. He said the bill was right, that he could not pay it then, but would pay $10, the next day, and the residue when convenient; that he was not legally bound to pay it, but it was an honorary debt, that it was like cash in hand, and he would pay it.

Rowe, for plaintiff.

Kelley and *McCrillis*, for defendant.

SHEPLEY, C. J., orally. — The conversation relied on by the plaintiff was prior to the Act, invalidating new promises in bankruptcy cases, except those made in writing. Was there a binding promise. The first part of the conversation was with some limitations. Parties in making verbal contracts often open with propositions which, on further consideration, they consent to enlarge. At the conclusion, the defendant said the debt was an honorary one, and he would pay it. We think it was not his meaning to connect this promise with the preceding limitations, and that it was a promise unconditional. *Judgment for plaintiff.*

DILLINGHAM *& al. versus* SMITH *& al.*

In a case of replevin, submitted for decision on questions of law, without any stipulation as to the allowance of damages, the court, at another term, after judgment of nonsuit and return, has no power to assess the defendants' damages or to submit that question to a jury.

REPLEVIN for mill logs. This action was withdrawn from the jury and submitted to the decision of the court upon legal questions, no stipulation being made as to the allowance of damages. The case was argued at the last law term and continued *nisi*. During the vacation, judgment of "nonsuit and return" was entered. 30 Maine, 370.

Kelley and *McCrillis*, for the defendants, now move that their damages be allowed, contending that the court has power at its election to assess them; or to frame an issue presenting the question of amount to a jury. R. S. ch. 130, sec. 11; *Mattoon* v. *Pierce*, 12 Mass. 406.

Rowe, for plaintiffs. — The defendants have laid no foundation for their claim. They had no property in the logs. The nonsuit was ordered, not because defendants owned the logs, but because, by reason of the intermixture with other logs, the plaintiffs failed to identify their own.

The court has no power to assess damages. By the pleadings, the question of defendants' damages was, at first, put in issue. But by consenting to withdraw the case from the jury, they waived the claim. 24 Pick. 32.

Shepley, C. J., orally. — The court has no power to make the assessment. Such matters belong to the jury, to be decided on testimony before them.

No consent has been reserved, that the court shall fix the amount or send the question to a jury. No issue is made up, nor can the court frame one for that purpose. The defendants should have arranged for the damages at an earlier stage. They might have apprized the court that they desired an assessment of damages, so that the judgment should not have been entered, till the assessment was had.

Of the merits of the claim, we express no opinion. As an individual I consider damages in such a case recoverable in a suit upon the replevin bond. *Motion overruled.*

State *versus* Boyd C. Leavitt *& al.*

An indictment for malicious mischief will not necessarily be defeated, merely because the acts proved might have supported a charge for larceny.

Exceptions from the District Court, Hathaway, J. presiding. Indictment under the thirteenth section of the one hun-

dred sixty-second chapter of the Revised Statutes, entitled "Of malicious mischief," &c., for wilfully and maliciously destroying certain shop tools, the property of one Dexter. There was evidence tending to show that the defendants, in the night time, broke open the shop, and threw the tools into the river. The defendants' counsel contended that the acts, if proved, constituted a *larceny*, and that, therefore, they could not support an indictment for *malicious mischief*, and requested the Judge so to instruct the jury. That request was denied; the verdict was for the State; and the defendants excepted.

The case was submitted by *Waterhouse*, County Attorney, for the State, and by *Knowles*, for the defendants, without argument.

Shepley, C. J., orally. — The request to the Judge assumed that, if certain acts would support a charge for *larceny*, they could not support an indictment for *malicious mischief*. But there is no such principle of law. This court has recently decided that acts, which might have supported an indictment for arson, would support a charge for malicious mischief. The instruction requested was properly refused.

Exceptions overruled.

Wilkins *versus* Babbershall.

In order to discredit an opposing witness, by proving, that he had made declarations in conflict with his testimony, it is not requisite, that he should be previously interrogated as to such declarations.

Exceptions. Writ of entry. Plaintiff claimed under a levy against Fowles & al. Defendant claims under a conveyance from Fowles, made prior to the plaintiff's attachment. To show the conveyance fraudulent, plaintiff read the deposition of Fowles. The defendant then called one Doane to show that Fowles had made a contradictory statement. To such proof the plaintiff objected, until Fowles,

upon inquiry, should have opportunity to explain the statements which he had made. But the proof was admitted, and the plaintiff excepted, the verdict having been against him.

J. Appleton, for plaintiff. — The proof was inadmissible. It was of mere out-door conversation, and on irrelevant matter. The defendant, at the taking of the deposition, should have inquired of Fowles as to any of his declarations, which he intended to prove. Such are the English and American decisions. Not to have done so, was a trap upon Fowles, and a wrong to the plaintiff. Greenl. on Ev. § 462; 2 Phil. Ev. 244; 3 Starkie's Ev. 1753.

The case of *Ware* v. *Ware*, 8 Greenl. 42, *contra*, was an uncalled for *dictum*, and wrong in principle. *State* v. *Blake*, 25 Maine, 350.

Howard, J., orally. — The plaintiff contends that it was not competent for defendant to prove the out-door statements of Fowles, till, upon inquiry, Fowles had had opportunity to explain. Such is the rule in England and in some of the other States. It was never so in Maine. It has always been understood that the declarations of a witness may be proved, without such previous inquiry. The rule is well known. It is a salutary one, and we see no reason for changing it.

Exceptions overruled.

Peters, for defendant.

The Wilton Manufacturing Company, *plaintiffs in error*, *versus* Ivory F. Woodman.

Want of legal service of the writ, is a sufficient cause for reversing a judgment recovered on default.

Of pleadings in the suit in error.

Double pleading is at the discretion of the court, and will be allowed only when there is reasonable ground for believing it will be for the furtherance of justice.

ERROR to reverse a judgment, which the defendant, resident in Boston, had recovered against the plaintiffs, on default, for $2807,72, damage, and $10,47, costs. The error assigned was that the writ had never been served on the plaintiffs.

The defendant's counsel at first appeared specially to take advantage of the service in this writ. His views in that respect having been overruled, he pleaded, that the writ in the original suit had been served by the officer's leaving a true and attested copy with the clerk of the plaintiff's company, and thereof put himself upon the country.

The plaintiffs protesting that no such service was made, replied that the writ was served conformably to the officer's return, which return was, (as appears by the papers and records of the case,) "I have served on the within named company by leaving an attested copy of this writ in the factory store for their appearance in court," and the plaintiffs aver that no other service or return was ever made, and pray that defendant may be estopped from averring any thing contrary to said return.

To that plea the defendant demurs, assigning eight causes of demurrer.

The defendant also offered two other pleas. One was a plea of accord and satisfaction, the other was a plea of a release of errors.

Plaintiffs resisted the reception of these pleas, because no leave had been given for double pleading, and because, as the counsel asserted, the pleas were utterly groundless, intended merely for a delay, which, as to the property seized upon the execution, would be ruinous to the plaintiffs' rights. The defendant then moved to plead double.

Webster, for defendant.

1. Its argumentative character is fatal to the replication. The denial of any rightful service is but an inference of the plaintiffs.

2. The replication is self-contradictory, in one part *asserting*, and in another part *denying*, that there was any service of the writ.

3. It should have joined the issue tendered in the plea. If the issue was not rightly tendered, the plaintiffs should have demurred.

4. It was a departure from the former pleadings, in which the plaintiffs had denied that any service had been made.

5. It does not traverse the allegation of the plea, which was an allegation of the only important fact in the case.

6. It sets up an estoppel. By what rule, after issue tendered, can an estoppel be pleaded?

7. It is too uncertain in its allegations to effect an estoppel.

8. It is double, informal, &c.

J. S. Abbott, for plaintiffs.

TENNEY, J., orally. — The third assigned cause of demurrer is, that the plaintiffs should have joined the issue tendered in the plea. That issue was irregularly tendered. The plea set out new matter and should have offered a verification. But the defect was of form only, and so the plaintiff might treat it. The plaintiff had the right to set out the service. The demurrer admits it as set forth. Such a service is manifestly insufficient.

The sixth and seventh grounds of demurrer are, that the plaintiffs invoke an estoppel; and that, even if an estoppel could attach to the case, the plaintiffs' allegations are too indeterminate to give it effect.

The evidence as to the service was the officer's return. That evidence is conclusive, but, in a legal sense, is not to be held as an estoppel. The plaintiffs' prayer that it might be so held was irregular. But it is mere surplusage.

In the other assigned causes of demurrer, nothing is perceived to impair the effect of the replication.

The defendant has moved for leave to plead double, and offers to plead and to prove an accord and satisfaction and also a release of errors. The former is inappropriate to this

form of action. But such a release would be a perfect defence.

The exhibition to the court of such a release would have had great weight upon this motion. Such a defence would hardly have left a necessity for the defendant's counsel to appear specially to take advantage of a supposed defect in the service of this suit, or to have presented a special demurrer with so many assigned causes, nor is it a wholly insignificant fact, that the original suit was brought in a county so far distant from the plaintiffs' residence, and when the time of service was so nearly expiring. On the whole, there does not arise a satisfactory conviction that the allowance of double pleading would advance the interests of justice, and the motion, being to the discretion of the court, is denied.

Judgment reversed.

WHITE *& al. versus* SANDERS *& al.*

If one wrongfully sell the plaintiff's goods, the receipt of money from him by the plaintiff, on account of such goods, would not be a ratification of the sale, provided the plaintiff would have had a right, *without notifying* the sale, to receive the money.

EXCEPTIONS. Trover for a lot of goods.

In 1848, the plaintiffs consigned the goods to one James Getchell, with private verbal orders to sell at retail and for cash only. Before the delivery of the goods to him, Getchell paid the plaintiffs $35 toward them, and promised $15 more, but did not pay it. He gave what was intended for security, by an absolute deed of a store. After retailing fifteen dollars worth of the goods, he sold all the residue to the defendants, at the invoice prices, taking in payment fifty dollars in cash, a horse, wagon and harness, and the defendants' notes at six and nine months for the balance. He exhibited the plaintiffs' invoice to the defendants, and receipted his bill of sale to de-

fendants, as agent for plaintiffs. After plaintiffs knew of the sale, they received of Getchell some store furniture, which they immediately sold, and also $13,55 in money, but whether it was a part of the $50 received of defendant, was not shown. The plaintiffs also received about $25 for the rent of the store.

At the time of purchasing, the defendants knew of the private instructions to Getchell to sell for cash only. This action was brought after a demand upon the defendants, of "the goods which they purchased of James Getchell."

SHEPLEY, C. J., presiding, instructed the jury that the demand was sufficient, if they were satisfied that defendants purchased the goods of Getchell, and took a bill of them.

The counsel for the defendants requested the Judge to instruct the jury, that if they believed that plaintiffs, since their knowledge of the sale to defendants, had accepted money, property, or security from the agent on account of the goods sold, this might be regarded as a ratification of the sale to defendants, notwithstanding the agent exceeded his authority in making it.

The Judge declined giving said instructions, but did instruct the jury that, if the plaintiffs received of Getchell, after he sold the goods to the defendant, money, or other property, which they would not be entitled to receive unless the sale was regarded as valid, the sale would thereby be ratified; but if they would be entitled to receive the same from Getchell, if the sale were regarded as unauthorized, the sale would not thereby be ratified.

To the instructions and rulings the defendants except, after verdict against them.

TENNEY, J., orally. — The instruction as to the demand was correct.

The defendants' counsel requested certain instructions. But the mere knowledge by the plaintiffs of the sale to the defendants, and their receipt from Getchell of money on account of the goods, would not necessarily be a ratification. The modi-

fication of requested instruction was rightfully made by the Judge. *Exceptions overruled.*

CARTLAND *versus* MORRISON.

The title to goods will pass by a sale without delivery from the true owner, though, at the time of the sale, they are in the tortious possession of a third person, claiming them.

The purchaser in such a case may, after demand, maintain trover for them, against such third person.

EXCEPTIONS from the District Court, HATHAWAY, J. presiding.

Trover for a yoke of oxen. They were formerly the property of defendant. He was keeping them in the pasture of one Fuller. He proposed to sell them to Garland, at a fixed price, to be paid in hauling. Garland consented to buy, if he could get Calef to receive them of him upon a debt. Defendant gave Garland a writing, addressed to Fuller, to deliver the cattle. The writing was left with Fuller, who consented to the taking. Garland and Calef at first could not agree on the price, and went away from Fuller's, giving him to understand there was no trade. But afterwards, on the same day, they agreed; and next morning Garland took them from Fuller's pasture, and delivered them to Calef. This was not known to Fuller till several days afterwards. The plaintiff bought them of Calef, and sold them to Clark for a colt and a note.

The defendant, fancying that the transaction between himself and Garland did not amount to a sale, and that the oxen were still his property, replevied them from Clark, and kept the possession of them.

Clark was alarmed, and induced the plaintiff to rescind the sale, and plaintiff gave back the note and colt to Clark. Afterwards, Clark, to settle the replevin suit, transferred all his right in the oxen to the defendant.

The plaintiff then demanded the oxen of defendant, without success, and afterwards brought this action of trover.

The question to the jury was one of ownership. Several witnesses were examined on each side. Defendant requested the Judge to direct a nonsuit. This was refused. Defendant then requested instruction, that, when Garland and Calef had presented the order, and examined the cattle, and gone away without taking them, or deciding to take them, the agreement, between defendant and Garland to sell, was at an end; so that the property did not pass to Garland. That instruction was not given. The instruction given was that, if the jury found the plaintiff, when he sold to Clark, to be the lawful owner, and that the possession which defendant then had was wrongful, it was competent for the plaintiff and Clark to rescind their trade, and that on doing so, the ownership re-vested in the plaintiff, without a formal delivery.

The verdict was for plaintiff, and defendant excepted.

Sanborn, for plaintiff.

Morrison and *C. S. Crosby*, for defendant.

WELLS, J., orally. — The claim to a nonsuit is not insisted upon. In withholding the other instruction requested, there was nothing wrongful. Defendant has argued, that as both parties claim under Clark, the vendee who first obtained the possession is entitled. But there was no ruling, or request for ruling, on that point. It is not for decision here. The ruling was, that if defendant's possession was wrongful, the re-sale from Clark to the plaintiff was valid without a formal delivery. That ruling is in accordance with the rules of law.

Exceptions overruled.

COOPER *versus* BAKEMAN.

In replevin, upon a plea of *non cepit* with brief statement that the property is in the defendant, *and not in the plaintiff*, it is incumbent on the plaintiff to prove property in himself.

If the brief statement merely allege property in the defendant, without denying it to be in the plaintiff, the burden of proving ownership is on the defendant. — Per WELLS, J.

REPLEVIN. General issue, with brief statement "that the property was the property of the defendant, and not the property of the plaintiff."

Upon the question of ownership there was testimony on both sides. The Judge ruled that the burden was on the defendant to prove property in himself. The verdict was for the plaintiff and the defendant excepts.

Cutting and *Sewall*, for defendant.

The ruling was probably based on the authority of *Green* v. *Dingley*, 24 Maine, 135. There the brief statement alleged property in the defendant, but did not, as in this case, allege that it was not in the plaintiff.

In Greenleaf on Evidence, vol. 2, sec. 563, (2d edition,) the author says, "If the defendant, besides the plea of *non cepit*, also pleads property, either in himself or a stranger, and traverse the right of the plaintiff, which he may do, with an avowry of the taking, the material inquiry is as to the property of the plaintiff, which the plaintiff must be prepared to prove, the *onus probandi* of this issue being on him; for if the former issue is found for him, but the latter is either not found at all, or is found for the defendant, the plaintiff cannot have judgment," and to sustain the doctrine cites some twenty authorities.

The case of *Dillingham* v. *Smith*, decided since the trial, is deemed conclusive. 30 Maine, 370.

Rowe and *Bartlett*, for plaintiff.

The general issue admits the plaintiff's property. The brief statement does not limit or qualify the admission.

The sole office of a brief statement, filed under R. S. c.

115, § 18, is to give notice of that special, substantive matter, which defendant proposes to prove.

A denial of any allegation in the writ is not notice of special matter to be given in evidence, and cannot properly be inserted in such brief statement.

Such traverse, if inserted, is mere surplusage, and is of no force or effect.

If defendant would traverse any allegation of the writ, which is not traversed by pleading the general issue, he must plead specially.

The act of 1831, abolishing special pleading, was repealed at the revision of the statautes in 1841.

A defendant may now file a special plea at common law, without pleading the general issue; or he may, under the statute, plead the general issue with as many special pleas as he chooses; or he may, in proper cases, plead the general issue, and give in evidence special matter with a brief statement.

The prohibitory act of 1831 being repealed, all decisions, and rules of practice, having their origin in such prohibition, are no longer in force.

If defendant, now, by filing a brief statement, fails to bring the matter to such an issue as he might have raised by a special plea, he alone is in fault, for having adopted that mode of pleading, and must bear his loss.

The brief statement in *Potter* v. *Titcomb*, 16 Maine, 423, would not be allowed under our present statute; nor would the counter brief statement, there filed for the purpose of bringing the matters to issue; as the only province of a counter brief statement, under the present statute, is to state new matter to be given in evidence in avoidance.

The only matter put in issue by the plea in this case, was the taking, and that was all plaintiff was bound to prove. *Greene* v. *Dingley*, 24 Maine, 137.

The only matter in relation to which defendant could adduce proof was, that the property was the property of defend-

ant; for that is the only matter contained in his brief statement. *Washburn* v. *Mosely*, 9 Shepl. 163.

The New Hampshire statute of 1831, is similar to ours. In *Cocheco Co.* v. *Whittier*, 10 N. H. 305, it was decided that the filing of a brief statement does not change the nature of the general issue, or in any way limit the admissions defendant makes by filing that plea.

Under the New York statute, which seems to be similar to ours, the brief statement seems to be regarded simply as a notice of new facts to be proved. 20 Johns. 746, 749.

In 13 Johns. 329, and in 1 Wend. 70, it was decided that a brief statement cannot be filed with a plea of *nul tiel record;* although their statute does not seem, like ours, in express terms to confine the brief statement to cases where an issue is joined to the country.

The brief statement is simply notice of matter which defendant proposes to prove. He may prove it or not, as he chooses. The *onus* is upon him. The plaintiff is only called upon to rebut.

WELLS, J., orally. — Under our statute, *non cepit* with brief statement of property in the defendant and not in the plaintiff, does not admit property in the plaintiff. Such pleading creates substantially an issue on the plaintiff's property. It is therefore incumbent on the plaintiff to prove property in himself. At common law, in a plea of property in the defendant, the *onus* is on plaintiff to prove property in himself, because if the issue be found merely that the property is not in the defendant, the plaintiff cannot have judgment. The plaintiff alleges the property to be his. The burden is on him to prove it.

In this case, the Judge ruled that the burden of proof was on the *defendant* to show property in himself. This was erroneous.

It would have been right, under our statute, if the pleading had not denied property in the plaintiff.

Exceptions sustained

STATE *versus* WALKER AND PAGE.

In an indictment, charging a conspiracy to prosecute a person who was *not* guilty, it is not admissible for the government to prove, that the defendants prosecuted *other* persons who *were* guilty.

EXCEPTIONS from the District Court.

Indictment, alleging that the defendants conspired to charge one Levi R. Gray, and cause him to be impleaded of an offence, of which he was not guilty.

The testimony of the government showed in substance, *that* Gray kept a public house; *that* five suits were brought against him for selling intoxicating liquors contrary to law; *that* in each of the suits the defendant, Page, was plaintiff, and the defendant, Walker, was his attorney; *that*, at the return-day of the first suit, the justice, though previously notified of the action, was absent from home; *that*, upon said justice's docket, Walker, in his capacity as a justice, entered a continuance of the action; *that* the justice afterwards, thinking the continuance was illegal, dismissed the action; *that* one of the said actions was dismissed for an informality in the summons; *that* two were nonsuited after a continuance, because the plaintiff did not further attend, and *that*, in one, the said Gray was charged, and appealed.

The government was permitted to show, though objected to, that there was an association of persons, called the Penobscot Temperance League, acting under certain pledges to each other, and to the public, among other things "to use all lawful measures to put an end to the lawless traffic in alcoholic liquors and mixtures," "by aiding to ferret out cases of violation of that law, and to secure testimony to convict each known violator of it"; *that* the defendants were members of that league; and had brought suits against many persons other than Gray for selling spirituous liquors, and what proceedings were had in each suit; *that* a large portion of the suits had been successful, and quite a considerable number were yet pending in the District Court, having been appealed into that court by the respective defendants; *that* money had

been received by the defendants in many cases for fines and costs, and *that* they had paid out moneys for costs and to employ agents to "hunt up cases, and procure testimony."

The District Judge instructed the jury, *that* if the defendants confederated to prosecute Gray for an offence of which he was innocent, they were chargeable on this indictment; *that* the nonsuit in some of the actions against Gray, was sufficient evidence of his innocence, unless his guilt was proved by the defendants.

The defendants were found guilty, and excepted.

Walker and *D. T. Jewett*, for defendants.

Waterhouse, for the State.

The arrangement entered into by the league, under which the defendants acted, was illegal. It was an agreement to ferret out offences by combination. Such is not the policy of the law. Such combinations tend to stir up litigation. It was, therefore, allowable to show how often and to what extent the defendants had done so.

SHEPLEY, C. J., orally. — The charge is, that the defendants conspired to prosecute Gray, an innocent person. After testimony on that point had been offered, the State was permitted to prove, that the defendants had combined to bring suits against other persons, with whom Gray had no connection. It is not proved or pretended, that these suits were illegal or unsuccessful. The charge was, that the defendants conspired to prosecute Gray *without cause*. The proof was, that they prosecuted others *for good cause*, in a legal manner, and with success.

Such proof was inadmissible. It could only create prejudice. The prosecution of *guilty* persons is not proof of a conspiracy to prosecute the *innocent*.

Exceptions sustained.

RUFUS DWINEL *versus* DANIEL J. PERLEY.

At law, the transfer of a note, secured by mortgage, does not assign the mortgage.

The purchaser of a bankrupt's land, at an authorized sale by the assignee, takes the land freed from any incumbrances thereon, made by the bankrupt, in fraud of creditors.

Thus, if a mortgage of land be made, in fraud of creditors, and the mortgager afterwards become bankrupt, the purchaser of the assignee's rights holds the fee, unincumbered by the mortgage.

THIS was a writ of entry. Demandant claims title under a sale by the assignee of the estate of the defendant, he having been decreed, June 13, 1843, to be a bankrupt, upon his own petition, dated February 25, 1843.

In the schedule A, of his indebtedness, the defendant inserted a note to his father, Daniel Perley, on which was due about seven thousand dollars. In the schedule B, of assets, he mentions the lands now in controversy, as under mortgage to Daniel Perley, to secure payment of the note.

The assignee applied, in due form, to the Bankruptcy Court, setting forth that the bankrupt was seized and possessed of the estate as mentioned in said schedule of assets, and asked and obtained license to sell the same. In his deed, he conveyed to the purchaser *all the right, title, interest, claim and demand*, in the land demanded in this suit, *which in his capacity of assignee, he had in and to said land*, the same having been returned in said bankrupt's schedule B, and represented therein to be mortgaged to Daniel Perley, to secure to him the payment of the amount due to him as mentioned in said schedule A. The deed then adds as follows: viz. "but it is not intended to convey said land subject to said mortgage; but *all the legal and equitable interest in and to said land, which vested in the assignee*, is hereby conveyed, and the said [purchaser] has the same right and power to contest the liability to the amount due upon said mortgage, if any, which I, as assignee, have or had power to do."

Daniel Perley died June 24, 1843. By his will, he be-

queathed to the defendant all notes of hand, which he might hold against him at the time of his decease. The defendant was in possession of the land at the making of the mortgage, and has so continued ever since. This action is brought by the grantee of the purchaser.

At the trial, the jury, among other things, returned that, at the time of the death of Daniel Perley, there was not any such valid subsisting note, as was mentioned in the bankrupt's schedule A, much evidence having been given on both sides, upon the question whether the note and mortgage were, at their inception, fraudulent and void.

A verdict, *pro forma*, was taken for demandant by consent, subject to be altered into a verdict for defendants or otherwise, as the court may adjudge conformable to law.

Cutting, for defendant, contended, —

1. That the assignee obtained leave to sell nothing but the equity of redeeming, and therefore his conveyance was void, he having sold another interest. The ownership is yet in the bankrupt, the defendant.

2. Where one buys only an equity of redeeming, he is estopped to deny the validity of the mortgage, and to hold the entire estate. *Russell* v. *Dudley*, 3 Metc. 147. The demandant therefore ought to have been precluded from offering proof, tending to show "that said mortgage and note, at their inception, were fraudulent and void."

It may be argued that *Jewett* v. *Preston*, 27 Maine, 400, is at variance with the case above cited. But there are material differences in the cases. In that case the evidence was admitted *without* objection; otherwise in this. That case related to *personal* property; this to *real*. In that case the "effects" of the bankrupt were ordered to be sold. In this case it was otherwise, as I have already shown. The leave to sell was not general. It referred to the bankrupt's schedule, and the schedule shows it was but an equity, which the assignee was empowered to sell. In the case *Jewett* v. *Preston*, the sale was pursuant to the decree, here not.

3. The bequest by his father cast upon the defendant the

ownership of the land, the demandant being estopped to deny the validity of the mortgage. The gift of the note, secured by the mortgage, transferred the mortgage, especially as the instrument of transfer is a will, which is to have a liberal construction. The legacy did not discharge the mortgage, it not being the interest of the mortgagee or of his legatee to have it so. This, then, is property acquired by the defendant after his bankruptcy. The tenant has become the mortgagee, the plaintiff is mortgager.

And here the question does not arise, whether or not the common assignment of a note *only*, carries along with it the mortgage given to secure its payment, which has been affirmatively settled in New York and New Hampshire; though otherwise in Maine and Massachusetts.

In the construction of wills, the intention of the testator is to govern, and if he bequeaths a note which is secured by a mortgage, his intention must be, that both note and mortgage should go together; and they must go together, otherwise the mortgage, being separated from the note, ceases to operate.

"An absolute deed of land and a bond made at the same time to re-convey upon the payment of a sum of money, constitute a mortgage; and the mortgagee's right, under the same, will pass by a devise of 'all the obligations for money due him.'" *Rice* v. *Rice*, 4 Pick. 349.

In that case, as in the case at bar, the testator was the mortgagee, both testators holding an obligation to pay money. Those obligations were devised. Nothing was mentioned about real estate or a mortgage, but still in the former case the court in Massachusetts held, that the mortgage passed under and by virtue of the devise.

The mortgage and note then being transferred to the tenant, after he was declared a bankrupt, and after he had parted with his equity, he became in fact the motgagee, and by force of the will inherited the rights of the testator.

The legacy could not operate as a discharge of the mortgage, for it was not for the mortgagee's interest for it so to do.

It follows, that before Pierce or his grantees can sustain an action against the tenant, they must discharge the mortgage.

This license was granted upon condition, "that the said assignee first give public notice of said time of sale, by advertising the property to be sold in a newspaper printed in Bangor in said district, fourteen days at least prior to said day of sale."

Consequently the assignee had no authority to sell until after he had complied with this condition.

There is no evidence in the case that he ever complied with the condition, excepting the recital in his deed.

And the law is well settled, that the recital in an officer's deed is not evidence of the facts recited. *Merrill* v. *Getchell*, 17 Maine, 191.

Rowe and *Bartlett*, for plaintiff.

The defendant's last point was not presented at the trial. But it is unimportant. The fifteenth section of the bankrupt act makes such recitals full evidence.

By the license to the assignee, he was empowered to sell, not an equity, but the land itself. *Jewett* v. *Preston*, 27 Maine, 400.

He was authorized to sell whatever would pass by deed, under the description used in his petition. The description then of the demanded premises, if it stood alone, would carry the fee. The subsequent recital, that the premises were mortgaged, does not limit or qualify that estate; or change it to an equity of redemption. We purchased the bankrupt's estate, subject to the contingency of the existence of the mortgage, the truth or falsehood of the recital. If false, it is of no effect. If true, it is merely notice of the existence of a mortgage, which the grantor would be at liberty to contest, and remove, in any legal way. *Greene* v. *Kemp*, 13 Mass. 518; *Bullard* v. *Hinkley*, 6 Maine, 293.

If Dwinel took subject to the mortgage, it was not a mortgage for a specific sum, but for whatever might be due on a certain note. Of course he has the right to show how much, and whether any thing be due on the note; and the holder of

the mortgage cannot maintain possession against him, without showing that something is due. *Vose* v. *Handy*, before cited.

All the defendant's interest passed to his assignee, by the decree of bankruptcy. Bankrupt Act, 1841, sect. 3.

Defendant acquired no new interest in the premises, by his father's will. A bequest of the notes to a stranger would not have operated as an assignment of the mortgage, (*Galliers* v. *Morse*, 9 B. & C. 267,) for that must be by deed. *Vose* v. *Handy*, 2 Maine, 322; *Prescott* v. *Ellingwood*, 23 Maine, 348.

But here was no bequest; there was merely a forgiving of the debt, (if any,) which operates as an extinguishment of the mortgage. *Hobart* v. *Stone*, 10 Pick. 215; vol. 14 Jurist, 53, *ex parte Priel.*

If there were any question as to the law, the finding of the jury would conclude defendant on the facts. By that finding, it is settled, that, at the time of his father's death, there were "no valid, subsisting notes," such as those, which he has here set up as a foundation of his claim as mortgagee.

He had then no right of possession against his assignee, at the time of the assignee's sale.

By that sale all the assignee's interest passed from him, and subsequently vested in the demandant, by the terms, used in the assignee deed, and the subsequent conveyances.

If the clause in the will be a legacy, and not a forgiving of the debt, the legacy is not perfect without the assent of the executor. The legacy may be wanted to pay debts. The case does not show that it will not; nor does it show that the executor has assented. He has not transferred, or delivered, to defendant, either the notes or the mortgage; but produces them all in court himself. 2 Black. Com. 512, 513; *Hobart* v. *Stone*, before cited.

The case of *Russell* v. *Dudley*, cited for defendant, does not apply. That goes wholly upon the construction of a special statute sale. There the officer undertook to sell only an

equity which did exist. Here the whole interest is in the assignee. His interest is very different from that of a sheriff.

TENNEY, J., orally. — The defendant contends, *that* the assignee's license authorized him to sell only the equity of redeeming; *that* by the petition and schedules the mortgage is recognized; so that the demandant took subject to the mortgage. To show that the demandant cannot set aside the mortgage and hold the fee, defendant cited 3 Metc. 147. In that case, the officer's sale recognized the mortgage, and purported to sell only the equity.

In this case, there was no devise of the mortgage to the defendant, and no express reference to this note. It is well settled that a mortgage does not pass by a transfer merely of the notes.

But what did the assignee sell? In his deed he expressly avows that he does not intend to sell an equity, but all the defendant's interest. This was a sale of all the interest which his creditors had in the land. It protected them against the fraud. But, again, what did the assignee sell? His license embraced more than the equity. The schedule states the land to be under mortgage. But the assignee does not recognize the mortgage; he does not ask leave to sell subject to it. Suppose the debt had been paid, would the equity alone have passed, on the ground that the mortgage was still outstanding? There is a wide difference between the case of an assignee, and of an officer selling on an execution. The officer is a mere instrument. The assignee holds the title. In this case a fair construction does not confine the application and license to the equity merely, but extends to all the defendant's rights. *There*, evidence concerning the notes, though objected to, was admissible.

The jury have found there was no valid note. There was then no equity of redeeming. The fee was in the assignee, and the purchasers under him took it.

Defendant further objects to a want of evidence, that, in making the sale, the assignee complied with the statute re-

quirement of notices, and has compared them with the requisites in sales for taxes. But the cases are unlike. The tax collector has no interest in the property; is a mere organ; whereas the title is wholly vested in the assignee. The bankrupt Act, sect. 15, dispenses with evidence of notice, except in the recitals of the deed; and though in the first part of the section there seems some limitation to the effect of the recitals, the last part of it declares them sufficient for establishing the title. *Judgment on the verdict.*

MILLER, *in equity, versus* WHITTIER *& als.*

A person, who has assigned all his interest in a contract made to him, need not join with the assignee as a plaintiff, in a bill for performance.

One, bound to convey land upon the performance by another of certain precedent conditions, does, by purposely incapacitating himself to make the conveyance, exonerate the obligee from the performance, prior to instituting a bill for relief.

THE bill alleges, *that* one Amos Patten conveyed to Joseph Whittier, (defendant) certain premises described; — *that* said premises were purchased by Whittier as trustee for James H. Perkins & J. P. Wendell, co-partners composing the firm of Perkins & Wendell; *that* afterwards said firm was dissolved, and Perkins transferred all his interest in the premises and other assets to Wendell, who carried on business under the name of J. P. Wendell & Co; — *that* Whittier became seized of the premises and possessed of the stock and personal property thereon, in trust for said Wendell, and being so seized and possessed made the following agreement with said Wendell, under the name of J. P. Wendell & Co., which was mutually executed and delivered; which is in the following words: —

"Memorandum of agreement, made and entered into this seventeenth day of November, eighteen hundred and forty-five, between Joseph Whittier of the town of Lincoln, county of Penobscot, State of Maine, of the one part, and J. P.

Wendell & Co., of the city of Philadelphia, State of Pennsylvania, of the other part, witnesseth, that said Joseph Whittier agrees to deed to A. E. Wendell, or whom she may direct, all that property, known to the parties as the Mattanawcook purchase, being the village of Lincoln, containing 600 acres, more or less, with grist-mills, saw-mills and all improvements, buildings, &c., belonging to the same. Also a tract of land known as the half township tract, with water communications, &c. It being understood that said property is clear of all incumbrances except two mortgages, each for $2000, one to J. J. Wiggins and one to Samuel Billings. Also excepting the building lots said Whittier has sold or may sell in the village, and farms on half township. He will also transfer all bonds, mortgages and securities, which he has received on sale of such lots to Ann E. Wendell. It is understood there is a farm which was sold to said Wiggin for $500, which said Whittier agreed to take back, which he will pay out of the funds which may be in his hands arising from the property, and said Wiggin to re-deed to Ann E. Wendell. He, said Whittier, agrees to take the management of said property for one year from this date, during which time he will convert as much of the personal property now on hand, and which may arise in future operations of the property, to the best advantage, into means to meet the liabilities or debts which have arisen, or may arise from the management of the same, and when such debts and liabilities are paid, then said Whittier shall transfer all the personal property which may remain on hand to said J. P. Wendell & Co., if required so to do, who on their part agree in the first place to pay into the hands of Gid. C. Smith, $1000 in cash, and their several notes at 3 and 6 months for $1000 each, amounting to $3000, which said Gid. C. Smith is to pay over to Nancy Whittier whenever he shall receive the beforementioned deeds duly executed and signed by said Joseph Whittier and wife, and it is understood that, if said deeds are executed at once, then said Smith shall pay the $1000, on receipt of them, to Nancy

Whittier, and enter satisfaction for that amount on a certain mortgage, which he holds as security for the payment of the above $3000 for said Nancy Whittier, and at the maturity of said notes, if paid, satisfaction to be entered by said Smith on the mortgage, and the money to be paid over to Nancy Whittier. J. P. Wendell & Co. further agree to pay said Joseph Whittier $900 as a salary for the management of the business for one year commencing at this date, and to secure to said Whittier the sum of $1500, by mortgage on the property at such time as may be agreed upon. Also to obtain and forward to Gid. C. Smith, said Whittier's notes, now in the hands of Grant & Stone, amounting to $10500 on interest from dates, being part of the money advanced for the purchase of the aforesaid property. J. P. Wendell & Co. also agree to accept said Whittier's drafts at such times and dates as may be agreed upon, for the payment of certain debts due in Boston for the merchandize, purchased for the benefit and management of lumbering, milling and farming on said property, amounting to about $1100. It is understood by this agreement that said J. P. Wendell & Co. are to exonerate said Joseph Whittier from all liabilities, which have arisen from the management of said business of lumbering and improvement of the property. It is also understood that should said Whittier wish to leave said property at the expiration of one year, said J. P. Wendell & Co. will use their endeavors to pay a part or the whole of the $1500 before mentioned. In witness whereof we have hereunto set our hands the day and year abovementioned.

"Joseph Whittier,
"J. P. Wendell & Co."

The bill then alleges, in substance, *that*, in fulfilment of this agreement, J. P. Wendell & Co. placed in the hands of Gideon C. Smith the sum of $1000, and their three notes for $1000 each, but said Whittier and wife have neglected and failed to execute the deed as provided in said agreement; and that the several stipulations which were to be performed by Wendell had all been performed, except, that instead of

taking up and forwarding to Smith for Whittier's use the notes of $10500, the plaintiff has taken them up and holds them in readiness for Whittier, when he shall have performed his part of the contract.

That Wendell afterwards, being indebted to the plaintiff, transferred and assigned to him all his interest in the personal property on the premises, and by deed, April 28, 1848, duly executed and recorded, conveyed to him, in mortgage, all his interest in said premises; and has since, by two deeds, conveyed all his interest in the premises to the plaintiff.

The plaintiff further alleges, that Ann E. Wendell granted and conveyed all her interest by a deed to the plaintiff, and directed said Whittier to convey the same to him.

By reason of all which, Whittier became trustee for plaintiff, and holds and should hold said property and the proceeds for his benefit and use; and plaintiff is entitled to have from said Whittier a conveyance of the real estate unsold; and possession of the personal property unsold; and an account of all that has been sold; and a transfer and delivery of the moneys and securities taken therefor; and an account of income and profits.

But Whittier, (combining with other defendants, &c.,) refuses to convey the real estate, or deliver the personal property, or to account for the proceeds of what is sold, or the income or profits, but pretends that he is not trustee, and that he holds in his own right, and threatens to sell.

The bill further alleges that, shortly after making the said agreement, the said Whittier did convey, with intent to avoid the trust, &c., to P. T. Jones, (defendant,) son-in-law of said Whittier, 4,500 acres of land, part of said premises, and at other times, divers other tracts, part of said premises, (as to which plaintiff prays a discovery.)

And said Whittier has, with such intent, also transferred and delivered to said Jones a large part of the personal property aforesaid. Which conveyances, transfers and deliveries were without any consideration, or any adequate considera-

tion ; and at the time of the making of them, said Jones had notice that Whittier held in trust, and of the agreements and dealings between said Whittier, and Perkins & Wendell and J. P. Wendell & Co.

Whereby Jones became trustee of plaintiff, as to the property so passed to him, and bound to convey and deliver to plaintiff, and to render an account of proceeds, rents and profits, and to pay the securities and moneys by him received therein. But he refuses to convey or to deliver possession, or to account.

Prayer for defendants to answer ; —

and that Whittier may be ordered to declare a trust of and concerning said real estate, and convey the same to plaintiff, and deliver the personal property, or so much of both as remains unsold ; to render an account of what has been sold and disposed of and of the income and profits ; and to pay over the moneys and securities received for the same, or so much as may, on such accounting, appear due to plaintiff; and that Jones may be ordered to declare a trust of and concerning all that has come into his hands ; and to convey and deliver the same to plaintiff, or so much as is unsold ; and of the income and profits ; and to pay over the moneys and securities received for the same, or so much as may appear to be due to the plaintiff.

Plaintiff offering to do on his part, whatever said J. P. Wendell & Co., his grantors, should do and perform by said agreement, and whatever the court shall order him to do ; and praying such other and further relief as to the court shall seem meet.

Defendants, Jones and Whittier, severally file general *demurrers* to plaintiff's bill.

Cutting, for defendants, Whittier and Jones.

By the contract relied upon, Whittier was to convey to Ann E. Wendell or "to whom she might direct" only the real estate. But the personal property he was to convey to J. P. Wendell & Co. *and not to their assigns* ; so that in order to sustain the bill J. P. Wendell & Co should have been joined as

party plaintiffs; or the bill may be said to be multifarious, embracing distinct substantive matters, real and personal estate; the one assignable and the other not, by the very terms of the plaintiff's proof.

J. P. Wendell & Co. were "*to obtain and forward unto Gideon C. Smith said Whittier's notes (then) in the hands of Grant & Stone, amounting to ten thousand five hundred dollars on interest from dates, being part of the money advanced for the purchase of the aforesaid property.*"

On this particular the bill alleges, not that said notes had been obtained and forwarded to Smith, but that said Wendell & Co. did obtain said notes, and that the same are *now held by your orator*, who is willing and hereby tenders to dispose of said notes as said Joseph Whittier may desire, and this court may direct, upon his full compliance with the agreement aforesaid.

The contract is clear, explicit and peremptory, that the notes shall be taken up and forwarded to Gideon C. Smith, who it would seem, was the person selected by the parties as the stake holder, until the deed was executed, when they were to be delivered up to Whittier.

Neither equity or law will compel Whittier to do any thing until the notes are lodged with said Smith.

It is not sufficient, that the plaintiff has them in his possession, and is willing to do with them as the court may direct.

Again, the bill must be dismissed for want of jurisdiction. The plaintiff alleges the defendant to be his trustee, and he is the *cestui que trust.* But no such fact legally appears. For "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." R. S. c. 91, § 31; *Cowan* v. *Wheeler*, 25 Maine, 267.

Rowe and *Bartlett* for plaintiff.

If there has not been a strict legal compliance with the terms of the contract, and the non-compliance does not go to

the essence of the contract, relief will be granted, if it be conscientious. 2 Story's Eq. § 771, 775, and per L'd Redesdale (in note to same); *Rogers* v. *Saunders*, 16 Maine, 92, 112, 113; *Getchell* v. *Jewett*, 4 Maine, 350, 360, 361; *Taylor* v. *Longworth*, 14 Peters, 170; 2 Sugden's Venders, 340; *Jones, in equity*, v. *Robbins & al.* 29 Maine, 351.

If a bill be brought by a party, himself in fault, the court will consider all the circumstances of the case, and decide according to those circumstances. *Brashier* v. *Gratz*, 6 Wheat. 528; [5 Cond. R. 165.]

If the important part of an agreement be performed, and an inconsiderable part be left unfulfilled, equity will decree a specific performance. *Church* v. *Steele*, 1 A. K. Marshall, Kentucky, 330.

Shepley, C. J., orally. — Whittier entered into a written contract. This bill is brought by an assignee who seeks a performance. The contract required, that Whittier should convey certain lands to Wendell's wife or her appointee. Whittier was also to transfer to Wendell & Co. all bonds and securities which he had received on certain sales. He was to manage the estates for a year, making sales and paying debts, and was then to transfer to Wendell all the remaining personal property.

There were many stipulations, which Wendell on his part was to perform.

The bill substantially alleges the performance of them all, except that which required Wendell to procure and lodge in the hands of Smith, to be delivered by Smith to Whittier, certain notes outstanding against Whittier amounting to $10,500, and interest.

As to that stipulation, the bill alleges, that the plaintiff had obtained said notes, and is ready to deliver them to Whittier, whenever Whittier shall have performed his part of the contract.

Whittier has never made the conveyances and transfers, on his part to be done.

The bill sets forth, that the interest both of Wendell and of Mrs. Wendell has become vested in the plaintiff, who was, by his stipulation to perform all that Wendell was to perform.

The bill also alleges, that Whittier for the purpose of avoiding the trust, conveyed to the other defendant, Jones, who is his son-in-law, 4500 acres of the land and other portions of the trust estate; and that Jones, in receiving said land, and other of the trust estates, had full knowledge of the agreements and trusts, into which Whittier had entered with Wendell & Co.

A general demurrer to the bill has been filed by each of the defendants. One objection to the bill is, that the personal property was to be conveyed to Mr. Wendell and therefore Wendell ought to join as plaintiff in the bill.

But all that Wendell had, and all that Mrs. Wendell had, went to the plaintiff, as is alleged in the bill and admitted by the demurrer. The defendant's chief objection is, that the plaintiff permits one of the specified conditions of the bill to remain unperformed on his part. He was to take up and deposit with Smith the $10,500 notes, outstanding against Whittier, and has not done so. It appears, however, that the plaintiff took up the notes, and holds them ready to be delivered to Whittier, when Whittier should fulfil his part of the contract. Still that objection would be fatal, except, that the bill alleges another fact, which is, that Whittier, for the purpose of avoiding the trust, conveyed to his son-in-law, Jones, 4500 acres of the land, and thereby incapacitated himself to perform the contract on his part. By that proceeding, he exonerated the plaintiff from delivering up the notes.

The bill further alleges, that Jones, in receiving the conveyance from Whittier, not only of the 4500 acres of land, but of other of the trust property, had full knowledge of the agreements and trusts between Wendell and Whittier. Upon such a state of facts, both demurrers must be overruled.

Note. — Wells, J. took no part in this decision. At the time of the argument, he was engaged in court at Piscataquis county.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF WASHINGTON,

1850.

PRESENT:

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

SPAULDING *versus* ADAMS.

A lien, *created by contract*, is not discharged by permitting the general owner or his assignee to take possession of the property, if it may be done consistently with the contract, and the course of business, and the intention of the parties.

Where one, entitled to a lien on property, conducts respecting it, in a manner inconsistent with the preservation of his lien, the presumption is that he has waived or abandoned it, unless such conduct be satisfactorily explained.

TROVER for five hundred and twenty-one mill logs, which the plaintiff claims to hold under a lien, according to an agreement with the owner for driving the same. The case was submitted to the court upon the depositions of Norris and of Alexander with some other agreed facts.

Alexander owned the logs. He employed the plaintiff to drive them to Veazie's boom, at seventy-five cents per thous-

and feet, and in the contract, which was in writing, gave to the plaintiff a lien on the logs, to secure the pay for driving. On the back of that contract, was an assignment of it by the plaintiff to H. O. & S. H. Hussey.

The plaintiff drove the logs according to the contract, and has received no pay.

After the logs were at Veazie's boom, Alexander sold the logs to the defendant, who manufactured and sold them, and paid Alexander for them.

There was a statement in one of the depositions, slightly tending to show that the plaintiff was present at the sale by Alexander to the defendant. The other deposition denied that fact.

A further exposition of facts will appear in the opinion.

Carr, for the plaintiff.

A. W. Paine, for the defendant.

Shepley, C. J. — The case is submitted upon an agreed statement composed in part of the depositions of James J. Norris and Hugh Alexander, with authority to make such inferences from the testimony as a jury would be authorized to do.

The contract made on April 14, 1848, between the plaintiff and Hugh Alexander, who was the owner of 521 logs, estimated to make 210 thousand feet of boards, secured to the plaintiff a lien on the logs for the payment of seventy-five cents per thousand feet for "driving" them to Veazie's boom, to be paid when the logs were driven into the boom.

When a lien, as in this case, is created by contract, it is not discharged by permitting the general owner, or his assignee, to take possession of the property, if it may be done consistently with the contract, the course of business, and the intention of the parties. *Bradeen* v. *Brooks*, 22 Maine, 463; *Oakes* v. *Moore*, 24 Maine, 214.

When a person, entitled to a lien on property, conducts respecting it in a manner inconsistent with the preservation of his lien, the presumption is, that he has waived or abandoned it, unless such conduct be satisfactorily explained.

Hence it has been held, that one, who has a lien upon goods, waives it by causing them to be attached to secure the debt, by which the lien is upheld. *Legg* v. *Willard*, 17 Pick. 140.; — and

that it is waived by taking a negotiable promissory note for the debt secured by the lien. *Hutchins* v. *Olcott*, 4 Verm. 549; *Chapman* v. *Searle*, 3 Pick. 38.; — and

that it is waived by claiming to be the general owner of the property subject to the lien. *Picquet* v. *McKay*, 2 Blackf. 465.

The counsel for the defendant insists, that the plaintiff is precluded from asserting a lien upon the logs, by proof that he was present, when Alexander sold them to the defendant, without intimating that he had a lien or claim upon them. The burden of proof is upon the defendant to establish these facts; and the testimony fails to prove them.

It does appear by the testimony of Norris, that the plaintiff and his partner, after the logs had been floated to the boom and sold to the defendant, and therefore after the plaintiff became entitled to his pay for driving them, "commenced running the logs from the boom to Indian Island, near the mills in Bradley, in which they were sawed, and continued to run them until they were all run and sawed up." "I sawed the lumber, (says Norris,) and saw said Spaulding very frequently, sometimes every day, while engaged in running the logs to the mill. He never made any mention of any claim to the logs." According to this testimony the plaintiff assisted the purchaser to take possession of the logs for the purpose of having them sawed and converted to his own use, without making known that he had any lien or claim upon them. This was conduct so inconsistent with the preservation of his lien upon them, that it must be regarded as waived or abandoned.

He appears to have assigned his rights, or to have attempted to do so, on May 8, 1848, before his labors were completed so as to entitle him to a lien, to H. O. & S. P. Hussey. This assignment at most could have the effect only to convey to

them whatever rights he might obtain and preserve in the property. It could not prevent his conducting in such a manner as to destroy those rights, when it does not appear to have been made known to the owner of the logs or to any person in possession of them, until after the logs had been sawed into lumber, which had been sold. *Plaintiff nonsuit.*

LITTLE *versus* WATSON.

The title to lands, granted by the Sovereign Power upon a condition to be subsequently performed within a limited time, will remain valid, until such grantor, by some Legislative Act, shall avail itself of a forfeiture.

The time allowed for performing such a condition, prescribed in a grant, made by Massachusetts prior to the separation of that State from Maine, of lands situated in this State, may yet be extended by the Legislature of that Commonwealth, notwithstanding the separation.

Although the preamble to a treaty does not form a part of the contract, yet being authenticated by the signatures of the contracting parties, its averments are to be regarded as admitted truths.

When the language used in a treaty clearly declares a fact, or grants, confirms or defines a right, it must be effectual, even if found to be inconsistent with the purpose disclosed by the correspondence which preceded it.

The treaty of Washington, of 1842, asserts, that that part of the line, which divided the territory of the United States from the territory of the Province of New Brunswick, and which lay between the monument at the source of the St. Croix river and the river St. John, was never ascertained and determined; and the fact thus asserted is not to be brought into question.

The treaty of Washington established, between the said monument and the St. John river, a new conventional line of boundary between this State and the Province of New Brunswick, irrespective of the line provided for by the treaty of Paris, made in 1783.

One who, at the time of the ratification of the treaty of Washington, was and for several years previously had been, in possession of land under a grant from said Province, has a title, which by the fourth article of said treaty is "held valid, ratified and confirmed" to him, although said land in fact lies within the limits of the United States, as established conventionally by the same treaty.

That provision of the treaty is binding upon this Court, without the interposition of any legislative action.

Grants of land made by authority of the British Government, and coming

within the scope of that provision, cannot, therefore, be vacated, even in a suit for the same land bought by a grantee of the State, within whose territory it is found to belong.

WRIT OF ENTRY. The land borders upon the *conventional* line of boundary, between the United States and the Province of New Brunswick, established by the treaty of Washington. It lies west of that line and far south of Mars Hill.

The demandant deraigns title in himself under a grant from the Commonwealth of Massachusetts made in 1802. At the time of the ratification of the treaty of Washington, in 1842, the tenant was, and for several years previously had been, in possession and actual occupation of the land, under a grant from the Province of New Brunswick. He now claims to hold it under the fourth article of that treaty, which provides, that "all grants of land heretofore made by either party within the limits of the territory, which, by this treaty, falls within the dominions of the other party, shall be held valid, ratified and confirmed to the persons in possession under such grants, to the same extent as if such territory had, by this treaty, fallen within the dominions of the party, by whom such grants were made."

The case was submitted to the court, upon facts agreed, the material parts of which are more fully presented in the opinion.

Rowe & Bartlett, for the demandant.

Apart from the fourth article of the treaty of Washington, the title of the demandant is indisputable, and if it is defeated by that article, he is remediless.

When the grant was made by Massachusetts, the boundary line had not been ascertained. By mistake the surveyor extended the township too far eastwardly; so that when the boundary was ascertained, it was found, that 1600 acres of the grant were within the territory of New Brunswick. For relief against that error, the demandant received from the Commonwealth $1000, upon their warranty of title. But the land *now* in controversy lies *west* of the boundary line

of the State, and he can have no call upon any one for redress, if he fail in this suit.

Can that article of the treaty operate so palpable a wrong? The tenant contends, that it is by *that treaty*, that the land falls within the United States. But we contend, that *irrespective of that treaty*, the land belonged to this Government. And such is the conclusion to which the mind must be led, by the history of the negotiation, and the condition of affairs upon which it was intended to operate.

This article looked to the *disputed territory* alone, and had no reference to lands south of Mars Hill. It was inserted in the treaty for the sole and avowed purpose of protecting the Acadian refugees, the "*habitans*" of Madawaska, and other settlers on the Upper St. John, and the Aroostook. The Legislatures of both States passed resolves for the appointment of commissioners to accomplish that object. And when the commissioners, under those resolves, had completed their labors, this part of the treaty was fully executed.

The question of compensation to the states, whose lands were to be taken, was discussed in the correspondence, and the amount fixed upon, and inserted in the treaty, but not one word as to compensation to individuals. These matters need no proof. They belong to public history.

The treaty, then, was not *intended* to confirm grants, or provide for the release of lands *belonging to individuals*, by prior grants, or of lands lying any where out of the *disputed territory*.

Does the *language* of the treaty necessarily express any such intention? "Grants of land within the limits of the territory, which, *by this treaty*, falls within the dominions," &c., is the expression.

The disputed territory lay North of Mars Hill. No part of our territory fell to us by this treaty, *except our portion of that which was in dispute.* No new line was established by this treaty any where else in this State. A new *conventional* line was agreed upon there, because it was found to be impossible to trace the line of the treaty of 1783, owing to the

ambiguity of the language used in describing some of its monuments. But the line *south of Mars Hill* was involved in no such uncertainty. It was clearly described and could be traced with mathematical precision. The treaty of Washington adopts and confirms it, and declares, that it is the true line. Nor can it be denied, that the line of the treaty of Washington is a due north line, for the treaty asserts it to be so. The eastern boundary of the demanded premises is this line; and this line is also the line of the treaty of 1783. Of course, then, the demanded premises are not within the scope of the fourth article of this treaty. For a confirmation of these views, we respectfully refer to the case of *Henderson* v. *Poindexter*, 12 Wheat. 530, 534.

If this be so, here is an end of defendant's case. If it be not so, then we claim for the plaintiff the protection of the constitution of the United States, which declares, [in Amendments Art. 5,] that private property shall not be taken for public uses, without compensation.

Our position is, not that this clause of the treaty is void, but that it cannot be enforced at present, against private property; not that it is without effect on private property, but that its operation is suspended till Congress shall pass a law providing for the necessary compensation. It cannot be enforced in this case *now*. It has been decided, under a similar provision in the constitution of this State, that compensation, in such cases, must be made, or provided for, when the property is taken, and, unless that be done, the court will not enforce the law taking property. *Comins* v. *Bradbury*, 1 Fairf. 447. This rule may not be applicable in its full extent, to a treaty provision, which may have the force of a law operating directly upon the subject, or may be a contract merely, requiring a legislative act to give it force. The Supreme Court of the United States. in *Foster* v. *Nielson*, 2 Pet. 253, distinguish between treaties, which act directly on the subject, overruling laws repugnant to them, and treaties which are in the nature of a contract, requiring subsequent legislation to

carry them out. As to the latter they say, that, until such acts of the Legislature are passed, the court are not at liberty to disregard existing laws. If this clause of the treaty is inoperative now, it may hereafter become operative when Congress shall have passed the necessary law to carry it into effect.

J. Hodgdon, for the tenant.

In the case *United States* v. *Pencheman*, 7 Pet. 8, it was held, that the words respecting titles in the Spanish treaty, "shall remain ratified and confirmed," were not a contract, *to be* executed *in futuro*, but as operating *per se*, without legislative intervention.

The words in the treaty of Washington, "shall be held valid, ratified and confirmed," are not less indicative of a title executed.

The demandant claims under a grant from Massachusetts. That claim is of no avail, for: —

1. The possession mentioned in the fourth article of the treaty intends, not a legal constructive possession, but an actual occupation. At least where such an occupation existed, it took priority to a mere constructive possession.

Now the tenant was not only holding under a grant from New Brunswick, but was, at the execution of the treaty, in the *actual occupation*. These are the only elements required to confer on him a perfect title, under that article.

2. The tenant's title is confirmed by the treaty, as a necessary result of the dissimilarity between the constitutions of the United States and of Great Britain.

By the latter, a treaty is an *executive* act, and when brought into conflict with vested individual rights or public laws, it requires *legislative* action to give it effect. The treaty stipulation is, that this grant is confirmed to the same extent as if such territory had, by the treaty, fallen within the dominions of New Brunswick. But if, on the divisional line, this land had fallen to New Brunswick, this plaintiff could maintain no action for it, because there have been no enactments of the Imperial Parliament, or of the Provincial Assembly, by which

any effect could be given to prior grants, from Massachusetts or Maine.

3. Demandant is estopped, by his own act, from claiming under the treaty of Washington. He petitioned for and received from the Legislature, an indemnity for his lands lying east of the cut out line, asserting that, by the treaty, they were lost to him. This was an admission that his title could not be sustained in the British courts. But the treaty, if it confirmed British grants up to the American line, equally confirms them on the American side of the line.

Hence, the demandant's claim was upon Massachusetts, to whom remuneration is to be made by the General Government.

4. The demandant has failed to establish any title; for the grant of Massachusetts, under which he claims, was but a conditional one, and the conditions were not performed. The Act of that State, extending the time for performing the condition, was passed after the separation of Maine, who thereupon became interested in the title, and the Act of Massachusetts, without the concurrence of Maine, could have no effect.

Shepley, C. J. — The lands demanded are admitted to have been included within the bounds of a township of land conveyed by the Commonwealth of Massachusetts, by its agents, John Reed and Peleg Coffin, to the trustees of Williams College, on February 2, 1802. It is also admitted, that the demandant by virtue of the conveyance made to him on Aug. 23, 1832, by Daniel N. Dewey, as the agent of the trustees, acquired all the title which could be conveyed by them, if they had made no prior conveyance.

The objection to the title derived from the trustees is, that the conveyance to them was made upon condition, that they should cause fifteen families to be settled upon the township within twelve years, which was not performed. The condition was to be performed subsequently; and in such case the title would continue to be valid, until the State should by some legislative Act make known its pleasure, that it should

become forfeited. This it did not do; but by a resolve it extended the time for performance of the condition, which was performed within the further time allowed. But it is said, that Massachusetts could not legally extend the time, after this State was separated from that, without the assent of this State. This objection is without foundation. The Act of Massachusetts providing for the separation of this State declares, that "all rights of action for, or entry into lands, and of action upon bonds for the breach of the performance of the conditions of settling duties, so called, which have accrued or may accrue, shall remain in this Commonwealth to be enforced, commuted, released or otherwise disposed of in such manner, as this Commonwealth may hereafter determine." This Act was assented to by the State of Maine, and made a part of her constitution; and it fully authorized Massachusetts to extend the time allowed for the performance of the condition contained in the deed of conveyance to the trustees of the college.

The demandant, it is said, is estopped or precluded from asserting any title to the premises demanded by his petition, presented to the Legislature of Massachusetts, and by the reception of the compensation granted to him by that State for the loss of lands conveyed to the trustees of Williams college.

That petition, presented in the year 1845, represented that the title to sixteen hundred acres proved to be invalid, because the bounds of the township were extended into the Province of New Brunswick; and it prayed for compensation therefor, which was made, not for the loss of lands ascertained by the treaty of Washington to be within this State, but for the loss of those ascertained to be within the province of New Brunswick.

The lands demanded are within this State; and they were legally conveyed by Massachusetts to the trustees of Williams college, and by their agent to the demandant, who will be entitled to recover them, unless his title was destroyed by the provisions of the treaty of Washington, bearing date on August 9, 1842.

The title of the tenant is derived from a grant of the lands demanded, made on August 12, 1841, by the province of New Brunswick to George Watson; and from a conveyance thereof made by George Watson and wife to himself on August 6, 1842. It is admitted, that the tenant has been in the undisturbed occupancy of the premises, for ten years before the commencement of the action on December 3, 1846, and that he has erected buildings upon and cultivated a part of the lands. He was thus in possession of the premises, when the treaty of Washington was made, claiming title under a grant from the province of New Brunswick, of lands actually within the limits of the United States, and already conveyed by the Commonwealth of Massachusetts.

The fourth article of the treaty of Washington contains this clause, "All grants of land heretofore made by either party within the limits of the territory, which by this treaty, falls within the dominions of the other party, shall be held valid, ratified and confirmed to the persons in possession under such grants to the same extent, as if such territory had by this treaty, fallen within the dominions of the party, by whom such grants were made."

Upon a literal construction of the language of the treaty, the tenant presents a title within its provisions and protected by them. The literal is the correct construction of such an instrument, when the language is clear, precise, not inconsistent with other provisions, and not leading to absurd conclusions. Vattel, lib. II, c. 17. And in such case no extraneous means for an interpretation of the treaty should be sought.

The argument for a different construction is in substance, that the line established by the treaty of peace of 1783 extended due north from the monument erected at the source of the river St. Croix; that by the line so established the premises were within the United States; that the treaty of Washington only confirmed that line, and that the premises did not therefore fall within the dominions of the United States by the treaty of Washington.

Although the preamble of a treaty does not form a part of the contract, yet being duly authenticated by the signatures of the contracting parties, its averments are to be regarded as truths admitted. When the language used in a treaty clearly declares a fact, or grants, defines, or confirms a right, it must be effectual, even if found to be inconsistent with the purpose disclosed by the correspondence, which preceded it.

The preamble to the treaty of Washington recites, that "certain portions of the line of boundary between the United States of America and the British Dominions in North America described in the second article of the treaty of peace of 1783, have not yet been ascertained and determined, notwithstanding the repeated attempts, which have been heretofore made for that purpose; and whereas it is now thought to be for the interest of both parties, that avoiding further discussion of their respective rights arising in this respect, under the said treaty, they should agree on a conventional line in said portions of the said boundary, such as may be convenient to both parties with such equivalents and compensations, as are deemed just and reasonable." Here is a distinct declaration, that the parties intended to agree on a conventional line, without regard to certain portions of the line established by the treaty or 1783; and an admission, that in those parts of the line, it had not been ascertained and determined. The admission of this uncertainty, was co-extensive with the conventional line agreed on. The first article then proceeds to establish a line beginning at the monument, and "thence north following the exploring line, run and marked by the surveyors of the two governments in the years 1817 and 1818, under the fifth article of the treaty of Ghent, to its intersection with the river St. John." This must, therefore, be regarded as a part of the conventional line; and although it does not run from the monument north, yet it must follow the exploring line, whether it should or should not be found to run on a course due north. If, as the preamble to the treaty admits, the line between the two countries from the monument to the river St. John had not been ascertained and

determined, the premises did fall within the United States by the line established by the treaty of Washington, and not by any former line agreed upon between the parties.

It is further insisted, that the intention was not, and that the construction should not be such, as to confirm grants of land made in the vicinity of this portion of the line, but those only, which had been made north of Mars Hill and near the Madawaska settlement. The correspondence, which preceded the treaty, is referred to as conclusive proof, that the clause in the fourth article of the treaty, and indeed the whole article, was introduced for that purpose alone.

Admitting the occasion of its introduction to be correctly stated, yet when language was used equally applicable to those and to other grants, the argument cannot be sound, which would introduce a limitation of such general language to grants of a particular class not named in the treaty to the exclusion of others equally embraced by the language used. It is more reasonable to conclude, that the negotiators perceiving the necessity of such provisions, to confirm one class of grants, concluded to make the provisions general, that it might include grants made upon other portions of the line, if such should be found, instead of restricting them to a class of grants especially calling for those provisions. There would, in such case, be nothing inconsistent with each other in the correspondence and treaty stipulations. A judicial tribunal would not be authorized to limit the plain and unrestricted language of a treaty to the accomplishment only of the particular purposes, which induced the parties to introduce each article. The intention is to be ascertained rather from the ambiguous language finally agreed upon, than from the anterior correspondence.

It is further insisted, that the treaty does not operate upon the title or grant *proprio vigore*, but only as a contract requiring legislative interposition to carry it into effect.

A treaty is usually a contract between the parties. It may, however, be so framed as to accomplish its purposes without any further act, if the language used be suitable, and the purpose be such as may be thus accomplished. In the United

States a treaty is to be regarded as the supreme law and operative as such, when the stipulations do not import a contract to be performed. It is true, that the language used in the treaty between the United States and Spain, made on Feb'y 22, 1819, was not regarded in the case of *Foster* v. *Nielson*, 2 Peters, 314, as operative *per se*, to confirm the grants alluded to; but when the language used in the Spanish duplicate came before the court in the case of the *United States* v. *Pencheman*, 7 Peters, 51, 88, it was decided to be operative upon the grants without any legislative interposition. The provision of the treaty as presented in the former case, declared, that grants made before a certain period "shall be ratified and confirmed", and as presented in the latter case, "shall remain ratified and cofirmed." There is an essential difference between the language, upon which the court acted in the case of Foster and Neilson, and that used in the treaty of Washington, which provides, that grants of land "shall be held valid, ratified and confirmed", which does not contemplate any future act as necessary to the validity, ratification, or confirmation, of the grant. They are held to be so by those, whose duty it may be to act upon them. The language addresses even more appropriately the judicial than the legislative department. It is the duty of this court to consider, that treaty to be a law operating upon the grant made under the authority of the British government, and declaring, that it shall be held valid, ratified and confirmed.

It is further insisted, that it cannot be permitted so to operate and thereby defeat the title of the demandant to the land without a violation of that provision of the constitution of the United States, which declares, that private property shall not be taken for public use without just compensation. It is not in the argument denied, that public or private property may be sacrificed by treaty; but it is said that such a provision of a treaty as would take private property without compensation, must remain inoperative or suspended, until compensation has been made.

Such a construction would infringe upon the treaty-making

power, and make its acts depend for their validity upon the will of the legislative department, while the constitution provides, that treaties shall be the supreme law.

The clause of the constitution referred to, is a restriction imposed upon the legislative department, in its exercise of the right of eminent domain. It must of necessity, have reference to that department, which has the power to make compensation, and not to the treaty-making power, which cannot do it. This provision of the constitution will not prevent the operation of the treaty upon the grant of the tenant. *Ware* v. *Hilton*, 3 Dallas, 236 ; *United States* v. *Schooner Peggy*, 1 Cranch, 110. The demandant must seek compensation for the loss of his land, from the justice of his country.

Demandant nonsuit.

TRUNDY *& al. versus* FARRAR.

The authority of an agent to transfer a note by indorsement, may be created verbally, whether the principal be an individual or a corporation.

Such authority may be inferred from facts and circumstances, connected with the transaction.

ASSUMPSIT upon three negotiable notes, given by the defendant to the proprietors of the town of Baileyville, indorsed by "Samuel Kelly, agent."

Whether Kelly had authority so to indorse the notes as to give to the plaintiffs a right to maintain this action upon them, is the only question in the case.

The case as reserved for the consideration of the court is as follows: —

To prove the agency of Samuel Kelly, the plaintiffs offered to show by parol, that he had acted as the agent of the proprietary from 1834, to the present time, giving deeds, indorsing notes, bringing suits, and taking care of the property.

The court ruled this evidence inadmissible for this purpose. Plaintiffs then introduced the records of the proprietors of

Baileyville, showing the organization of the proprietary and the choice of Samuel Kelly agent, and several votes in relation to his authority from 1834 to 1842. It also appeared in evidence, that said Kelly had acted as the agent of the proprietors of Baileyville from the time of his election to the present time, occasionally indorsing and transferring notes given for lands sold by him as agent of the proprietors, giving deeds and generally transacting their business; that they have had no other agent; that said Kelly had transacted all the business of the corporation; that in 1836, the greater part of the lands, then unsold, was transferred to be held in severalty; that the lots which had been bonded to settlers, and not paid for, were transferred to said Kelly; that all the notes and securities held by the proprietary at that time, were transferred to said Kelly; that since that time, he has been the principal owner of the lands of the proprietary; that in selling out in 1836, all the lots which had been bonded to settlers, with some lots held by Kelly, two lots by J. Granger, and some others, were reserved.

It also appeared, that Reuben Lowell was chosen treasurer of the corporation in 1834, but it did not appear, that he accepted the office, or ever acted as treasurer; nor did it appear, that any other person was ever chosen, or ever acted as treasurer.

It further appeared in evidence, that the notes sued in this action, were three of five notes given for a lot of land, bought by defendant of the proprietors of Baileyville, and, that the other two notes were indorsed, one by "Samuel Kelly" the other "Samuel Kelly, agent," and sued in the name of Henry Clark of Boston, in a suit which was defaulted.

George M. Chase, called by defendant, testified, that in 1836, the lands of the proprietary in Baileyville, excepting the lots bonded to settlers and certain other reserved lots, two to J. Granger and some to S. Kelly, were transferred to himself and George J. Galvin; that while they held the lands he cut some cedars by permit from Galvin; that the proprietors never got any settlement with Kelly as agent; that some of

the proprietors did cut some timber from the land in off-set to the timber that Kelly cut; that no other agent was ever chosen, had no recollection of Kelly's having been forbidden to act as agent. It appeared, that the notes in suit in this case were claimed as the property of Samuel Kelly, by him, when they were transferred to the plaintiff.

The presiding Judge ruled, that this evidence was insufficient to show any authority in Kelly, the agent, to indorse the notes so as to transfer the interest of the payees in them to the plaintiff.

If, in the opinion of the whole court, the aforesaid rulings were correct, and the evidence insufficient to maintain the action, the plaintiff is to be nonsuit; otherwise a new trial is to be granted.

J. Granger, for plaintiff.

Fuller, for defendant.

TENNEY, J. — "A general agency exists, where there is a delegation to do all acts connected with the particular business or employment." Story's Agency, sect. 17. "The principal will be bound by the acts of his agent, within the scope of the general authority conferred on him." *Ibid.* sect. 126.

The authority of an agent may be created verbally, without writing, excepting for some special acts; and may be inferred from the relation of the parties, and the nature of the employment, without proof of any express appointment. It is sufficient if there be satisfactory evidence of the fact, that the principal employed the agent, and that the agent undertook the trust. The agency must be antecedently given, or be subsequently adopted. 2 Kent's Com. Lect. 41, p. 477 and 478.

It is very usual to prove the agency by inference from the habits and course of dealing between the parties. These may be such as to show that there was an appointment sufficiently broad to cover the acts done by the agent, or that there has been a continued ratification thereof; the principal would be

bound by either. "Having himself recognized another as his agent, by adopting and ratifying his acts, done in that capacity, the principal is not permitted to deny the relation to the injury of third persons." 2 Greenl. Ev. sect. 65; Story on Agency, sect. 56 and sect. 127." When an agency actually exists, the mere acquiescence may well give rise to the presumption of an intentional ratification of the act. *Ibid*, sect. 256.

On the question, whether a person is an agent of a corporation or not, the same presumptions are applicable to such bodies, as to individuals; and that a deed, or a vote or by-law is not necessary to establish a contract, promise or agency. *Maine Stage Co.* v. *Longley*, 14 Maine, 444; 2 Greenl. Ev. sect. 62. "In America the general doctrine is now firmly established, that whenever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made with its authorized agents, are express contracts of the corporation." Story's Agency, sect. 53. "In all matters of daily necessity within the ordinary powers of the officers of a corporation aggregate, or touching its ordinary operations, the authority of its agents may be proved, as in the case of private persons." 2 Greenl. Ev. sect. 62.

The notes in suit were given by the defendant to the proprietors of Baileyville, for a lot of land, which he purchased of them, and indorsed by Samuel Kelly as agent. The questions presented are, whether there was sufficient evidence from the vote of the proprietors, of authority in Kelly to negotiate the notes in their behalf; and whether there was evidence before the jury, upon which they should have passed in relation to the existence of the agency, arising from the conduct of the proprietors.

The vote passed June 9, 1834, was introduced as evidence by the plaintiff, without objection, and is in these words; "Voted, that the agent be and is authorized to bargain and sell any of the lands of the proprietors, to attend to the disposing of the grass thereon, and the working out of the proprietor's taxes, and to attend to such other business as may

concern the general interest." This vote is very comprehensive. The terms used, in the vote of an organized proprietary, would authorize the transfer of their lands by their agent. The right to bargain and sell them involves the power to receive the consideration. The authority to attend to such other business as may concern the general interest, will embrace the power to receive notes, for the consideration and payment of the same ; and if it was found more for the interest of the proprietors to negotiate those notes, than to obtain the sums secured thereby, by directly calling upon the makers, it would not exceed the limits of the agency.

It was shown by the records, that Samuel Kelly was chosen agent in the year 1834, and that he had acted as such from that time, to the time of the trial of the action, indorsing and transferring notes, given for lands, sold by him as their agent, giving deeds and generally transacting their business, and all their business, they having no other agent ; that in the year 1836 the greater part of their lands, then unsold, was transferred, to be held in severalty ; and that the notes and securities held at that time, were transferred to him. The proprietors having elected Kelly as their agent, for some purpose, these acts of his, it may fairly be inferred, were known to them, and were acquiesced in. A jury might be authorized to make the inference, that as he took notes as the consideration of deeds given by him of the proprietors' lands, and transferred notes given therefor ; and as the notes and securities held by the proprietors were transferred by the proprietors themselves, he was their general agent, and clothed with the power to do that, which had for so long a time been done without any objection, made by them. The acquiescence of the proprietors in these acts, many of which must have been generally known, during the time, he acted as their sole agent, and they had meetings and passed votes in relation to his authority, was evidence that they had authorized him to transact their business in the manner in which he did it, and that he was possessed of full power to perform all the duties of their general agent.

The objection to Kelly's authority to transfer the notes in suit, does not come from the proprietors, but from the defendant, who dealt with them through their agent, Kelly. He received the value of the notes, and is bound to pay the amount to some one. The facts in proof are such as would induce the plaintiff to conclude, that Kelly was the agent; or was held out to the world as such, and if so, good faith requires, that the proprietary should be bound by his acts. This would effectually protect the plaintiff from loss, and would equally secure the defendant from all exposure to pay his notes a second time. We think, independent of the vote of the proprietors, there was evidence of the agency of Kelly, which might with propriety be submitted to a jury.

According to the agreement of the parties,

the action is to stand for trial.

JOHNSON *& al. versus* CHARLES R. WHIDDEN.

In the trial of an action, in which property has been attached on the writ, it is not a valid objection to the admissibility of the defendant's witness, that he is surety on a replevin bond, by virtue of which the same property was replevied from the attaching officer at the suit of a third person.

That the witness, in such a suit, was the defendant's *grantee* of land attached on the writ, will not exclude his testimony, unless it appear that the conveyance to him was subsequent to the attachment.

Though one witness testify positively to a fact, and another witness of equal credibility contradict it, and swear to facts inconsistent with its truth; yet the jury are not to be instructed, *as matter of law*, that the fact is *not proved*.

ASSUMPSIT. Property, both real and personal, was attached on the writ. The defendant was defaulted. Certain subsequently attaching creditors defended.

In defence, Rendol Whidden was called as a witness. Being objected to, he stated on the *voir dire*, that he was surety in two replevin bonds, in virtue of which the same personal property was replevied from the attaching officer.

Also, that he was a grantee under this defendant, of a part

of the real estate attached in this suit. He also stated certain facts, relative to the purchase from the defendant of the goods now sued for, from which it was contended that he was liable to the plaintiffs therefor as the original purchaser. He also stated that he had given his bond to the defendant to pay all the defendant's debts. But, as the defendant had released the witness, this point was not much insisted upon.

HOWARD, J., presiding, admitted the witness.

There was also the testimony, *for the plaintiffs*, of one Brigham, which the plaintiffs alleged to be in contradiction to the witness, Whidden. Upon this particular, the plaintiffs requested the Judge to instruct the jury, *as matter of law*, that when one witness swears positively to a fact, and another witness of equal credibility contradicts it, and testifies to facts inconsistent with its truth, such fact is to be regarded as not proved.

This instruction was not given.

The verdict was for the defendant.

J. Granger, for the plaintiffs.

1. R. Whidden was interested. If a witness, he might, by defeating this action, dissolve the attachment on the land he had purchased of the defendant, and also escape liability on the replevin bonds. It is like the case of bail or of indorser of a writ, or creditor of insolvent estate. Neither of these can be a witness. 6 Greenl. 364; 14 Maine, 30; 1 Harr. Dig. 1048; 26 Maine, 37; 12 Maine, 51; 8 Greenl. 27.

2. The plaintiff was entitled to the requested instruction, as to conflicting testimony. 13 Maine, 90.

Pike, contra.

HOWARD, J. — The defence in this case is made by subsequent attaching creditors, under provisions of the Revised Statutes, chap. 115, sect. 113 — 119. The plaintiffs caused certain personal and real estate to be attached as the property of the debtor. Reed replevied the personal property from the attaching officer, Nutt, and gave a replevin bond in the usual form, with Rendol Whidden as surety. The latter was call-

ed as a witness for the defence, but objection was made to his testifying on account of his interest, arising from being a party to the replevin bond.

If the plaintiff in replevin should succeed in his suit, the witness could not be made liable on the bond; and if he should fail, he might return the property, or pay the damages as provided in the bond; but if he did neither, the bond might be enforced against the witness. It is quite apparent, that the liability of the witness in this view of the case, could be but indirect, uncertain, and contingent, and that he could have no certain, legal or immediate interest in the event of this suit. But neither the failure, nor the success of the plaintiff in this suit, will affect the liability of the witness upon the replevin bond. The officer may contest the right of the plaintiff in replevin to the goods attached, in either event, regardless of the result of this action, and have judgment for a return, in order to restore them to the rightful owner. The witness cannot, therefore, relieve himself from his obligation by his testimony, and this objection cannot prevail. 1 Stark. Ev. 103–4; 1 Greenl Ev. § 386.

The release from the defendant discharged the witness from all liability which could result from his agreement, or obligation to pay this debt.

It appears that, the witness was grantee of the debtor, or of *his* grantee, the Freeman's Bank, of certain real estate embraced in the plaintiff's attachment; and it is contended, that the attachment created an incumbrance which the witness is interested to remove, by defeating this suit. If the attachment was made before the witness had an interest in the real estate, he might be interested to defeat it, but if made since, he would have no such bias or interest. The testimony does not show whether the attachment was before or since the conveyance from the debtor, under which the witness claims, and therefore does not establish any interest in the witness, by reason of his claim to the real estate.

Two witnesses may be equally honest and of "equal credibility," and yet, their testimony may not be equally credible

or satisfactory. The circumstances under which they testify, and their means of knowledge of particular facts, may be different, and their habits of observation, and memories, and intellectual capacities, may be widely different; all of which may affect the credibility and influence of their testimony. The instructions to the jury that they were to judge which of the witnesses testified to the truth; that they should take all the circumstances into consideration affecting both witnesses, and their means of knowledge, and give credit to the statements of the one or the other, as they might find them entitled to their belief, were therefore correct.

Judgment on the verdict.

WHEELER *& als. versus* NICHOLS.

A mortgage of personal property, made to a number of persons to secure them against their liabilities, as indorsers for the mortgager, is not invalidated by the fact that no *two* of the mortgagees were liable upon any *one* paper.

Should any trespass be committed upon the rights derived under the mortgage, the action for redress may be brought jointly by all the mortgagees.

The owner of personal property, attached upon a writ against him, and actually retained by the officer or his bailee, may transfer his interest therein either absolutely or in mortgage, subject to the attachment-lien.

When such a mortgage has been made, and the bailee of the attaching officer, while the custody of the goods is in him, consents to hold the goods as servant of the *mortgagee*, and actually holds for *him*, there is such a taking of delivery and retaining of possession by the mortgagee as to make it unnecessary that the mortgage should be recorded, although the value of the property exceeds thirty dollars.

It is not legally inconsistent that the same bailee should act to keep possession, both for the attaching officer and for a purchaser under the owner.

In such a concurrent possession by the same bailee, the priority of legal rights would obtain.

Though a debt, for which property has been attached, may have been paid and the attachment thereby discharged, yet the attaching officer cannot be charged as a wrongdoer for retaining the possession, until satisfactory evidence be given him, that the attachment has been vacated.

If, by reason of an attachment of personal property, a purchaser of it from the debtor cannot receive an *actual* possession, a *symbolical* delivery of it will be sufficient.

TRESPASS against the sheriff for taking and selling, upon *mesne* process, certain goods which the plaintiffs claim to hold under a mortgage from the debtors in said suit.

The evidence was submitted to the court, with power to draw inferences as a jury might.

It was shown that the attachment was made on the 2d of July, 1847, upon a writ in favor of Charles Tappan, and that the property was placed for safe keeping in the hands of one Clapp, as bailee to the attaching officer. The mortgage was made on the 10th of the same July. The value of the property exceeded thirty dollars. Whether the doings of the town clerk on the 13th of July constituted a valid recording of the mortgage, was a question much discussed. But by the adjudication of the court upon the facts proved by the evidence, that question became immaterial. Clapp continued in possession until the morning of the 14th of July. Whether from that time forward he became the keeper for the *mortgagees* or continued as keeper for the attaching officer only, was another question strenuously controverted.

In the afternoon of said 14th of July, the officer returned an attachment of the goods on a writ in favor of the Canal Bank, and subsequently upon a number of other writs, but all subject to Tappan's attachment.

On the 5th of August, Clapp surrendered the custody of the goods to the officer, induced by his threats to take forcible possession, and by a contract of indemnity given by the officer and by the attorney of the Canal Bank.

On the 18th of August the debt due to Tappan was paid by the mortgagees. By consent of the Canal Bank and other subsequently attaching creditors, and also of said debtors, the property was sold at auction by the officer on the 8th of September, 1847.

This suit is brought by the three mortgagees. The condition of the mortgage was, in substance, that whereas said mortgagees had at various times indorsed for the mortgagers certain and various notes, drafts and checks, the mortgage

conveyance was to be void, if the mortgagers should protect the mortgagees against the said indorsements.

It turned out, in fact, that each of the mortgagees was indorser upon some of the mortgagers' paper, but no two of them were upon any one piece of such paper.

The defendants contended, thereupon, that the mortgage was not a security for any but joint liabilities, and that the action, being in the name of the mortgagees jointly, cannot be sustained.

A more detailed exhibit of the facts is contained in the opinion.

Hayden, for the plaintiffs.

J. Granger, for the defendant.

TENNEY, J. — This action is trespass against the sheriff of the county of Washington for the alleged taking of certain goods from the possession of the plaintiffs. In two of the counts, the defendant is charged with having taken the goods himself, and in two others, it is alleged that they were taken by one James Nutt, his deputy. The defendant justifies the taking of the goods by his deputy upon the ground, that the same were the property of C. and J. S. Bedlow, against whom he had certain writs; one of them was in favor of Charles Tappan, upon which he attached the goods on July 2, 1847; another was in favor of the Canal Bank on which he returned an attachment of the same goods on July 14, 1847, and there were several other writs on which the goods were attached subsequently to the 14th of July and previous to Aug. 1, 1847.

The right of the plaintiffs is derived from a certain mortgage of the property in question, given by C. & J. S. Bedlow on July 10, 1847, to them, and certain acts, which were done by and for them by virtue of the same. The evidence shows that each of the plaintiffs had severally indorsed certain paper for the mortgagers, but it did not appear that they had assumed any joint liability for them. It is stated in the condition of

the mortgage, that the "said Wheeler, Deming and Horton have at various times indorsed for the said C. and J. S. Bedlow, certain and various notes of hand and drafts, checks, &c. made and drawn at various times during the past six months. Now if the said C. and J. S. Bedlow, shall well and truly pay or cause to be paid all such notes of hand, drafts, checks, &c., where the said Wheeler, Deming and Horton are holden as security, and shall release them from all liability occasioned by their indorsing said notes, drafts and checks, then this conveyance shall be void, otherwise shall remain in full force and virtue."

It is contended by the defendant, that from the terms of the condition in the mortgage, the plaintiffs could have no claim upon the goods, excepting as an indemnity for joint liabilities. In giving a construction to the mortgage, the design of the parties thereto must be sought. In this inquiry the subject-matter to which it refers, and the situation of the parties may be taken into consideration. *Cummings* v. *Dennett*, 26 Maine, 397. The parties had a purpose in its execution; neither is presumed to have intended a void instrument. It not appearing, that the mortgagees had assumed any joint liability during a period of six months, immediately preceding the date of the mortgage, it cannot be restricted in its construction to any such liability. When it recites, that Wheeler, Deming and Horton had indorsed certain and various notes, &c., it does not necessarily mean, that all of them have indorsed each note, draft or check, but that their names are on notes, drafts and checks, drawn by the mortgager. The terms "certain and various notes of hand, drafts and checks," are used collectively and it was intended to be said, that upon them, taken collectively, were the indorsements of each and all of the mortgagees. The mortgage was to be void, if the mortgagers should pay or cause to be paid *such* notes, drafts and checks as those previously referred to, where the names of the plaintiffs were to be found. It cannot be doubted that it was the object of the parties to secure the mortgagees for all their liabilities as indorsers for them, assumed during the preceding

six months, whether the indorsements were several or joint, or whether the names of all were upon the same piece of paper, or not.

Such being the construction of the instrument, the action for any trespass upon their rights derived from it, under the evidence disclosed, should be in the names of the mortgagees jointly, the mortgage itself not being made to them severally.

The deed introduced by the plaintiffs is a mortgage for the security of a sum greater in amount than thirty dollars, and cannot be valid against the defendant, unless it appears from the evidence, that possession of the mortgaged property was delivered to and retained by them; or unless the mortgage was recorded by the clerk of the town, where the mortgagers resided. R. S. chap. 125, sect. 32. According to the construction given to section 32 of the same chapter, prescribing what shall be done to constitute a valid record, in *Handley* v. *Howe*, 22 Maine, 560, the mortgage was not so recorded as to be valid. But it is contended for the plaintiffs that they have brought themselves under the other provisions of the statute, which gives validity to the mortgage.

It is conceded, that Amasa L. Clapp was the keeper of the goods attached on the writ in favor of Charles Tappan against C. and J. S. Bedlow, employed by Nutt, the officer, who made the attachment, till the morning of the 14th of July, 1847. Whether he was the keeper under Nutt after that time and till August 5, 1847, is a question in dispute. He testifies that he abandoned the custody of the goods for the officer, and became the keeper under the plaintiffs, by virtue of the mortgage to them, dated July 10, 1847. Other evidence is relied upon to show, that his relations with Nutt were continued to the time, when he finally left the store in which the goods were situated.

It may not be material to settle this controverted question of fact, in order to determine, whether this action can be maintained or not. The evidence introduced on both sides, shows satisfactorily, that Clapp was in possession of the goods, from

the forenoon of the 14th day of July, till after all the attachments were attempted to be made by Nutt upon the property, as well at least for the mortgagees, as for the officer. In addition to the express testimony of Clapp, that he held possession exclusively for the plaintiffs, is the statement of Bradbury, the attorney of Tappan, that he went with Deming, one of the mortgagees, on the morning of July 14, 1847, and that he told Clapp that he was willing, that he should be the keeper of the goods for the plaintiffs, subject to the attachment; that Deming inquired of Clapp, if he would be the keeper for the plaintiffs subject to the attachment, and that he consented to be so for the sheriff and for them.

Walker, the partner of Bradbury, testifies, that no one of the mortgagees ever pretended, that Amasa L. Clapp was the keeper of the Bedlow stock of goods exclusively for them. The evidence from this witness, excepting so far as it shows that Clapp gave different accounts of some matters, from that contained in his deposition, is of a negative character. He was not present at the meeting at the store on July 14, between Deming, Bradbury and Clapp, when it appears from the testimony of the two last, that Clapp was to be keeper for the plaintiffs, and no fact known to him conflicts with their statements upon this point.

Nothing in the case shows, that any change took place in the possession of the goods after the forenoon of July 14th, till the time when Nutt took the key on August 5th. Whatever service Clapp undertook for the plaintiffs and entered upon, continued during that period. The indemnity, which he received from the officer, and the owner of the claim in the name of the Canal Bank, shows, that they understood, that he had possession of the goods, and that he asserted it in behalf of the plaintiffs prior to that time; if not exclusively for them, certainly for both them and the officer. That possession when it was undertaken for the plaintiffs was not against the permission of the officer; for it does not appear, that the officer had knowledge, that he took charge of the goods for them, at the time that he assumed the care.

It is quite evident, therefore, that Clapp either abandoned the custody of the property for the officer on July 14, and took them in charge under the mortgage to the plaintiffs; or that by the consent of the attorney of the creditor in whose suit they had been attached, he had the possession both for the officer, to preserve the attachment, and for the plaintiffs to make perfect their rights under the mortgage, subject to the attachment. Upon the latter hypothesis what were the rights of the plaintiffs?

It appears, that on the 5th of August, the keeper surrendered the custody of the goods, so far as he held it for the plaintiffs, induced by the threats of the officer to take forcible possession, and the indemnity given by him and Mr. Granger.

Do the facts of the case show that possession of the goods was taken and retained by the plaintiffs, within the meaning of the provision of the statute, previous to, and till the time, when Nutt made the attachment upon the writ in the name of the Canal Bank, which was 6 o'clock in the afternoon of July 14th? Whatever was done for protecting the plaintiffs, took place in its commencement on the forenoon of that day, so that if that attachment was invalid, the subsequent ones were equally so.

The mortgage was effectual between the parties thereto without a delivery of the property, and gave the right to the mortgagees to take possession of it, there being no agreement in the case, that the possession was to be retained by the mortgagers. It follows, that if the plaintiffs came to the lawful possession of the goods, though not by the agency of the mortgagers, their rights became as perfect as they would have been by a delivery from them. *Carrington* v. *Smith*, 8 Pick. 419.

In *Fettyplace* v. *Dutch*, 13 Pick. 388, it is said by the court, "an attachment must constitute a lien, and as the general property remains in the owner subject to such lien, if the general owner can without a trespass make an actual delivery of the property, subject to the lien created by the attachment, a sale with such delivery is lawful, and will vest the property

in the vendee, subject to such attachment, so as to give the vendee a prior title to that of the subsequent attaching creditors."

When an officer has the possession of goods attached for the purpose of maintaining a lien, they are not suffered to be so in the control of the debtor, that an actual delivery can be made, but a symbolical one is deemed to be sufficient; and it is so effectual, that upon such possession, replevin can be maintained. *Whipple* v. *Thayer*, 16 Pick. 25; *Mitchell* v. *Cunningham*, 29 Maine, 376.

When goods have been attached, and put into the charge of a keeper by the officer, and the keeper abandons the possession, the attachment is dissolved. *Carrington & al.* v. *Smith*, 8 Pick. 419; *Gower* v. *Stevens*, 19 Maine, 92; *Sanderson* v. *Edwards*, 16 Pick. 144.

If the attorney abandons the suit in which an attachment of property is made, the attachment is necessarily vacated. If he orders the officer to relinquish the attachment, it would be improper for the officer to refuse, unless he held it at that time by virtue of an attachment in favor of another. The officer is protected if he takes security of property attached by him, which is approved by the attorney, and releases the property. *Jenney* v. *Delesdernier*, 20 Maine, 183. Such being the control, which the creditor's attorney has over property attached, the possession of the keeper under the officer, in behalf of a purchaser or mortgagee, by the consent of the attorney of the attaching creditor, subject to the attachment, cannot be unlawful in the keeper, the purchaser, or the mortgagee. The possession of the one is not adverse to that of the other; the claim of the one is in submission to the other, and both are consistent. Such possession in nowise differs in principle from a case, where the same individual has possession of property for two mortgagees, where the right of one is subject to that of the other. As long as the keeper holds the property that the attachment may remain valid, the officer is not exposed to peril, and the attaching creditor's security is not diminished. Can it be doubted, that the keeper of goods

taken by an officer upon mesne process, can receive a mortgage of the same from the owner, subject to the attachment, and can perfect his right under it, by retaining the possession for himself and at the same time for the officer? If the keeper can thus acquire rights for himself, and preserve the attachment, it is clear, that another can acquire like rights through his agency. A mortgagee has the same power to retain possession of property attached and in the hands of a keeper, that he has to take it, so that he can maintain replevin therefor, if he retains it by the consent of the attaching creditor or his attorney, and the keeper becomes his agent for the purpose. If the keeper can dissolve the attachment, by an abandonment of the possession altogether, without the consent of the officer, and against his wishes and the wishes of the creditor, he certainly can take possession for another, who becomes interested after the attachment, when the possession for the latter is not designed to interfere with or injuriously affect the rights of the officer or the creditor.

Clapp having the possession of the property for the plaintiffs from the forenoon of the 14th day of July, to the time, when the defendant received the key from him, by the consent of the attorney of the attaching creditor, without interference on the part of the officer, the mortgagees are to be regarded as having received the delivery of the possession of the property and retained it, till August 5, 1847; and they thereby acquired rights superior to those, who caused the property to be attached subsequent to the possession taken in behalf of the mortgagees.

On the 14th of July, after possession had been so taken and retained by the plaintiffs through their agent, the defendant returned the same goods as attached on the writ in the name of the Canal Bank, and subsequently on others, subject to the attachment on the writ in favor of Tappan. These last attachments could not have been effectual to deprive the plaintiffs of their rights as mortgagees, which had before become perfect. On the 5th of August, the defendant, and the owner

of the demand in the name of the Canal Bank, knew that the plaintiffs claimed to have a mortgage of the same goods, and that Clapp represented himself possessed thereof for them; they did not deny the existence of the mortgage, but disputed its validity.

The attorney of Tappan, not having intended to relinquish the attachment, so long as Clapp had possession for the officer, it remained good, unless it was void by being excessive, of which no opinion is given. On the assumption that the attachment of the officer upon the writ of Tappan was effectual, the officer was responsible for its continuance. He therefore, had the right to take the possession from Clapp, his bailee, at pleasure, and retain it exclusively for his own protection on account of his liability to Tappan; he had the right to retain that possession, till he had satisfactory evidence, that Tappan's debt had been paid, or the attachment otherwise vacated. This debt was paid on August 18, 1847, and the attachment no longer existed, but the officer not having notice of it, could not be treated as a *direct* trespasser upon the possession of the property.

But the mortgage to the plaintiffs being effectual, the defendant had no right to hold the property on the writs, which came to his hands after the plaintiffs' possession under their mortgage, and the knowledge of their claim by the officer.

The return of the writs to court, with the attachments indorsed thereon, and the subsequent sale of the property on the execution obtained in the suit of the Canal Bank, after the debt in favor of Tappan was paid, was an injury to the plaintiffs, for which they were entitled to damages.

This action cannot be maintained for the retention of the property upon Tappan's writ, so long as that attachment remained unimpaired; neither can the plaintiff recover damages in this suit for the *sale* of the property, which was not made, till after its commencement, but the brief statement admits the attempt to *hold* the property by the defendant, for the security of debts in favor of the Canal Bank and others, after the deputy was apprized of the existence of the mortgage and the

possession under it, when the attachments upon these debts were of no validity.

The plaintiffs had an interest in the goods, after the Tappan debt should be paid. For a violation of their rights in the enjoyment of this interest, subject to the officer's right under the attachment, an action on the case can be maintained.

The statute having abolished the distinction between trespass and trespass on the case, there is no impediment to the plaintiff's recovery in this action. *Welch* v. *Whittemore*, 25 Maine, 86.

The defendant having deprived the plaintiffs of their right in the withholding the goods from their possession, for an unauthorized purpose, is accountable for their value after deducting the amount of the debt in favor of Tappan, and all costs thereon.

English *versus* Sprague.

An action, originating in a justice's court, cannot be brought to this court, by appeal from a judgment of the District Court, on a demurrer in law, or upon an agreed statement of facts.

The remedy is by exceptions.

Assumpsit commenced before a justice of the peace, and brought to this court by an appeal from a judgment, rendered by the District Court upon an agreed statement of facts.

Shepley, C. J. — The case is irregularly here. It should have come up by exceptions. In a suit originating in a justice's court, where the question is upon a demurrer in law, or upon facts agreed, the statute gives no appeal to this court.

Consent of the parties cannot confer jurisdiction.

Action dismissed.

CROCKER, *in equity, versus* SMITH.

If an intestate have conveyed land, without any consideration, in trust for his own benefit, the administrator is not entitled to a re-conveyance.

The law gives him not a title to the land of his intestate, but merely a right to sell the same, in a prescribed mode and for certain specified purposes.

THE plaintiff is administrator of Asa Smith's estate. The bill sets forth, *that* the intestate was owner of certain real estate, which he conveyed, without any consideration, to the respondent; *that* it was the agreement of the parties that the respondent should hold the same in trust, for the use of the intestate; and *that* the estate has been represented insolvent. It thereupon prays that a re-conveyance may be decreed.

The respondent appears, and, in writing, admits the truth of the allegations contained in the bill.

BY THE COURT. — The bill cannot be maintained. The administrator has no title to the lands of his intestate. At most, he can have only a right to sell. And he can sell only when the court of probate shall decree the sale to be necessary; and under many guards, (such as an oath of faithfulness, specified notice and bond to account,) for the safety of the heirs, creditors, &c. A conveyance by the respondent to the administrator would enable him to sell without furnishing the protections required by law.

Neither would a conveyance to the heirs, constitute the land to be assets of the estate. The case, too, presents other difficulties, quite insurmountable.

But there is no *necessity* for a decree such as is prayed for. The statute, relating to the sale of lands, of which the intestate was disseized, contains ample provisions for the case presented in the bill.

Bill dismissed.

Pike *versus* Lowell.

The limitation in § 8, of the bankrupt law, applies to actions in the name of an assignee in bankruptcy, though brought wholly for the benefit of a third party.

Assumpsit, brought April 28, 1849. Certain persons were decreed to be bankrupts in 1842. The plaintiff was assignee of their estate. In said capacity he sold to one Bolkcom a demand against Stephenson, since deceased. The demand had been in the hands of Mr. Lowell, and prior to said sale, Mr. Lowell had collected the money; but he declined to pay it over, except to Stephenson's administrator, saying the demand never belonged to the bankrupt's estate.

Bolkcom brings this action, in the name of the assignee, to recover said money. The defendant pleaded the limitation, contained in the 8th section of the Bankrupt Act.

Walker, for plaintiff.

In an action, brought by an assignee *to close up an estate*, two years would constitute a bar. Not so, when the suit is brought for the use of a *third person*. The two years are a bar, only when the assignee's interest is adverse to that of the defendant. The object of the limitation was to compel an early settlement of the estate. Here the estate is all settled. The limitation being in derogation of the common law should be construed strictly. Bacon's Abridg. title, Statute, letter I., 4 & 5; *Hancock* v. *Minot*, 8 Pick. 37.

The analogies to cases of executors sustain our position. 2 Maine, 75; 14 Maine, 320; 8 Pick. 36.

Lowell, pro se.

Tenney, J., orally. — The distinction drawn by the plaintiff's counsel cannot be sustained. There is nothing in the statute, from which it can be inferred. Limitation laws are arbitrary, but they are binding.

Judgment for defendant.

SMITH *versus* SWEETSER.

A mortgager of land, whose right of redeeming has been sold on execution, has no rights in the land, until redeemed from the sale.

His acts upon it may be treated as trespasses.

Before the redemption, whether he be in possession or not, he can maintain no action of trespass *quare* against the purchaser for acts done upon the land.

TRESPASS *quare*, for tearing down a small barn, alleging, in aggravation, the injury to a swine by exposing it to the cold.

Lowell, for the plaintiff.

Thacher, for the defendant.

TENNEY, J., orally. — The plaintiff mortgaged the land, and his equity of redeeming was sold at a sheriff's sale to the defendant. The plaintiff was residing on the place. He had been requested by the defendant to remove, but refused to do so. Before the plaintiff redeemed the land, the barn was taken down by the defendant, with a view to constrain the plaintiff to remove. The plaintiff had no rights there. The seizin, which he had had, as mortgager, had passed to the defendant, who could maintain trespass for every act which the plaintiff might do upon the land. *Fox* v. *Harding*, 21 Maine, 104; *Abbott* v. *Sturtevant*, 30 Maine, 40.

That right in the defendant was not impaired by the plaintiff's possession, for that very possession was a trespass. The plaintiff was entitled to redeem within a year from the sheriff's sale. That gave him no right in the land, till the money should be paid. The fact that he did afterwards redeem, cannot affect the defendant's rights to do acts upon the land prior to the redemption.

But it is asked, can the plaintiff have no redress for injuries done to the estate before he redeemed it. That point is not before us. Perhaps it would not be too much to say, if he cannot, the law allows some failure of justice.

For the injury, said to have been done to the swine, *trespass quare clausum fregit* is not the appropriate action.

Judgment for the defendant.

WITHERELL *versus* SWAN *& als.*

A book, kept by a surveyor of lumber, in which are entered the names of the buyer and of the seller, the quantity of lumber surveyed and the time when, if it be the only book kept by the surveyor, from which he draws off the charges for his services, is admissible, with his suppletory oath, in a suit by himself against the buyer for his fees as surveyor.

A book, to be admissible, must be the original entry and made at the time. Those facts must of necessity be proved by the oath of the party. The book must also be in his handwriting, and must show the amount of the claim. No particular form of a book is necessary. But it must appear to have been kept intelligibly, fairly and truthfully.

When the plaintiff's book and oath have proved the charges, if the defendant would rely upon payment made, the burden is on him to prove it, either by cross-examination of the plaintiff or from other sources.

ASSUMPSIT upon an account annexed, for services in surveying lumber. The trial was had in the District Court before HATHAWAY, J.

It was admitted, that the plaintiff was a legally qualified surveyor. In support of the account, he offered a book, with his suppletory oath, to which the defendants objected. On being sworn, he testified, *that* he kept no day-book, or any other book than this, containing his charges for surveying; *that* the entries were in his handwriting, and made at the dates thereof; and, *that* he performed the services in surveying as appeared on the book.

On cross-examination he stated, *that* it was a survey book; *that* he entered in it names of the seller and of the buyer of the lumber which he surveyed; *that* from this book he made all his bills for his services in surveying; *that* he looked first to the seller for his pay, and if he could not get it from him, he looked to the buyer. The item in the book, which the plaintiff relied upon, was an entry of a specified quantity of lumber surveyed, stating the day, and the seller, and also naming the defendants as the buyers. The price carried out was at a higher rate than the statute allows for surveying.

There was no other evidence to show, that the service was performed, or for whom, or at whose request it was performed.

The Judge admitted the book and the testimony, and instructed the jury, "*that the book was evidence of the amount due from defendants to plaintiff for surveying as charged in the plaintiff's account*, and, that they should assess the damages for the plaintiff, (if they believed his testimony,) at the statute price for surveying so much lumber *as should appear by said book to have been sold to said defendants* which was surveyed by plaintiff, deducting credits on plaintiff's bill of particulars."

The jury found a verdict for the plaintiff.

To these rulings and instructions defendants excepted.

B. Bradbury, for defendants.

The survey book was inadmissible. It was not a book of account. It contained no charges against any one. The entry was not made for the purpose of charging any one. See Greenl. Ev. vol. 1, § 140. It was merely a memorandum, intended for the convenience of parties actually interested. It cannot be evidence to show who the parties were.

The law does not require such a book to be kept. It therefore has none of the elements of a record. Between other parties, it might be used to refresh the surveyor's memory, if he should be called as a witness. To use it as testimony for the surveyor himself, is a perversion of its import and design. There is no proof that the defendant ever purchased the lumber or heard of it, till called to answer in this suit.

It is necessity alone which upholds the practice of allowing a person to testify in his own behalf. At the expense of much legal principle, the rule has already been pressed to the extreme point. It needs contraction rather than expansion. In a case like this, there can be no necessity to admit the plaintiff's mere book survey.

The suppletory oath, as it was called, fell far short of sufficient testimony. It did not state, that he did the service for the defendants, or that they knew of it or assented to, or that they ever purchased the lumber or knew of its existence. The entry on the book might have been made, and doubtless

was, at the suggestion of the seller alone. Plaintiff knows his debtor by hearsay only. He testified that his first call is upon the seller, and he does not say that he has not been paid. See Greenl. Ev. vol. 1, § 140, note and cases cited. In case of goods sold, the seller, if he rely on his book, must testify to a delivery to the defendant. If the delivery be to an agent, he must prove the agency by testimony other than his own. By analogy, ought there not to be, by plaintiff's testimony or otherwise, some proof that the defendants had some sort of interest or knowledge about this lumber.

The claim, in its nature, admits of better evidence. If the plaintiff claim of the seller, he may call the buyer; if of the buyer, he may call the seller.

That instruction to the jury was erroneous, which stated "that the book was evidence of the amount due from the defendants to the plaintiff for surveying as charged in the plaintiff's account." At most, it could be evidence only of the amount of labor performed, no price being charged thereon.

That instruction was also erroneous, which directed the jury to "assess damage, at the statute price, for surveying so much lumber as should appear by said book to have been *sold* to the defendants." By that instruction, the book is made evidence of the sale.

The plaintiff invokes the statute, which gives the surveyor a right to recover of the buyer. By the book alone, even unsupported by his oath in that particular, he is allowed to prove that these defendants were the buyers. This must be erroneous.

Chase, for plaintiff.

Howard, J., orally. — Was the book admissible? This sort of proof is not known in some of our States. It is not known in any other country. It is an invasion of the old maxim, "*nemo in sua propria causa, testis esse debet.*"

The book of a plaintiff, in order to be admitted, should be the original, and made at the time of performing the service.

The evidence of these facts must necessarily come from

him. It must be in his handwriting. The present plaintiff testified to all these facts, and also that he did the surveying. The book must also show the amount of the claim. No particular form is necessary. The book states the quantity surveyed. The statute fixes the price.

It is objected that it is not appropriately an account-book, such as the law can admit in evidence. But we consider a book sufficient for that purpose, if it be kept intelligibly, fairly and truthfully.

It is also objected that it was not kept, and the entry was not made, for the purpose of charging the defendants. But the plaintiff testifies that that is his mode, and his only mode of charging.

It is further objected that the plaintiff did not testify that he had not received pay. This objection cannot prevail. The proofs made a *prima facie* case, competent for the jury to act upon. If defendants would rely on payment, they might inquire of the plaintiff, or prove it from other sources.

Another objection is, that the plaintiff's case admits of better evidence. True, it might in some instances be so. But, as stated in the plaintiff's argument, it is difficult to see how either the buyer or seller, or any other person could, except from the book itself, fix the quantity surveyed.

The book seems also to be sustained by some peculiar safeguards. It was made under an oath of office, and for the security of many interests, and it contains many minutes not usual in books of account. There were high inducements for keeping it correctly.

We feel bound then to hold the book admissible, notwithstanding the objections offered.

We come then to consider the instruction given to the jury. The statute imposes upon the buyer the obligation to pay for the surveying. The objection to the ruling is, that the book was made evidence of the quantity of lumber *sold*. As an isolated proposition, the language would seem unsustainable; but taken in connection with the facts of the case, its fair construction is, that the jury were instructed, if they believed

the witness, to assess damage, at the statute rate, for surveying so much lumber as appeared by the book to have been *surveyed by the plaintiff*, deducting the credits on his bill of particulars. Thus understood, the instruction was substantially correct. *Exceptions overruled.*

TALBOT *versus* COPELAND *& al.*

In determining the boundaries of land conveyed by deed, if any of the abuttals or calls of the deed are found, they cannot be disregarded, although the others may not be found.

Those which are found, if not inconsistent with each other, are elements in the rights of the parties, and cannot be departed from, to substitute the subordinate description, by courses and distances given in the deed.

WRIT OF ENTRY, bringing into question the boundaries of a large tract of land, with a claim of $3000, for rents and profits. The deed, under which the demandant claimed, conveyed "the township of Crawford, bounded on the north six miles by townships No. 21 and 16; on the east six miles by townships No. 15 and 16; on the south six miles by township No. 19, and on the west six miles by townships No. 25 and 26, containing 23,040 acres," excepting certain specified lots.

The verdict was for the tenants.

The demandant filed an exception to the ruling of the Judge, and also a motion for a new trial, alleging that the verdict was against law, evidence, the weight of evidence and the instructions, given by the court to the jury.

The evidence reported was very copious, and the motion as well as the exception was argued strenuously and ably by —

J. Lowell and *J. Granger*, for the demandant, and by *Downes & Cooper*, for the tenants. As motions for new trial commonly involve more of controversy as to the construction and weight of testimony, than as to principles of law, the insertion of them in this work is deemed rather discretionary than imperative. Though as to this motion, it was designed, at first, from the ample minutes of the Reporter, to present, in

a condensed form, the argument and the decision, it was soon found, that these, with the testimony on which they were founded, would absorb a portion of the book more than commensurate with the legal information to be derived from them.

The instruction *excepted to* was, that "as the deed, under which the demandant claimed, referred to no specific objects other than surrounding tracts or townships, the lines should be so run as to answer all these abuttals or calls; but if it cannot be so run, then the next certain order of description should be resorted to; to wit, the distances mentioned in the deed, and the township should be run out six miles square."

The questions arising upon the motion for a new trial were very elaborately and clearly examined and discussed by the Chief Justice, and the decision of the court was, that the motion was not sustained.

The judgment of the court upon the exceptions was also announced by

SHEPLEY, C. J., orally. — The instructions excepted to authorized the jury to disregard *such* calls of the deed as they *could* meet, unless they could find and meet *all* the calls. In this there was error. It is not pretended that the calls, which the jury could meet, were inconsistent with each other. They could not then rightfully be set aside. They were elements in the rights of the parties. The jury were permitted to say, if we cannot meet *all* the calls, we will disregard *all*, and run the tract by the courses and distances merely. Such a mode is at variance from established rules.

Exception sustained.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF HANCOCK,

1850.

PRESENT:

HON. JOHN S. TENNEY LL.D.,
HON. SAMUEL WELLS,
HON. JOSEPH HOWARD,
} ASSOCIATE JUSTICES.

LEE *& al. versus* OPPENHEIMER.

A parole agreement by a creditor with his debtor, to discharge the debt, on receiving a sum less than the amount due, is without consideration and inoperative.

But the accepting of a *third person's* note, taken on such an agreement, though the note be of less amount than the debt, will support the agreement and discharge the debt.

ASSUMPSIT on book account for $154,74, being the amount which was originally due.

The defendant offered the following receipt, signed by the plaintiffs, viz., "New York, 4 Feb'y, 1848, Rec'd of A. S. Herman eighty dollars, which is in full for our demand against J. Oppenheimer of Maine, for $154,74, and we agree to discharge said Oppenheimer therefrom upon the payment of the

costs incurred therein." The costs were paid by the defendant prior to the entry of the action.

Herman, on taking the receipt, gave his note to the plaintiffs for the $80, which he afterwards duly paid. Except the cost, nothing further has been paid to the plaintiffs.

By consent, a default was entered, which is to be taken off if the foregoing facts constitute a legal defence.

WELLS, J. — An agreement by a creditor to discharge a debt, upon receiving a less sum than is due to him, is not binding upon the creditor. There is no consideration for the agreement to relinquish the balance. *Fitch* v. *Sutton*, 5 East, 230; *Bailey* v. *Day*, 26 Maine, 88. But this rule does not apply, where the acknowledgment of satisfaction is by deed, or any other articles than money, or the note of a third person for a smaller sum than the amount of the debt, or a less sum than is due, before the day of payment, or paid at another place than that limited by the contract, are received by the creditor in full satisfaction of the debt. *Pinnel's case*, 5 Co. 117; *Brooks* v. *White*, 2 Metc. 283. The least consideration in such case is sufficient to make the agreement binding. *Hinkley* v. *Arey*, 27 Maine, 362.

A creditor cannot coerce his debtor, to deliver to him any article of property, which belongs to the debtor, nor to procure for him the note of a third person; they can only be obtained by contract, and the creditor is at liberty to pay such price for them as he may think proper, and if he agrees to cancel his debt, when such article, or the note of a third person for a less sum than the debt, is delivered to him, he is bound by the execution of the agreement, although it may not be so beneficial to him, as it would be to receive the whole amount of his debt in money. It is equivalent to a purchase, the relinquishment of the debt being the consideration paid, when the creditor receives such note or other article for his debt. But the direct purpose being to pay the debt and not to sell the note or other property, the transaction is considered in law an accord and satisfaction, the parties esti-

mating for themselves the value of the satisfaction. So also parties may change their contracts as to the time and place of payment, upon such consideration as they may think proper.

The defendant was indebted to the plaintiffs in the sum of one hundred and fifty-four dollars and seventy-four cents, and after this action was commenced, but before it was entered in court, they received of A. S. Herman, eighty dollars, as appears by their receipt in writing, in full for their demand against the defendant, and agreed to discharge the defendant from it upon the payment of the costs, which had been incurred. This receipt is open to explanation, and it appears by the evidence, that Herman, instead of paying the eighty dollars when he took the receipt, gave his note to the plaintiffs for that amount, and has since paid it to them. The costs were paid previously to the entry of the action.

The reception of Herman's note and the payment of the costs by the procurement of the defendant, having been agreed by the plaintiffs to be taken in full satisfaction of their debt, must be considered as having that effect, and a defence to the action. Whether the same result would have been produced upon the payment of eighty dollars in money, by Herman for the defendant, as the terms of the receipt indicate, and the additional payment of the costs, before the right of the plaintiffs to them had become established by a judgment, it is unnecessary to determine.

No question is presented in the report of the case in relation to the pleadings, but if there had been no other plea than the general issue, as is suggested by the counsel for the plaintiffs, that would have been sufficient, as payment or accord and satisfaction may be given in evidence under it. 1 Chitty on Plead. 472.

The default is to be taken off, and the action stand for trial.

CROSBY, *administrator of Joseph Cutler, versus* OTIS.

When lands belonging to the wife have been sold by an authorized agent, the money received therefor, in the hands of the agent, belongs to the husband, and, after his death, may be received by his administrator.

Neither at law or equity, can the widow maintain process against the agent to recover such money.

Interest on the balance of an account stated, is recoverable from the date of the settlement.

ASSUMPSIT to recover $1927,09, with its interest since October 17, 1845. The plaintiff introduced an account stated, of that date, signed by the defendant, showing a balance of that amount in favor of *the intestate.*

It appeared *that* a certain township of land, called No. 8, was owned by certain proprietors, the wife of said Joseph Cutler being owner of fourteen thirty-seconds, and the defendant being also one of the owners; *that* the defendant had acted as agent of said proprietors, having sold lands as their treasurer, and paid to each of the individual proprietors, from time to time, (agreeably to an arrangement among them,) their proportions of moneys received for lands sold, and on notes taken for lands sold.

It further appeared, *that* said Cutler had always acted for the interest owned by his wife; had corresponded with said defendant, and had settled, after a protracted investigation, the account exhibited, being for receipts and payments on account of said fourteen thirty-second parts of said lands; and *that* said defendant had been called upon to pay such balance, and had made direct promises to said Cutler in his lifetime, by letter and verbally, to do so.

Robinson, for the plaintiff.

The stated account is conclusive as to the *party* whom the defendant owed. It is an admission that he was acting as agent for the *husband.*

Though the lands belonged to the wife, yet when sold and converted into cash, the fund was at once vested in the husband. It was not in the nature of a chose in action, once

owned by her. She always consented to his management of the concern, and now makes no claim. *Shuttlesworths* v. *Noyes, & Downs, Trustee,* 8 Mass. 229; *Russell* v. *Brooks*, 7 Pick. 65; *Washburn* v. *Hale, Adm'r*, 10 Pick. 429; *Commonwealth* v. *Manley*, 12 Pick. 173; *Emerson* v. *Cutler*, 14 Pick. 108; *Pierce* v. *Thompson*, 17 Pick. 391; *Savage* v. *King*, 17 Maine, 301; *Chase* v. *Palmer*, 25 Maine, 341.

J. A. Peters, for the defendant.

1. If there should any thing be recoverable by the plaintiff, his claim to *interest* is not well founded. The defendant was acting as an agent for others, and not bound to pay interest till after a particular and certain demand. None such appears here. No date is shown when any demand was made. If no date be shown with certainty, the date of the writ shows the time of the demand.

2. The plaintiff has no title to recover. The fund in the defendant's hands belongs to Mrs. Cutler. Not having been reduced by the husband into actual possession, he took no right in it. A recovery here would not bar one by her. The report itself shows, that the husband was "acting for the interest owned by his wife," that is, as agent for her. The promise then was, in legal intendment, made to her.

3. The stated account can be no foundation for this suit. It was not founded on any new consideration. Even if the husband could have sued upon that account as on a new promise, this action is not brought upon a new promise. The account was no contract. It merely fixed the amount due to the rightful creditor. To entitle the husband to recover, he must have got the claim into a judgment or into money, or into a new, valid contract, which changes and destroys the old obligation entirely, and *amounts to a payment in money.* It must be a destruction of the old claim, so that the husband, even while alive, could have in no manner availed himself of the old claim in any form. Com. Dig. Baron and Feme, (E. 3); Kent's Com. vol. 2, Lecture 28, sect. 4.

No matter whether the claim accrued *before* or *after* cover-

ture. Com. Dig. Baron and Feme, (V.); 2 Mod. 133; 3 Term R. 631; 6 Johns. Chan. 178; 9 Vesey, Jun. 174.

It matters not, even if the husband had exercised acts of claim and ownership, or if the debtors had assumed the claim as belonging to the husband, and acted accordingly, unless they had entirely discharged the original obligation.

HOWARD, J. — The defendant, as treasurer of the proprietors of "township No. 8," sold certain portions of their lands, and accounted for the proceeds, from time to time, to the proprietors individually, "agreeably to an arrangement between them." The wife of the intestate was one of the proprietors, and owned fourteen thirty-second parts of the township. Her husband "had always acted for the interest owned by his wife, had corresponded with the said Otis, and settled, after a protracted investigation, the accounts exhibited, being for receipts and payments on account of said fourteen thirty-second parts of said lands." The statement of the accounts, signed by the defendant, and exhibited as a part of the case, purports to be an account current between him and Joseph Cutler, the intestate, commencing in August, 1835, and closing at the date of the settlement, October 17, 1845. This account shows a balance of $1927,09 due to the deceased; "and the defendant had been called upon to pay such balance, and had made direct promises to said Cutler, in his lifetime, by letter and verbally so to do." The intestate died in May, 1848, and this suit was brought by his administrator, to recover the balance named, and interest.

The wife of the intestate is still living, and it is understood that she does not object to the maintenance of the action; at least, no objections have been presented by her in the progress of the cause; and it seems to be admitted that the defendant was properly authorized, and empowered to make sale of the lands, in the manner in which it was done. The fee of the lands was in Mrs. Cutler, and in her real estate the husband had only a qualified interest, during coverture. At his decease she would be admitted to the entire control of the property in

her own right, unaffected by any claims of his representative, heirs, or creditors. When, however, the real estate of the wife was legally alienated, the proceeds in money became personal property, and belonged to the husband. It was his money in the hands of the defendant, although an equivalent for her lands. The defendant became his debtor by operation of law, and accountable to him only, subject to the rules of law, applicable to debtor and creditor. At the death of the husband, the debt was a part of his estate to be administered by his representative. 2 Black. Com. 435; 2 Kent's Com. 135; *Barlow* v. *Bishop*, 1 East, 432; *Doswell* v. *Earle*, 12 Ves. 473; *Savage* v. *King*, 17 Maine, 301; *Chase* v. *Palmer*, 25 Maine, 341; *Commonwealth* v. *Manley*, 12 Pick. 173; *Emerson* v. *Cutler*, 14 Pick. 119.

It is proved that the defendant received the proceeds of the sale of the lands of the wife during coverture, under the direction of the husband; that he kept the account with the husband solely; and that he has paid him a large portion of the proceeds, and has frequently promised to pay him the balance, on demand made. The husband claimed the proceeds, not, as the evidence indicates, for his wife, but for himself; and it does not appear that either the husband or wife ever intended that this fund should be treated as her estate. The defendant, then, cannot stand upon the supposed right of the wife to the money in his hands, when, upon the facts of this case, she could not, if she chose to do so, maintain a claim for it in her own right, in law, or in equity.

The action is maintainable; and, according to the agreement, the defendant is to be defaulted, and judgment must be rendered for the plaintiff, for the balance of $1927,09, with interest from October 17, 1845, when it was admitted to be due on settlement.

BLUEHILL ACADEMY *versus* ELLIS, *Administrator.*

The treasurer of a corporation, having obtained permission to borrow the funds in his hands, upon giving his note with a mortgage, is not, by the giving of his note *without* the mortgage, exonerated from liability as *treasurer* for the amount.

Charges made annually by the treasurer against himself in the corporation books, for annual interest on such amount, brought down to a period within six years from the date of the writ, are recognitions of the debt, by which the limitation bar is removed.

Though, upon the death of such treasurer, and the insolvency of his estate, the corporation should present the *note* to the commissioners, with the usual oath that *it was due and unsecured*, they would not thereby be precluded from afterwards abandoning the note and claiming upon the account, as due from the treasurer in his official capacity.

ASSUMPSIT. Plea, general issue and limitation. The facts were agreed, upon which the court should enter judgment as the law requires.

The defendant's intestate was clerk and treasurer of the Academy from Aug. 1831, to his death in April, 1848, having the custody of its securities, books and papers. It was one of its by-laws, that no part of the funds should be loaned by the treasurer, except on mortgage of real estate, of double the value of the sum loaned.

It was the duty of the treasurer to take notes on annual interest for all money loaned, and to see that all deeds and other instruments of value were duly executed, and to keep, in his own hands, "until mortgages were duly given, all the funds proposed to be loaned; and also to collect the interest annually."

In Aug. 1831, the intestate obtained leave of the trustees to borrow about 600 dollars, of the funds in his hands, upon a mortgage of real estate, and George Stevens was authorized to see that the security was properly given. Under that arrangement the intestate, on the first day of September, 1831, took to his own use $626,23, for which sum, with annual interest, he placed upon the files of the corporation his own negotiable note, and drafted a mortgage of real estate. The draft was folded in the form of a deed, and filed as a mortgage from him to

the Academy, and placed among the mortgages, but it was never executed.

Mr. Stevens was appointed, in 1835, to examine the securities due to the Academy, and the state of the funds, and to audit the treasurer's account. He reported in February, 1839, as follows: "I find the accounts in the best order, well vouched, and have examined the securities for money loaned. It appears to be perfectly secured by mortgage and otherwise." This report was accepted. Mr. Stevens would testify that, while pursuing his examination, the intestate gave him a bundle of papers, purporting to be mortgages belonging to the Academy, among which was said draft, and represented that it was a mortgage to secure his said note; and that he, the said Stevens, confiding in that representation, omitted to examine the paper.

The intestate charged himself on the corporation books for the $626,23, and also for the interest annually, up to, and including that which became payable Sept. 1, 1843. The credits, which he gave to himself on the books, were sufficient to balance the said charges for interest up to Sept. 1, 1841, but not afterwards.

It did not, until after the intestate's death, come to the knowledge of the trustees that the mortgage was not executed, or that any of the annual interests remained unpaid. The intestate's estate was represented insolvent. The new treasurer of the Academy presented the note to the commissioners, and made oath that it was due without deduction, and that there was no security for the same. The commissioners allowed it. The defendant filed his objection with the requisite notices; and thereupon this action for money had and received was commenced, June 11, 1849.

The plaintiffs were allowed, against the defendant's objection, to add a count upon the original account.

Robinson and *Hinckley*, for the plaintiffs.

The note was never accepted. It never became the property of the Academy. The intestate had no right to appropriate the money to his own use, except on giving a mortgage,

which was never done. The money was taken, therefore, not only without authority, but in violation of the by-laws and of the trust confided. The note was a mere nullity. The money withdrawn is therefore to be treated as still in his hands as treasurer. So he himself considered it. At least he did not consider the note as a payment for it, for he charged himself the amount with annual interest in the corporation books. The last interest was charged to him, by himself, in said books, Sept. 1, 1843. This was a recognition of the debt at that time, and it was within six years from the date of the writ, and displaces the limitation bar.

C. J. Abbott, for the defendant.

This action is in the nature of an appeal from the commissioners of insolvency. The claim presented there, and that claim alone, is the one to be acted upon here. But that claim was the note, and nothing else. The plaintiffs there made an election to rely on the note. That election was made after they had discovered there was no mortgage. For their treasurer made oath, "that it was unsecured," and was due. By that election, thus understandingly made, they must be bound. It was a waiver of all objection, for want of a mortgage. But now they disclaim the note, and say it was never valid. It is too late. By the note thus accepted, it being a negotiable one, the account was paid. Besides, the note was always valid, at least from the time when the plaintiffs had reasonable opportunity to discover, from examination of the papers, that there was no mortgage.

The account, which the plaintiffs wish to revive, was not a running or mutual account. Its entries were only on one side. It was a specific charge and stood alone. 4 Maine, 337. It was the intestate's private account; not his account as treasurer.

It is not to be viewed as an account stated, for it was made by one party only.

The schedule for the appeal exhibited only the note. The plaintiffs' motion to amend it, by substituting the account, is not to be allowed. If so, it introduces a new claim, never

sworn to, and never acted upon. And if due, it may be collaterally secured. The law requires such security to be made known. Other creditors would be interested in such security.

The charges of interest made by the intestate against himself on the corporation book, for the years 1842 and 1843, were no payment, because there were no credits to set against them. They could not, therefore, defeat the limitation bar. The Stat. c. 146, § 19, requires the new promise or acknowledgment of indebtedness to be *express*, made in writing, and signed by the party.

TENNEY, J. — It was not known to the trustees, before the death of the defendant's intestate, that the note signed by him, was not secured by a mortgage of real estate, according to the provision in the by-laws; notwithstanding an auditor was appointed on April 15, 1835, to examine the accounts, who reported on Feb. 28, 1839, that the accounts of the treasurer were in the best order, well vouched, and that on examination, the securities for money loaned, appeared to be safely secured by mortgage and otherwise, and the report was accepted by the trustees. The mortgage deed made out, corresponding with the note, but not executed, was placed upon the file with other mortgages; and having such a label upon it, as it was proper that it should have, if executed and made in all respects perfect, it was supposed by the auditor to be effectual, and he did not examine it, as it was his duty to have done. The note not having been secured according to the requirement of the by-laws, could not be considered as received by the trustees without any action upon their part, and without knowledge of its true condition. The books of the treasurer show that the intestate did not treat the note as having passed from him to the trustees; he charges himself with the same sum as that named in the note under the same date, being money loaned by the direction of the trustees, and afterwards from time to time charges himself with the annual interest on the principal to Sept. 1, 1843. This sum, thus charged as principal, he received, as it is admitted, and ap-

propriated to his own use. There is no reference to the note either on the credit or debit side of his book. It was undoubtedly the design of the intestate to have the mortgage executed and so placed that it would be regarded as delivered, for security of the note, which was perfect excepting that it had not been accepted by the payees. But it was neglected from time to time and was never done. He was responsible for this money as the treasurer, after he had received it; and it is manifest that he did not consider, that his official responsibility had ceased, and, that his liability as a borrower had commenced, although he had so far availed himself of the authority of the trustees to lend the money, as to make use of it as a loan to him. As the note was not understood by the intestate, who knew all the facts, to have become the property of the trustees, and as it cannot be treated as having been taken by them constructively in violation of the by-laws, it was not an extinguishment of his liability for the money received, which was intended as its consideration.

Upon the hypothesis, that the note never became the property of the institution, it is insisted, that this action is not maintainable, inasmuch as the claim presented to the commissioners of insolvency, was the note, and not a sum appearing due upon the treasurer's books. Great liberality has been allowed in adjusting the mutual claims, existing between creditors of a deceased insolvent and his estate, with a view, that one should be a set-off to the other, as far as it would extend, in order that perfect justice should be done. And with this view the technical rules, which have been inflexible in ordinary suits, have been made in some measure to yield. *McDonald* v. *Webster*, 2 Mass. 498; *Jarvis* v. *Rogers*, 15 Mass. 389; *Fox* v. *Cutts*, 6 Greenl. 241. Judge Mellen, in the opinion of the Court, in *Lyman, Adm'r*, v. *Estes*, 1 Greenl. 182, says, "our statutes relative to the settlement of insolvent estates, contemplate a fair adjustment of all demands subsisting between the deceased and his creditors at the time of his death, so that the balance justly due to the estate may be collected." "The strict principles of the common law, and technical

rules of pleading must not be applied to cases, where the parties have not mutual remedies at law, which they can enforce as in cases of insolvency. *Knapp, Adm'r*, v. *Lee*, 3 Pick. 452. As promotive of the same purpose, the R. S. chap. 109, sect. 20, have provided, that when an appeal is taken from the decision of the commissioners, and the creditor shall prosecute his claim in an action for money had and received, the creditor may annex to his writ a schedule of all his claims, or the nature thereof; or he may file in the office of the clerk of the court to which the action is brought such schedule, fourteen days at least before the return day of the writ; and the administrator, at such time as the court may direct, may file an abstract of all the demands which the deceased may have left against the supposed creditor; and judgment shall be rendered for either party, as the case may be, upon the balance to be ascertained at the trial.

The R. S. chap. 115, sect. 9, provide, "that no summons, writ, declaration, plea, process, judgment or other proceedings in courts of justice shall be abated, arrested or reversed for any kind of circumstantial errors, or mistakes, when the person and case may be rightly understood by the court, nor for want of form only, and which by law might have been amended." Under this provision of the statute, when the court have jurisdiction of the persons, and the subject-matter, an amendment of a declaration in a writ can be made, by inserting a new count, if it shall appear that it is for the same cause of action. Judge PARKER says, in *Ball* v. *Claflin*, 5 Pick. 304, "The new count offered must be consistent with the former count or counts, that is, it must be of the like kind of action, subject to the same plea, and such as might have been originally joined with others. It must be for the same cause of action; that is, the subject-matter of the new count must be the same as that of the old; it must not be for an additional claim or demand, but only a variation of the form of demanding the same thing." *Eaton* v. *Whitaker*, 6 Pick. 465; *Clark* v. *Lamb*, *Ibid.* 512.

In *Vancleef* v. *Therasson & al.* 3 Pick. 12, which was an

action on account annexed for goods sold and delivered, and for which a negotiable note had been given, it was held that the plaintiff could not amend the writ by inserting a count upon the note, being for a different cause of action, but was entitled to recover, as the writ stood, the transaction being in New York, where the note is not payment of the account. By the law of Massachusetts and of this State, the taking of a negotiable note for an existing account, is a discharge of the latter, unless otherwise agreed by the parties. It follows, if the note taken had no validity, the supposed consideration of it stands unaffected.

The case of *Barker & al.* v. *Burgess & als.* 3 Metc. 273, was where an action was commenced against a firm on a note, which one member had given in the name of the company, embracing matters against him individually. The defendants having given evidence, that the note was not valid and binding upon the partnership, the plaintiffs asked leave to amend their declaration, by inserting the common counts, for goods sold and delivered, for labor and services, &c., with a view of filing a bill of particulars, embracing so much of the original consideration of the note, as arose from the liability of the partnership on their own account. This amendment was granted and approved by the whole court, under the provisions of the statute, which in this respect were substantially similar to that of this State.

The note of the defendant's intestate, never having been received by the trustees, so as to discharge the claim against him as treasurer for the same amount, his original liability remained unimpaired. If an action had been brought against him in his lifetime, and the writ contained only a count upon the note, and it should be found that the note was not valid for any cause, a count for the consideration, of money had and received would be for the same cause of action and admissible.

It could not have been the design of the Legislature, when they allow an appeal from the decision of the commissioners of insolvency, by authorizing an action with only the general

equitable count of money had and received, to be less liberal, touching the form of the proceedings, than in providing for amendments in the ordinary proceedings in court between living parties, and to exclude forever from any consideration in cases of insolvency, in a manner which can be effectual, just demands against the estate. But upon a strict construction of the statute it is apprehended, that this objection of the defendant cannot prevail. It was undoubtedly intended, that the action at law upon an appeal should be for the claim presented to the commissioners, and allowed or rejected by them. If a writ could be amended by the insertion of a new count, it is because the new count is for the same cause of action as that of the former. If it is adjudged for the same claim on a question of amendment, it cannot fail to be so regarded in the case of an appeal like the present.

The demand intended to be presented to the commissioners, was for money in the hands of the intestate at the time of his death belonging to the Academy. The evidence presented to the commissioners was a note dated Sept. 1, 1831. The money, appearing due from the intestate upon his books, as money loaned by the direction of the trustees on the day of the date of the note and for the same amount, was the same, which was the consideration of the note. The proof relied upon in support of the latter, being different from that presented to the commissioners, cannot change the character of the claim, as the note was not an extinguishment of his former liability.

The distinction attempted between the liability of the intestate in his individual and official capacity, has no substantial foundation. His estate is answerable for whatever moneys were in his hands at the time of his death, whether he held them in his fiduciary character of treasurer, or as the borrower of the amount by the authority of the trustees. It is only in the mode adopted by the plaintiffs, that they can have an adjustment of their claims against his estate, whether he is liable in one capacity or the other. The books in either case are equally evidence.

The charge of the intestate against himself on Sept. 1, 1831, of the sum of $623,26, is evidence, that he was then liable for that sum; the subsequent charges of the annual interest from year to year upon this sum was a recognition that it was unpaid. The credits of payments made, show that there was between the intestate and the plaintiffs an open account current. In such a case the cause of action accrued at the date of the last item proved in the account. R. S. c. 146, § 9. The last item in the account charged against the intestate, by himself, was on Sept. 1, 1843. This was within six years of his death, and the statute of limitations cannot be a defence. According to the agreement of the parties, there must be entered *Judgment for the plaintiffs.*

DOANE, *Appellant, versus* LAKE, *Administrator cum testamento annexo.*

Although a testator omit to make, in his will, any provision for one of his children, and it does not appear that the omission was intentional, the will may nevertheless be approved without any condition or restriction.

The remedy for such child is, not by resisting the probate of the will, but by subsequent proceedings in the Probate Court or otherwise.

THIS is an appeal from a decree of the Judge of Probate, allowing the will of Bangs Doane. The testator had several children, living at the time of his decease, of whom the appellant is one. No devise or legacy was made to the appellant. There was no evidence to show whether the omission was intentional or occasioned by mistake, or to show that the appellant had had an equal proportion of the testator's property bestowed upon him, during the lifetime of the testator. The will was approved without qualification or condition.

A. W. Paine, for the appellant.

The appellant never had his portion of the estate. No provision was made for him in the will, and it does not appear that the omission was intentional. The will, therefore, should not have been approved at all. But if approved, it should

have been done only upon condition that the appellant should have the same share, as if his father had died without making a will. R. S. ch. 92, sec. 18.

T. C. Woodman, for defendant.

The remedy of the appellant, if he have any, is not by resisting the probate of the will, but by seeking in the Probate Court his share in the distribution of the personal property, and by petitioning for a partition as to the realty. R. S. ch. 92, sec. 17, 18, 19, 20, 24, 25; ch. 108, sec. 21; ch. 105, sec. 24; *Terrey* v. *Foster*, 1 Mass. 146; *Church* v. *Crocker*, 3 Mass. 17; *Wilder* v. *Goss*, 14 Mass. 357; *Tucker* v. *Boston*, 18 Pick. 162; *Wild* v. *Brewer*, 2 Mass. 570; *Merrill* v. *Sanborn*, 2 N. H. 499.

The probate of the will is conclusive only as to its due execution. R. S. ch. 92, sec. 25. And there is no distinction between lands and chattels, as to the effect of the probate. *Dublin* v. *Chadburn*, 16 Mass. 433.

TENNEY, J., orally. — The will may be good and effectual as to all its provisions, limited only by such rights as the appellant may have in the estate. But there can be no mode of giving it such an effect, except by the allowance and approval of it. After its allowance and approval, its import may be modified, at law, so far as may be requisite for securing to the appellant whatever rights he may be able to prove.

Decree affirmed. No costs.

TENNEY *versus* BUTLER *and two others.*

The contending by counsel, in argument to the jury, that a certain position is a principle of law, does not of itself require the Judge to instruct the jury upon that point.

ASSUMPSIT, tried before TENNEY, J. The plaintiff made a claim upon an account against the three defendants, who are alleged to be co-partners.

The plaintiff's counsel, in his argument to the jury, *contended*, that less evidence was necessary to show defendants to be partners, in an action against them, than plaintiffs are required to show, when suing as co-partners; and that, as the evidence was not in the hands of the plaintiffs, slight evidence should satisfy the jury of the fact of partnership. The jury were instructed, upon this point, that the party, upon whom is the burden of proof to establish a co-partnership of those who are the other party, must satisfy the jury of the existence of such co-partnership.

The plaintiff excepted.

Herbert and *Drinkwater*, for the plaintiff.

Hinckley, for the defendants.

WELLS, J., orally. — 1. The plaintiff's counsel contends that the Judge did not rightfully instruct the jury as to the amount of evidence necessary to prove that defendants were co-partners, and that less evidence is required to prove a co-partnership among defendants than among plaintiffs in a suit.

But no request was made for instruction on that point. It is only said that the plaintiff's counsel, in his argument to the jury, *contended* for that principle. But that is not equivalent to a request for instruction. The Judge need not instruct upon the point, unless upon a request for instruction.

2. The instruction given was clearly correct. It was no more than that the party, alleging a co-partnership, must prove it to the satisfaction of the jury. The Judge did not say how much evidence they ought to have in order to satisfy them. It was not in his province to say.

Exceptions overruled.

MASON *versus* INHABITANTS OF ELLSWORTH.

In an action against a town for an injury sustained through a defect in the highway, notice to the town, that such defect existed, is sufficiently proved, if the same was known to two of its inhabitants, capable to communicate information of it.

It is not necessary that such inhabitants should be among the principal men of the town, or that they should be assessed for public taxes.

Bodily pain is among the items for which compensation is to be made to one, who has suffered an injury through a defect in the highway.

CASE, tried before WELLS, J., for damage through a defect in the highway. It consisted in a sudden or abrupt deepening of the cart-rut, which was, at the time of the accident, covered by water.

One Dunham and one Hinkley, inhabitants of Ellsworth, testified that they had known of the defect a week before the accident.

The defendants proved that the cash tax of Ellsworth, for that year, was over $5000; that Dunham was taxed but $2,60, and Hinkley was not taxed.

The jury were instructed that, if the witnesses were believed, notice to the defendants was sufficiently proved; and that among the items of damage they should include the bodily pain, suffered by the plaintiff. The defendants excepted to these rulings.

Herbert, for defendants.

1. The case does not show the witnesses to have been "principal men, or men of substance." *Lobdell* v. *New Bedford*, 1 Mass. 153; *Springer* v. *Bowdoinham*, 7 Maine, 442; *French* v. *Brunswick*, 5 Maine, 29; *Reed* v. *Northfield*, 13 Pick. 94.

In all those cases the defects were open and visible. In this case the defect was a secret one. It was a hole in a rut, filled with water, with nothing to distinguish it from other parts of the way, or from an ordinary rut. It could be seen only by searching for it.

Can there be an implied notice of a latent defect? Latent defects, of however long continuance, do not carry notice.

What is reasonable notice, is a question for the court.

The jury found a matter of law only.

2. The instruction, that the jury should compensate for bodily pain, was erroneous.

TENNEY, J. — It has been settled, in *Verrill* v. *Minot*, (31 Maine, 299,) that such an allowance is proper.

Herbert. — In that case, was the item of suffering charged for in the declaration? The tendency of such a doctrine would be to make drivers careless. There can be no standard for estimating such damage. The rule would introduce quite too much looseness into legal proceedings.

J. Appleton and *Robinson*, for plaintiff.

HOWARD, J., orally. — Dunham and Hinkley were inhabitants of Ellsworth. Dunham testified that he knew of the defect about a week before the accident, and that he drove over the place with an ox-cart every day.

Hinkley testified, that he was in the habit of passing there with a loaded team, saw the defect a week before the accident, was afraid to let his horses go into the hole, lest they should "get stuck." He found the mud in the hole to be 15 inches deep. Dunham was assessed $2,60 out of more than $5000 tax. Hinkley was not assessed. The Judge ruled that, if the jury believed the testimony of these witnesses, the notice, requisite for charging the town, was made out. Was that ruling correct?

It was early found that the beneficial operation of the statute would be in a great measure defeated, if express notice to the town, in its corporate capacity, or to its officers, must be proved. It was then decided that the requisite notice might be implied. And it was held, that actual notice to some of its principal inhabitants would be sufficient. Afterwards it became the rule, that knowledge of a defect by some of the inhabitants would answer, if they were capable to receive and to give notice to the town. It has not, perhaps, been settled how many of the inhabitants must have had the notice. We think it quite unimportant what amount of taxes

may have been assessed against such inhabitants. The notion which contemplated the notice to be given to some principal inhabitant seems to have been long disregarded. On the whole, there does not appear to be any valid objection to the Judge's ruling.

2. The jury were instructed, that in their assessment of the damage, they should compensate the plaintiff for his suffering of bodily pain. We consider that ruling to be correct ,and that it is in harmony with the decisions in this and in other States, and that it is now the settled doctrine. *Verrill* v. *Minot*, 31 Maine, 299.

Exceptions overruled.

DURGIN *versus* BAKER.

In a contract of service, at stipulated wages, for a specified time, "if the parties can agree," either party may terminate it at pleasure, and without showing that there was any reasonable cause of disagreement.

ASSUMPSIT on account annexed, and *quantum meruit* for two months labor. The contract was, that the plaintiff "should labor for the defendant six months at $13 per month, *if they could agree.*" The plaintiff worked two months and then quit. For that labor, this suit is brought. It was tried in the District Court, HATHAWAY, J.

The Judge was requested by the defendant to instruct the jury, that the plaintiff could not recover, without showing that he had reasonable cause for disagreement. That instruction was not given. Verdict for plaintiff. Exceptions by defendant.

C. J. Abbott, for defendant.

Where a contract is made for service for a stated term, if the hired leave before the term expires, without good cause, no wages can be recovered. *Stark* v. *Parker*, 2 Pick. 267; *Thayer* v. *Wadsworth*, 19 Pick. 349; *Olmstead* v. *Beal*, *ibid.* 528.

A contract for a definite term, if the parties can agree, does not differ substantially from the contract in the authorities cited.

In this contract, it is apparent, that the defendant intended to secure the services of the plaintiff for six months; and that the plaintiff was willing to become bound for that term, under *some* circumstances at least.

The words "if they could agree," are not to have such force given them, as to destroy the *important* clause, "for six months."

If disagreement had arisen from the fault of the plaintiff, would he have been justified in leaving? To justify the plaintiff, under such a contract, in leaving before the end of the term, there must have been reasonable cause for leaving.

But if the words "if they can agree," do modify the contract, and render it distinguishable from the cases in Pickering, still they are to receive such a construction, as to carry out the intention of the parties.

Tuck, for plaintiff.

HOWARD, J., orally. — The contract reserves to each of the parties the largest liberty. Neither could control the other. Either might terminate the contract at pleasure. It was not requisite that he should have a reason for it. He cannot, therefore, be required to prove one.

Exceptions overruled.

JUDITH SNOWMAN *versus* BURNHAM WARDWELL.

In an action by a female for a breach of promise of marriage, the fact that she had committed fornication with other men, is no defence, if, at the time of making the contract, the defendant had knowledge of the misconduct.

Nor is proof of such misconduct a defence against such a contract, made by the defendant before, but continued by him as a subsisting contract after, he had knowledge of it.

Generally, a new trial will not be ordered on the ground of newly discovered evidence, if the same be merely cumulative.

It is a rule that new trials, on the ground of newly discovered evidence, will not be granted, unless it shall seem to the court probable that it might alter the verdict.

ASSUMPSIT, upon an alleged breach of a contract of marriage. In order to prove the contract, the plaintiff proved attentions by the defendant to her in 1847 and 1848.

The defendant denied having entered into such a contract. He also contended that, if such a contract should be proved, the plaintiff, by committing fornication with other men in August, 1847, had absolved him from the obligation to marry her. Evidence upon these points was presented to the jury.

Some of the plaintiff's witnesses testified that the defendant continued his visits and his attentions to her until into 1848. The trial was in the District Court, HATHAWAY, J.

"The court instructed the jury, *that*, if the plaintiff, after a mutual engagement of marriage between her and the defendant, committed the crime of fornication with any other man, the defendant would be thereby absolved from such engagement; *that*, after he obtained a knowledge of the misconduct, it was optional with him whether to break off, or to continue the contract; *that*, subsequently to the knowledge of such misconduct, he might enter into such a contract with the plaintiff; and *that*, if he waived the misconduct, or entered into the contract after he had knowledge of it, he would be bound by the contract."

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

Kelley, for defendant. The instruction gave to the jury

too great a latitude of inference. It authorized them to infer from floating rumors, that defendant knew of plaintiff's misconduct, and that, from attentions to her after the existence of such inferred knowledge, he entered into a new contract with her. A mere continuance of attentions, after a knowledge of the plaintiff's misconduct, would not bind him to marry her. The rule of *condonation inter nuptos* is not applicable. After being told of her fault, he disbelieved it. The ruling required him to believe mere rumor, or rather presupposed that he must have believed it. In the nature of the case, *rumor* was all the evidence he could have. How was he to obtain the *knowledge?*

Peters, for plaintiff.

WELLS, J., orally. — There was testimony tending to show that, whatever may have been the plaintiff's misconduct, the defendant had information of it; and that he, nevertheless, continued his visits and attentions to her.

The jury were instructed that the defendant would not be excused from the contract, if he continued it in force, after he had *knowledge* of her misconduct.

It is argued that the ruling was erroneous, because it required the plaintiff to believe or pre-supposed him to have believed, whatever rumors he might hear.

But the ruling did not relate to *rumors*, which he might have heard. It related to *knowledge*, which he possessed.

If, after knowing of her conduct and character, the defendant continued the original contract in force, or made a new contract to marry, there is no principle of law, which can relieve him from performing it.

The Judge did not assume to instruct the jury, what, or how much, evidence was necessary, in order to prove that the defendant had the knowledge. That matter was left wholly with them.

Exceptions overruled.

The defendant moved for a new trial on the ground of newly discovered evidence. To sustain the motion, he offers

not *testimony*, but affidavits merely. This is not according to the practice. We can therefore consider the motion merely in the light of a proposition to postpone the case, till the testimony can be had. But we have examined the affidavits. If put into deposition form, they would not constitute a sufficient ground for the ordering of a new trial. It is mostly cumulative. We do not say that a new trial cannot, in any case, be granted on the ground of evidence merely cumulative.

The ground of the rule is that, as the matter was before the jury, and they had viewed the features of the case, it is to be presumed the evidence proposed to be added, on the very point before them, would not have altered their conclusions. It is, however, conceivable that evidence might be introduced, such as would lead the jury to a different result. But for that purpose the evidence must be very strong. Besides, unless the rule was quite stringent, there would be no end to litigation. But some of the affidavits state facts, not of the cumulative character. To them, another principle is deemed applicable, which is, that a case will not be opened to a new trial, unless the court should think it probable the new evidence would alter the verdict. Such is not our impression in this case. *Motion for new trial overruled.*

EDWARD HUTCHINGS *versus* BUCK.
EDWARD HUTCHINGS, JR. *versus* SAME.

An agreement under seal to withdraw an action from the court, is not rescindable by one of the parties alone.

Where, in pursuance of such an agreement, the entry of "neither party," has been made on the docket, the suit is discontinued and the jurisdiction of the court over it is at an end.

Though the same agreement also contains a submission of the action, and the referee afterwards dies, before having acted upon the matter, still there is no authority in the court to recall and restore the action to the docket.

THESE actions were pending in 1849 in this court, and were referred, by a written agreement under seal, to two individuals.

In the agreement to refer, was a stipulation that the actions in court should be entered "neither party." At the next regular term of the court, in July, A. D. 1849, those entries were made.

Before the adjourned term of the same court, in August of same year, William Abbot, Esq., one of the referees, who was in full life when the agreement to refer was entered into, and when said docket entries were made, deceased. For that reason, at said adjourned term, a motion was made to strike off said entries, and to let the actions stand for trial.

The motion was allowed, and the defendant excepted.

J. Appleton, for the defendant.

Kelley, for the plaintiffs.

The referee died *during the term*, in which the entries of "neither party" were made. The entries may, therefore, be stricken off. The contract of submission could not be executed. Things then stood as before.

Where parties have substituted another *available* tribunal, instead of the courts of law, the arrangement is not rescindable. But in this case, Providence, *not the plaintiffs*, has rendered the arrangement unavailable.

It is every day's practice to take off nonsuits. These entries are of no higher sanctity, than that of a nonsuit.

Courts, for reasons shown, may strike out a reference altogether. The order, restoring the actions, was wholly at the discretion of the presiding Judge; to such orders, exceptions cannot be alleged. It avoids circuity of action, and operates no injustice, for the defendant loses nothing by it.

WELLS, J., orally. — Upon examination it appears very clear, that when there has been an agreement under seal to take an action out of court, otherwise than by rule of court, and such an entry has been made, no further jurisdiction can attach to it here. The effect of such an agreement to refer, is a discontinuance of the suits. The authorities cited go to that extent. The actions have been discontinued by the agreement of par-

ties. The entry was rightfully made, and if it had not yet been made, it would have to be made, pursuant to such sealed agreement.

THE STATE *versus* CLEMENTS.

If a proprietor of land grant the right of a private way across it, of a specified direction and width, and afterwards convey the land on one side of such way, bounding it by the line of the way; *it seems* the grantee of such land takes no fee in any part of the strip of land covered by the right of way.

Neither, by virtue of his deed, does he take, in such strip of land, any easement or any right of way by necessity.

When one has used a certain degree of force, in order to protect his property, it is not matter of law for the court, but matter of fact for the jury, to decide whether that degree of force was necessary and therefore justifiable.

COMPLAINT for an assault and battery committed upon Geo. N. Black, 15th Nov. 1849. The case comes into this court by appeal. It appeared, *that*, two years before the alleged assault and battery, Black contracted to purchase a strip of land on which to build a road from the public highway to his mill; *that* he built the road, and, two months prior to the assault, put a gate across it, which he usually kept locked up in the night, and which was generally left open in the daytime; *that* he has ever since been in possession of said road; *that* he received his title deed of the land on which the road was built in September, 1849, and that defendant purchased the land adjacent to the road, upon which it is bounded on one entire side, and received his deed of it in April, 1849, five months prior to the execution of Black's deed, both of which are from the same grantor. The defendant contends that, by virtue of his deed, he has an easement in the road.

The defendant attempted to pass upon the road with his team, and Black prevented him; whereupon the defendant struck him with an iron crow bar. As to the severity of the blow, there was some slight conflict of testimony.

Upon this state of facts, the defendant's counsel "requested the Judge to instruct the jury as to his right of way, in virtue of his deed."

He also contended, that, as the defendant had a right of way, he used no greater degree of force than was lawful.

The Judge refused to give any instructions as to the right of way, but did instruct the jury, that whether defendant had or had not a right of way, the blow with such a weapon, inflicted upon Black, could be justified only in necessary self-defence.

The verdict was against the defendant, and he filed exceptions.

C. Lowell, for defendant, read a document of great length. The legal points which it presented and urged were the following: —

1. The Judge ought, when requested, to have instructed the jury, that the defendant had an easement in the road, and therefore a right to pass upon it. 3d vol. 3d ed. Kent's Com. 433, and onward; 2d vol. 2d ed. Hilliard's Ab. 349, and notes; 17 Mass. 413; 4 Mass. 110; 21 Pick. 292; 1 N. Y. Digest, 303, and citations.

The defendant's deed gave him a right of way upon said road.

When he purchased, his grantor owned the whole. The defendant had no other way to get to the public road. He had therefore, a right of way by necessity.

But, further, he owned one half of the land, covered by the road. "A grant of land, bounded on a highway, carries the fee in the highway to the centre of it, if the grantor, at the time, owned to the centre, and there be no words to indicate a different intention." *Johnson* v. *Anderson*, 18 Maine, 76.

2. The Judge erred in instructing the jury, that whether defendant had or had not an easement in the way, he had no right to strike Black such a blow, as testified to by the government's witnesses, unless necessary for self-defence, without some allusion to the conflicting and modifying evidence of the

other witnesses. *Greenleaf* v. *Booth*, 9 Peters, 292; *Pierce* v. *Whitney*, 22 Maine, 113; *Lapish* v. *Wells*, 6 Maine, 175.

The character of the rest of the argument may be inferred from the opening part of the opinion given by the court.

Kelley with *Lowell*, for defendant.

The defendant had a legal way upon the road, both by his conveyance and also by necessity.

The Judge ruled that all, which the defendant had a right to do, was to defend himself. This ruling is believed to be erroneous. Where one is using his lawful right, he may exert force enough to repel resistance to his actions.

The case was submitted by the government without argument.

TENNEY, J., orally. — The first argument offered for the defendant is of an uncommon type. Upon such arguments, it is always proper that the court should animadvert. Our remarks are not intended to apply to this argument in particular, on account of the vehemency of its invective, or the extent of its departure from known and salutary rules, though its aberrations have been very wide.

With the kindest feelings, and in relation to other cases as well as this, we announce that such irregularities are always viewed without approval. They conciliate no favor; they beget no advantages. Judges, like other men, may admire the pungent language of the distinguished, though unknown, Junius; the cutting satires and scorching invectives of the "Great Sub Umbra." But in tribunals of justice, such emanations are inappropriate and out of place.

Courts may be reluctant to arrest the torrents of impassioned zeal, or the fervors of eloquent denunciation; still they must *decide* only upon a stern and dispassionate application of rules, purely intellectual and unyielding.

They always find most pleasure, when counsel, both in their addresses to the jury and the court, keep most "*super*

antiquas vias legis." To every thing *dehors* the rules, we are forbidden to give any weight.

This case comes up on exceptions.

The defendant contends that he had legally an easement in the road, a right to pass there; and that his acts in vindication of that right, were lawful; that he might rightfully persist in the use of the way, and exert the force necessary for protecting that right. He requested of the Judge instructions to the jury "as to his right of way from his deed in that road." Such instructions were not given. Was the defendant injured by that refusal? He exhibited a deed, and claimed that it gave to him a fee in one half the width of the road. It is not necessary for us to decide its effect, but our impression is, that it bounds his land by the east line of the road.

He however claims an easement. Black had built a road to his mill. Whether or not it was a public mill, like a grist-mill to which all have a right to go, does not appear. There is nothing to prove that the public had any right of way there. Black had built the road to his own mill, and had kept it in his possession. What is there to show that the road was any thing more than a private way, owned by Black? How then had defendant any right to use it?

His deed, though bounded by the road, did not necessarily constitute the road a public one. Nothing shows it to have been dedicated to the public. The defendant fails to show that he had a right of way there. Till he had offered proofs of that, he could not be aggrieved by the Judge's refusal to give the instruction.

The instruction was not technically right. It assumed as matter of law that a certain degree of force, which a man had applied to another, in defence of rights, was more than he had a right to use. A man may use force enough to protect his property. Whether he has used more than that is matter to be settled by the jury. But the ruling did the defendant no injury, for he had no rights there to be protected.

But it is also urged that the defendant had a right of pass-

ing there by necessity. The principles, applicable to right of way by necessity, have no application to this case.

In the defendant's request for instructions, he asked for general views, "as to the defendant's right of way from his deed." Counsel may ask that a particular principle be presented by the Judge to the jury. But the Judge is not bound to offer a treatise or general exposition of the law upon any subject. *Exceptions overruled.*

GRAGG *versus* FRYE.

Upon a count on a note, not alleged to be upon interest, a note drawing interest cannot be received in evidence, though agreeing in all other respects with the count.

Such a count, in a suit previously commenced, and yet pending, cannot, in an action upon a note drawing interest, be pleaded in abatement, as being for the same cause of action.

A note for money given by the plaintiff to the defendant may be proved under an account filed in set-off, for money had and received. For that purpose no amendment of the set-off claim is necessary, though it is allowable, if moved for.

ASSUMPSIT on a promissory note, with set-off filed. The writ is dated in March, 1849. The set-off contained an item of fifty dollars, for money had and received. Defendant moved to *amend his set-off*, by describing a note of hand payable by plaintiff to defendant, or order, and claiming to prove the same under charge for money had and received. The court allowed the amendment, the plaintiff's counsel objecting.

On the trial the defendant offered in evidence the set-off note aforesaid; to the admission of which the plaintiff objected, and offered as a witness, J. A. Peters, the defendant's attorney. Mr. Peters testified, *that*, in February, 1849, he made a writ against the plaintiff in favor of Timothy George, on a note payable to said George by the plaintiff, *that*, when said writ was made, the defendant, Frye, was present, and wished to have this note included in the action, brought by

said George, and indorsed said note for that purpose; *that* a count was made in that writ, intended to be upon that note, in which count, the witness by mistake, mis-described the note by omitting the words "on demand and interest;" *that* there was no count for money had and received in said writ; *that* the note was indorsed and delivered to him by defendant, to be sued in said action as the property of Mr. Frye; *that* it was the defendant's property, and was indorsed merely for the purpose of being sued in that action for Mr. Frye's benefit; *that* he had at this term, by leave of court, withdrawn his count upon said note from the writ.

The Judge admitted the note in set-off.

The jury returned a verdict for defendant. The plaintiff excepted to the rulings.

Herbert, for plaintiff.

1. By the facts proved, the legal property in the note passed to George. *Marr* v. *Plumer*, 3 Greenl. 73—76.

The suit by George upon the note was clearly maintainable. *Marr* v. *Plumer*, 12 Maine, 15; *Bradford* v. *Bucknam*, 24 Maine, 336; *Pratt* v. *Thornton*, 28 Maine, 355, 360; *Little* v. *O'Brien*, 9 Mass. 423.

There was a sufficient consideration for the transfer, in the implied promise of George to collect the avails for the use of the defendant.

These were not, then, mutual demands between the parties. While the suit upon the note was pending in favor of George, the plaintiff's demand could not be set off against it.

2. If, however, they were mutual demands, the defendant is estopped, to assert his ownership. The facts proved, would have estopped the plaintiff to say that George was not the owner. Estoppels are mutual.

3. There was a former action pending, which would be good cause of abatement. 1 Chitty's Plead. 488, 489, and note; *Commonwealth* v. *Churchill*, 5 Mass. 174; Story on Pleading, 26; 19 Pick. 13, 20; *Webster* v. *Randall*, 17 Pick. 510.

It is immaterial whether the action of George was pending

at time of the pleading, if pending when plaintiff's action was commenced.

If urged that George's count on the note was defective, it is replied that it was clearly amendable.

Peters, for defendant.

The note was not in suit in a prior action: — 1. Mr. George never consented to have the suit commenced in his name upon Frye's note. *Bradford* v. *Bucknam*, 3 Fairf. 15 & 16.

2. Although the note was *intended* to have been sued, it was mis-described, and *not* included in the prior action, *and* there was no money count in the writ. 1 Term R. 447; 8 Pick. 541; Strange, 1171; 1 Greenl. Ev. § 58; 1 Stark. Ev. 386.

Where the first action must have been *ineffectual*, its pendency will not abate the second suit. 1 Root, 355, 562; Gould's Pleading, ch. 5, § 126.

The count in the prior action had previously to the trial of this cause been withdrawn by leave of court; and as there was no record left of any count upon said note, there was no evidence, by record, that the same had been sued. *Buffum* v. *Tilton*, 17 Pick. 510.

The suits were not between the same parties. To make good the plea of *lis pendens*, the *plaintiff* must be the same in both suits. 2 Sumner, 589; 3 Sumner, 165.

There are not *two suits* in the sense of the plea. We have not twice impleaded the other side. They have impleaded us, not we them. We do not bring them but once into court. It was not voluntary with us to come in again while the first action is pending. We are *forced* into court by the party complaining.

Wells, J., orally. — The question is as to defendant's right to prove the note in set-off, under an account for money had and received.

The statute requires the demand filed "to be as certain in substance as would be required in a declaration;" and allows

amendments, when deemed proper by the court. It is settled that in a declaration for money had and received, such a note may be given in evidence. The amendment was allowable, but wholly unnecessary.

Another objection is, that the note had been previously sued in the name of another person; and that the defendant had no right to withdraw it pending this action, and to file it here. And the case is said to be analogous to second suits for the same causes of action. But there is a diversity to be considered. In those cases the remedy is in abatement. The objection may be waived. But we think in this case, there was not a previous *lis pendens*. The count was upon a different note, one not drawing interest. This note is upon interest.

This note would not have supported the count. It is upon that ground that our decision is founded. There was, at no time, a *lis pendens* upon the note.

Exceptions overruled.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF WALDO,

1850.

PRESENT:

HON. JOHN S. TENNEY, LL. D.
HON. SAMUEL WELLS,
HON. JOSEPH HOWARD,
} ASSOCIATE JUSTICES.

HANLY *versus* MORSE *& al.*

By the Rev. Stat., in order to give effect to an unrecorded conveyance of land, a subsequent grantee must have had *actual* notice of such conveyance.

Prior to the Rev. Stat. a visible *possession* of land under a deed, though unrecorded, was *constructive* notice of title.

As against a subsequent grantee, such constructive notice was equivalent to a registry of the deed.

This rule of constructive notice is still in force, *as to deeds made prior to the Rev. Stat.*, even against conveyances made *since* the Rev. Stat.

Thus A, to whom land was conveyed, prior to the Rev. Stat., and who, though his deed was unrecorded, was in the visible possession at the time of a conveyance from the same grantor, made *subsequent* to the R. S., is entitled to the protection of the rule, which was in force when he took his deed, and which made constructive notice equivalent to a registry.

The possession of the representatives of A, whether as tenants, grantees or heirs, must have, upon a subsequent grant, the same effect, as if he was himself in possession, when such subsequent grant was made.

WRIT OF ENTRY. Many title deeds, pertaining to the demanded premises, were introduced by the parties. But the decision of the court brought but two of them into particular examination.

1. A deed from Daniel F. Harding to the demandant, dated, acknowledged and recorded in 1847.

2. A deed from the same Daniel F. Harding to Walter Blake, dated and acknowledged in 1840, and recorded in 1848. Under this deed the tenant deraigned title in himself.

The jury found specially that Blake, at the time of his death, (which occurred in 1846,) was, by his tenants, in possession of the premises under his said deed; also that his representatives were in possession at the time the demandant took his deed from Harding; and also that the demandant, when taking his deed, had no actual notice of said conveyance from Harding to Blake.

Kelley, for the demandant.

The unrecorded deed to Blake availed nothing as against the demandant, a subsequent grantee, who had no *actual notice* of such a conveyance. It is now settled that nothing but *actual* notice will defeat such a subsequent conveyance. *Spofford* v. *Weston*, 29 Maine, 140. In that case, this rule was held applicable to deeds made prior to the Rev. Stat.

In Massachusetts, under a statute of similar phraseology with our Rev. Stat. it is held that possession alone is not equivalent to notice. 11 Metc. 244.

Lowell, for the tenants.

The opinion of the court, (TENNEY, J. dissenting,) was read by

WELLS, J. — Walter Blake, being the owner of the demanded premises, on the thirteenth of June, 1827, by his deed of that date, which was recorded on the twenty-seventh of the following August, conveyed them to Daniel F. Harding. Blake was in the actual possession at the time of his conveyance, and retained it until his death on the twenty-third of

August, 1846. Harding, on the eighth of September, 1840, re-conveyed the same premises to Blake, but his deed was not recorded until the nineteenth of June, 1848. On the twelfth of November, 1847, Harding conveyed them to the demandant, by deed recorded on the fifteenth of the same November. The tenants claim title under Blake and his representatives.

The jury have found, in answer to a question put to them by the court, "that Walter Blake was in possession of the demanded premises at the time of his death, by his tenants, under the deed of Daniel F. Harding, of September 8, 1840, and that his representatives were in possession at the time the demandant took his deed from D. F. Harding of November 12, 1847."

The possession of the representatives of Blake, whether as heirs, tenants or grantees of him, must be viewed in the same light, as if he had held it himself when the demandant took his deed.

The deed from Harding to Blake was made before the Revised Statutes went into operation. And at that time the law was well settled, that the visible possession of an improved estate by the grantee under his deed is implied notice of the sale to subsequent purchasers, although his deed has not been recorded. *Matthews* v. *Demerritt*, 22 Maine, 312. So that the possession of Blake under his deed from Harding afforded him the same protection, by the law then existing, as if it had been recorded.

But the Revised Statutes, chap. 91, sect. 26, introduced a new principle, and abolished the constructive notice arising from possession under a deed not recorded, and required actual notice of such deed to a subsequent purchaser, to prevent him from holding the estate.

This statute cannot be understood as applying to deeds made before its passage; its language does not require such construction. If the Legislature had intended that those who were quietly reposing on their titles, which were then entirely valid, by the law as well known and understood, should lose

that protection, and that they could not be secure from subsequent purchasers under their grantors, unless their deeds were recorded, it is believed, that a more explicit expression of such intention would have been made. When an estate is fully vested in the holder of it, if it should be required by the Legislature, that he should perform some further act in order to retain it, such requisition would doubtless be declared in clear and unambiguous terms. It cannot be fairly deduced from the provisions of the statute under consideration.

In *Spofford* v. *Weston*, 29 Maine, 140, no constructive notice arising from actual possession on the part of Johnson or Spofford was set up to defeat the operation of the deed to Weston, but the question presented for decision was whether Weston had actual notice of the deed from Butler to Johnson, under whom Spofford claimed.

It is agreed by the parties, that if upon the documentary evidence and the finding of the jury on the special questions presented to them, the demandant is not entitled to recover, the verdict is to be set aside and a nonsuit entered.

The documentary evidence shows a valid deed from Harding to Blake, prior in time to the deed of the demandant from the same grantor, and that the tenants hold under Blake and his representatives ; and the jury have found, that Blake was in possession at the time of his death, by his tenants, under the deed of Harding, and that his representatives were in possession at the time the demandant took his deed from Harding. And as the evidence must be viewed in reference to the law as it was when Blake took his deed, it follows that a nonsuit must be entered.

Dissenting opinion by

TENNEY, J. — The statutes of Massachusetts at the time of the separation of this State from that Commonwealth, and for a long time previous, required that a deed to be valid against persons, excepting the grantor and his heirs, &c., should be acknowledged and recorded. The statutes of this State, passed in 1821, are similar upon the same subject. Actual notice

of a conveyance or an implied notice, arising from an open and visible occupation by one holding under an unregistered deed, was not regarded in all respects as a substitute for the record of it, but precluded one, who had taken a deed subsequently and caused it to be recorded with such notice, from asserting a title under it against the prior grantee, who had omitted to give notice of the conveyance to himself by the registry of his deed. This was not upon the ground, that the first purchaser had complied with the legal requirements to make valid his title, but solely on account of a disability in the second purchaser, to avail himself of the omission of the first, by reason of the *fraud*, in taking a conveyance, with the evidence before him, express or implied, that the title had passed from his grantor.

Judge Trowbridge, in his reading upon the provincial statute of Massachusetts Bay, "for registering deeds and conveyances," published in 3 Mass. 573, says, "If the second purchaser had notice of the first conveyance, before he purchased, no estate would pass to him, by the second deed, though recorded before the first, because it is *fraudulent.*" Again, "If the bargainee, upon the execution of the deed, enters by force of it, and continues in possession of the land, taking the profits thereof, without recording his deed, there can be no purchaser of that land, without notice in the sense of the law; because the law deems such entry and occupation sufficient evidence, of the alteration of the property. And the bargainor having neither the real nor apparent right of possession, or of property, is not capable of conveying the land; and a deed of the land from him to a third person is by the common law, accounted fraudulent and void." "The registry is designed only to give notice, in order to prevent purchasers being imposed upon by prior conveyances; which they are in no danger of, when they have notice of them." Page 576.

Lord Mansfield, in the case of *Worsley* v. *DeMattos*, 1 Bur. 474, says, "valid transactions as between the parties may be fraudulent, by reason of covin, collusion, or confed-

eracy, to injure a third person." And as an instance, "A buys an estate from B, and forgets to register his purchase deeds. If C, with express or implied notice of this, buys the estate for a full price, and gets his deed registered, this is fraudulent, because he assists B to injure A."

In *McMechan* v. *Griffing*, 3 Pick. 149, it is said in the opinion of the court, "It was also determined, and it is equally well settled, as the sound construction of the statute, that as the registry was designed only to give notice, and thereby prevent purchasers from being imposed upon, by prior conveyances, any notice of the first conveyance to a *subsequent purchaser*, before his purchase, is equivalent to the registry of his deed. If the subsequent purchaser, thus affected with notice, should nevertheless complete his purchase, intending to get his deed recorded before the first purchaser, and thereby to hold the estate, it would be a manifest *fraud* upon the first purchaser, and therefore void as to him."

It was expressly held by this court, that an entry under a deed not recorded, followed by continued visible occupancy, is only implied notice of a change of property, but is not equivalent to the registry of the deed. *Hewes* v. *Wiswell*, 8 Greenl. 94. The court say in this case, "If it were equivalent to the registry of a deed, then it would follow as a legal consequence, that a fraudulent purchaser, with notice of a prior unregistered deed, and his innocent grantee without such notice, who had paid a full consideration, and placed his deed upon record, would both stand on the same ground, and neither of them would hold the land against the first purchaser, who entered under his deed, and openly possessed and received the profits, without recording it; but such a consequence is utterly inadmissible; for it is unquestioned law, that in such a case, the innocent purchaser could hold the title, against every one."

From the citations already made, it is a *continued* possession of the first purchaser, existing before and at the time, the second purchaser takes his deed, that can be treated as a notice

to the latter, and which will affect him as guilty of a fraud upon the former.

And Judge Trowbridge remarks, "While the bargainee is in the visible possession and improvement of the lands, &c., the bargainor is no more capable of making a second conveyance thereof to another, than a person of unsound mind would be; so that a bargainee in fee, who, upon the execution of the deed of conveyance, enters by force of it, and *continues* in possession, needs not the aid of the deed, or of the statute of uses, to enable him to hold the land against a second purchaser." 3 Mass. 582.

If the possession of a purchaser under his unrecorded deed was abandoned, or suspended at the time a deed was given by the same grantor to another purchaser, the previous occupancy did not affect the second grantee, for he was not presumed to have had knowledge of the land and its possession till he was about to become interested in it, and could not have been charged with a fraud, without actual notice of the prior deed, upon one, who had neither recorded his deed, or held possession under it at the time. And no decision has gone farther, than to maintain that an occupation at the time of the execution and delivery of the second deed, was implied notice of the first.

The R. S. chap. 91, § 26, provide, that no conveyance, &c. shall be good and effectual against any person, other than the grantor, his heirs, devisees, and persons having actual notice thereof, unless it is made by deed recorded as provided in this chapter. This provision establishes the rule, that one about to become the purchaser of real estate, was under the necessity of looking only to the public records, to ascertain, whether the title was in the person, who proposed to convey to him. Finding by the records, that the title was where it was represented to be, he would be protected by the title under the deed, unless he had actual notice, that the title had passed to another. It was undoubtedly intended to give to the grantee of real estate, who had omitted to do, what the law prescribed as a prerequisite, to make his title perfect in

any event, no longer the opportunity to overcome the effect of his own negligence, by showing a fraud in a subsequent purchaser, by implied notice only. The evidence upon the question, whether there was a visible occupancy by one holding by virtue of an unrecorded deed at any particular time, might be conflicting and uncertain, inasmuch as the possession for various causes would often be of an equivocal character. And to allow parol evidence in the testimony of witnesses, whose memory might be imperfect after a considerable time, or whose integrity might be doubtful, to control the title as exhibited by the records, would tend to render insecure title to real estate, which it has always been the policy of the law generally, to make certain by evidence, which time could not change, especially when such testimony should be for the purpose of defeating a title, perhaps honestly acquired for a full consideration, by proof at most of constructive fraud.

The present statute has introduced no new provision, requiring different acts or forms in the transfer of real estate; but has confined the evidence of fraud within narrower limits when the same land has been conveyed by a second deed recorded earlier than the first. It informs those, who neglect to record their deeds, that they cannot avail themselves of a species of proof to show a fraud in a subsequent purchaser of the land conveyed to them, which was before open to them. This proof did not show a title in themselves, perfect in every event, but was competent for the purpose of establishing an actual fraud in one, who would take from them, the benefit of their unrecorded deeds, or who was guilty of a legal fraud at least, in taking a position under a deed to contest their title.

The Revised Statutes of Massachusetts passed in 1836, ch. 59, sect. 28, which is identical with the one of this State, chap. 91, sect. 26, has been the subject of examination by the Supreme Judicial Court of that Commonwealth, in the case of *Pomroy* v. *Stevens*, 11 Metc. 244. In the opinion it is said, "Since the Revised Statutes, chap. 59, sect. 28, no implied or constructive notice of an unregistered deed, can

avoid a subsequent deed or attachment." "It is not sufficient to prove facts that would reasonably put him on inquiry. He is not bound to inquire, but the party relying on an unregistered deed against a subsequent purchaser, or attaching creditor, must prove that the latter had actual notice, or knowledge of such deed." In this State a similar construction is given by this court, to the provision, which we are now considering. *Spofford* v. *Weston*, 29 Maine, 140.

But in the former of the decisions just referred to, the origin of the claims of both the contending parties was subsequent to the Revised Statutes of Massachusetts; and in the latter the one party claimed under a deed from an individual made before the Revised Statutes of this State, and the other party by a deed from the heirs of the same individual, made after the Revised Statutes, still there was no evidence that possession had been taken of the premises under the first deed, and continued till the time, when the last was delivered; and hence it was contended in argument that neither are in point. And it is insisted on the part of the tenants in this action, that this provision in the R. S. must be construed as prospective only in its operation, and the rights of a party, who took a deed, before the Revised Statutes took effect, and went into possession under it, and continued that possession, till after the passage of those statutes, and was in visible occupancy of the land, when another took a deed of the premises from the same grantor, and caused it to be recorded, the latter deed being also subsequent to the Revised Statutes, the former purchaser will hold the land, although his deed was not registered till after that to the second purchaser.

If the former grantee in the case supposed had done all, which was required to make perfect his title in any event, the right thus acquired could not be taken away by any new provision in the statute. But the delivery of a deed, and an open and visible occupancy under it, instead of its registration, we have seen were not in all cases equivalent to the delivery and recording the same. Such deed, delivery and possession, would be effectual to secure the title, against a subsequent

purchaser, who took his deed and caused it to be recorded before the Revised Statutes took effect. But when the second purchase is made afterwards, the facts are materially changed, and the question is, whether the old law is to apply to the second purchaser, instead of the new, or in other words, is the first purchaser to have all the benefit of the old law, against the second purchaser, and the latter be treated as having committed a fraud upon him, when he did all, which the statute in force at the time of his purchase seemed to require?

The question is not whether the deed to the first purchaser was sufficient or otherwise for all the purposes of a conveyance, capable under the statute and other legal requirements of passing a title; but it respects entirely the notice to subsequent grantees, holding deeds under the same grantor of the same premises, and attaching creditors; and the effect of such notice.

Down to the time when the Revised Statutes took effect, in the case supposed in the tenant's proposition, the title of the first purchaser was in fact perfect, though he had failed to do all, which might be necessary, under a different state of facts, for his security; and his omission exposed him to no loss of his purchase. "The estate, as between the parties to the deed, passed immediately on its delivery to the grantee; and when recorded it would be rendered valid, from the beginning, by relation back, to all intents and purposes, unless the grantor in the meantime, should have conveyed the estate to a subsequent *bona fide* purchaser, or it should have been attached, or otherwise incumbered as his property." *McMechan* v. *Griffing*, before cited. To that time, there having been no other conveyance of the premises, the possession taken under the deed was wholly without effect upon the title, as there was no one, who could contest his right, and it must be treated in the case as a perfect nullity, inasmuch as it was not notice to one, who became a purchaser after the Revised Statutes, more than a possession, which had been abandoned before the delivery of a deed to a second purchaser. If no

possession had been taken under a deed, delivered before the Revised Statutes, while the former statutes were in force, could an occupancy begun and continued afterwards, prevent the operation of a second deed duly recorded? It is believed, that there can be but one answer to this question. It could not have been the design of the Legislature which enacted the Revised Statutes, to allow a possession, taken for the first time, long after they were in force, under a deed delivered before their operation, and never recorded, to be a notice to a subsequent purchaser, after the new statute, who recorded his deed, and defeat the title under it, because obtained by fraud. And if the possession taken under the deed, before the Revised Statutes, could not be notice to one, who had not assumed at that time to have acquired any interest in the land, that possession, continued subsequently, could have no more effect, than it would have, had it commenced after the Revised Statutes became the law of the State.

The second purchaser, therefore, being a stranger to the land during the continuance of the former law, and not affected by the possession of the first, till he took his deed, the new statute comes in for his protection, as in all cases under it, and declares that implied or constructive notice shall have no effect upon his title.

The present statute was evidently intended as a protection to all, who may receive deeds, after it took effect, against claims of which they had no other notice, than the visible occupancy of one, who had in fact a deed from the former owner. If possession alone requires an investigation by one negotiating for a purchase, to ascertain whether this possession run back to an earlier period than that, when the new statute took effect, such inquiry would probably be followed by actual notice of a deed, if one was taken, to the person in possession, and the restrictive provision in the statute would be of very little practical benefit.

The title to real estate is not made to depend upon a new provision, differing from the former statute, but merely operates

upon the remedy against a conflicting claim, by taking from a party certain facts as evidence which formerly were such, upon a question of notice to a grantee of a former deed from his grantor to another person.

It certainly must be immaterial in effect, whether former occupancy which was abandoned before a second deed was taken, failed to be notice to the last purchaser, by reason of the abandonment, or whether by a positive statute, it ceased to be notice, and evidence of fraud, if he should take a deed while it continued.

The demandant took his deed from Daniel F. Harding on November 12, 1847, and caused it to be seasonably recorded. He had no actual notice of the deed from the same grantor to Walter Blake, under whom the tenants claim, dated on September 8, 1840, and recorded subsequently to the one to the demandant. Walter Blake went into possession under his deed, and so continued till the time of his death; and that possession was retained by his representatives till after the deed which is the foundation of the demandant's title. This possession was not such a notice to him, in my opinion, and for the reasons given, as to render him guilty of fraud in obtaining his deed. It was good and effectual to pass the title, under the law, which I think applicable to this case. I am constrained, therefore, reluctantly to dissent from the opinion, which has the concurrence of a majority of the court, which heard the arguments in this case.

INHABITANTS OF VINALHAVEN *versus* AMES.

The courts of law are alone authorized to determine the amount of damage which a minor, apprenticed by the overseers of the poor, is entitled to recover for ill-treatment suffered from his master.

The overseers, in fixing the amount, would transcend their authority.

A payment made to them, unless its amount had been settled in a suit at law, would not bar a claim against the master, made by the apprentice, when arrived at age.

A note given by the master and payable to the treasurer of the town, on an adjustment made by the overseers, in discharge of such a claim is, therefore, without consideration, and uncollectable by the town.

EXCEPTIONS, from the District Court.

Assumpsit, upon a note of hand, signed by the defendant, and payable to the treasurer of the town, for the sum of thirty dollars, dated Dec. 10, 1846.

The defendant introduced evidence tending to show, *that* a poor child, between two and three years of age, was bound to him by indentures, dated April 20th, 1839, by the overseers of the poor of said Vinalhaven; *that* said child continued with him until 1845, when the overseers charged him with having abused the child, and claimed the right to take him away, and to have the indentures given up; whereupon the defendant surrendered to said overseers the child, and also the indentures.

Also, *that* the overseers demanded of him the sum of fifty dollars for the injury done to the child, and that upon such demand, he paid them twenty dollars in money, and gave the note in suit for the other thirty.

The plaintiffs introduced testimony tending to show, that fifty dollars were paid by the plaintiffs to the defendant in 1840, as a bonus for taking said child; and that the note in suit was given, and the twenty dollars paid by defendant as aforesaid, for and in consideration of said fifty dollars so advanced.

The counsel for the defendant requested the court to instruct the jury, that if they found the note was given wholly

for personal abuse inflicted by the defendant upon said child, then this action could not be maintained.

Said counsel also requested the court to instruct the jury that, if they found said note was given wholly for abuse inflicted upon said child by said defendant, and that the damages for said abuse had not been settled in a *suit* or *suits*, commenced by the overseers of the poor, then this action could not be maintained.

But the court instructed the jury, that it made no difference whether the note was given for the fifty dollars advanced by said plaintiffs, or for breaches of the indentures, or for personal abuse inflicted upon said child; that in either event the plaintiffs were entitled to recover in this action upon the note. The verdict was for the plaintiffs and the defendant excepted.

Abbott and *Howes*, for the defendant.

The note, if given for injury done to the child, was without consideration.

Overseers of the poor have no authority to liquidate such claims of minor apprentices. They can only bring suits for them. The courts must determine the amount to be paid.

A recovery here would not bar a recovery hereafter by the apprentice.

Besides, there was no mutuality. The note should have been payable to the minor. 5 Mass. 491; 6 Johns. 93.

Kelley, for the plaintiffs.

Overseers are bound to look after all the rights of such apprentices. In substance, they are made statute-guardians. The power to bring suit against the master for the injury includes the power to receive the pay without suit. Suppose the injury to be admitted, and ample compensation offered, must there be a suit?

It is immaterial to whom the defendant chose to give the note, there being no fraud or misunderstanding concerning it.

Tenney, J. — The jury were instructed, that the plaintiffs were entitled to recover upon the note, whether it was given

for money advanced by the overseers of the poor, for a breach of the indentures, or for personal abuse inflicted by the master upon the child. It not appearing from the exceptions, upon which of these three grounds the verdict for the plaintiffs was returned, if the instructions were erroneous in any respect, the exceptions must be sustained.

By the provisions of R. S. chap. 32, sections 13, 15, 16 and 20, overseers of the poor may bind by indentures the minor children of paupers; it is their duty to inquire into their treatment, to protect and defend them in the enjoyment of their rights, in reference to their masters and others; upon complaint made to the District Court by them against their master for abuse, ill-treatment or neglect, the court upon notice to the master and a hearing, may discharge the child from the master; the overseers can institute a suit upon the indentures to recover damages for breaches of any of the covenants therein contained; and the amount recovered is to be deposited in the town treasury, and for the benefit of the apprentice in the discretion of the overseers, and the balance is to be paid to him, when his apprenticeship shall terminate; and at the expiration of the term for which the minor is bound, he has his remedy for damages for any of the causes of complaint against the master, for which the overseers are authorized to commence actions, other than for such causes, as may have been tried in a suit or in suits so instituted by them.

Whatever sums of money may be received of a master, to whom a child is bound by the overseers, by reason of his neglect of duty or of positive injury inflicted, is for the exclusive benefit of the apprentice, at whatever time it may be received. Until the expiration of his term, neither he nor any other, excepting the overseers, can have a voice in enforcing a claim, which may be supposed to exist against his master, for any cause growing out of the relation between them. It was the intention of the statute to afford him a remedy immediately after the injury, which should be received, if the overseers in the exercise of their discretion should deem it proper to resort to it; and so far as they should have proceeded in the en-

forcement of the means of redress, by the course prescribed by law, the apprentice would be concluded. They have no other power than that of agents, and their agency can extend no further, than the law which confers it will authorize. In protecting the rights of minors apprenticed by them, in the discharge of their duty as agents, and in taking the steps to obtain pecuniary satisfaction for wrongs inflicted, they are the agents of the minors under the statute as well as of the town. But they are appointed by the town alone, and neither the minor nor his guardian, if he have one, can be heard in the selection.

Was it the intention of the Legislature to clothe overseers of the poor with the power to determine the amount of damage, which the apprentice may receive by the wrongs or neglects of the master, as well as to judge of the expediency of making a claim in his behalf and commencing a suit for its recovery? The power to fix the compensation for the supposed injury is in its nature judicial, and there is a propriety in limiting its exercise to those persons, who from experience and other qualifications, or from the nature of the general duties, which they ordinarily perform, are presumed to be peculiarly fitted to determine such questions. Overseers of the poor may be abundantly competent to cause suits to be brought against masters of apprentices bound by them, and prosecuted to judgment, when they might not be deemed so fully qualified to pass upon all the questions involved in the claims, upon which suits are instituted.

Overseers of the poor derive all their powers from the statute, and can legally exercise none excepting such as are expressly given or are clearly implied. If provision had been made, that the damage supposed by them to have been received, by minors who were bound, from improper treatment or neglects of their masters, should be settled by referees, selected by the overseers and the masters complained of, and in case of inability to agree in the selection, that the Judge of Probate or some other public officer should make it, no one could doubt, that the Legislature intended, that the overseers

should not be the judges of the amount of damages. It does not follow, that the overseers have a right to determine the amount of damage, from the fact, that it is submitted to them by the statute, whether a suit shall be commenced or not. An attorney may have full authority given him by his principal to commence a suit upon a disputed claim, or not, in his discretion ; but if there is a question in relation to the amount, the attorney would not have power to judge of that matter conclusively without further authority.

The language of the statute in relation to this duty of the overseers is very different from that employed in giving to their discretion the care, support and employment of paupers; in this respect, there can be no submission to the judgment of others, excepting to the town itself, in legal meeting, unless it be when the overseers of different towns disagree in relation to claims made by one against the other. In the discharge of their duties in the support of paupers, overseers act solely as the agents of their respective towns, but if they are empowered to judge of damages alleged to have been sustained by a minor bound by them, the interest at issue is not exclusively that of the town.

The neglect of the overseers for the whole term of the apprenticeship, to institute a suit for the recovery of damages on account of a supposed injury received by the apprentice from his master, does not bar his right to maintain a suit therefor, afterwards. If their omissions, even for the space of twenty years and more, can have no effect to conclude him, was it intended, that he should be debarred of his remedies otherwise open to him, by their positive acts, unless they are such as are clearly authorized ?

In an action brought by an apprentice against his master, on his becoming qualified to commence it, and for the causes mentioned in the twentieth section of the chapter referred to, upon a defence attempted on the ground of a previous settlement and discharge of the overseers without a suit, in the absence of any statute provision authorizing such settlement, would it be unreasonable for him to answer, that the settle-

ment was made by those, having no authority excepting from the choice made by the town in which his settlement was established, and the statute authorizing that choice; that they had no agency from him, or any others, who were responsible to him; that he had in no manner, after he possessed the legal power to act for himself, sanctioned the doings of the overseers; that the neglects and abuses of his master, and the breaches of his written contract in the indentures, were such a violation of his personal rights, and were suited to have such a lasting and so great an effect upon his subsequent life, that he could not consent that the determination of those who had no other sympathies for him, than those which arose from their official relation, having none of the qualifications which are supposed to belong to our judicial tribunals, should be conclusive upon him? Might he not well say, that however faithfully and conscientiously they may have designed to discharge their appropriate duties, still he did not acknowledge that they were his authorized agents, and he should claim the right to present his own case, in his own behalf, to the constituted tribunals of his country?

By the statute, the remedy is open to the apprentice in all cases against his master, excepting for causes which have been *tried* in suits, commenced by the overseers. We are not at liberty to show that this language was used loosely, or that it was intended to be interpreted differently from what the ordinary meaning of the term would require, unless from other parts of the statute such interpretation would be erroneous. We find nothing which induces us to believe, that the language was designed to be used, to convey a meaning other than what is usual. The case provided for in the part of the statute touching the duties of overseers on the subject of minor children of paupers is peculiar. Such children should be suitably provided for, and their future happiness attended to; they are not supposed to have guardians, and the pauperism of their parents unfit them to attend effectually to their paternal duties. It is evident, however inconvenient or expensive it may be, that the established courts are to settle the dam-

ages, which it is supposed a minor bound by the overseers, has sustained from his master, until he is qualified to act for himself in that particular.

The note in suit was taken by the overseers for one of three causes. If it was for money previously advanced by the overseers, the settlement made by them might be effectual; but if for a breach of the indentures, or for personal abuse of the master to the child, they had no authority to make it, and the settlement was not a bar to an action for the same cause. Consequently, the note in such case was destitute of consideration.

Exceptions sustained.

Kelley, for the plaintiffs.

Abbott and *Howes*, for the defendant.

MATTHEWS, *in equity, versus* LIGHT.

An agent, employed by the owner of land, to bid off the same when sold at auction for taxes, cannot, by taking the deed in his own name, acquire title to himself.

If one, having title to land by an unrecorded deed, make himself instrumental in causing another to purchase the same from a third person, such owner will not be permitted to set up his title as against such purchaser.

In order that a collector's deed of land, sold by him for taxes, shall convey title, it must appear that the provisions of law, preparatory to and authoritative of such sale, have been strictly complied with.

BILL IN EQUITY.

Its allegations, so far as they called for the action of the court in making up their opinion, were substantially *that*, in July, 1835, upon the defendant's assurance that he was the owner of a described lot of land, upon which were a stream of water and an old saw-mill, the plaintiff undertook to purchase the same, and to pay $200, cash in hand, and the balance in seven equal annual payments; the price of the land to be ascertained by the award of two disinterested persons,

one of whom was to be appointed by the defendant, and the other by the plaintiff; *that* the plaintiff appointed one Prescott, and that the defendant appointed Albert Cargill, and that the said referees set the land at $980, being twice its just value; *that*, not suspecting any interest in said Cargill or any fraud in the defendant, he, the plaintiff, paid to the defendant the said $200, and gave his seven notes for the balance, as previously agreed; and took therefor the defendant's bond to convey, when the notes should be paid; *that* he made payments, including said $200, to the amount of $591, toward said purchase; *that* he cleared out the stream, and erected upon the lot a new mill, which, with his other improvements, amounted to $2000; *that* he occupied the land till 1841, when the defendant took possession, and has since retained the premises, including all the erections and improvements made by the plaintiff, and has received rents and profits therefor at the rate of $200 per year; *that* Cargill, the said appraiser, instead of being a disinterested man, (as was represented by the defendant, and believed by the plaintiff,) was in fact the owner of a large part of the premises, including the site of the mill; *that* the residue of the land was owned by the heirs of one Pierce, and the defendant had no title whatever to any part of the lot; *that* the defendant had full knowledge of said ownerships, and yet, intending to cheat the plaintiff, took the said $200 and said notes, and gave said bond, though knowing he had no title to the land; *that*, within the said seven years, the plaintiff offered the defendant to pay him the amount due upon said notes, if the defendant would procure a title to be made to the plaintiff; and afterwards, on the 26th of April, 1847, the plaintiff made a demand upon the defendant for the possession of the premises, and asked for an account of the rents and profits, and offered to pay what the balance might be, if any; all of which was refused by the defendant, who denied that the plaintiff had any right or interest in the subject-matter.

The prayer of the bill is, *that* said defendant make answer on oath, &c., and *that* the said contract be declared void by

reason of the defendant's fraud and want of title; *that* the outstanding notes be canceled, and the purchase money, so far as the same had been paid, be refunded, and the amount, expended by the plaintiff in making the mill and other improvements, with the net rents and profits, be paid to the plaintiff; and *that* other suitable relief be given.

The substance of the answer, so far as the same became material to the decision, is stated in the opinion.

Lowell, for the plaintiff.

Bulfinch, for the defendant.

TENNEY J.—The plaintiff seeks a decree, to rescind the contract made by him with the defendant, for the purchase of the land described in the bill; a surrender of the outstanding note, given by him; a restoration of the money paid toward the original consideration, and that expended in the erection of the mill and other improvements, with interest on the same; also the rents and profits of the mill, since the defendant took possession, deducting the repairs made by him.

The bill charges, that the defendant never had any title to the land, the same being the property of others, which was well known to the defendant; that the southerly end of the same, being about forty-four acres and on which the mills stood, was the property of Albert Cargill, deceased, and the residue belonged to the heirs of Joseph H. Pierce, deceased; that the defendant fraudulently represented to the plaintiff, that he was the lawful owner of the land, and thereby induced the plaintiff, confiding in this representation, to enter into the contract for the purchase of the same; that the defendant fraudulently selected Albert Cargill, as a disinterested man, to estimate the value of the land with Jonathan Prescott, who was selected by the plaintiff for that purpose, knowing the said Cargill to be interested as the owner of a part of the land.

The answer denies all fraud; and alleges, that the defendant was the true and lawful owner of all the land described in the bill; that he acquired a title thereto, and was in posses-

sion thereof as early as the year 1812, before the town of Liberty was organized as a plantation; that since the organization he and he alone has paid all the taxes upon the lot, which have always been assessed to him; that he had the exclusive possession of the land till the year 1835, or about that time, and that no one then made any claim in derogation of his title; that he was not apprised of any out-standing title whatever, when the contract was entered into between the parties to this suit; that said Cargill had no title to any part of the premises; but he was employed as the defendant's agent, to pay the taxes assessed to him in the town of Liberty upon the premises; that the defendant furnished him with the money for that purpose; that Cargill paid the taxes as he was employed to do; that by accident the collector's deed was made running to Cargill; that the defendant paid the taxes, before the time of redemption run out; and that Cargill never made any claim to the land, or supposed he had any title thereto during his life-time, and did not cause his deed to be recorded.

This part of the answer is responsive to the bill, so far as it charges fraud, and alleges a want of title in the defendant, and a title in others. The proof tends to confirm, these allegations in the answer. So far as it goes, it is corroborative of the statements therein of the defendant's exclusive and adverse possession of the lot for more than twenty years, before the contract between the parties was made. There is no evidence of title or possession of Joseph H. Pierce or his heirs, which can control or qualify the possession of the defendant.

The evidence touching the supposed title of Cargill, shows, that in bidding off the land, and in receiving the collector's deed, he acted as the authorized agent of the defendant, and made no claim in any manner to the premises in his own behalf. Acting as the agent of the defendant, he could not take a title to himself, and the deed, if valid in other respects, would be inoperative in his favor. *Pratt* v. *Thornton*, 28 Maine, 355.

But if the collector's deed had been received by Cargill

under such circumstances as to confer on him the benefit of the purchase at the collector's sale, his subsequent conduct as alleged in the bill would defeat his title to the land as against the plaintiff, even if the defendant had not caused redemption. By a well established and well known principle in equity, when he was instrumental in causing the plaintiff to expend his money, and to give his promissory note as a consideration for the land, ignorant of Cargill's claim, it was too late for the latter, to set up a title under his unrecorded deed to defeat the right, which the plaintiff had acquired from the defendant by his contract. "*Qui tacet consentire videtur.*" "*Qui potest et debet vetare, jubet.*" *Wardell* v. *Van Rensalaer*, 1 Johns. Ch. 344; *Storrs* v. *Barker*, 6 Johns. Ch. 166.

The plaintiff has produced no proof, that the collector's deed would have passed any interest to Cargill, if he had not been acting as the agent of the defendant in bidding off the land and taking the deed. The deed was from the collector of taxes of the town of Liberty, under a sale for the non-payment of the sum assessed upon the lot. To make out a title in the purchaser, something more is required, than the production of the collector's deed, though in proper form. In such cases great strictness is necessary; and it must appear, that the provisions of the law preparatory to, and authorizing such sales have been previously complied with. *Brown* v. *Veazie*, 25 Maine, 359. There has been no attempt to prove a compliance with these provisions, or to show, that the proceedings of the collector, which are essential to give effect to the deed, were such as the statute requires.

As the case is presented, Cargill had no interest in the land, which would have prevented the defendant, from giving a title, on the receipt of the sum stipulated in the contract. He claimed to have no right, which precluded him from being competent, according to the agreement of the parties, to act with Prescott in estimating the value of the land.

The whole case discloses, that a fair contract was entered into by the plaintiff for the purchase of the land from the de-

fendant. It may be true, that a value was placed upon the land, by those selected to make the appraisal, above its real and just worth. But this is probably imputable to the notions, which were then generally entertained in reference to such property, and not to any corrupt design of the defendant, or the appraiser selected by him. When the plaintiff became satisfied, that he had made an improvident contract, he attempted to give effect to some transactions which those interested therein and the parties to them had never contemplated, in order to relieve him from his obligations, and to obtain the money paid to the defendant, and expended upon the land, but these attempts have proved abortive.

Bill dismissed with costs.

Hardy *versus* Sprowle.

A person, related to another by affinity in the fourth degree, according to the rules of the civil law, cannot act as juror in a suit, to which such other person is a party, except by consent.

Though at the empannelment, no objection was made to such a relative, and he was therefore permitted to act as a juror, yet, if it appear that such affinity was not known to the party moving to set aside the verdict, till after it had been rendered, it must be set aside.

Trespass. The verdict was for the defendant, and the plaintiff moves to set it aside: —

1. Because rendered against the weight of evidence.

2. Because one of the jurors, who tried the cause and rendered the verdict, was a first cousin to the defendant's wife, which affinity was not known to the plaintiff, until after the rendition of the verdict.

Howard, J. — The motion to set aside the verdict, as against evidence, is not supported by a statement of the whole evidence, prepared in conformity with the statute requirements, or the rules of court, and must be dismissed. But the

motion affecting the competency of a juror, is properly before us, and will be considered.

It is highly important that jurors should be disinterested and indifferent, in all causes in which they are called upon to deliberate and decide. Facts and circumstances which are regarded as affecting their impartiality unfavorably, and disqualifying them from sitting in particular cases, have been indicated by statute provisions. "The court, on motion of either party in a suit, may examine, on oath, any person called as a juror therein, whether he be related to either party, or has given or formed any opinion, or is sensible of any bias, prejudice, or particular interest in the cause; and if it shall appear from his answers, or from any competent evidence, introduced by the party objecting to the juror, that he does not stand indifferent in the cause, another juror shall be called, and placed in his stead for the trial of the cause." R. S. chap. 115, sect. 65.

"When a person is required to be disinterested or indifferent in acting upon any question, in which other parties are interested, any relationship in either of said parties, either by consanguinity or affinity, within the sixth degree, inclusive, according to the rules of the civil law, or within the degree of second cousin, inclusive, shall be construed to disqualify such person from acting on such question, unless by the express consent of the parties interested therein." Chap. 1, sect. 3, rule 22; chap. 145, sect. 40; chap. 115, sect. 68.

One of the jury who rendered the verdict in this case, was cousin of the wife of the defendant, and consequently was related to him by affinity within the sixth degree. If this had appeared at the trial, it would have constituted a legal disqualification of the juror. But the exception was not then taken in season to prevent his sitting in the cause. The plaintiff has filed his affidavit, stating "that he never gave his consent thereto, and that he did not know of said relationship till since the trial of said cause, and till after the verdict was rendered therein." Of course he could not have made the objection until he had been apprised of the fact.

The testimony of the juror, John Dunham, has been taken

for this hearing, and he states the relationship, and 'that he had long known the defendant's wife, his cousin,' but that he "never knew the defendant." "The relationship did not bias my mind in deciding the case. I had no conversation with the defendant, and the relationship did not occur to me during the trial and subsequent deliberation." The juror might have had full knowledge of the affinity, without ever having any personal acquaintance with the defendant. He could have known that the defendant was a relative, without having any knowledge of his person. Thus situated the juror was not qualified to sit in the trial of the cause. The law is general, and prescribes the rule of disqualification rigidly, and regardless of the fact whether the juror might or might not be biased by the relationship, in a given case. Without doing injustice to any, it assumes that all, thus related, may be influenced by that consideration, and holds them incompetent to act and decide impartially.

Verdict set aside, and a new trial granted.

A. Merrill, for the plaintiff.

Ruggles and *Dickerson*, for the defendant.

Note by the Reporter. — It is generally required, that a person, when acting upon any question, in which others are interested as parties, should be disinterested or indifferent; and by the R. S. c. 1, § 3, R. XXII, if such person stand within certain degrees of relationship, either by consanguinity or affinity, to either of the parties, he is not considered disinterested or indifferent, but is disqualified to act, except by express consent. This being a principle, liable to be invoked in every suit at law, it is hoped that the following short exposition, deduced chiefly from Blackstone's Commentaries, will not be unacceptable, to some of the readers of the Reports.

In reckoning the degrees of relationship, *as to collateral kindred*, there is a wide difference between the rules of the civil law, and those of the common law, into which the canon or ecclesiastical law was adopted. As to lineal kindred, all the codes are in harmony.

Lineal consanguinity subsists between persons of whom one is descended in a direct line from the other. Thus, there is lineal kindred between a man and his father, grandfather, great-grandfather, and so upwards in the direct line. And there is lineal kindred between a man and his son, grandson, great-grandson, and so downwards in the direct line. Every generation in this *lineal*, direct consanguinity, constitutes a different degree, reckoning either upwards or downwards. Thus the father of a man is related to him in the first degree, his grandfather is related to him in the second degree, and his great-

WHITNEY *& al. versus* BATCHELDER.

A creditor to whom the debtor has made a conveyance of land, absolute in its terms, is not bound to account for its value toward the debt, if the conveyance was, at the time, intended by the parties to operate merely as collateral security.

In a suit for the recovery of the debt, such a conveyance, given and received as collateral security, cannot be sustained by the defendant as a payment.

Parole evidence, in such a suit, is admissible to show that the land was conveyed, not as a payment, but as collateral security.

ASSUMPSIT, upon a promissory note of $300, brought against the maker.

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grandfather in the third. So his son is related to him in the first, and his grandson in the second, and his great-grandson, in the third degree.

Collateral kindred agrees with the lineal in one respect; which is, that collateral relations descend from the same stock; but differs in this; that they do not descend one from the other.

Collateral kindred, then, are such as lineally spring from one and the same ancestor. Thus, if A have two sons, who have each a numerous issue, both these issues are lineally descended from A as their common ancestor. They are *collateral kinsmen* to each other, because of having the blood of that common ancestor in their veins, which denominates them *consanguineos*.

So many *ancestors* as a man has, so many *common stocks* he has from which collateral kinsmen may be derived. In the civil law, for computing degrees of relationship, (which has been adopted in Maine by the statute above-mentioned,) the rule is to count upwards from either of the persons related, to the common ancestor, then downward to the other party related, reckoning a degree for each person both ascending and descending. For example, a man is related collaterally to his brother in the second degree; to his nephew in the third; and to his grand-nephew in the fourth; that is, counting upwards from himself to his father, (who is the common ancestor,) is one degree; and from his father downward to his brother is another degree, making the second; to his nephew, (or brother's son,) makes the third; and to his grand-nephew is another degree, making the fourth. So, one's uncle stands in the third degree; viz. from himself upwards to his grandfather, who is the common ancestor, is two degrees, and from that common ancestor down to the uncle is another, making the third degree. By the same mode of computing, if there be second cousins, B and R, it will be found they stand in the sixth degree to each other; viz. from B upwards to the great-grandfather, who is, in such cases, the common ancestor, is three degrees; and from that common ancestor through his son and grandson to his great-grandson R., is three degrees more, making in the whole, the six degrees. And the same rule of computing extends to all the degrees of kindred, however remote.

Documentary and parole evidence was offered for the adjudication of the court, who were, by agreement of parties, to render judgment upon nonsuit or default, as the legal right should require.

So far as any facts were considered by the court as proved, and deemed material, they are adverted to, and the effect of them presented in the decision.

W. G. Crosby, for the plaintiffs.

Williamson, for the defendant.

1. Parole evidence is not admissible to show any trust or condition in a deed. *Flint* v. *Sheldon*, 13 Mass. 443.

The papers speak for themselves, and admit the consideration, and the parole testimony should not control the documentary evidence.

The receipt in the deed cannot be contradicted by parole evidence. *Steele* v. *Adams*, 1 Maine, 1.

2. A writing, not under seal, does not operate as a mortgage or defeasance. *Kelleran* v. *Brown*, 4 Mass. 443; *Laud* v. *Laud*, 1 N. H. 39; *Ranlet* v. *Otis*, 2 N. H. 167.

3. The land, if of sufficient value, paid the debt. *Fales* v. *Reynolds*, 14 Maine, 89.

It must be so considered, unless the land was restored.

Wells, J. — The defendant contends that the debt claimed has been satisfied by a conveyance of real estate, made by him to the plaintiffs.

On the thirty-first of May, 1848, the defendant did convey to the plaintiffs certain real estate by an absolute deed, and at the same time gave to them two promissory notes, one payable in June then next, for $300, and the other on or before the fifteenth of August then next, for $178. At the same time the plaintiffs gave to the defendant a writing, not under seal, reciting the consideration of the conveyance as being four hundred and seventy-eight dollars, and agreeing to re-convey the premises upon the payment of three hundred dollars in June then next, and one hundred and seventy-eight dollars on or before the fifteenth of August then next.

There is nothing in the written evidence, which indicates that the land was received in payment of the debt, but if any inference can be drawn from it, in relation to the connection between the deed and the debt, such inference is, that the land was conveyed as collateral security for the debt.

A debt may be paid in land as well as in money, and when so done, and the debtor is again called upon for payment, he may prove that the consideration of the conveyance was the discharge of his debt. The acknowledgment of satisfaction of the consideration of the deed by the grantor is not inconsistent with the fact that such consideration was paid by the discharge of a debt, which the grantee had against him. And as parole evidence may be admitted for such purpose, so it may be to repel the inference of payment, and to show that the land was conveyed as collateral security.

By the testimony introduced by the plaintiffs it appears, that the land was conveyed merely as collateral security, and that it was expressly agreed not to be in payment of the debt. This evidence does not affect the deed, or in any respect change its absolute character, nor is it offered for that purpose, but to repel the allegation that the debt has been paid by the conveyance.

If an absolute deed of land is given as collateral security for a debt, the law does not say it shall be considered as a payment of the debt, in direct opposition to the agreement of the parties. Such an arrangement is not repugnant to the provisions of the law, whatever inconvenience may arise from it, and creates no bar to the recovery of the debt. *Woodman* v. *Woodman*, 3 Greenl. 350.

In *Fales* v. *Reynolds*, 14 Maine, 89, the court considered the facts as proving that the land was conveyed in satisfaction of the debt *pro tanto*.

If the defendant had paid the money according to the terms of the writing given to him, he would have been entitled in equity to a re-conveyance of the land. Whether the

reception of the money recovered in this suit by the plaintiffs would enlarge the time for performance by the defendant, it is not necessary to decide in this action, nor will it become so hereafter, for the plaintiffs declare their willingness to re-convey the land upon payment of their debt.

A default must be entered.

CUNNINGHAM, *Adm'r*, *versus* BATCHELDER.

In the Judge's instructions to the jury, a remark that, in relation to a position taken by one of the parties, he had perceived no evidence in support of that position, but still referring it to the jury to settle the case upon the evidence, is not such an interference with the province of the jury, as to sustain exceptions.

In an action upon a promissory note, a receipt in full of all demands, given by the plaintiff to the defendant, will, if unexplained or uncontradicted, defeat the action.

ASSUMPSIT, upon four promissory notes made to the plaintiff's intestate by the defendant.

The defendant read in evidence a paper dated subsequently to the giving of the notes, and purporting to be a receipt of one dollar from the defendant, "in full of all demands," and to be signed by the intestate. It was dated March 12, 1847.

As to the genuineness of the receipt evidence was offered by both parties.

The plaintiff's counsel contended that it was a forgery, and also that, if genuine, the jury might well infer, from the facts and circumstances in the case, that it was not designed by the parties to cut the notes.

TENNEY, J. instructed the jury *that* the receipt, by its terms, would discharge the notes, if unexplained or uncontradicted; — *that* there was no evidence, that he was aware of, to show that said receipt if genuine was not designed to cut said notes; and *that*, if unexplained or uncontradicted, the only question for them to consider, was whether the receipt was genuine, or a forgery; and *that*, if they should find the receipt genuine and unexplained or uncontradicted, they would

find for the defendant. The verdict was for the defendant, and the plaintiff excepted to the above instructions.

Abbott and *Howes*, for the plaintiff.

There was a wrong in that portion of the Judge's address to the jury, which instructed them, that *he* was not aware of any evidence to show, that the receipt, if genuine, was not designed to cut the notes. The remark had a wrongful tendency to withdraw the attention of the jury from the evidence as to the genuineness of the paper, and the design for which, if genuine, it was given.

Williamson, for the defendant.

There was also, in the case, a motion for a new trial, and much evidence was considered by the court upon that question. Some of that testimony is adverted to in their decision. But the exhibit of the evidence on that motion, is not deemed necessary for any elucidation of the *legal* point, if such it may be called, which was settled upon the exceptions.

TENNEY, J. — The receipt offered by the defendant, in full of all demands, was denied by the plaintiff to be genuine, who contended also, that if genuine, it was designed by the parties only as evidence of the discharge of the accounts of the plaintiff's intestate, upon the settlement of their mutual dealings, exclusive of notes of hand. The court instructed the jury that the receipt would discharge the notes in suit, if unexplained or uncontradicted; that there was not evidence, that it was aware of, that the receipt was not designed to discharge said notes; and if unexplained or uncontradicted, that the only question for them to consider, was whether the receipt was genuine or a forgery; and that if they should find the receipt genuine and unexplained or uncontradicted, their verdict would be for the defendant. Upon exceptions taken to these instructions, it is contended, that the remark, that the court was not aware of any evidence, that the receipt, if genuine, was not designed to discharge the notes, had a tendency to withdraw the attention of the jury from the evidence, which they should have considered.

The natural presumption is in favor of a receipt, and that presumption will prevail, till it is displaced by direct proof or strong circumstances. And in case of doubtful claims, when a compromise takes place and receipts are given as final discharges between the parties, upon deliberate consideration and good faith, there is the greatest reason to uphold them. But when there has been no such compromise; when there has been an entire mistake of right, or unobserved comprehensiveness in the language, reaching beyond the matters under settlement, there would be gross injustice, in refusing the injured party an equitable relief. The foregoing is substantially the language used by the court, in the case of *Harnden* v. *Gorden & al.* 2 Mason, 541, and is in accordance with the law applicable to receipts.

In the case at bar it is insisted, that the receipt could not have been intended to discharge the notes in suit, because those notes and also notes held by the defendant against Sherburn Batchelder were not given up. The language of the receipt is sufficiently broad to embrace notes as well as accounts; and it is not perceived how that which was deemed necessary to be the subject of a receipt as it regards the notes, should render its design so different from its plain import. It was the business of the plaintiff to explain this, in order to limit the operation of the written evidence.

The omission to use this receipt in the trial of this action in the District Court, cannot be regarded as evidence, that it was intended to apply only to the account. A party may, if he chooses withhold his evidence till the trial, which is expected to be final; and the fact of his doing so, can hardly be considered as a circumstance tending to show the design of the parties in giving and taking a receipt to be other than that, which the receipt would clearly indicate. The introduction in the District Court of another receipt of equivocal date and doubtful appearance, and no more comprehensive in its terms, could be no evidence to restrict the plain meaning of the one in question.

It could not have been expected, that the defendant, when

he called upon the counsel of the plaintiff, known by him to be already engaged as such, should have disclosed fully his defence; and his omission to do so, is not evidence, that a receipt which he then actually had, was intended by the parties to have a restricted effect.

The statement to the plaintiff's counsel, and afterwards repeated in writing under oath, on July 12, 1847, "that the estate held notes against him, then in suit in the District Court, which should be given in set-off to the amount of about two hundred and eighty-two dollars, was after he had commenced his suit for the recovery of his claim embracing the account, to which it is admitted on the part of the plaintiff, the receipt did apply, if genuine. It could not have been the defendant's design, to give to the receipt the meaning insisted upon, when in effect, he was contending for the same result, if the receipt was disregarded, to which the parties would come by giving it full effect.

But if the evidence adduced did tend to show that the receipt was not intended by the parties, as a discharge of the notes, were the instructions erroneous? The whole instructions are to be considered together, and therefrom it is to be determined whether the party taking exceptions has been injured. In connection with the remark complained of, the jury were instructed to find for the defendant only in the event that they should be satisfied that the receipt was genuine, and unexplained or uncontradicted. It was for the jury to know the evidence introduced, and to judge of its effect, and there was a submission to them, by implication at least, by language used and twice repeated of the question, whether the receipt was explained or contradicted. The remark of the Judge, that he was not aware of evidence upon this point, could not be treated by the jury as a direction or an intimation to them to disregard any of the evidence in the case, when it is considered in connection with what precedes, and what follows it.

The question of the genuineness of the receipt was submitted to the jury under all the evidence in the case, some of

which came from witnesses called by the defendant, whom we cannot doubt were well qualified to judge of such matters; and notwithstanding the court might come to a result differing from that of the jury, still it is not believed that they so clearly erred in their conclusion, as to allow the motion to set aside the verdict, to prevail.

Exceptions and motion overruled.

GILMAN *versus* PERKINS.

The provisions of R. S. ch. 66, requiring staves to be surveyed or culled previous to a sale, apply, not to pine staves made for fish barrels, but only to certain descriptions of oak staves.

An action may be maintained to recover the price of such pine staves sold to the defendant, though they were not culled or surveyed.

ASSUMPSIT, for a quantity of pine fish barrel staves.

The defence was that the sale was illegal and void by the R. S. chap. 66, sec. 20, because the staves had not been culled or surveyed. TENNEY, J., ruled that the prohibitions of that section of the statute do not apply to staves of this description. Verdict for plaintiff, and exceptions by defendant.

Hubbard, for the defendant.

Kelley, for the plaintiff.

HOWARD, J. — The survey, inspection, and admeasurement of shingles, clapboards, hoops, staves, boards and other lumber, is regulated by the Revised Statutes, chap. 66. The subsequent statutory provisions, for the survey of lumber in particular localities, do not affect the subject under consideration. Every town is required to elect at its annual meeting, one or more persons to be surveyors of shingles, clapboards, staves and hoops; (sec. 5,) and every town being a port of delivery, and where staves and hoops are usually exported, is required to choose, annually, two or more suitable persons to be viewers and cullers of staves and hoops; all of whom are to be duly

sworn, sec. 18. In section 12, it is provided that "staves, packed for sale or exportation, shall be well and proportionably split and of the following dimensions." Then follows a description of the dimensions required for white oak butt staves, white oak pipe staves, white or red oak hogshead staves, and white or red oak barrel staves. But no mention is made of any other variety or description of staves, in that chapter. Section 13 refers to the manner of selling and counting, only. It is provided in sect. 19, that all staves and hoops, before being shipped to any place beyond the United States, shall first be viewed, culled and surveyed, by one of the officers mentioned in the 18th section, and marked, and a proper certificate thereof be given to the master of the vessel in which they may be shipped. The provisions of section 20 are, that "any person, selling and delivering any boards, plank, timber or slit work; or any clapboards, shingles, staves or hoops, or shipping off, or attempting to ship off, any of such articles, before they are surveyed, measured, viewed or culled, as the case may require, shall forfeit two dollars a thousand," &c. In these sections are to be found all existing provisions of law for the viewing, culling and surveying staves.

The prohibition, in section 20, applies only to the sale of the different sorts of lumber mentioned in the preceding sections, for surveying, measuring, viewing or culling of which, rules and dimensions are given. Upon the sale of staves of a different description, the statute has not imposed any restriction. It will be observed, however, that, although the statute is thus limited in its application to particular kinds of staves, yet, in reference to other lumber mentioned, its language is sufficiently general and comprehensive to embrace all varieties of materials of which it may be composed. See Rev. Stat. chap. 54, sect. 14, and Act of 1846, chap. 213, respecting fish barrels, and lime-casks.

This suit was brought for the recovery of the value and transportation of a quantity of "pine fish barrel staves." "The defendant contended that the sale of the staves was illegal and void, under the statute requiring staves to be culled or survey-

ed, and that the action could not be maintained." (Sect. 19.) But the presiding Judge ruled that the statute, referred to, did not apply to staves of that description; and to such ruling, the defendant filed exceptions. In the opinion of the court, and for the reasons stated, the ruling was correct, and the exceptions must be overruled. The motion to set aside the verdict, as being against the evidence at the trial, is not supported, and must be also overruled.

Judgment on the verdict.

HARDY *versus* AMOS SPROWLE.

It is a general principle, that a chattel cannot be replevied from one part owner by another part owner.

Personal property belonging to tenants in common, and attached as the property of one of them, may, upon the application of the other, be delivered by the officer to him, after an appraisal had and bond given, as prescribed in R. S. c. 114, § 65 and 66.

It seems, that *after a delivery* to the applicant, he may replevy the property even from his co-tenant, if it be taken or detained by him.

But *Held*, that though the appraisal has been had, and the bond given, yet the *delivery*, to authorize such a replevin, must have been, not merely a formal, but an actual one, giving to the applicant the *actual custody* of the property.

Until *such* a delivery, the bond given by the applicant, has not become operative.

REPLEVIN for the schooner Tamerlane, her tackel and apparel.

The evidence was submitted to the court for the ascertainment of the facts of the case, and for a judicial decision thereupon. To show what the facts were found to be, reference is made to the decision.

Hubbard, for the plaintiff.

The defendant was the mere servant of the officer, and as such removable at his pleasure; and after removal could have no rightful possession of the property. If he persisted in

keeping it, after a demand, the officer might maintain an action against him for it. 21 Pick. 318; 3 Fairf. 328.

The plaintiff after the property had been appraised, and he had given his bond, and after the officer had delivered the property to him, succeeded to all the rights, which the officer had before the delivery, and became entitled to all the officer's remedies to enforce his rights.

After the delivery, the *officer* certainly could not replevy the property, because the bond in his hands had been substituted for it, and all his rights in it were at an end. The right of action was, therefore, with the plaintiff.

Kelley, for the defendant.

WELLS, J. — The plaintiff is owner of five-eighths of the schooner Tamerlane. The defendant, on the 4th of March, 1846, sold one half of the schooner to John W. Sprowle, and took back a mortgage of the same, to secure the payment of the note given for the price. The note was payable in six months. By the terms of the mortgage, the condition was broken upon a failure to pay the note at its maturity. If the mortgager neglects to redeem the property within sixty days after the breach of the condition, the title of the mortgagee, by our statute, becomes absolute.

The defendant does not now claim to have owned more than three-eighths of the schooner, at the time he sold one half to John W. Sprowle, and his interest under the mortgage must be limited to the same extent. The parties are therefore the owners of the schooner as tenants in common, and the general principle of law is, that one tenant in common of a chattel cannot maintain replevin against another tenant, because each one is entitled to the possession.

But the defendant, on the 8th of January, 1847, after his title under the mortgage had become absolute, by a suit commenced in his own name against John W. Sprowle, on a note other than that secured by the mortgage, caused an attachment to be made of three-eighths of the schooner, thus attaching his own property.

The plaintiff, by virtue of the statute, c. 114, § 65 and 66, procured an appraisal of the schooner, and gave to the attaching officer a bond, and entitled himself as part owner to have it delivered to him, if John W. Sprowle was also to be deemed a part owner When the property was attached, the officer put it into the possession of the defendant as his keeper, and on the 15th day of March, 1847, the same day when the bond was given, the officer, in the presence of the defendant, who was then discharged as keeper, delivered it, as is stated, to the plaintiff. But the defendant refused to permit the plaintiff to take it, and declared, that neither the plaintiff nor any other person should take it out of his possession, and that he had a mortgage on it, and had taken possession under the same; and within thirty days after judgment in the action against John W. Sprowle, as appears by the report of the evidence, the defendant delivered the execution to the officer, and directed him to demand the property attached, and he did so, and it was delivered to him, and he advertised the same for sale on the execution, but did not sell it, and it was afterwards sold by the defendant.

It is not expressly stated of whom the officer made the demand, but as it appears, that the schooner remained in the possession of the defendant, we understand, the demand was made on him, and that the officer had not in fact delivered the property to the plaintiff in such manner as to give him the control of it, but had allowed it to remain with the defendant.

If it were conceded, that the defendant by causing the three-eighths of the schooner to be attached as the property of John W. Sprowle, when it was his own, by that act admitted John W. Sprowle to be a part owner, so as to bring the transaction thus far within the provisions of the statute, still the plaintiff cannot claim the property under the statute, until the officer has put him into the actual possession and control of it. A merely formal delivery is not sufficient. The actual custody of it should have been given by the officer to the plaintiff. But instead of that, the officer leaves it with the

defendant, and afterwards takes it from him and advertises it for sale. Under such circumstances, the bond taken by the officer did not become operative, and no action could be maintained upon it, because he had not entitled himself to retain it, by doing substantially what the statute required.

If he should have dispossessed the defendant, and delivered the property to the plaintiff, but has not done it effectually, the plaintiff's remedy is on him, to recover such damages, as may have arisen from a failure to discharge his official duty. But the plaintiff's right to the entire control of the property, under the statute, was not perfected. He may have done enough, to have authorized the officer to have removed the property from the custody of the defendant, and delivered it to him, but the officer did not so act. All, that is required by the statute to confer exclusive possession on the plaintiff, has not been done, and he has not acquired under it a right to maintain replevin against another part owner.

Whether the defendant would be precluded by attaching his own property, from showing it was his own and the attachment thereby void, and that John W. Sprowle was not in reality a part owner, it becomes unnecessary to decide.

According to the agreement of the parties a nonsuit must be entered.

PLUMMER *versus* STURTEVANT.

A surveyor of highways has no authority to subject to a public easement any land, not lying within the lines of the road.

However important to the public it may be, to have the water turned off from the highway, the surveyor has no authority to make a ditch, for that purpose, through adjoining improved lands.

For such an act, trespass may be maintained by the owner of the land.

TRESPASS *quare.*

The defendant entered upon the plaintiff's land, and there excavated a ditch about fifteen rods long and one to two feet

deep, and three to four feet wide. This was done in order to turn the water from the highway, where it was flowing from the side-hill above.

The defendant, by brief statement, justified as a surveyor of highways.

The case was submitted to the court for a nonsuit or default, according to legal rights.

Dickerson, for the plaintiff.

Abbott and *Howes*, for the defendant.

When a public highway is established, whatever is necessary to the proper enjoyment of the easement, passes as incidental; and if the ditch, opened by defendant, was necessary for the protection of the road; was dug in the most suitable place, or even in a proper place; was dug no longer, deeper or wider than was necessary to effectually carry off the water; and no unnecessary injury was done to the plaintiff's close; then this action cannot be maintained.

The public have an *easement* in their highways, giving them the right to repair, use and protect them, for purposes of travel; and if, in making, repairing, using, or protecting them, it becomes necessary to overstep the prescribed limits of the highway, the right so to do is incidental to the principal right. It is a *secondary easement* arising from the necessity of the case, and it is just as proper and as legal for the public to exercise and enjoy the *incidental* right or *secondary easement* as it is for them to exercise and enjoy the principal right or easement. Both are acquired by the laying out of the highway, and both are paid for in the allowance for damages to the owner of the soil.

Wherever a right or power is given, *in express terms*, all other powers and rights necessary to the proper enjoyment of those expressly given, are incidental or implied.

Easements of whatever kind, are accompanied by such *secondary* easements, as are necessary to the proper enjoyment of the principal ones. 5 Metc. 434.

It is not only a right but a duty, imposed upon highway

surveyors, to make all such bridges, culverts and drains, as may be necessary to effectually carry off the water, and protect the roads from injury; and the law, which imposes the duty, will protect them in the use of all necessary measures. 21 Pick. 348; 13 Maine, 255; 3 Salk. 132.

If the *drain* was necessary for the preservation of the road, necessary to keep it in a safe and suitable condition for travelers, and was opened in a suitable place, then the opening of it was authorized by positive enactment. Revised Statutes, chap. 25, sect. 71.

The public had a right by prescription to re-open the drain. 18 Maine, 69.

The defendant was a *public* agent. He owed duties as a *public officer*, not only to the town, but to the traveling public. The law made it his duty to see that the road was kept in a suitable condition.

The place, where the ditch was made, was the natural channel, or place where the water from the side-hill above naturally passed off, and if so, the surveyor had a right to re-open it.

Howard, J. — The alleged trespass consisted in the defendant's entering the plaintiff's enclosure without license, and removing a portion of his fences, and ploughing up a strip of his land, about fifteen rods in length, and digging a ditch through it, from one to two feet deep, and from three to four feet wide, for the purpose of conducting off water which flowed down an adjacent highway. This ditch conveyed the water across the plaintiff's pasture and field, to the land of another person, but it drifted and deposited gravel on the plaintiff's land, thereby doing damage.

The defendant pleaded the general issue, and by a brief statement, justified the supposed acts of trespass, as having been done "in the lawful discharge of his duty as a highway surveyor in the town of Searsmont, in repairing the public highway in said town, and opening water-courses to protect said

public highway." If the justification be insufficient, the defence must fail upon the facts proved, or not disputed.

The duties of a surveyor of highways are prescribed by statute, and his power and authority, in respect to the construction and repairs of public roads, are derived wholly from statutory provisions. He may, within his district, remove any obstacle, natural or artificial, that obstructs, or is likely to obstruct, or render dangerous the passage of any highway or town way. R. S. chap. 25, sec. 71. "He may also dig for stone, gravel or other materials, suitable for making or repairing the roads, in any land not planted nor enclosed, and the same may remove to any place on the roads in his district, where he may judge it necessary." Sec. 72. But he is not authorized by law to appropriate the lands of individuals, lying without the limits of the roads, and enclosed, to the convenience or necessities of the public. As a surveyor, the jurisdiction of the defendant was limited, and confined within definite bounds, and beyond that, his official capacity could not give him any rights, immunities, or protection, not enjoyed by other citizens.

The evidence does not sustain the position, that "the place where the ditch was made was the natural channel or place where the water from the side-hill above naturally passed off, and if so, the surveyor had a right to re-open it." Nor does it support the argument, that the public had acquired by prescription, a right, or an easement, principal or secondary, to turn the flow of water from the highway on to the plaintiff's land. And it does not appear that such diversion of the water was necessary to the enjoyment of the right of way by the public; although it is proved that the water, when suffered to flow down the ditches by the sides of the road, had injured it, and that it could be more conveniently directed on to the land of the plaintiff, than in any other direction; and that the channel made by the defendant, was suitable for the purpose for which it was constructed. But it was not the duty of the defendant, and he did not possess the power, to subject the estate of the plaintiff to a servitude to the public in

the manner attempted. In our opinion his supposed justification is insufficient, and his attempt to perform a duty has resulted in committing a trespass upon the property of the plaintiff. Damages were assessed by a jury in the District Court, for the sum of five dollars, and for that amount, upon the evidence before us, the plaintiff is entitled to judgment.

MARDEN *versus* CHASE.

That rule of the common law is in force in this State, which holds that a bargain and sale of a fee-simple estate, to take effect *in futuro*, is inoperative and void.

That result however is not to be admitted, if the deed show a different intention, and one which can be carried into effect, without a violation of the rules of law.

A deed showing that the bargainor lived upon the land, and reserving "the use, occupation and control of it, during the lives of the grantor and his wife, *for their support and maintenance*," shows an intent that the *reservation* should be a restricted and qualified one; extending only to the measure of relief which the grantor and wife might actually need for their support and maintenance.

Such a deed therefore is not void, as creating a fee to take effect *in futuro*.

WRIT OF ENTRY.

The trial was before TENNEY, J.

The demandant introduced a deed of quitclaim to himself from Nathaniel Moncey, wherein the premises are described, and are also stated to be the farm on which the grantor lived, except a reservation to said grantor and his wife, of the use, occupation and control of said premises during their natural lives "for their maintenance and support."

The demandant also introduced an unsealed paper, dated September 12, 1847, made by said grantor, after the death of his said wife, and prior to the commencement of this suit, as follows, viz : —

"I, Nathaniel Moncey, hereby give up all my interest, use and control of the Brown lot, so called, to Thomas Marden, 2d, it being the same lot deeded to the said Thomas by

me; and in consideration of the control and use of said farm, the said Thomas is to provide for my support and maintenance."

The tenant showed no title in himself, but contended that the action could not be maintained in the name of the demandant, and requested the court so to instruct the jury. This the court declined to do, but, for the purpose of this trial, instructed them that the action was rightly brought in the name of the demandant.

To which instructions, the counsel for the tenant excepted.

Abbott and *Howes*, for the tenant.

1. A writ of entry can be maintained only by one having a present right of entry. Moncey, by the reservation in his deed, created for himself a life-estate. 4 Kent's Com. 23, 24; 2 Devereaux, 411.

The demandant, then, has no present right of entry or possession. His right, if any, is but reversionary.

2. That life-estate is a realty. 1 Hilliard's Ab. c. 2, § 1, 5 Ibid. c. 4, § 1; R. S. c. 94, § 14; and c. 91, § 26; *Symmes* v. *Drew*, 21 Pick. 278; 6 Mass. 251.

3. An estate for life can be conveyed only by a deed, a sealed instrument. R. S. chap. 91, sec. 26; 4 Mass. 443; 15 Ver. 479; 4 Gilm. 536; 19 Maine, 363.

White and *Palmer*, for the demandant.

1. The deed of Moncey clearly shows upon its face, an intention to convey a fee on mere condition subsequent; that is, for him to have the income for a limited time, if needed for his support. As to the wife, the condition has been fulfilled.

No particular collection of words is necessary to create a condition. It is to be gathered from the intent of the parties. *Howard* v. *Turner*, 6 Greenl. 106; *Simonds* v. *Simonds*, 3 Met. 558; *Taft* v. *Morse*, 4 Metc. 525; *Hayden* v. *Stoughton*, 5 Pick. 528; *Brewer* v. *Hardy*, 22 Pick. 376.

2. The deed is not to be taken as conveying a fee *in futuro*. If any part of it is to be rejected, it is the reservation.

Shep. Touch. 85; *Stukely* v. *Butler*, Hobart, 171; *Lilley* v. *Whitney*, Dyer, 27; *Goodtitle* v. *Gibbs*, 5 Barn. & Cress. 709; *Shed* v. *Shed*, 3 N. H. 452; *Thompson* v. *Gregory*, 4 Johns. 81; 2 Black. Com. 164; 3 Bacon's Abr. 383, title Grant.

The deed is good in all its parts. Parties are not to be taken to use unmeaning or contradictory terms. It is a settled rule that deeds, and parts of them, are never to be declared void if by construction they can be made operative. Shep. Touch. 82, 83; 2 Wm. Saunders, 96, note; *Pray* v. *Pierce*, 7 Mass. 381; *Russell* v. *Coffin*, 8 Pick. 151; *Emery* v. *Chase*, 5 Greenl. 232; *Richardson* v. *York*, 14 Maine, 216.

The writing of Sept. 12, 1847, is abundant to make the deed complete, were it not so without it. It is clearly good as a waiver of the condition, and is tantamount at all times to a fulfillment of the condition; and is entirely consistent with the idea of a condition subsequent.

The fulfillment of a condition perfects the deed, and makes it complete. 5 Coke's R. 85, *Penyman's case.*

It is good as a relinquishment and discharge of the life-estate, if that construction should be upheld. R. S. chap. 91, sect. 30.

Tenney, J. — The title relied upon by the demandant is under a deed of quitclaim from Nathaniel Moncey, to him and heirs and assigns forever, warranting against all claims, which have or may originate in him. After a description of the land, which is represented as being the farm on which the grantor lives, follows "excepting and reserving to the said Nathaniel Moncey the use, occupation and control of the said described premises, during the said Nathaniel Moncey's and his wife Margrette Moncey's natural lives, for their maintenance and support."

The tenant introduced no title of evidence in himself, but denied, that the demandant could maintain this action, inasmuch as the whole premises described were reserved during the lives of the grantor and his wife; and that the instrument

subsequently executed by the grantor, purporting to cancel this reservation, not being under seal, was wholly inoperative for the purpose intended.

If the reservation is as broad in its signification, as it is contended in behalf of the tenant, the deed as one of bargain and sale of a fee-simple estate, to take effect *in futuro*, would be void. This result is not to be admitted, if it can be prevented by a construction, which will carry into effect the intention of the parties, and that their designs shall not be defeated. So that if a man have two ways to pass lands by the common law, and he intended to pass them one way, and they will not pass that way, *ut res valeat*, they may pass the other way. Shep. Touch. 82. Upon this principle, a deed of lease and release has been holden to be a covenant to stand seized to uses, when the consideration was a good one. *Doe* v. *Trummer & al.* 2 Wils. 75. A bargain and sale from a parent to a child, to take effect after the death of the parent, has been holden to be a covenant to stand seized to the use of the parent for life, with a vested remainder to the child in fee; because, as a bargain and sale, it would have been a conveyance of a freehold, *in futuro*, and therefore void. *Wallis* v. *Wallis*, 4 Mass. 135; *Emery* v. *Chase*, 5 Greenl. 232. But in the present case, it is believed, effect may be given to the deed under which the demandant claims, consistently with the true intent of the parties, as shown by the deed and in the manner contemplated by them, notwithstanding it is inartificially drawn.

If the design of the parties had been, that an entire reservation of the whole subject-matter of the deed should be made, to continue during the lives of the grantor and his wife, so that the grantee could take nothing at the time of the delivery, the clause "for their maintenance and support" would be wholly unnecessary. The object of the reservation, being expressed, could not enlarge in the least the meaning. But the design may have been to restrict the reservation and thereby to give effect to the deed. The land described in the deed was that on which the grantor lived. It is manifest,

that at the time of the transaction, he depended upon this farm as the source from which his support was to be derived. By the alienation, he did not intend to expose himself to want by the loss of that upon which he so relied for that purpose. The security for his wife's support was also intended to be retained in the same manner, if she should survive him. It is difficult to believe, that it was his expectation or that it was the expectation of the grantee, that the grantor was to have the exclusive management of the farm, unaided by the grantee, during the decrepitude and disease of old age, which might have been anticipated before his death; much less that all the burden and care of taking charge of a farm, would devolve upon his widow, if she should survive him, when she could have no title whatever under a reservation, and when it is considered that the sole purpose expressed, was their support and maintenance. Hence the reservation was a qualified one. It was to continue so long as the grantor and his wife should need support, but no longer; it was to be for an amount, which would be sufficient for the purpose expressed, but to be limited thereto. Such is the plain import of the deed, and should have the effect intended, if no principle of law is violated thereby. If the reservation is absolute, without any qualification, the deed will be utterly inoperative for every purpose. The mode of support provided by the grantor would be entirely changed from his manifest design; the support of his wife after his decease, would be from her dower in the farm, instead of the whole farm, if the income of the whole should be necessary, as he undoubtedly intended.

The deed may be fairly construed to convey an estate, immediately subject to the support of the grantor and his wife, during their lives, and incumbered by the right of the grantor to the use, occupation and control of the farm, so far as it might be necessary to obtain that support. Such right would not necessarily extend to an exclusive occupation or control of the farm, and would not therefore amount to a reservation of a life-estate in it.

Exceptions overruled.

Newell *versus* Ayer *& al.*

Though the conduct of a juror may, in some respect, be at variance from the requirements of the court, yet, if it do not appear that some injury to either party could have resulted from it, it is not a sufficient ground to require a new trial.

A message was sent by the jury to the Judge, that they were not likely to agree upon a verdict; and the officer, under direction of the Judge, opened the door and apprised the jury that they were called into court. It was then said by one of the jury that they could probably agree, and the Judge, on being notified of it, recalled the order. While the door was thus opened, two of the jurors left the room for a minute or two, and then returned, after which a verdict was agreed upon.

For this cause, a motion was made for a new trial.

The two jurors testified that, their absence was upon a needful occasion, and that, while absent, they had no conversation with any person.

Wells, J., orally. — Where misconduct on the part of jurors has been of injury to a party, it is the duty of the court to set aside their verdict. It was misconduct in the two jurors to leave their room without permission of the court. But they held no conversation with any one, and it does not appear that any injury could have resulted from their act.

The motion is overruled.

Fuller *versus* Kenney *& al.*

If an officer, having a writ for service, offer the summons to the defendant, who refuses to receive it, he may rightfully return that he delivered the summons, or he may return the facts specifically, and they will be held as a delivery.

Palmer, for plaintiff.

Brown, for defendant.

WELLS, J., orally. — The objection is to the sufficiency of the service of the writ on one of the defendants, and it comes before us on exceptions to the refusal of the court below to dismiss the action for that cause. This invites the inquiry whether the return of an officer, that he offered a summons to defendant, and upon the defendant's refusal to receive it, threw it down, discloses a sufficient service. No officer can compel one to take from him a summons; all he can do is to offer it. If the law required the service of writs to be made by reading only, would it be said to be invalid, because that, when the officer begun to read, the defendant went off, or turned a deaf ear? In this case the officer might properly have made a return in the usual form, instead of stating specifically what he did. If there was any fault, it belonged to the defendant, and the loss, if any, must be his. The court below decided rightfully, and the *Exceptions are overruled.*

BAKER *versus* CARLETON *& al.*

In a disclosure upon a poor debtor's bond, the father of the debtor, being objected to by the creditor, is incompetent to act as one of the justices of the peace and quorum.

But, if the debtor take the prescribed oath before two such justices, of whom his father is one, the damage for the breach of the bond is to be assessed under the provisions of the statute of 1848, c. 85.

DEBT on a poor debtor's relief-bond.

The debtors took the oath prescribed by the statute before two justices of the peace and quorum, one of whom was their father. He was selected by them, and was objected to by the plaintiff.

If that proceeding constitutes a defence, the plaintiff is to be nonsuited. Otherwise the defendant is to be defaulted, with damages according to law, to be adjudged by the court.

N. H. Hubbard, for plaintiff.

One of the justices was interested. Consequently the pro-

ceedings were invalid, and the plaintiff is entitled to a judgment according to the R. S. c. 148, § 39, unless he is to be restricted by the Act of August 11, 1848.

The defendants do not bring themselves within the provisions of the Act of 1848, they not having "been allowed by two justices of the peace and quorum to take," &c. according to the provisions of the second section of said Act.

When the statute speaks of "two justices of the peace and quorum," it intends such justices as are not disqualified by statute. *Bramhall* v. *Seavey*, 28 Maine, 45.

——— ——— for defendants.

The bond has been literally complied with. But, if the court consider it to have been broken, *actual* damage only can be assessed. R. S. c. 115, § 78; *Daggett* v. *Bartlett*, 22 Maine, 227; *Rider* v. *Thompson*, 23 Maine, 244; *Ware* v. *Jackson*, 24 Maine, 166.

In *Niel* v. *Ford*, 21 Maine, 440, it was decided, that the justices had no jurisdiction. Yet the statute relieved as to damage. The other cases cited are to the same effect.

It was for giving relief in cases like this, that the Act of 1848 was passed. *Call* v. *Barker*, 28 Maine, 319.

TENNEY, J., orally. — In *Bard* v. *Wood*, 30 Maine, 155, it was decided that a justice holding the relationship of uncle to both of the parties, was disqualified to sit in the hearing of the disclosure. The question as to the effect of one of the justice's incompetency, has often been before the court; and it has been supposed that the statute of 1848, chap. 85, was intended to embrace all such cases.

In this case the bond has been broken, and the damages are to be assessed according to the provisions of that statute. The only light we have on this subject is furnished by the statement filed in the case, from which it appears, that the principal debtors were worthless, and that the oath prescribed in Revised Statutes, chap. 148, sect. 28, was administered to them.

The plaintiff is entitled to judgment for one cent damages, and one-fourth of a cent costs.

Defendants defaulted.

SARAH C. ELWELL *versus* JONATHAN ELWELL.

The R. S. c. 89, relating to divorces, is not repealed by the Act of 1849, c. 116.

Conduct by one of the parties constituting a cause of divorce, under the R. S. c. 89, entitles the other party to a divorce as a matter of *right*. But under the Act of 1849, applications for divorce are addressed only to the *discretion* of the court.

Under the Act of 1849, a divorce *a vinculo* will not be granted for such cause only as, under the R. S. c. 89, gave a right to a divorce *a mensa et thoro*.

THIS is a libel for divorce from the bonds of matrimony. If in the opinion of the court the libelant is entitled to such a divorce, supposing all the facts alleged are proved, then the case is to stand for trial. If not, the libel is to be dismissed.

W. Davis, for the libelant.

1. The statute of 1849, relating to divorces, repeals all that portion of the Revised Statutes, relative to causes for divorce. For a new statute, covering the whole ground of a former statute, repeals it, *without any express words* to that effect. *Bartlett* v. *King*, 12 Mass. 545; *Nichols* v. *Squire*, 5 Pick. 168; *Towle* v. *Marrett*, 3 Greenl. 22.

2. The statute of 1849, is *retrospective* in its intended application. There is no *limitation* or restriction in its terms. *Jones* v. *Jones*, 18 Maine, 308. The *object in view* in its enactment, requires this construction. *Winslow* v. *Kimball*, 25 Maine, 493. And prior legislation upon the same subject-matter, leads to the same conclusion. 3 Mass. 21; Statutes on this subject of 1821, 1829, 1830, 1835, 1838, 1847 and 1849.

But if the statute of 1849 is *prospective* only, the libel is

still good, for it alleges facts, as *existing grounds of complaint*, at the time it was made.

TENNEY, J., orally. — This is a petition for a divorce under the statute of 1849, c. 116. The libel contains allegations of various kinds of ill-treatment on the part of the husband towards the wife; such as compelling her to labor out of doors, bring in wood, and water; take care of his cattle in the winter, during his absence; and do other things unsuitable to female habits and capacities. It is also stated, that he was ill-tempered, and abusive to her and her children, and neglected, though abundantly able, to make suitable provision for their support. The result was, that the parties separated; and the feelings, temper and spirit of the husband are alleged to remain so unchanged, that the parties can never live together again. All the grievances set forth had existed for a long time prior to the statute of 1849.

On the part of the libelee it is said, that the statute of 1849 cannot apply to this case, because it was not designed to be retrospective in its effect. We have come to a different conclusion, in our construction of that statute; and have granted divorces under it, without any reference to the *date* of the causes alleged.

But it is further contended that, as there is no repealing clause in it, the provisions of the Revised Statutes, c. 89, are still in force; and that all cases that come within those provisions, must be determined by them.

We have already decided, (*Motley* v. *Motley*, 31 Maine, 490,) that the statute of 1849 does not repeal any part of the 89th chapter of the Revised Statutes. Under the statute of 1849 no one can claim a divorce, except as a *matter of discretion.* But under the former statutes, any one coming within their provisions may claim a divorce as a *matter of right.* Both statutes are therefore still in force. It is provided in chapter 89, § 6, that "a divorce *from bed and board* may be granted, for the cause of extreme cruelty; or whenever the husband shall grossly, or wantonly, and cruelly neglect or refuse to

provide suitable maintenance for his wife, he being of sufficient ability." Such a divorce is not prayed for here, and therefore cannot be granted.

Libel dismissed.

ADAMS *& al. versus* HARDY *& al.*

A person, who writes his name upon the back of a promissory note, may be held as a promisor jointly with the one who subscribes his name on the face of the note.

ASSUMPSIT, upon a promissory note against two defendants as joint promisors. The name of one of them was subscribed to the note; the name of the other was written upon the back of it. The defendant contended that they were not chargeable as joint promisors. TENNEY, J., before whom the trial was had, overruled the defendants' position. The verdict was for the plaintiffs, and exceptions were filed.

Kelley, for the defendants.

The practice in Massachusetts violates that essential principle, that a contract shall be construed according to the intent of the parties. It has been exploded in New York and by Judge Story. The English decisions are all against it. If it has not been adopted here, it is of importance that it should not be.

One who writes his name on the back of a note, is a *backer*, an indorser. He is made a second indorser, the moment the payee indorses it, and he ought not to be charged as an original promisor.

Hubbard, for the plaintiff.

WELLS, J. — Exceptions overruled, and judgment on the verdict.

GEORGE WOOD, *in equity, versus* WHITE *& al., Ex'rs.*

The equity powers of this court extend to the correction of mistakes in a will. Where the testator, in the will, has mistaken the christian name of a legatee, the error may be corrected, as to its effect, on a Bill in Equity.

BILL IN EQUITY, alleging that this plaintiff was indebted to Nathaniel Wilson upon two notes of hand secured by separate mortgages of real estate; one of said notes dated in 1845, for $1000, at two per cent. interest, the payment not to be called for under ten years; the other dated in 1846, for $175 in ten years, with annual interest: —

Also further alleging that the last will of said Wilson, which has been duly approved, after making certain specific legacies, gave and devised all his estates, real and personal, to his executors, in trust for certain uses, &c., and among the legacies was the following: —

"I give to J. Wood of Belfast, the whole amount, principal and interest, he may owe me at the time of my decease, which is secured to me by mortgage, and I do direct my executors to release said mortgage forever to the said J. Wood, as soon as may be after my decease;" —

Also further alleging that said bequest was made for the benefit of this plaintiff, and that the name "J. Wood," instead of George Wood, was inserted in the will by mistake, &c., and that the plaintiff has applied to the executors for a release of the mortgage and a surrender of the notes. Wherefore, &c.

The answer of the executors, alleges their belief that this plaintiff is the person, for whom the said bequest was intended, and that the name of "J. Wood" was inserted in the will by mistake, instead of George Wood, &c.; also that the notes are not needed, for payment of any debts or legacies.

Abstract of evidence as agreed to by parties.

Nathaniel Wilson, the testator, died in Boston on the day after the execution of his will. Said will was drawn, by his directions, by a scrivener, who was a stranger to the names of the legatees. At the time it was drawn, said testator was very sick.

Said complainant married, in 1838, a niece of testator, in whose welfare he had taken a deep interest. Friendly relations had continued to exist between testator and complainant to the time of his death.

The money for which the largest note was given was loaned by testator to complainant to aid him in purchasing a farm, and the money for which the smallest note was given was loaned for the purpose of aiding him in purchasing another parcel of land, contiguous to the parcel first purchased.

Testator has been absent from Belfast most of the time for last twenty years; his residence there being only occasional.

Complainant has received letters from testator when abroad, addressed to him as J. Wood.

Testator held no notes, claim, nor mortgage against any person by the name of J. Wood, at the time of making his will, or at his decease.

The two parcels described in the two mortgages together constitute complainant's farm.

There are two persons resident in Belfast, known by the name of J. Wood, viz. James Wood and Joseph Wood, neither of whom ever had any business transaction with said testator and neither of whom claims to be the legatee named in the will; no other person resident in town, whose name is the same, or resembles it.

Nothing has ever been paid on either of said notes, nor any demand for payment made; complainant has remained in undisturbed possession of the mortgaged premises.

The cause was submitted to the determination of the court without argument; but the following authorities were cited in support of the positions that the subject-matter is within the jursdiction of the Court, and that the facts disclosed will justify them in proving the decree prayed for. 20 Pick. 368; *Dimmock & al.* v. *Bixby & al.* cited with commendation in *Savings Institution* v. *Makin*, 23 Maine, 373; *Tucker & als.* v. *Seamen's Aid Society & als. ib.* 7 Metc. 188; *Minot*

& al. v. *Boston Asylum, &c. ibid*, 418; *Sutton* v. *Cole*, 3 Pick. 232.

WELLS, J., orally. — A question has suggested itself, whether the heirs should not be made parties; but we think the rightful parties are before the court. Where, as in this case, the executors have control of all the estate, no other parties need be introduced. Executors or administrators may discharge mortgages and surrender notes.

The only question then is, whether the bequest can be corrected by substituting "George Wood" for J. Wood.

Courts are often called upon to adjudicate as to devises and legacies, when there are several persons of the same name. Such cases present a latent ambiguity.

In this case, the complainant is not of the name, mentioned in the will. There is no latent ambiguity. It is a case of misdescription. Can the court inquire who was meant? There is jurisdiction as to mistakes, as well in regard to wills as to other matters. The testimony makes it very apparent, that there was a mistake in the name, which ought to be corrected, and we consider that the power to do it exists in the court.

Prayer of the bill is allowed.

CASE

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF PENOBSCOT,

1850.

PRESENT:

HON. ETHER SHEPLEY, LL. D. CHIEF JUSTICE.

HON. JOHN S. TENNEY, LL. D.
HON. SAMUEL WELLS,
HON. JOSEPH HOWARD,
} ASSOCIATE JUSTICES.

MOOR, *in Equity, versus* VEAZIE *& al.*

When all the legal and beneficial interest in the subject-matter of a suit in equity has become vested in the plaintiffs, by assignment or otherwise, it is not necessary that former proprietors or assignors should join in the suit.

All the citizens of a country have, *by the common law*, an inherent right in common to navigate its navigable waters.

That right is not limited to tide waters, but extends also to navigable fresh-water rivers and lakes.

Of this right the citizens or subjects cannot be deprived, even by the government itself.

The common law accorded to the sovereign power the "care, supervision and protection" of this common right.

Upon the power which has this care, supervision and protection of a common right, is the duty to regulate its use in such a manner, that it shall be safe and convenient.

This duty involves the right to remove impediments to that use.

This State has the right to make improvements in its navigable rivers, for the more safe, convenient and useful enjoyment of the common right of navigating them.

To render the common right more beneficial, the State may encourage new modes of navigation, and for that purpose may grant an exclusive use, (for a term of years,) of the waters in the new mode, as a compensation for the skill, expense and risk required for its introduction.

The constitution of this State invests the Legislature with "full power to make and establish all reasonable laws and regulations for the defence and benefit of the people, not repugnant to said constitution or that of the United States."

Whether an enactment is reasonable or for the benefit of the people, this court is not authorized to decide. That decision is confided to the Legislature alone.

The power, given to Congress, to regulate *commerce* with foreign nations and among the States, includes the power to regulate *navigation* with foreign nations and among the States, and extends both to salt and fresh waters, and beyond, as well as within, the ebb and flow of tides.

It is however restricted to such waters as can be employed in commerce between a State and foreign nations, or some other State.

It does not extend to those waters within a State, from which a vessel cannot be navigated to a foreign port or to another State.

The power given to Congress to regulate *commerce* with the Indian tribes does *not* include *navigation* with the Penobscot Indians, or, *as it seems*, with any of the Indian tribes whatever.

It is confined to that sort of trade, of which navigation constitutes no part.

A coasting license, granted to a vessel, plying upon the interior waters, from which it could not reach another State or a foreign nation, is unauthorized and inoperative.

The provisions of the Act of July 30, 1846, entitled an Act to promote the improvement of the navigation of the Penobscot river, are not repugnant to any of the provisions of the constitution of Maine, or of that of the United States.

BILL IN EQUITY. This is the case in which an injunction was ordered, as reported in vol. 31, page 360. It now comes up for an adjudication upon the general merits.

The substance of the bill is presented in the former report.

The following facts were agreed by the parties: —

Before the passage of the Act set forth in the bill, the Penobscot river above Oldtown had never been navigated.

Between tide water at Bangor and Oldtown, a distance of eight miles, said river is crossed by four dams, and is not now, nor ever was navigable. There is a railroad from Bangor to Oldtown which, since the filing of this bill, has been extended to the river at the steamboat landing at Oldtown. Before any improvements were made on the river, the plaintiff built the steamer, Gov. Neptune, and run her on said river between Oldtown and Piscataquis falls, from the 27th day of May, 1847, till the 8th day of July following, when she was arrested by the drought. In August of that year, the grantees under said act commenced making improvements on said river below Piscataquis falls, by removing rocks from the channel. During that season the sum of eight hundred dollars was expended in said improvements. On the 14th day of October, 1847, said steamer, Gov. Neptune, re-commenced her trips, and continued them until arrested by the ice. On the 27th day of November, 1847, said steamer was run over Piscataquis falls to a place called Nicketow, about fourteen miles above Five Island rips. This was done at a high pitch of water. In the spring of 1848, the plaintiff built the steamer Mattanawcook. On the first day of August she was run to Lincoln, and laid up there till certain obstructions were removed at a place, called Mohawk rips, above said Piscataquis falls. In August of that year, plaintiff removed some large boulders from said rips, which had rendered the passage hazardous at all times, and entirely obstructed it for steamboats at all ordinary stages of the water. On said rips the plaintiff expended, during said season, three hundred dollars, which was the only improvement made that summer on the river, owing to the continued high state of the water. In the winter of 1848, the plaintiff expended at a place called "the Cook" two hundred and twenty-five dollars, in removing a ledge under contract with said Levi and Warren R. Young, two of the defendants; said "Cook" is within the town of Oldtown, and is above Oldtown falls "village" and "landing." From the 22d day of August, 1848, to the 2d day of July, 1849, said boats were run daily over their respective routes, except

when said river was obstructed by ice. In February and March, 1849, the plaintiff built the dams, described in his bill, for the purpose of passing his boats down behind some islands in said Piscataquis falls.

Being prevented from completing his dams by ice and freshet, he built a railroad from the foot of said islands to the head of said falls. Said railroad is two miles in length. Since the construction of said railroad, said dams have remained without being completed; said railroad connects the steamboat route above said falls with the route below said falls, and was built before the filing of the plaintiff's bill. Since the filing of said bill and the granting of the injunction, the plaintiff has expended, in the bed of said river, in removing rocks and deepening the channel thereof, between Oldtown falls and Five Islands rips, between two and three thousand dollars, and has built, and is now running over the route, below said falls, another steamboat, called the Sam Houston, and is also now running the Gov. Neptune and Mattanawcook. The plaintiff's boats were arrested by the drought on the 6th day of July, 1849, and did not re-commence running until the 15th of October. The season of 1849 was a season of long continued and unusual drought, and the year 1848, a remarkable one, for a long continuance of high water on the river. In the periods of ordinary high water, said river was passable for boats of the peculiar construction of the plaintiff's boats, before any improvements were made on the river, except at Piscataquis falls and Mohawk rips. These were passable for a few days in the year only at a very high stage of the water. The removal of a few large boulders in Mohawk rips and the digging down of some rock bars have now rendered Mohawk rips navigable, when the other sections of the river are navigable.

Piscataquis falls can never be made passable with safety except in a high freshet, without a large expenditure. The improvements on the "Cook" were made to widen and straighten the channel, and render it passable at a very high stage of the water, when it otherwise would not be passable.

The improvements by the plaintiff have been chiefly confined to removing rocks and deepening a channel in the river, which channel at some places follows the raft channel, and at other places leaves the raft channel. The channel improved by the plaintiff, is at places narrow and crooked, and would not admit of two boats passing each other going in opposite directions. Since the improvements have been made, the plaintiff's boats can run on the river with two and one-half feet less water than was necessary before they were made. Said river is subject to high freshets in the spring, which soon subside, and the water falls to a moderate pitch early in the season.

The Penobscot river takes its rise and has its whole course in the State of Maine. The draught of plaintiff's boats is from twelve to fifteen inches when light, and about two feet when loaded. Plaintiff is assignee of said charter property and privileges under it, as set forth in the bill. Said steamer, Gov. Dana, was built by said Veazie, and run by said Levi Young and Warren R. Young, between Oldtown and Piscataquis falls from the 10th day of May, A. D. 1849, to the granting the injunction.

The city of Bangor is a port of entry, situate at the head of the tide on Penobscot river, and the steamer, Gov. Dana, was of burden of forty-six tons, custom house admeasurement, and was enrolled and licensed for the coasting trade at said port of Bangor.

The Penobscot tribe of Indians own all the islands in the Penobscot river above Oldtown falls, some of which they occupy. Said tribe of Indians always have been, and now are, under the jurisdiction and guardianship of this State.

Moor, plaintiff, *pro se*, with whom was Kelley.

That the court has jurisdiction, and that this process is the appropriate remedy, are points which have already been settled. *Moor* v. *Veazie*, 31 Maine, 360.

The only questions now open are, whether the Act of the Legislature is constitutional, and if so, whether the plaintiff

has so far complied with its conditions as to entitle him to the remedy here sought.

I. The Act confers powers; sect. 1, 2 and 5. It conveys rights; sect. 4. It imposes obligations; sect. 3.

These are all the essentials of a contract. The Act is, therefore, a contract, if the Legislature had jurisdiction of the subject-matter.

The Legislature has power to control the interior waters. Const. art. 4, part 3, sect. 1; R. S. chap. 126, sect. 1; Lord Hale, *de jure maris*, chap. 2, prop. 3; *Spring* v. *Russell*, 7 Greenl. 273; 4 Pick. 460; 5 Pick. 199; 1 Pick. 180.

The power has been exercised more than two hundred years, as may be shown by a multitude of private Acts, reaching even to the farthest interior of the State.

The Legislature is empowered to make all "reasonable" laws "for the benefit of the people," not repugnant to the constitution of the State or of the United States.

Suppose a canal had been authorized, along the bank of the Penobscot river, to be fed from its waters. Such have been established in Connecticut, New York, Massachusetts, Pennsylvania, &c. Who could doubt the validity of such charters? If authorized to canal upon land, much more so, in the bed of a public river; for, in the former case, there would be the taking of private property; in the other, only the regulation of a public right. This public right extends to waters "floatable," though not "navigable," within the rules of the common law.

[The plaintiff here offered a long list of private Acts, passed since the formation of this State, which he said were passed in the exercise of the legislative power over the interior waters, and as being demonstrative of a correspondent usage. He particularly commented upon the Act, giving to Seward Porter the exclusive right to navigate the Kennebec river by steam.]

But we stand not upon usage. We go to the fountain, the common law. I refer especially to the tracts of Lord Hale, received as doctrine in this State.

As to the *use* of our rivers, they have always been subject to legislative control. What effect upon our bridges, canals, booms, dams, mills and a multitude of aquatic rights, would result, at this day, from a withdrawal of the power?

Neither is the Act in conflict with the constitution of the United States. *Livingston* v. *Van Ingen*, 9 Johns. 507; *Gibbons* v. *Ogden*, 17 Johns. 488; *Ogden* v. *Gibbons*, 4 Johns. Ch. 150; *Gibbons* v. *Ogden*, 9 Wheat. 1; *N. R. S. Nav. Co.* v. *Livingston*, 3 Cow. 713; *Brown* v. *Maryland*, 12 Wheat. 419; *Wilson* v. *B. Bank*, 2 Peters, 251; *New York* v. *Miln*, 11 Pet. 158; *Warren Bridge Case*, 11 Pet. 420; *United States* v. *New Bedford Bridge*, 1 Wood. & Minot, 401; 7 Howard, 283.

II. Has the plaintiff, then, so far complied with his charter as to be entitled to the remedy here sought?

Paine, for the defendants.

For the purposes of the present trial, that position will not be controverted.

Moor. — The agreed statement of facts admits the defendant's interference. The case, then, must be with us, and we move that the injunction be made perpetual, both against the further use of the defendant's boat, and against injury to our improvements, and that a master in chancery be appointed to assess the damages.

A. W. Paine, for defendants.

I. Plaintiff's charter is void; its enactment not being within the power of the Legislature, as granted by the constitution of Maine, art. IV, part third, § 1.

1. Because not "reasonable."

2. Because not "for the benefit of the people."

The river was by nature navigable for steamboats, and of course free to all. This right, thus common to all citizens, the Legislature had no power to take away without a just compensation. *Improvements* merely, of a navigable river, to be enjoyed by the maker alone, do not afford a good consideration for depriving the citizen of his natural rights; and

any act of the Legislature having that effect, is both unreasonable and not for the benefit of the people. And where any such act jeopards the rights of the citizen, a court of law is bound to declare it a nullity. *Pierce* v. *Kimball*, 9 Greenl. 60.

It is conceded that the Legislature have the power to grant monopolies in the enjoyment of any rights or property, brought into existence by the grantees, as in cases of railroads, canals, bridges, &c.; and that they have equal power to substitute one right of the citizen for another of similar kind, as was the case in *Spring* v. *Russell*, and other cases cited by plaintiff; and to grant exclusive privileges in all cases, where the consideration, received in return by the citizen or state, is just and ample; but where vastly important rights are taken away, without such compensation in return, as is the case here, it is contended, that the act does not fall within the constitutional power of the Legislature. *Cottrell* v. *Myrick*, 3 Fairf. 222; *Bloodgood* v. *M. & H. R. R. Co.* 18 Wend. 61; 2 Kent's Com. (5th Ed.) 339 and 340, and in notes; *City of Boston* v. *Shaw*, 1 Metc. 135.

The private property of one cannot be taken for the private uses of another in any case. *Props. &c.* v. *Laboree*, 2 Greenl. 290.

II. The charter in question is in violation of the constitution of the U. S. art. 1, § 8, clause 3.

"*Commerce*" the exclusive power of regulating which is vested in Congress, includes *navigation*, which term embraces the vessel, its management and the control of the waters on which it moves. *Gibbons* v. *Ogden*, 9 Wheat. 189 and 193; 2 Story's Com. on Con. § 1060.

What is the true criterion or rule for the exercise of this power by Congress, is the question now presented. Does the power extend to, and embrace navigable waters, situated wholly within the limits of a single State, and not approachable from the sea?

1. It is very clear, that the power is not limited to tide waters, or those known, as "navigable" by the common law.

And it is equally clear, that it is not limited to such waters as are approachable from the sea. On very few of the navigable rivers of the country is the limit of tide water co-terminous with their navigability; and a vastly important part of the navigation of the country is on waters, not by nature approachable from the sea. By adopting these criterions, all the commerce of the great lakes, of Lake Champlain, and of the Mississippi and tributaries would all be excluded.

Nor can it be contended that the true criterion is, whether the waters divide States, or pass into different States. The Hudson above the line of New Jersey, the Penobscot to Bangor and the Kennebec to Augusta, are clearly within the power in question. See cases below.

2. It is contended that the power in question is co-extensive with the subject itself; that wherever commerce and navigation, as defined by Congress, exists, there the right to regulate it exists also.

The reason of any particular provision of the constitution affords a good rule for its construction. C. J. MARSHALL, in 12 Wheat. 441.

Hence the power to regulate *importation* being given, Congress has exclusive power to pass laws regulating the *sale* of imports. *Brown* v. *Maryland*, 12 Wheat. 419.

Also for the protection of imported goods against thieves. *U. S.* v. *Coombs*, 12 Pet. 78.

And for their transportation over land and innavigable waters. *Gibbons* v. *Ogden*, 9 Wheat. 196; *Waring* v. *Clarke*, 5 Howard, 463.

And also to give the most complete effect to maritime jurisdiction. *U. S.* v. *Bevans*, 3 Wheat. 336.

3. *The coasting trade* is an essential part of the commerce of the United States, the exclusive power over which is in Congress. This embraces all ships and vessels "found trading between district and district, or *between different places in the same district.*" Act of 1793, chap. 8, sect. 6; 3 Cow. 746.

This "comprehends all navigation within the limits of ev-

ery State in the Union, so far as it may be, *in any manner*, connected with commerce with foreign nations, or among the several States, or with the Indian tribes." *Gibbons* v. *Ogden*, 9 Wheat. 197.

The express language of the decree, in that case, includes the case at bar. Page 240.

Neither the language of the statute nor of the court requires, that this "connection" should be by an uninterrupted *water* communication, but the reason and spirit of the enactment equally applies, whether this connection is wholly by water, or partly by land. Congress have interfered to regulate commerce by land in such cases, and the court have sanctioned such an exercise of power. *Gibbons* v. *Ogden*, 9 Wheat. 196.

The same reason exists with respect to goods shipped from Lincoln over the waters in question, via Bangor to Boston, as exists in case of goods shipped at Chicago, via Albany to the same place. In both cases the waters passed, form a part of the line of connection, by which the commerce of different States is carried on.

4. The action of Congress recognizes the correctness of our position. The statute of 1838, chap. 191, for security of the lives of passengers on board of steamboats, and the additional Act of 1843, chap. 94, both embrace all steamboats, "transporting passengers in or upon the bays, lakes, rivers or other navigable waters of the United States." All steamboats wherever plying in the United States, are subject to this law, and its constitutionality and binding effect upon such has been judicially recognized. Plaintiff's boat is subject to it. *Waring* v. *Clark*, 5 Howard, 465.

The word "navigable" is very clearly not used here in its common law sense, and no definition can be given to the term, which would not exclude the waters of the Mississippi above the reach of the tide and the whole of the lakes, as well as the waters in question.

The uniform action and decision of Congress and the Supreme Court has been to include within the power of the

former, all waters upon which the coasting trade can be carried on in their natural state. The waters in question being of that character, it is submitted whether the U. S. have not the exclusive power claimed for them.

I respectfully submit, too, that the suit, if any, should have been brought, not in the name of the plaintiff, but in that of the Penobscot River Navigation Company, as given in the 5th section of the plaintiff's charter.

SHEPLEY, C. J. — The cause, after argument, is submitted for decision upon the bill and answers and upon an agreed statement of the facts.

By virtue of an Act approved on July 30, 1846, the plaintiff claims the exclusive navigation, by boats propelled by steam power, of that part of the Penobscot river above the town of Oldtown, so far up as it may be rendered navigable for such boats, by virtue of the Act.

By the first section, William Moor and Daniel Moor, jr., their associates and assigns, are authorized to improve the navigation of the river above that town; and for that purpose to perform certain acts in the bed of the river.

By the second section they are authorized to hold land upon the banks of the river, and to appropriate certain property of the riparian proprietors, and to flow their lands upon payment of damages.

The third section declares, that the grant is made upon condition, that they shall within seven years improve the navigation of the 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 seven years build a canal and lock round said falls, or a railroad to connect the route above with the route below said falls."

The fourth section grants to them, their associates and assigns, upon performance of the condition "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 the Act." It also prohibits the obstruction of the navigation for certain other purposes; and provides, that boats not propelled by steam power, shall be allowed to make use of any locks and other improvements upon payment of a reasonable toll.

The fifth section authorizes them to become 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, "provided, that they shall at any time during the continuance of the grant, elect by a 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 alleges, that the conditions required by the Act have been performed, and that the plaintiff has become by assignment entitled to all the rights and privileges granted by the Act. It is admitted, that he "is assignee of said charter, property and privileges under it as set forth in the bill."

The objections which have been made to the maintenance of the suit, and to the decree prayed for, will be noticed in their order.

1. The jurisdiction of the court was examined upon a motion for an injunction pending the suit, and the objection made to it, was overruled by an oral opinion, notes of which were taken by an intelligent member of the bar, which appear to have been published in the Law Reporter, vol. 12, No. 6, (see also, 31 Maine 365,) in a manner, that might lead a reader to the conclusion, that a maturely considered opinion had been drawn in writing. It may not be useful to present the reasons in a more perfect manner.

2. The performance by the grantees and their assignees of the conditions required by the third section of the act; what was required by a correct construction of the Act, and how far the defendants were entitled to make the objection, were noticed in the same oral opinion. As the objection has not

been renewed, it may not be useful to enter upon any further discussion of these matters.

3. The right of the plaintiff to maintain the suit in his own name, and not in the name of the corporation is for the first time denied.

The law is different as administered in courts of equity and courts of law, respecting parties plaintiff. Courts of equity do not so much regard technical difficulties, as they do the fact, that the suit is prosecuted by those, who represent the entire legal and beneficial interest to the matter in litigation. Hence assignees of all the interest to rights and contracts may maintain suits respecting them in courts of equity. *Whitney* v. *McKenney*, 7 Johns. Ch. 144; *Trewthick* v. *Austin*, 4 Mason, 41.

Holders of shares in corporate bodies may, under certain circumstances, maintain suits against their officers and against other shareholders. *Gray* v. *Chaplin*, 2 Sim. & Stu. 267; *Hichens* v. *Congreve*, 4 Russ. 562.

But a suit cannot be maintained by all or any portion of such shareholders, involving the interest of the corporation, unless the corporation itself will be bound by the judgment. In this case the plaintiff appears to be the sole assignee and owner of the corporate franchise, if such there be, and it might be difficult to determine, that the corporation would not be bound by the judgment, or that it was absolutely essential, that the suit should be prosecuted in the corporate name. It is not, however, necessary to decide this question, for the rights and privileges granted do not appear to have become vested in a body corporate. They were granted to the persons named in the Act, and to their associates and assigns, and not to a corporation. There is no proof, that they have been conveyed to one.

The plaintiff is admitted to be the sole owner, which is inconsistent with any other ownership.

The grantees by the Act are not constituted a body corporate, except upon certain conditions precedent. The privilege of becoming such a body at any future time during a contin-

uance of the grant, is accorded to them. They can become such a body only, when a majority in interest elect to avail themselves of that privilege, and to organize according to the provisions of statute, chap. 76.

There is no proof, that a majority in interest have at any time elected to become a corporate body, or that they have organized as such according to the provisions of the statute. And no proof therefore of the potential existence of such a corporation, as that named in the Act. The objection cannot prevail.

4. The provisions of the Act are alleged to be repugnant to the provisions of the constitution of this State.

All the citizens of a country have by the common law a right in common to navigate its navigable waters. This is an inherent right, of which they cannot be deprived by the sovereign of any government, based upon an acknowledgment of the rights of its citizens. This is in substance the conclusion, to which the court came in the case of *Williams* v. *Wilcox & al.* 1 Willmore, Wallaston & Hodges, 477, in which the right of the British sovereign to destroy a common right of navigation in tide waters, was very elaborately investigated both by the bench and the bar. The defendants have a right in common to the navigation of the Penobscot river; but the proof does not show, that by reason of being riparian proprietors or otherwise, they have any rights superior to those of other citizens. The right in common of all the citizens to the use of its navigable waters has been established by judicial decisions; and that right is not limited in this State to waters, in which the tide ebbs and flows, but is admitted in lakes and fresh water rivers, which are navigable. *Berry* v. *Carle*, 3 Greenl. 269; *Wadsworth* v. *Smith*, 2 Fairf. 278; *French* v. *Camp*, 18 Maine, 433; *Brown* v. *Chadbourne*, 31 Maine, 9. In the province of New Brunswick it was fully admitted in such waters by a decision based upon the common law, in the case of *Esson* v. *McMaster*, 1 Kerr. 501. The same doctrine has been admitted in most of the States of the Union, either by regarding fresh water rivers as

navigable waters, or by regarding them as common ways for passage and transportation. *Scott* v. *Willson*, 3 N. H. 321; *Commonwealth* v. *Chapin*, 5 Pick. 199; *Palmer* v. *Mulligan*, 3 Caines, 307; *Pethin* v. *Olmstead*, 1 Root, 217; *Cason* v. *Blazer*, 2 Binn. 475; *Wilson* v. *Forbes*, 2 Dev. 30; *Cox* v. *The State*, 3 Blatch. 193; *Bullock* v. *Wilson*, 2 Port. 436.

The common law accorded to the sovereign power, the "care, supervision and protection" of this common right of navigation in navigable waters, whether fresh or salt. Hale, *de jure maris*, chap. 4, prop. 3. This treatise has been received with approbation in most of the States as a correct exhibition of the law on those subjects, of which it treats. The power which has the "care, supervision and protection" of a common right, is bound to regulate its use in such manner, that it may be safe and convenient. The duty to make the use safe and convenient involves the right to remove obstructions, to improve, or to render more safe and convenient the waters for the purposes of navigation. The right to improve navigable waters is therefore accorded to, and it exists in the sovereign power, which is entitled to regulate the use of such waters for the purposes of navigation. The common law conceded to the sovereign power, the care, supervision, protection, regulation and improvement of navigable waters, that no one might be molested in the enjoyment of the use of them, or debarred of the exercise of his common right. Without regulation or without improvement, the enjoyment might be unsafe, inconvenient, or useless.

When several of the States of this Union, formerly subject to the British sovereignty, severed the ties, that bound them to it, their respective citizens became possessed of the sovereign power in their States, and entitled to exercise the rights over navigable waters, which were formerly vested in the British crown. This they could not well do without a delegation of these rights to some form of government. Having formed a State government they yielded the exercise of these rights to it, and the State governments thus became rightfully

entitled to the care, supervision, protection, regulation, and improvement, of the navigable waters within the States respectively in a manner not inconsistent with the provisions of their respective constitutions. These rights, or this power they still retain so far, as it has not been granted or delegated to the government of the United States. This State has therefore the right to make improvements in its navigable rivers and waters for the more safe, convenient and useful enjoyment of the common right of navigation in them.

When the people are in the enjoyment of that common right in several different modes, their rights or privileges are not, necessarily in any degree impaired or abridged by the introduction of another and new mode of using the waters for passage and transportation. The use of the waters in the accustomed modes may be rendered more safe and convenient by the improvements required for the introduction of the new mode. If the State may rightfully permit or restrain the introduction of a new and particular mode of navigation without prejudice to the common right of use in the accustomed manner, it may do so upon such terms and conditions, as it may judge to be expedient. And may therefore encourage its introduction, by a grant of the exclusive use of the waters in that mode for a term of years, as a compensation for the skill, expense, and risk required for its introduction. This it may do without an infringement upon, or a diminution of the common right of navigation existing at the time.

The agreed statement of facts does not show, that the navigation of the Penobscot river, in the accustomed manner, must necessarily be injured, or that it has in fact been injured, or that the rights of the defendants or of any other citizen to such use, have been impaired or abridged by the introduction of a new mode of navigation by the Act, by boats moved by steam. It does not therefore appear, that any existing rights have been invaded or diminished by the passage of the Act.

The right of the State, however, to impair and diminish the common right of passage and of transportation, in the

accustomed manner, for the purpose of increasing the facilities for its more safe, convenient and useful exercise in another manner, has been asserted and exercised in most of the States; and in many of them, with the sanction of their highest judicial tribunals.

Permission has been given to erect dams, which impeded the navigation of rivers, to increase the facilities for their navigation, by means of canals and locks; and for the use of their waters to feed canals not useful for their own navigation. To place booms in and across navigable rivers to facilitate the floating of logs and lumber. To change the channel of rivers, by which the navigation of them, as formerly enjoyed has been entirely destroyed, to facilitate it in a new channel.

Permission has also been given to erect dams, bridges, cause-ways, and other obstructions, impeding the navigation not for the purpose of giving greater facilities in another mode, but for the promotion of a common benefit in a manner entirely disconnected with navigation. Such as dams, to create a water power for different manufacturing purposes, and to control and withdraw the water to supply aqueducts; and bridges and cause-ways to facilitate intercourse by land. *Spring* v. *Russell*, 7 Greenl. 273; *Proprietors of Side Booms* v. *Haskell*, *idem*, 474; *Cottrill* v. *Myrick*, 3 Fairf. 222; *Parker* v. *The Cutler Mill-dam Co.* 20 Maine, 353; *Lebanon* v. *Olcott*, 1 N. H. 339; *Woods* v. *The Nashua Manfu. Co.* 4 N. H. 527; *Commonwealth* v. *Breed*, 4 Pick. 460; *Charles River Bridge* v. *Warren Bridge*, 7 Pick. 445; *Boston Mill Dam* v. *Newman*, 12 Pick. 467; *Mayor of Charlestown* v. *County Commissioners of Middlesex*, 3 Metc. 202; *Kellogg* v. *Union Com.* 12 Conn. 7; *Enfield Toll Bridge Co.* v. *The Hartford & New Haven R. R. Co.* 17 Conn. 40; *Lansing* v. *Smith*, 8 Cow. 146; *The People* v. *The Rensselaer & Saratoga R. R. Co.* 15 Wend. 113; *Zimmerman* v. *The Union Canal Co.* 1 Watts & Sergt. 346; *Susquehanna Canal Co.* v. *Wright*, 9 Watts & Sergt. 9; *Commonwealth* v. *Fisher*, 1 Penns. 462; *Monongahela*

Navigation Co. v. *Coons*, 6 Watts & Sergt. 101; *Gavit* v. *Chambers*, 3 Ham. 495; *Hogg* v. *Zanesville Canal & Man. Co.* 5 Ham. 410; *Willson* v. *The Blackbird Creek Marsh Co.* 2 Peters, 245; *The City of Georgetown* v. *The Alexandria Canal Co.* 12 Peters, 91; *United States* v. *The New Bedford Bridge*, 1 Woodb. & Min. 401.

Many other cases might be cited, as well, if not better, suited to illustrate and establish the rightful exercise of such a power.

The provision contained in the constitution, that the Legislature "shall have full power to make and establish all reasonable laws and regulations for the defence and benefit of the people of this State, not repugnant to this constitution nor to that of the United States" is especially relied upon.

The argument attempts to prove, that the Act is not a reasonable one; that it is not for the benefit of the people; and that it is the right and duty of this court to judge of it in both those respects.

The Legislature must of necessity judge of these matters in the first instance. This court is not authorized to decide whether an enactment of the Legislature, which by the constitution it is clearly entitled to make, is reasonable or for the benefit of the people.

The Legislature is expressly authorized to establish inferior courts. It does establish one. This court cannot decide, that it was not reasonable, or for the benefit of the people, that such a court or one of such a character should be established. To do so would be to violate the constitution and cause a conflict between these two departments of the government. When the Legislature decides, that an Act is reasonable and for the benefit of the people, as it does by making the enactment under the sanction of an oath to support the constitution, that decision must be conclusive, if the enactment be not repugnant to any provision of the constitution, and be not made colorably to effect one purpose under the appearance of effecting another.

If the Legislature should authorize private property to be

taken ostensibly for public use, when it is apparent by the enactment itself, that it was intended to be taken for private uses only, it would be the duty of this court, in a case properly presented, to examine and decide upon its character; and it would not be bound by any declaration of the Legislature, that the property was taken for public use. But when the question is one of expediency merely the decision of the Legislature, that it is reasonable and for the benefit of the people, is conclusive. *Spring* v. *Russell*, 7 Greenl. 273; *Parker* v. *The Cutler Mill Dam Co.*, 20 Maine, 353; *Commonwealth* v. *Breed*, 4 Pick. 460; *The People* v. *The Saratoga and Rensselaer R. R. Co.*, 15 Wend. 132. The cases cited by the counsel for the defendants do not authorize a different conclusion. The remark referred to in the case of *The City of Boston* v. *Shaw* was made respecting a by-law, and not respecting a legislative enactment.

Whether it was expedient and in that sense reasonable, and for the benefit of the people to grant for so long a period, the exclusive navigation by boats moved by the power of steam, of that part of the Penobscot river, to induce persons of skill to incur the risk to be anticipated by their introduction and use, is a question, which this court is not authorized to entertain and decide. It does not find any provision of the Act to be repugnant to any of the provisions of the constitution of this State.

5. The provisions of the Act are alleged to be repugnant to that clause of the constitution of the United States which declares, Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

In the consideration of this question it will be admitted, that commerce includes navigation, and that the regulation of it includes the regulation of navigation, without regard to the kind of vessel employed, or the kind of waters, in which it is floated, or the kind of power by which it is moved. And without intimating any opinion upon the controverted ques-

tion, whether Congress has the exclusive power to regulate commerce to the extent of the grant, its exclusive power to do so will be admitted, for the consideration of this case. That part of the power of Congress to regulate commerce, will only be considered which authorizes it to regulate navigation. The inquiry therefore will be limited to the extent of the power of Congress to regulate navigation. The three different branches of the power to regulate commerce will be separately considered so far only, as that power extends to the regulation of navigation.

The first gives the power to regulate navigation with foreign nations.

The exercise of this power is not limited by the bounds of any State. Vessels may be authorized to navigate waters within the bounds of a State, and to pass through a State, if it be practicable to do so while employed in this class of commerce. The power was conferred without regard to the jurisdiction of the States. The limits of a State do not constitute any portion of the elements, by which the extent of the power is to be ascertained and determined; nor does the kind of waters, in which the vessel is navigated. The exercise of the power is not restricted to waters, in which the tide ebbs and flows. There may be commerce and navigation of this class upon fresh water lakes and rivers, and to the regulation of such navigation the power will extend.

This exercise of power is however restricted in these and in all other waters to the regulation of such navigation as can be employed in commerce with foreign nations. It is restricted by the natural limitation existing upon the practical and possible use of the waters for purposes of commerce with foreign nations. If a vessel cannot be navigated from waters within a State to a foreign port, the right to regulate the navigation upon such waters is not embraced by the terms, by which the power is granted. On the other hand when a vessel can be navigated from a port or place, within any of the States of the Union, to a foreign port or place, the United States may authorize it to navigate those waters, and no law

of a State can prevent it. From whatever ports or places within any of the States situate on tide waters, or on fresh water rivers or on fresh water lakes, a vessel can be navigated to a foreign port or place, there the laws of the United States may reach to secure and to protect her right to that navigation. Beyond this, such laws cannot reach for such a purpose. Upon waters not included within such limits, whether they be salt or fresh, vessels may be navigated without submission to the laws of the United States. To their regulation her laws do not and cannot extend. Their regulation is one of those rights not by this branch of the power conferred upon the United States, but is one of those reserved to the States, to be exercised by them with the same freedom and to the same extent, as it might have been, if they had never become members of the Union. The extent, to which the power of Congress to regulate navigation has been conferred, and to which it may be exclusively exercised, is ascertainable by ascertaining the simple fact, whether a vessel can be navigated from a port or place within the United States, to a port or place within a foreign country.

The second branch confers the power to regulate navigation "among the several States."

This power may also be exercised by Congress within the jurisdiction of the States, and upon fresh as well as upon tide waters with respect to vessels, which can carry on commerce among the States. Those vessels, and those only can be employed in such commerce, which can be navigated from some port or place within one State, to some port or place within another State. If they cannot be so navigated, they cannot be employed in commerce among the States. Congress may regulate the navigation of a vessel in all waters without regard to their distinguishing character, in which a vessel can be navigated from a place in one State to a place in another State; and this may include the navigation in waters between different ports or places in the same State, because such waters can be used for purposes of navigation among the States. Navigation upon the waters of

a State, which cannot be thus used, is not comprehended by the terms, in which the power is confided to the United States. It is subject to regulation only by the laws of the State, in which it is employed.

These rules are subject to a single exception; when a river, pond, or small lake, incapable of use for general purposes of navigation, constitutes the boundary in whole or in part, between the United States and a foreign country, or between different States of the Union, the passage of ferry boats and row boats from bank to bank above falls or rapids, which wholly obstruct the passage of vessels by them down the current, will afford no evidence, that the navigation upon these waters can be subject to regulation by the power of Congress.

No judicial decision has been noticed, which denies to a State the right to regulate the navigation upon its interior waters, which cannot be navigated in the manner before stated for purposes of commerce with foreign nations or among the several States. On the contrary, that right has been admitted in those judicial opinions which have been considered to advance the most extensive claims to the regulation of commerce and navigation by the United States.

In the case of *Gibbons* v. *Ogden*, 9 Wheat. 194, MARSHALL, C. J., observes, "Comprehensive as the word 'among' is, it may very properly be restricted to that commerce, which concerns more States than one. The phrase is not one, which would probably have been selected to indicate the completely interior traffick of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce, to which the power was to be extended, would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State." When speaking of the proper legislation of the States, the opinion states, "Inspection laws, quarantine laws, health laws of every

description, as well as laws for regulating the internal commerce of a State" are parts of the mass. Again, "If Congress license vessels to sail from one port to another in the same State, the act is supposed to be necessarily incident to the power expressly granted to Congress, and implies no claim of a direct power to regulate the purely internal commerce of a State."

With all deference it is submitted, that the power last named need not be claimed, and that it does not accrue as an incidental or implied power, that it is expressly granted by being necessarily included within the limits, to which the right of the United States to regulate commerce extends by the terms of the grant; and excluded from the limits, to which the right of a State to regulate its internal commerce may extend.

Mr. JUSTICE MCLEAN observes, in his opinion in the *Passenger Cases*, 7 How. 283, "Over the navigable waters of a State Congress can exercise no commercial power, except as regards an intercourse with other States of the Union or foreign countries." "All commercial action within the limits of a State, and which does not extend to any other State or foreign country is exclusively under State regulation. Congress can have no more power to control this, than a State has to regulate commerce with foreign nations and among the several States."

Mr. JUSTICE WAYNE, in his opinion in those cases, observes, "Those regulations which affect only the commerce carried on within one State, or which refer only to subjects of internal police, are within the powers reserved.

To Congress is granted the power to regulate commerce "with the Indian tribes."

No judicial opinion is known to have determined, that this branch of commerce included navigation. It was not the subject of examination in those cases, which decided, that commerce did include navigation."

The admission, that commerce includes navigation, is not intended to include commerce with the Indian tribes.

The language must have been used with reference to such commerce with them as was known to have existed. The

treaties made with them before the Union, and the ordinances made by Congress under the confederation recognize and provided for trade or traffick with them. But no national, conventional or statute law, or ordinance is known to have recognized or authorized navigation to be carried on with any Indian tribe. No vessel, it is believed, had then or has since entered or cleared as arriving from, or proceeding to the territory of any such tribe. The grant was made to regulate a commerce, which had at the time a well known character. Hence CHIEF JUSTICE MARSHALL, while presenting reasons for the conclusion, that the commerce, of which he was speaking included navigation, observes, "All America understands, and has uniformly understood the word commerce to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed." Let the same rule be applied to ascertain the meaning of commerce with the Indian tribes, and it will not be found to include navigation, but to include trade or traffick in goods and merchandize between those tribes and other persons.

Whatever may be the extent of the power, it cannot be construed to authorize Congress to regulate navigation upon the waters of a State, which cannot be used for purposes of commerce with foreign nations, or among the several States, without overruling the uniform declarations contained in the opinions of the Supreme Court of the United States, that the power to regulate commerce does not authorize the regulation of navigation on waters, which cannot be used for such purposes.

"The Indian tribes" referred to, were those tribes which were in a condition to determine for themselves with whom they would have commerce, or in a condition to have Congress determine it for them; and not those small tribes or remnants of tribes yet denominated tribes, which had before that time and have ever since continued to be under the control and guardianship of a State, and were without power to carry on commerce or trade, except by permission and under the regulation of the State laws.

That the Penobscot tribe of Indians were, when the constitution of the United States was framed and adopted, under the complete control of State laws, and without the power to conduct commerce or trade, except by permission of a State, will appear by a reference to State enactments.

So early as the year 1633 the general court of Massachusetts ordered "that no person whatsoever shall henceforth buy any land of any Indian, without license first had and obtained." In 1650 the French, Dutch and other foreigners were forbidden to trade with them. In 1657 that Commonwealth declared its right to all the fur trade with them, and forbid others to trade with them in furs. It had before that time forbidden the sale to them of guns, gunpowder, and other munitions of war. In 1693 an Act was passed "for the better rule and government of the Indians in their several places and plantations."

The first section provided for the appointment of persons "to have the inspection and more particular care and government of the Indians in their respective plantations;" and these persons were authorized to determine pleas betwixt party and party, and to punish criminal offences. Such a course of legislative control was, it is believed, continued until this State was separated from Massachusetts, although contracts denominated treaties were made with them by the State, for the relinquishment of their title to lands. By the Act of separation this State assumed the performance of all the obligations made by Massachusetts to the Indian tribes within her jurisdiction; and in the year 1821, passed an Act for the regulation of the Penobscot and Passamaquoddy tribes of Indians.

These laws will be ascertained by a reference to the ancient charters and statutes of Massachusetts, under the title, Indians. Neither the Congress under the confederation, nor the government of the United States, appear to have at any time exercised any control over, or to have made any contract or treaty with the Indians within the jurisdiction of Massachusetts or of this State. Vide American State Papers, title, Indian Affairs.

By the agreed statement it appears, that the Penobscot tribe of Indians "always have been, and now are under the jurisdiction and guardianship of this State." This tribe cannot therefore, be one of those referred to in the constitution of the United States.

The conclusion must be, that commerce with the Indian tribes did not include navigation, and if it did, that the Penobscot tribe was not one of the tribes referred to in the constitution.

It appears from the agreed statement of facts, that the boat owned and navigated by the defendants, was enrolled and licensed for the coasting trade at the port of Bangor.

This can be of no importance, if she cannot carry on that trade. The power of Congress to regulate commerce, can neither be enlarged nor diminished by a grant of, or by a refusal to grant, a coasting license. Such a license, when received by a vessel, exclusively and necessarily employed in the waters of a State, which cannot be used to carry on commerce with foreign nations or among the several States is wholly inoperative. It would be unauthorized by the laws or constitution of the United States.

It further appears by the agreed statement, that the Act granting the exclusive navigation by steam power, does not apply to any part of the Penobscot river, which is within eight miles of any place, from which a vessel can be navigated to a foreign port or to a port in another State. It is limited to that part of the river, from which no vessel can proceed and pass out of the limits of the State.

The provisions of the Act are not therefore, repugnant to any provision of the constitution of the United States.

A decree may be drawn by counsel and entered, to prohibit by injunction the defendants from navigating by boats propelled by the power of steam that part of the Penobscot river, in which a grant is made of the exclusive right of navigation in that mode, so long as such exclusive right shall continue; and for the recovery of costs.

CASE

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF YORK,

SPECIAL SESSION, JANUARY 21, 1851.

(By Adjournment from the September Term, 1850.)

PRESENT:

Hon. ETHER SHEPLEY, ll. d. Chief Justice.
Hon. JOHN S. TENNEY, ll. d. } Associate
Hon. JOSEPH HOWARD, } Justices.

CAPITAL CASE.

State *versus* James H. Smith.

The rule of the common law is in force in this State, that when the death of a human being occurs by the act of one, who is in pursuit of an unlawful design, without any intention to kill, it will be either murder or manslaughter, according as the *intended* offence is a felony or only a misdemeanor.

Whether such intended offence be a felony or a misdemeanor, is not to be ascertained by the common law classification of crimes, but by the classification made in our own statutes.

Any crime, *liable* to be punished by imprisonment in the State prison, is a felony. It belongs to the class of felonies, although by statute made pun-

ishable, in the alternative, *either* in the State prison, *or* the county jail, *or* by a fine.

In an indictment for murder, alleging the act to have been done with a specified instrument, it is not necessary to be proved that the act was done with that particular instrument. It will be sufficient if proved to have been done with some other instrument, if the *nature* of the violence, and the *kind* of death occasioned by it, be the same.

In an indictment, alleging that a pregnant female was murdered by the defendant, by his attempt to procure an abortion, it is not requisite to allege that she was *quick* with child.

Though such an allegation be inserted, it need not be proved; for as it is no part of the description of the offence, it may be rejected as surplusage.

An experienced physician, after having made a *post mortem* examination of the body of a female, may, *as an expert*, offer his opinion whether she had been pregnant, and what was the cause of her death.

Upon trial on such an indictment, the prisoner is to be presumed innocent, until proved to be guilty.

In order to a conviction upon such a trial, it is requisite that, in view of all the evidence, the jury believe, beyond a reasonable doubt, that the accused is guilty.

INDICTMENT, for the murder of one Beringera D. Caswell. It contained four counts.

The third count charged, in substance, that at, on, &c. Beringera D. Caswell was pregnant and *quick* with child, and that the defendant, intending to procure an abortion, did [in a certain described mode,] apply to the person of said Beringera a certain [described] metallic instrument, whereby he caused her to become sick and to die.

A witness testified, that he was an experienced medical man, and that he made a *post mortem* examination of the body. He was then asked by the counsel for the State, whether he believed the deceased had been with child, and if so, what were his reasons for such belief. This question was objected to. But it was allowed, on the ground, that the witness was an expert, and he stated his belief that she had been pregnant, and described the appearances of the body which led to that belief. He was also, against the objection of defendant's counsel, allowed to offer his opinion as to the cause of her death.

Clifford and *Wilkinson*, were counsel for the defendant.

Clifford submitted to the consideration of the court the following legal position: — Even if the facts are proved as alleged; they do not constitute the crime of murder.

1. It is an ordinance of the common law, now in full force in this State, that where death occurs by the act of one, in pursuit of an unlawful design, without any intention to kill, it will be either murder or manslaughter, according as the intended offence is a felony or only a misdemeanor.

In this case, it is not pretended there was any intention to kill. The government only allege, that the intent was to procure an abortion. That offence, at the common law, was not a felony. True, our statute has declared that felonies shall include all offences, punishable by imprisonment in the State prison. It is respectfully submitted whether that ordinance can be evaded by a change made by the Legislature, in the mere *name* of an offence.

2. If the common law ordinance is to be thus modified, the causing of an abortion is not, *by our statute*, made a felony. An offence, to be a felony, *must* be punishable in the State prison. But this offence is made punishable, *either* by imprisonment in the State prison *or* in the county jail, *or* by a fine.

In the construction of statutes, the principle is, that felonies shall not be created by implication, and that, "if the language be of doubtful import, the doubt shall operate in *favorem vitæ*."

The causing of an abortion, therefore, is not to be held a felony, even by our own statute, and consequently the death of Beringera, even if caused as alleged in the indictment, cannot amount to the crime of murder.

The Court, by Shepley, C. J., —

1. The rule, adverted to by counsel, touches those cases of homicide only, in which there was no intent to kill, and that rule is in force in this State. It was adopted however, without any view to perpetuate the ancient classification of offences, but with reference to such graduation of crimes as might from time to time obtain in this State.

2. By the Revised Statutes, c. 167, § 2, any offence, which *may be* punished by imprisonment in the State prison, is made a felony. If the offence be one, *liable* to *such* a punishment, it is a felony and its character in that respect does not at all depend upon the sentence which a court may pronounce.

The other legal positions, upon which the case was decided, are sufficiently exhibited in the following few particulars of the charge given to the jury by

SHEPLEY, C. J., — Gentlemen of the jury — Upon you, in some degree, depends the just administration of the law. If you disregard the law, the promises which it makes to the citizen, of life, liberty and the pursuit of happiness, become unreliable. But happily your course is a straight one, fraught with no difficulties. With the opinion of others, in the court room or out of it, you have nothing to do. If your duty be faithfully performed, you can, in no event have cause for regret.

The defendant is to be considered innocent, until his guilt be proved.

Does the evidence satisfy you : —

1, *that* the body, found in the brook, was that of Beringera D. Caswell ; —

2, *that* she was pregnant, and *that* the defendant, at her desire, had procured an abortion ; —

3, and *that*, in so doing, he caused her death.

[The evidence, as applicable to each of these inquiries, was fully recapitulated by the Judge.]

In examining the testimony, it is not requisite that you should believe a particular witness beyond all reasonable doubt ; but it is requisite that, in view of all the testimony, you should believe, beyond all reasonable doubt, that the defendant is guilty.

The indictment, in its third count, charges that the deceased was *quick* with child. Whatever allegation is descriptive of the offence, must be proved. But if the fact stated be merely

in aggravation, so that it may be stricken out, and yet leave the offence fully described, it may be rejected as surplusage. In order to fix upon the defendant the guilt of the offence charged upon him, it is not requisite to be either *alleged* or *proved*, that the deceased was *quick* with child. Such an allegation is not essential to the description of the offence. It is merely in aggravation, and you may disregard it. It is alleged in the indictment, that the death was caused by the use of a specified metallic instrument. But it is not necessary that the proof should show that it was done by that particular instrument. It will be sufficient, if proved to have been done by some other one, if the *nature* of the violence and the *kind* of death occasioned by it, be the same.

Whoever shall unlawfully kill any human being with malice aforethought, either express or implied, shall be deemed guilty of murder.

Whoever shall commit murder with *express* malice aforethought, or in perpetrating or attempting to perpetrate any crime, punishable with death or imprisonment in the State prison for life, or for an unlimited term of years, shall be deemed guilty of murder in the first degree.

Whoever shall commit murder, otherwise than above described, shall be deemed guilty of murder in the second degree.

For an illustration of murder, in the first degree, suppose *that* a person breaks into your house with a dangerous weapon, for the purpose of stealing your money; *that* he is detected and seized by your son, and *that* the robber strikes the son a blow by which his life is taken. Now the robber may have had no ill-will against your son, and no aforethought purpose to kill him; yet, as the crime, which he did intend, and did attempt to commit, is punishable by imprisonment in the State prison for life, and therefore a felony, the killing would be murder in the first degree.

To illustrate murder in the second degree, we may suppose a person should attack another and strike him a mortal blow with a deadly weapon; though there be no proof of previous

design or ill-will or unkind feelings, yet the law allows the malice to be implied; that is, it allows the inference of a heart void of human kindness, depraved and fatally bent on mischief.

Another case of murder in the second degree, and where the malice is implied, is when the killing is committed by a person, when in the perpetration of a crime, punishable by imprisonment in the State prison, such crimes being made felonies by our statute. As the wilful causing of an abortion is "punishable in the State prison," it is a felony; and if, in the perpetration of that offence, a killing occurs, the malice, making it murder in the second degree, may be implied.

The jury returned a verdict that the defendant was guilty of murder in the second degree. After having rendered that verdict, the court, at the request of the defendant's counsel, and by consent of the prosecuting officer, inquired of the jury, before they had left the jury box, whether it was upon the third count, that they rendered that verdict. They answered that it was upon the third count, and that they did not come to any finding upon either of the other counts.

Tallman, the Attorney General, by whom the case was argued for the State, then moved for sentence, and the defendant was sentenced to suffer imprisonment in the State prison for life, agreeably to Rev. Stat. chap. 154, sec. 3.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF YORK,

APRIL TERM, 1851.

PRESENT:

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

MOULTON *versus* POWERS.

Where, by the registered title, the divisional line of lands is described to be at a mark, a given distance from a monument, and the place of the mark is not identified, such given distance *may* be controlled by other evidence as to the locality of the line.

Of the degree or strength of testimony, necessary for the maintenance of an action of trespass *quare clausum*.

TRESPASS *quare*, for cutting trees on the plaintiff's land. The parties owned adjoining lots, and the divisional line was in dispute. The defendant's title was acquired and recorded in 1809, and his side line was described to be at a mark sixty-seven rods from a monument. The plaintiff's land, subsequently acquired by him, was bounded upon the said side

line. The mark cannot now be found. The lands near the border line have never been cultivated.

The plaintiff introduced proofs, (from trees anciently marked, and from his long continued habit of cutting wood and timber on the disputed territory, and from some acquiescences and recognitions on the part of the defendant, and from an ancient surveying and making of the line, by the ancestors of the respective parties,) tending to show that the *locus* was upon his own side of the true boundary.

The defendant insisted that the boundary was to be found at the end of the sixty-seven rods, and requested the Judge so to instruct the jury, but that instruction was refused.

The defendant's counsel also requested the Judge to instruct the jury, that, in order to entitle the plaintiff to a verdict, they must be satisfied, *beyond a reasonable doubt*, of the defendant's guilt. The Judge declined to give that instruction, but did instruct, that on the question whether the defendant cut *any* trees, without reference to the place of cutting, they must be satisfied that he did cut them; and that, on the question whether the trees, so cut, were on the plaintiff's side of the division line between the lands of the parties, they must believe that the evidence clearly preponderated in his favor. The verdict was for the plaintiff, and the defendant excepted.

Appleton and *Bourne*, for the defendant.

1. The defendant's title was manifested by the *record* only. The plaintiff, by bounding on him, takes the defendant's *record* boundary.

Distances are to govern when the site of the monument is unknown. Parole evidence is inadmissible to control the record, where the description is plain. No departure from the description of a deed can be allowed, except to conform to its boundaries. Ann. Dig. of 1847, page 116; *Pride* v. *Lunt*, 19 Maine, 115; *Machias* v. *Whitney*, 16 Maine, 343; *Heaton* v. *Hodge*, 14 Maine, 66; *Herrick* v. *Hopkins*, 23 Maine, 217; 20 Maine, 205; 25 Maine, 472; 4 Mass. 114; 13 Pick. 150; 13 Wend. 300; 11 N. H. 485 and 520.

A recorded line, referred to in a subsequent deed, is a monument, binding on the grantee.

2. Where an act of wrong, an act involving criminality, is charged, and where the verdict must be either guilty or not guilty, the evidence must be sufficient to remove all reasonable doubt. Trespass *quare* is such a case, and the onus is on the plaintiff. The presumption is in favor of the defendant, and a mere preponderance of evidence is not sufficient. Full proof is requisite, and full *proof* is that only, which dislodges all reasonable doubt. 1 Starkie on Ev. 478, 543.

The refusal to give the instruction might lead the jury to think they should find for the plaintiff, *without full proof.*

Where the affirmative of an issue remains doubtful, the jury should find for the party holding the negative. 16 Ohio, 324.

3. Where a certain train of facts is required to make an affirmative, each of those facts must be proved by equal evidence. There is no distinction as to the weight of evidence required to establish a line, and to establish an invasion of it.

A clear preponderance of testimony, does not necessarily differ from a mere preponderance. A jury might be led into error by either expression.

The word preponderance is of unusual occurrence to a jury. Its exact import might not be fully understood. Were they to understand that, if the statement of four witnesses be opposed to that of five witnesses, the latter *must* be believed, because they were a majority in number? If so, there would be error.

The charge prescribed different degrees of evidence upon the two branches of the case. This was uncalled for. Distinctions in the law of evidence should not be unnecessarily multiplied. 1 Greenl. on Ev. sect. 4; 11 Metc. 463; 5 Metc. 181; 1 Metc. 270.

D. Goodenow, for the plaintiff.

By the Court, per Wells, J. — There must be judgment on the verdict.

Patten *versus* Libbey.

In a suit to recover for an injury done to the plaintiff's horse, through the unskillfulness of the defendant, the expenses of doctoring and taking care of it cannot be recovered, *unless declared for as special damage.*

Exceptions from the District Court.

Case. The defendant, by consent of the plaintiff, attempted some treatment of the plaintiff's horse in order to increase its value. The result was unfavorable, and in consequence of it the horse died.

After the injury, the plaintiff sent for a horse-doctor, and expended time and money, in attempting a cure.

The declaration alleged that the horse was lost by the want of skill and faithfulness on the part of the defendant, and claimed to recover damage therefor.

The Judge instructed the jury upon the question of liability for unskillfulness, and also, that if they found a verdict for the plaintiff the amount to be assessed for him would be the "damage sustained by him in the loss of his horse, and that *they would be authorized to include, in addition, the amount of expenses properly incurred by the plaintiff in sending for a person skilled in disorders of horses, and in the care of the horse after the injury until its death.*" The verdict was for the plaintiff. The defendant excepted.

J. Shepley, for the defendant.

The instructions are erroneous, because they authorize the jury to include in their verdict, *special damages*, which are not specified in the plaintiff's declaration. Greenl. Ev. 2d ed. vol. 2, § 254, and notes; Chitty's Pl. 10th Am. Ed. p. 338, and p. 396, and notes; *Furlong* v. *Polleys & al.* 30 Maine, 493.

Wilkinson and *Tapley*, for the plaintiff.

1. The plaintiff is entitled to an indemnity for the damage sustained by the fault of the defendant. In such cases, all damages, which are the natural and proximate consequence of the wrong, must be included. *Longfellow* v. *Quinby*, 29 Maine, 205; 2 Greenl. Ev. § 268, 253, and 635; *Watson* v. *Lisbon Bridge*, 14 Maine, 201; *Dickinson* v. *Boyle*, 17 Pick. 79. In actions of tort, the declaration involves not only the principal wrong, but its injurious results. 16 Conn. 200. The expenses in doctoring and taking care of the horse were the "natural and proximate consequence of the wrong," and "the necessary result of it," and not "special damages." An utter neglect of the horse, in its injured condition, would have been unnatural and unjustifiable.

2. The plaintiff was bound to use diligence and faithfulness in order to reduce the damages which the defendant would be held to pay. 7 Greenl. 51; 17 Pick. 288; 2 Greenl. Ev. § 261.

Had not a cure been *attempted*, the defendant would have justly complained that his rights had been disregarded.

The want of an allegation of special damage was cured by the defendant's neglecting to object to the testimony on that point.

The instructions may have been given in view of the waiver by the defendant of an allegation of special damage. 2 Greenl. Ev. § 254; 1 Chitty's Pl. page 399; *Waite* v. *Maxwell*, 5 Pick. 220; *Rice* v. *Bancroft*, 11 Pick. 472; *Curtis & al.* v. *Jackson*, 13 Mass. 513; *Jacobs* v. *Bangor*, 16 Maine, 187.

Howard, J. — The instructions of the Judge of the District Court, as to the measure of damages, cannot be sustained. Special damages were not declared for, and, as they were not the necessary or inevitable result of the alleged wrong, cannot be claimed or recovered in this action.

Exceptions sustained, verdict set aside, and a new trial granted.

EMERSON *versus* NOBLE.

The penalty for selling prohibited liquor, without license, may be incurred, although the sale was upon credit, and although the law furnishes to the seller no means of enforcing payment for it.

EXCEPTIONS from the District Court.

Debt, upon the statute of 1846, chap. 105, to recover a penalty for a sale by the defendant, of prohibited liquor, without license.

The plaintiff's evidence was in substance, *that*, at the defendant's place of business, one Sargent called upon the defendant for a pint of brandy, telling the defendant he had no money then, but promising to pay for it; and *that* the defendant furnished it, but was never paid for it.

The Judge ordered a nonsuit.

Luques, for the plaintiff.

Wilkinson, for the defendant.

The facts show no sale, but merely a gift. Act of 1846, chap. 205, sect. 1 and 5; Story on Contracts, sect. 778.

Even if a sale was intended, no sale was effected.

In order to a sale, there must be payment, or a remedy to enforce a payment. No payment was made to the defendant, and the law prohibits any suit to recover it. Sect. 10; *Commonwealth* v. *Thayer*, 8 Metc. 525.

When the plaintiff's evidence could not warrant the jury in finding a verdict for him, it is lawful for the Judge to direct a nonsuit. *Pray* v. *Garcelon*, 17 Maine, 145.

WELLS, J. — It is contended on the part of the defendant, that the action cannot be sustained, because, as the price of the liquor could not be recovered, there was not a contract of sale. It is true, that according to the principles of the common law, in a sale of property there must be a valuable consideration, and if it be voluntarily transferred without such consideration, it is a gift.

The price of the liquor sold in violation of law could not be recovered, for such recovery is prohibited in express terms

by the Act of 1846, chap. 205, sect. 10, and if paid, it can be recovered back by virtue of the provisions of the eleventh section of the same Act. The intention of the Legislature must be gathered from the whole Act, not only in relation to its provisions generally, but as to the meaning of the words, which it employs. The purpose is manifest to inflict a penalty upon the sale of liquor without license, and to prohibit a recovery of the price when sold on credit. And the statute considers a sale as having taken place, although the liquor is not paid for on delivery, but by the agreement, payment is to be made at a subsequent time. The inability of the seller to coerce payment by legal process, does not in contemplation of the statute so far change the character of the transaction, as to prevent it from being considered a sale. It is not a gift, for there is an expectation that the price will be paid.

The facts stated in the bill of exceptions are sufficient to authorize a jury to find a sale of liquor, within the meaning of the language used in the statute, and these facts should have been submitted to them for their determination.

The nonsuit is taken off,
and a new trial granted.

POWERS *versus* GOWEN.

One of the joint makers of a promissory note can maintain no action for contribution, unless he has paid upon the note, more than the defendant has; even though there should be other joint makers, who are insolvent.

EXCEPTIONS from the District Court, COLE, J.

Assumpsit on the money counts.

Hayes & Cogswell received a note of $4560, payable in five years with interest annually, and signed by the plaintiff, and the defendant with two other persons, and gave to the signers a bond to convey to them a tract of timber land, if the note should be paid. They however, in said bond, reserved the liberty to operate upon the land, stipulating, that the avails of

the operation should be indorsed on the note. They accordingly lumbered on the land, under that reservation. Toward the interest the plaintiff paid $50, and the defendant paid $800.

The receipts, given by Hayes & Cogswell to the defendant for this payment was handed by *his* counsel to the *plaintiff's* witness and read by the witness in the hearing of the jury.

The other two signers, after paying toward the interest $186,80, in unequal sums, had become insolvent. A further amount of interest having accrued, Hayes & Cogswell sued this plaintiff alone for it, and recovered therefor an execution of $522,19, and afterwards indorsed upon the same that they had received its contents by *Powers' share* of the lumbering operations. The other three signers of the note were each entitled to a share of the lumbering equal to what Powers was entitled to.

A nonsuit was ordered and the plaintiff excepted.

The case was submitted without argument for the plaintiff.

J. Shepley, for the defendant.

1. This action is brought for contribution, on the ground, that two of the joint makers of the note had become insolvent. But the plaintiff had no cause of action against either of them. He had paid the least of either of the four makers. The receipt on the execution could give no right of action against either. It was only an acknowledgment of having received from Powers a share of the joint avails of the lumber, which share was just equal to what each of the other makers were entitled to be allowed.

2. But, if two of the joint debtors had become insolvent and were in arrear, as compared with either this plaintiff or this defendant, yet the plaintiff cannot recover against the defendant, till he has paid more than the defendant has. But the plaintiff has not paid so much as the defendant has.

3. This action must fail, because the plaintiff has not paid so much as his own quarter part of the note.

Again, unless the whole principal as well as the interest of

the note had been paid by Powers, it would not have been of any benefit to this defendant, because Hayes & Cogswell were not bound to convey the land, till the last dollar was paid to them.

SHEPLEY, C. J. — This suit appears to have been commenced by one of the makers of a promissory note against another maker for contribution.

The plaintiff does not appear to have paid so much upon the note as the defendant; and the larger portion of what he has paid was derived from the common estate, for which the note was made in payment.

Under such circumstances a nonsuit was properly ordered.

Exceptions overruled.

STACKPOLE *& al. versus* CURTIS.

The grant of a "mill site" conveys a water power, together with the right to maintain a dam wherever such dam would be suitable for the convenient and beneficial appropriation of the water power.

To establish a prescriptive right of flowing water by a dam for the use of a mill, it is not necessary that the dam should have been maintained, for the whole period, upon the *same spot;* it is sufficient, if shown to have been maintained upon the *same mill site,* though removed, from time to time, to *different places* upon such *site.*

PROCESS to recover damage for flowing the complainants' land by a mill-dam. The respondent pleaded by brief statement, that he and those under whom he claims, had, for more than twenty years, maintained a dam upon the same "*place,*" upon which stands the dam now complained of, to as great a height, &c.

Evidence upon that question was submitted to the jury.

The facts proved, so far as necessary to be presented, appear in the opinion given by the court.

SHEPLEY, C. J. instructed the jury that, if the respondent's dam was erected upon the same *site,* of the ancient dam, (and

if, in other respects, the prescription was maintained,) the defence was established.

The verdict was for the respondent. The complainants excepted.

J. Shepley, for the complainants. The pleading was, that the dam was erected upon the same *place* of the ancient dam. This allegation it was incumbent upon the respondent to prove. 1 Greenl. Ev. § 58, 63, 69, 71; 2 Greenl. Ev. § 539; 2 Stark. Ev. (Boston ed. in 2 vols.) 667; 3 Kent, 547.

The right acquired by prescription extends no further than to the extent of the user, out of which the right springs.

The instruction to the jury was, that the respondent is protected, if his dam was, (not upon the same *place*, but,) upon the same *site* of the ancient one. The word "*site*" is of broader import than the word "*place.*" It gave to the respondent a protection, though his present dam may be at a great distance from the former one. We submit that this ruling was erroneous.

Bourne, for the respondent, cited 1 Dane's Ab. 529; *Richards* v. *Squibb*, 2 Esp. 26; *Cottel* v. *Luttrel*, 4 Co. 86; *King* v. *Tiffany*, 9 Conn. 167; Angell on Water Courses, 170; *Cooper* v. *Barker*, 3 Taunt. 99; *Cary* v. *Daniels*, 8 Metc. 467; *Branch* v. *Doane*, — Conn. 402; *Buddington* v. *Bradley*, 16 Conn. 213; *Bealy* v. *Shaw*, 6 East, 208; *Davis* v. *Brigham*, 29 Maine, 402; *Hatch* v. *Dwight*, 17 Mass. 269; 15 Johns. 213, *per* THOMPSON, C. J.; 13 Johns. 212, *per* PLATT, J.

There was also a motion for a new trial: —

1. Because the verdict was against the evidence given on the trial.

2. Because the verdict was not only without any evidence to support it, but was contrary to and against the uncontradicted evidence, introduced by the respondent himself at the trial.

3. Because the verdict was against the weight of evidence.

4. Because the verdict was against law.

5. Because the verdict was against the law, as stated to the jury by the presiding Judge at the trial.

SHEPLEY, C. J. — The defence presented was a prescriptive right to flow the lands of the complainants. The mill-dam and saw-mill of the respondent were not erected at the same place, where a former mill-dam and saw-mill owned by Jeremiah Bettes had been erected, by the use of which the prescriptive right was alleged to have been acquired.

The respondent's mill and dam had been erected on land formerly owned by Bettes at a place, where Bettes had for many years maintained another dam and a grain-mill thirty-one and a half rods below his saw-mill.

The jury were instructed that it was necessary to maintain the prescription, that the respondent's "mill and dam should be on the same *site* with the preceding Bettes dam and mill." "If on the same *site*, and the prescription was otherwise maintained, their verdict should be for the respondent."

The cases cited by the counsel for the respondent show, that the word "site" is used in judicial proceedings, when mills and water rights are spoken of, as comprehending a fall of water suitable for the erection and use of mill-dams and mills. Such a fall of water being denominated a mill site, or mill seat. The use of the word in this sense is believed to be so common, that the jury probably understood, that the word was used in the instructions in this sense.

If used in this sense it is insisted, that the instructions were erroneous. That the brief statement of the respondent alleges, that the right to flow was "conveyed to the then owners of the dam and mill, then standing on the same place;" and that the prescription must be proved as alleged.

The grant is alleged to have been made to the owners of a mill standing on the same place as the present mill. It is not alleged, that they were by the grant restricted to the use of the water at one particular place. Nor is it alleged that the grant was to flow by a dam standing at a particular place. If a

grant be made to a person owning a dam and mill erected at a particular place of a right to flow the lands of the grantor, the grantee is not necessarily restricted to the use of the water at the precise place, where it was used, when the grant was made. When the grant is made to the owner of a mill without words of limitation or restriction, the intention of the parties and the true construction of the grant must be ascertained from the language used and the circumstances or facts existing, when the grant was made. The grantor would understand, *that* the grantee desired to have the full use of the water for his mill and privilege without being subject to the payment of damages for any injury occasioned by the flowing of the water upon the adjoining lands; *that* the existing dam and mill might decay; *that* others might be erected; *that* the grantee might be expected to erect them on the mill site then used, on the place most convenient and useful. He could not be expected to anticipate, that the grantee would erect a dam and mill on a different mill site and claim a right to flow the water for the use of such a mill.

It would be reasonable to conclude, that it was the intention of the parties, that the grantee might cause the water to be flowed upon the lands of the grantor to the extent of the grant for the use of mills upon that mill site at any place most convenient and useful.

If the right to use the water in this case be regarded as acquired by the exercise of rights, adverse to those of the owner of the land, the person, who caused the water to be flowed, cannot be supposed to have asserted a right more restricted than he would have obtained by an unrestricted grant. He should be regarded as asserting a right co-extensive with his necessities. It being necessary for the profitable use of his water-fall or water power to cause the water to flow upon the lands of others, the just inference is, that he asserted the right to flow, to enable him to make use of that water-fall or water power.

It accordingly appears from the cases cited, as well as from

other decided cases, that a prescriptive right to cause water to be flowed, has not been regarded as appurtenant to a mill or dam erected in one particular place on a water-fall, but as appurtenant to the water privileges or water power, which cannot be used without occasioning the water to be flowed.

If one grant to the owner of a water-fall the right to flow his lands to a certain extent, it cannot be material to him, whether the flowing be occasioned by a dam erected some rods higher or lower upon that water-fall.

Prescription being founded upon the presumption of grant, should be regulated by such a construction as the grant would receive.

The counsel for the complainants contend, that the testimony proved, that there were two separate and distinct mill sites. One used for the grain-mill and dam, which could be, and was used without causing the water to flow upon the adjoining lands; and another used for the saw-mill and dam, which was not used without causing the water to flow upon the adjoining lands to some extent. Such does appear to have been the state of facts, while both those mills were used. It is also true, that both were owned by the same person, the grain-mill being used only when it could be by water first used for the saw-mill.

The jury might be authorized by the testimony to conclude, that the grain-mill could not be used to advantage, if the water had not been flowed and preserved by the dam erected at the saw-mill. The grain-mill would then become dependent upon the flow of the water for its profitable use, and the water privilege would become substantially one, although used for the working of different kinds of mills.

There may be several mills upon one water-fall or mill site, all deriving their motive power from the same head of water, while the water is used for some of them upon a lower level than for others.

The grain-mill appears in this case to have been removed, because it was of little or no value. This, with other testi-

mony, might induce the jury to conclude, that there was but one mill site or place for a mill upon that water fall; and that water for the working of one mill only could be supplied by the stream.

The language used in some of the deeds of conveyance speaks of "mill privileges," "Fletcher's mills" and "Fletcher's two saw-mills," but this language has reference in part to another ancient saw-mill, which once existed further down the stream than the grain-mill; and it does not materially affect the question submitted to the jury, whether the existing saw-mill and dam were erected upon the same site as the former saw-mill and dam owned by Bettes.

Under such circumstances the court does not perceive, that the jury must have acted under some improper bias or influence in coming to their conclusion.

Exceptions and motion overruled.

ANDREWS *versus* WHITE.

The traveling from place to place, *though within the same town*, for the purpose of vending goods, wares and merchandize, without having obtained license therefor, is a violation of the statutes of 1846, c. 200, and of 1848, c. 63.

EXCEPTIONS from the District Court, COLE, J.

Debt, to recover a penalty, upon the charge, that the defendant, *at Biddeford*, did presume to travel, and did travel from place to place for the purpose of vending goods, wares, &c. without license.

The defendant contended, that the penalty is not incurred by traveling for such purpose in a single town. But the Judge instructed the jury, that traveling from place to place *in the same town*, in the manner and for the purposes described in the declaration, would be a violation of the statute.

The defendant excepted.

Leland, for the defendant.

"From place to place," in the statute, means "from a place

in one town to a place in another." And yet the declaration alleges the defendant's acts to have been all done in one town, Biddeford.

The declaration was defective in its description of places. They may have all been in one house.

It was error in the Judge to refer the jury to the declaration in the writ.

Goodwin, for the plaintiff.

HOWARD, J. — The plaintiff declared for a forfeiture, alleged to have been incurred by the defendant by traveling "from place to place," in the town of Biddeford in this State, "for the purpose of vending sundry goods, wares and merchandize, without having obtained any license therefor," contrary to the provisions of the statutes of 1846, c. 200, and of 1848, c. 63, relating to hawkers and pedlers. The question presented by the exceptions is, whether traveling "from place to place" in the same town, in the manner, and for the purposes mentioned in the declaration, would constitute a violation of these statutes. The Judge of the District Court instructed the jury, that it would constitute such violation.

It has been decided, that the phrase "from place to place," in statutes conferring jurisdiction for the location of highways, authorized their establishment from one place in a town to another place in the same town. *Commonwealth* v. *Cambridge*, 7 Mass. 158; *New Vineyard* v. *Somerset*, 15 Maine, 21; *Vassalborough* v. *County Commissioners of Kennebec*, 19 Maine, 338; *Harness* v. *County Commissioners of Waldo*, 26 Maine, 353; *Windham* v. *County Commissioners of Cumberland*, 26 Maine, 406.

The statutes, "in relation to hawkers and pedlers," appear to have been drawn with special intent to extend their prohibitions equally throughout the State. If the phrase "from town to town," only, had been used, the business of peddling could have been successfully prosecuted, perhaps, within cities, villages and populous towns, and in large tracts of territory

unincorporated, without restriction, but by the use of the phrase "from place to place," after the phrase "from town to town," the object of the Legislature would seem to have been effected, and the prohibitions made so general and definite as to affect the traffic in all parts of the State. Wherever, therefore, a person can travel in the State, for the purpose of vending goods, wares and merchandize within the prohibition, there he may incur the penalty provided by statute.

The exceptions to the charge of the Justice of the District Court, and to his refusals to rule as requested, must be overruled.

LITTLEFIELD *versus* GETCHELL.

Declarations of a party, made more than two years prior to a conveyance of land to him, and having no connexion with it, are not admissible as evidence to prove fraud in the conveyance.

If the owner of land have released the covenants in the deed of his grantor, no action can be maintained thereon by any subsequent assignee of the land.

In order to protect the grantor against such an action, it is not necessary that the release be recorded.

WRIT OF ENTRY. — The demandant conveyed the premises by a conditional deed to Jos. L. Getchell, who afterwards conveyed the same by warranty deed to the tenant in 1842. The demandant, in 1848, re-entered for condition broken.

The tenant introduces a deed of release made by the demandant to him in 1845, purporting to be in consideration of one dollar. The demandant contends that this release was fraudulently obtained, and offered a witness to prove that the tenant, when purchasing the land of Joseph, in 1842, offered to the demandant $100 for such a release. This testimony was excluded, by TENNEY, J., presiding.

The tenant having released said Joseph "from all the covenants" in his said deed, introduced him, (against the demand-

ant's objection on the ground of interest,) and examined him as a witness.

The verdict was for the tenant, and exceptions were filed by the demandant.

Goodenow and *Appleton*, for the demandant.

1. The rejected testimony was admissible. It tended to show the tenant's knowledge and participation in the fraud. 1 Pick. 351; 2 Pick. 184; 16 Mass. 384; 1 Story's Eq. 194, c. 6, § 186, 197, 218, 222, 308, 310, 311, 315.

2. Joseph L. Getchell was not made a competent witness by the release. He had an interest to avoid liabilities on his covenants to those who might purchase the land from the tenant. The fact, that a verdict cannot be used in evidence, is not a universal test of competency. In the case of *Bowman* v. *Whittemore*, 1 Mass. 242, the opinion of SEDGWICK is the better law. 3 Greenl. 462; 6 Greenl. 368 and cases there cited; 14 Maine, 30; 4 Mass. 653; 5 Mass. 144; 20 Maine, 307; 6 Maine, 457; 29 Maine, 530; Greenl. Ev. § 386.

Leland, for the tenant.

SHEPLEY, C. J. — The demandant being the owner conveyed the premises, containing about two acres of land with a dwellinghouse thereon, with other lands to Joseph L. Getchell, on May 9, 1842, by a conditional deed; who conveyed the same to the tenant on August 15, 1842.

On February 15, 1845, the demandant released to the tenant all right, title and interest in the premises demanded, and in another lot containing about twenty acres. This conveyance is alleged to have been obtained by fraud.

It appears that Joseph L. Getchell desired to sell the lot last named to the tenant, who was unwilling to purchase it, unless he could obtain a confirmation of his title to the lot first named.

The demandant proposed to prove, that the tenant at the time, when he purchased the lot first named, "offered to pay the sum of $100, if the demandant would release to him the

condition in his deed to Joseph L. Getchell as to the house, and that the demandant refused to do it." This proposed testimony was not received ; and its exclusion constitutes the first cause of complaint. It could have proved only, what sum the tenant was willing to have paid in the year 1842, to make his title perfect. The circumstances might have materially altered before he made the purchase in 1845.

Declarations made between two and three years before the fraud was alleged to have been committed, and having no connexion with the last conveyance, could have no proper tendency to prove, that it had been obtained by fraud ; and they might well be excluded.

Although Joseph L. Getchell had received a full release of the covenants contained in his deed to the tenant, his competency to testify as a witness for the tenant was denied ; and his testimony was received.

It is insisted, that he would still be liable on his covenants, which would run with the land, to any future grantee of the tenant.

When the tenant executed that release he was the owner of the land, and he alone was entitled to the benefit of those covenants. He therefore could legally discharge the witness of their burthen.

The registry of conveyances was designed to exhibit the titles to real estate ; not the rights of action, which grantees might acquire by the covenants contained in the deeds of conveyance.

The deeds of defeasance required to be recorded, by statute chap. 91, sect. 27, are such as operate upon the title to real estate ; not such as operate only upon covenants, upon which personal actions may be maintained.

Purchasers are not entitled to regard the registry as affording information respecting their rights of action on covenants contained in the deeds recorded.

In the case of *Chase* v. *Weston*, 12 N. H. 413, the re-

lease of covenants running with the land decided to be ineffectual was made by one, who had previously conveyed the estate.

Exceptions overruled.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF CUMBERLAND,

APRIL TERM, 1851.

PRESENT:

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

EZRA C. ANDREWS *versus* SENTER.

A party, for whose benefit a condition subsequent is attached to a devise of real estate, being in possession, at the time of a breach, is *presumed* to hold for the purpose of enforcing the forfeiture.

Such party may waive the forfeiture.

Acts, inconsistent with the claim of forfeiture, may sufficiently evidence such waiver.

Several lots of land, belonging to a non-resident proprietor, were by the assessors inventoried and valued separately. They were taxed, not in separate sums, but in an aggregate sum; and were by the collector advertised as separate lots, specifying a tax upon each; — *Held*, that a sale of them all, *in solido*, for a gross sum, for payment of the tax, conveyed no title.

In tax sales under the Act of 1826, chap. 337, unless the collector "record and return to the treasurer, his particular doings" within thirty days, as required by the 8th section, the sale is void.

So also it is void, unless the return designate or describe the land sold.

WRIT OF ENTRY, for a lot of land in Portland.

Andrew S. Marwick owned the demanded premises, and by his will, approved in 1833, devised the same to his wife, Elizabeth, upon condition that she should support his mother, Mrs. Lydia Marwick, (who was his heir-at-law,) in a comfortable and suitable manner. The demandant derives title under a conveyance from said Elizabeth, made in 1834. This title is contested upon the alleged ground that the support, secured to Lydia by the condition of the will, was not furnished, whereby the land was forfeited to her. She died in 1844. The tenant makes title by a conveyance from her heirs-at-law, dated in 1849. In 1850 he entered for condition broken. Upon the question of forfeiture, there was much evidence, and it was submitted to the consideration of the court, in whose estimation it proved that the condition in the will had not been performed. Whether Lydia took the requisite measures, by entry or otherwise, to perfect a forfeiture, or whether she waived the delinquencies, as to her support, became a material inquiry.

The tenant, also claims title to the land by a deed to him from one Jones, to whom it was deeded by the collector, upon a sale for the payment of taxes, of the year 1841.

In that year, the inventory and valuation of the demandant's non-resident land, was as follows: —

Ezra C. Andrews of Boston,	*Amount of Estates.*
House, Spring Street, $150. — do., Munjoy, $200.	$350

In the "tax book, the entry was —

"Ezra C. Andrews. — Tax on estates, $3,85."

The description in the collector's advertisement was; —

Names of non-residents.	*Description of prop.*	*Value.*	*Tax.*	*Am't of tax due.*
Ezra C. Andrews, 1841.	House, Spring St.	$150	$1,65	
Ezra C. Andrews, 1841.	House, Munjoy.	200	2,20	$3,85

The collector made to the treasurer a written return of the sale, in the following form, bearing date more than thirty days after the sale.

List of real estate sold for taxes, June 28, 1843.

Who taxed to.	*Who bought.*	*Amount tax.*	*Amount cost.*
Ezra C. Andrews.	Henry Jones.	$3,85	$2,61

Fox, for the demandant.

Lydia Marwick, for whose benefit the condition in the will was inserted, was satisfied with the support furnished her, and waived any further support than such as she received from the demandant; the tenant, therefore, cannot take advantage of the breach. 1 Hilliard's Real Prop. 369; Greenl. Cruise, title XIII. Estate on Cond. 47; 1 Conn. 79.

She was the heir at law of the devisee, and could alone enter for breach. 2 N. H. 120; *Marwick* v. *Andrews*, 25 Maine, 530.

The persons who were the heirs of Andrew S. Marwick, at the time of the breach of the condition, can alone enter; and if they do not, but waive the entry, their heirs acquire no right; it is such a chose in action, as does not pass by descent. When once waived by a party entitled to the right, it is gone forever.

The *tax title was void;* because no *return* or *record* was made according to the requirements of the statute of March 6, 1826. *Shimmin* v. *Inman*, 26 Maine, 233.

It was the duty of the collector to *record* and *return* to the treasurer "his particular doings in the sale within 30 days."

The two pieces of land should have been sold separately, each for its own tax; and not together, for the whole amount of both taxes. *Hayden* v. *Foster*, 13 Pick. 492; *Wallingford* v. *Fiske*, 24 Maine, 390; *Moulton* v. *Blaisdell*, 24 Maine, 284.

Rand, for the tenant.

A. S. Marwick devised the demanded premises to his wife on *condition*. *Marwick* v. *Andrews*, 25 Maine, 525.

The evidence shows that the condition was not complied with.

Lydia Marwick, the heir-at-law of Andrew, was always in possession of demanded premises; and where the person, entitled to take advantage of the breach of condition, is already in possession, a formal entry is not necessary.

Hence the estate, upon the forfeiture, vested in her. *Hamilton* v. *Elliot*, 5 S. & R. 375; *L. & K. Bank* v. *Drummond*, 5 Mass. 321; *Frost* v. *Butler*, 7 Greenl. 229.

But if no forfeiture, yet by the tax sale, the title is in the tenant.

By Stat. 1831, chap. 501, it is sufficient to produce in evidence: —

1. Collector's deed recorded.
2. Assessments signed by assessors.
3. Warrant of assessors to collector.
4. Proof that collector complied with the law in advertising and selling.

Such evidence is made conclusive, and it was all furnished in this case.

SHEPLEY, C. J. — The devise of this estate by Andrew Scott Marwick to his wife Elizabeth, was decided in the case of *Marwick* v. *Andrews*, 25 Maine, 525, to have been upon condition subsequent; and that her title was liable to be defeated by an omission to perform the duties required by the condition. Whether the devise be regarded as imposing upon the devisee a personal trust or not, the testimony proves, that there has not been a performance of the condition by the devisee or her grantee.

Lydia Marwick, for whose use the condition was to be performed, was the heir-at-law of the testator, and she occupied the premises to the time of her decease. It is therefore insisted, that no formal entry was required of her to create a forfeiture of the estate.

The law will presume, that a person, who cannot make a formal entry upon the estate of another for condition broken, because he is already in possession, intends to hold possession to enforce all his legal rights, unless there be some indication, that such was not his intention, by which the presumption of law may be rebutted.

When the facts disclosed are inconsistent with a claim to hold for condition broken, the presumption will be rebutted, or the person entitled to make an entry will be considered as having waived a performance of the condition. Forfeitures are not favored by the law; and any acts of the party entitled

to cause a forfeiture, clearly inconsistent with a claim to be the owner of the estate by forfeiture, must be regarded as proof, that performance of the condition was not intended to be enforced for the purpose of creating a forfeiture.

Lydia Marwick appears to have died in the month of March, 1844. Although she had not been supported in the manner required as a condition of the devise, she had continued to receive from those, who claimed to be the owners of the estate under the devise, assistance and a partial support, until nearly, if not quite to the close of life.

When the demandant was notified in the month of November, 1841, by some of her relatives, that she was poor and destitute, he replied, that he had paid as much for her support, as the land was worth. It appears from the testimony of Charles Blake, that he, at the request of the demandant, furnished her with bread, meat, and wood, whenever she called for them, from December 13, 1841, to June 6, 1843; and yet she appears to have been in the alms-house from March 8, to May 1, 1843. She appears to have been supplied with such articles as she called for, from the provision and grocery store of James Stetson, and from a store kept by the demandant during the year 1842.

She appears to have informed Doct. John Merrill three or four weeks before her decease, that Mr. Blake supplied her by demandant's request with what she wanted.

This continued reception of supplies from the demandant, as owner of the estate, was wholly inconsistent with a claim on her own part to be the owner of it, and with a denial of the rights of the demandant as owner.

The legal presumption, that she was holding the estate as forfeited is rebutted by the proof; and she must be regarded as having omitted to claim it as forfeited, or as having waived a more perfect performance of the condition.

In the case of *Frost* v. *Butler*, 7 Greenl. 225, a reception of part of the produce of the farm was not regarded as a waiver, only because the person claiming a forfeiture would

be entitled to receive it consistently with his claim to hold the estate for condition broken.

The formal entry for condition broken made by the tenant in the month of January, 1850, nearly six years after the decease of the person, for whose benefit the condition was inserted, can have no effect upon the rights of the parties.

The tenant presents a conveyance made by a collector of taxes assessed during the year 1841, upon the premises. This title to the premises cannot be sustained.

Admitting, that its validity must depend upon the regularity of the proceedings in making the sale, and not upon the legality of the assessment, it appears upon the proof presented, to be fatally defective.

Although the collector appears to have advertised separately two lots owned by the demandant with the amount of the tax upon each, he appears to have sold them together for the amount of the taxes due upon both of them. This appears from his return made to the treasurer; and there is no other proof, that each lot was sold separately for the collection of the amount of taxes assessed upon it.

The collector does not appear to have recorded and returned to the treasurer within thirty days after the sale "his particular doings in the sale," as required by the act of March 6, 1826, c. 337, § 8. His return, which was signed more than thirty days after the sale, contained no designation or description of the land sold. If it had been made in season, the owner could not have ascertained from it, whether any or what land of his had been sold.

Tenant defaulted.

LEIGHTON *versus* LEIGHTON *& al.*

The equity jurisdiction, given to this court in cases of waste, is confined to cases of technical waste; cases in which there is a privity of estate.

PETITION for an injunction, alleging *that* the plaintiff now

owns and possesses, and for the last fifty years, has owned and possessed a twenty-eight acre lot of land, upon which there is growing a large quantity of valuable wood and timber; — *that* one of the defendants has been committing strip and waste thereon, without any right or title, and without the consent and against the will of the plaintiff, by cutting and hauling away the wood and timber, for which the plaintiff has instituted against him an action of trespass, now pending; — *that* both the defendants have expressed a determination, and made preparations, to commit further strip and waste, in the same way, against the will of the plaintiff; — *that* such strip and waste would be to the plaintiff an injury which could not well be compensated by any damages, which he would be likely to recover; — *that* the defendants are men of no pecuniary responsibility; — and *that*, if the strip and waste be persisted in, the plaintiff must be without remedy.

Wherefore the plaintiff prays *that* the defendants be required to set forth, upon oath, what amount of wood and timber they have, either jointly or severally, carried away, or caused to be carried away, from the premises, or cut thereupon; — *that* they be decreed to make payment for the same, and *that* they be restrained by a writ of injunction from any further strip and waste.

The defendants demurred to the bill for causes noticed in the argument.

Deane, for the defendant.

1. The bill shows that the plaintiff has a plain and adequate remedy at law. R. S. chap. 96, sec. 10; *Webster* v. *Clark*, 25 Maine, 313; R. S. chap. 169, sec. 3.

2. Waste can be committed only by a person having some privity of estate, or some kind of tenancy in the premises. Eden on Injunction, chap. 9, page 115 to 129; Story's Equity Com., vol. 2, sect. 913 and 919; R. S. chap. 129, secs. 1, 6 7, 11, 14, 15, 16.

3. Courts of equity will not grant injunctions in matters of "trespass," except in case of *irreparable* injury, which cannot be prevented in any other way. Eden on Injunction, c.

9, page 139, 1st ed.; *Johnson* v. *Lord Byron*, 7 Vesey, 308; Eden on Injunction, c. 9, page 318. *Stevens* v. *Beekman & als.* 1 Johns. Ch. 138, is a case very similar in all its features and directly in point.

4. The plaintiff has a plain and adequate remedy at law for any injury threatened against his property. R. S. c. 169, § 3, 4, 5, and 6.

5. If the bill as presented does not exhibit a case for the interference of a Court of Equity, it will be dismissed on demurrer. *Reed* v. *Johnson*, 24 Maine, 322.

It is not sufficient, that the case be one of which courts of *general equity powers* could take jurisdiction. It must be a case coming within the limited jurisdiction given by our statutes. *Reed* v. *Johnson*, 24 Maine, 322.

Fessenden and *Willis*, for the plaintiff.

By c. 96, § 11, "this court may issue writs of injunction in all cases of equity jurisdiction, whenever necessary to prevent injustice." This case is within a general equity jurisdiction, and the necessity is urgent. If our claim were only for past damages, the equity jurisdiction of this court would not attach. But we ask prevention. If we can hold for one purpose, the court will take cognizance of the whole. But if entitled to the injunction only, our process is not defeated by asking more.

This court has jurisdiction of waste, in the modern import of that term. 2 Story's Eq. Plead. § 918, 919, 925, 926, 928, 929; *Jerome* v. *Ross*, 7 Johns. Ch. 321, 322, 328, 330, 332.

WELLS, J. — The plaintiff in his bill alleges, that the defendant, Leighton, has committed strip and waste upon his land, described in the bill, by cutting and hauling away the wood and timber growing on it, that he has commenced an action of trespass against the defendant, which is now pending, and that both of the defendants have expressed their determination and intention, and have made preparations to com-

mit further strip and waste by putting on teams and taking off the wood and timber.

The defendants have demurred to the bill, and the question arises whether it can be maintained. The act done was a trespass, and those threatened to be done were of the same character.

This court has equity jurisdiction in those cases only in which it is conferred by statute, and it is expressly given in the case of waste, when there is not a plain and adequate remedy at law. Ch. 96, § 10. But the remedy given by an action of waste at the common law was confined to cases where there was a privity of estate. 2 Black. Com. 281. Our statute, chap. 129, sect. 1, gives the same action, to the person having the next immediate estate of inheritance, against tenants in dower, by the curtesy, tenant for life or years, in which he shall recover the place wasted, and the amount of damages done to the premises. The statute thus recognizes the privity of estate as the foundation of the action, and defines with accuracy its limits. The Legislature then gives the party injured a further remedy in equity.

Formerly, courts having general equity jurisdiction, confined the exercise of it in relation to waste, to such as was technically so called, but it was afterwards extended to trespasses where the mischief was irreparable, and operated as a permanent injury to the estate. Story's Eq. Jur. sect. 928; *Thomas* v. *Oakley*, 18 Vesey, 184. In *Stevens* v. *Beekman*, 1 Johns. Ch. 317, it was doubted whether this extension of the ordinary jurisdiction of the court would be productive of public convenience. And in *Jerome* v. *Ross*, 7 Johns. Ch. 345, while the jurisdiction was admitted to exist in that court, exercising full chancery powers, it was stated that it ought to be restrained to those cases where the property itself was of peculiar value, and could not well admit of due recompense, and would be destroyed by repeated acts of trespass. It is thus apparent, that courts of general chancery jurisdiction exercise it, in relation to a certain class of trespasses, and the question arises whether it has been given

to this court. The same question has arisen upon a similar statute in Massachusetts, *Attaquin* v. *Fish*, 5 Metc. 140, and the rule laid down there as having been acted upon, in the construction of statutes conferring chancery jurisdiction upon the court, is, never to take cognizance of any subjects, which are not expressly brought within it by statute, and not to extend jurisdiction to such subjects by implication, and certainly not when the implication is doubtful. And it was decided, that the equitable powers given concerning waste, extended to cases of technical waste only, and not to those trespasses, which courts, that have full chancery powers, restrain by injunction.

Acting upon this rule, to which no objection is apparent, we must confine the jurisdiction to cases of technical waste. We cannot find in the statute any clear and satisfactory intention to confer a more enlarged power. Because courts of equity in the plenitude of their power have gone beyond legal waste, a term well defined and understood in the law, and have granted relief and injunctions in cases of trespasses committed and threatened to be committed, this court having but a limited jurisdiction, cannot feel justified in pursuing the same course.

Nor does there appear to be any pressing necessity for such action. A party in possession of his property, has the legal right to protect and defend it. If his timber is cut down, he may take or replevy it, or recover damages in an action of trespass. And by statute, chap. 169, he may have a criminal process against any one, who has threatened to commit an offence against his person or property, and if there is just cause to apprehend and fear the commission of such offence, the person against whom the complaint is made, may be put under bonds, with sufficient sureties to keep the peace. And when a party is out of possession of real estate, and has commenced an action to recover it, and the person against whom the action is brought shall commit any act of waste, or shall threaten to do so, by the Act of July 10, 1846, chap. 188,

the court in which such action is pending, may issue an injunction to stay such waste.

The remedies afforded by the law to the plaintiff are so ample, that there is less regret of a want of jurisdiction by which his bill could be sustained. This cannot be viewed as a bill for discovery, for it is not averred that the facts rest within the knowledge of the defendant alone, and are incapable of other proof. *Woodman* v. *Freeman*, 25 Maine, 546.

Bill dismissed with costs.

PULCIFER *versus* PAGE.

A right of property by accession may occur, when materials, belonging to several persons, are united, by labor, into a single article.

The ownership of an article, so formed, is in the party, (if such there be,) to whom the *principal part* of the materials belonged.

TRESPASS for an iron chain, which each of the parties claimed to own.

The evidence tended to show, *that* each of the parties had a chain; — *that* each chain had been broken into several pieces; *that* the plaintiff, without the consent or knowledge of the defendant, carried all the pieces to a blacksmith, and had them made up into two chains; — and *that* the defendant carried away one of them into which some part of his own chain had been incorporated. It was for this chain, that this suit is brought.

The Judge instructed the jury that if the plaintiff had only incorporated into this chain some small portion of the defendant's chain without his consent, not exceeding two or three links, it would not thereby become the property of the defendant. To this ruling the defendant excepted.

Woodman, for the defendant, argued copiously as to the doctrines of goods intermixed. Those views, being by the court considered inapplicable, are here omitted. The counsel then proceeded: —

The joining of a part of the defendant's chain to a part of the plaintiff's chain was a wrong done by the plaintiff. At most he was entitled only to the part which had previously been his, and before maintaining any suit, he must have offered to separate the parts. *Bond* v. *Ward*, 7 Mass. 127; *Shumway* v. *Rutter*, 8 Pick. 443, 448; *Lewis* v. *Whittemore*, 5 N. H. 366; *Tufts* v. *McClintock*, 28 Maine, 428.

The defendant had a right to take his own part of the chain, and if a part of the plaintiff's had been so connected with it by the plaintiff that he could not take his own without taking the plaintiff's part also, it was the plaintiff's fault and not his.

The charge of the Judge was erroneous in instructing the jury, that the property of the chain depended upon the quantity of the defendant's chain, which the plaintiff had incorporated into the one in dispute. The right of property in the chain as a whole or as to parts of it, depended rather upon the fact that the mixture was made without the defendant's consent or knowledge by the plaintiff, and upon the manner and motive of doing it.

Goodwin, for the plaintiff.

Howard, J. — This case presents a question of acquisition of property by accession, but does not involve an inquiry concerning the admixture or confusion of goods. It is a general rule of law, that if the materials of one person are united to the materials of another, by labor, forming a joint product, the owner of the principal materials will acquire the right of property in the whole, by right of accession. This was a rule of the Roman, and of the English law, and has been adopted, as it is understood, in the United States, generally. Dig. 6, 1, 61; *Bracton de acq. rerum dom.* B. 2, c. 2, § 3, 4; Molloy, B. 2, c. 1, § 7; Pothier, *Trait du droit de propriete*, L. 1, c. 2, art. 3, No. 169—180; 2 Black. Com. 404; 1 Bro. Civil Law, 241; *Glover* v. *Austin*, 6 Pick. 209; *Sumner* v. *Hamlet*, 12 Pick. 83; *Merritt* v. *Johnson*, 7 Johns. 474; 2 Kent's Com. 361.

The distinctions and qualifications, that may be appropri-

ate and necessary in the application of this doctrine to a variety of cases that may arise, do not require consideration, in determining this case. The first instruction stated was favorable to the defendant, and forms no ground of exceptions for him; and the plaintiff does not complain of it. The second instruction, that "if the plaintiff had only incorporated into this chain some small portion of the defendant's chain, without his consent, not exceeding two or three links, the chain would not by the incorporation of such small portion, become the property of the defendant," is understood to be in accordance with the rule of law before mentioned, and is not erroneous.

Exceptions overruled, judgment on the verdict.

MOULTON *versus* SMITH.

In replevin, a verdict of *non cepit* and a judgment for return, are not conclusive upon the question of *property*. They only show that, *for some cause*, the defendant is entitled to the *possession*.

A judgment of return, in an action of replevin, founded upon a verdict of *non cepit*, is not a bar to a suit involving the question of property.

It is no valid objection to a declaration, that it contains one count in case and another of trespass, *de bonis asportatis*.

TRESPASS, *de bonis asportatis*.

Robert A. Bird, a deputy sheriff, attached goods as the property of one Carter. This plaintiff took them from Mr. Bird in a replevin suit. To that suit Mr. Bird pleaded *non cepit*, and also *that* the property in the goods was in one Carter, and not in the plaintiff; — and *that* he, the said Bird, being a deputy sheriff, attached the same upon a writ against said Carter, wherefore he prayed a return.

Upon those pleadings and the evidence introduced by the parties, the cause was submitted to a jury, by whom a verdict was rendered that the defendant, Mr. Bird, *did not take* the property in manner and form, &c.

Upon that verdict, judgment was entered for a return of

the goods to Mr. Bird, and upon the writ of return, the goods were restored to him.

This is an action of trespass against the sheriff for the aforesaid original taking of said goods.

The writ contained two counts; one charging that the goods were taken by the sheriff; and the other was substantially a count in case, alleging that Bird, the defendant's deputy, took the goods and sold them, and converted them to his own use.

Under the general issue, the sheriff read in evidence the record of the judgment in the said replevin suit, and of the doings upon said writ of return; and he thereupon contended that this action could not be maintained; but the Court, SHEPLEY, C. J., ruled otherwise. It was admitted, that the creditors, on whose writ Bird made the attachment of the goods, recovered judgment against Carter in that suit for a very large amount.

The jury returned a verdict against the sheriff, who moves for a new trial, alleging that the verdict was against evidence, and the questions of law arising upon the evidence are also by agreement submitted to the court.

Fox, for the plaintiff.

The proceedings in *Moulton* v. *Bird* are no bar to the present suit.

The only finding there is on the general issue.

1. *Non cepit* admits property in plaintiff, and the taking only is in issue. To support his case, the plaintiff needs only to prove that the defendant was in possession of the property, at the place named in the writ. *Vickery* v. *Shurburne*, 20 Maine, 34; *Sawyer* v. *Huff*, 25 Maine, 464; 1 Chitty's Pl. 499; *Whitwell* v. *Wells*, 24 Pick. 25.

The brief statement does not, of itself, create an issue. The Revised Statutes do not *require* the general issue to be pleaded.

Defendant may or may *not* have offered evidence, under his brief statement. From the record, this court cannot know that that cause was decided upon any thing but the general

issue, and that plaintiff failed to prove what was necessary to sustain that issue for him.

The record was admitted as evidence, but the defendant offered no proof to show on what ground the verdict was rendered.

Non cepit admits property in the plaintiff, and if that record is of any effect, it would seem to be record evidence, that property was the plaintiff's, and should rather be a bar to the defendant than the plaintiff.

A judgment of return is of no effect on a question of property. *Collins* v. *Evans*, 15 Pick. 65.

In replevin, where a plea of property is interposed, as well as *non cepit*, a verdict for the plaintiff upon *non cepit* determines nothing except the taking. *Sprague* v. *Kneeland*, 12 Wend. 163.

The verdict on plea of *non cepit* leaves the question of title of property undisposed of. *Boynton* v. *Page*, 13 Wend. 431.

Case is proper remedy. 2 Dane, chap. 58, art. 2, sect. 1; *ibid.* art. 3, sect. 2.

The defendant did not justify under any execution or offer any in evidence.

Rand, for the defendant.

The judgment in the former suit, (*Moulton* v. *Bird*,) is a bar and perfect defence to this suit.

That suit settled both the *taking* and the *title* to the property now in controversy.

In that suit the court rendered judgment for return, which they would not have done, unless *title* had been settled against plaintiff. *Simpson* v. *McFarland*, 18 Pick. 430; *Quincy* v. *Hall*, 1 Pick. 357; *Hoffman* v. *Noble*, 6 Metc. 68; *Collins* v. *Evans*, 15 Pick. 63; *Whitwell* v. *Wells*, 24 Pick. 32.

That the former judgment is conclusive, whether pleaded specially, (by way of estoppel) or given in evidence, is substantially recognized in 1 Greenl. Ev. § 528, &c.; *Chase* v. *Walker*, 26 Maine, 559; *Putnam* v. *Morewood*, 3 East, 346.

If the plaintiff can maintain any action, he cannot maintain trespass.

There was no illegal *taking* if there was a subsequent conversion, the remedy should be sought in trover.

WELLS, J. — The defendant contends, that this action cannot be maintained, because in the action of replevin against Bird, his deputy, the jury returned a verdict of *non cepit*, and the court ordered a return. Bird filed a brief statement avowing the taking of the goods as the property of Carter. It appears from the cases decided in Massachusetts, cited in argument, that the court will look into the facts of the case as well as the pleadings, to determine whether there shall be a return or not. In that action it did appear, that Bird had attached the goods as the property of Carter, and that they were taken out of his possession by the writ of replevin. He had in fact taken the goods and by finding a verdict in his favor, the jury must have found the right of property in Carter, but there was an accidental omission to insert it in the verdict. By our statute the defendant may plead the general issue, and give in evidence any special matter in defence by filing in the cause a brief statement of it, and a verdict upon the general issue will usually be decisive upon the matter in controversy. But a verdict of *non cepit* does not decide that the property belongs to the defendant. And although a return was ordered to Bird, it was not done upon the verdict alone, but upon that with the pleadings and the facts in the case.

Although a return was had, that did not decide the title to the property in favor of Bird, so that it could not be subsequently contested, but the decision went no further than that in the peculiar state of the case, he was entitled to the possession. The court had no power to decide finally upon the question of property, such determination would fall within the province of the jury. The record in that case does not interpose any obstacle to the recovery in this action.

It is further objected, that an action of trespass in this case

cannot be sustained. There are two counts in the plaintiff's declaration. One of them is in the usual form of trespass, *de bonis asportatis*, the other alleges a taking and conversion of the goods by Bird, that he sold them and converted the proceeds to his own use. If the possession of Bird, for whose official acts the defendant is responsible, could not be considered wrongful, yet the sale and conversion by him must be viewed in a different light, and were injuries to the plaintiff, for which damages might be recovered in an action on the case, and the second count in the declaration is of that character. And our statute, c. 115 § 13, declares, that in all actions of trespass, and trespass on the case, the declaration shall be equally good and valid, whether the same shall be in form a declaration in trespass, or trespass on the case. Wherever then one will lie, the other will also, and being thus made of the same nature, no objection can arise to their joinder. If the state of facts show a party entitled to recover in trespass or case, his declaration may be framed in either form or both, the distinction between them having been very clearly abolished by the statute.

The defendant asks the court to set aside the verdict as against the evidence, and although there are circumstances, from which an inference might be drawn, that the sale from Carter to the plaintiff was made to defraud the creditors of Carter, yet they are not sufficient to authorize the court to set it aside. There are no means of determining by any thing in the report of the case, whether the jury rendered damages for the pictures, which, it is alleged, had been returned to Carter, and had not been sold by him to the plaintiff, or for any pictures described in the bill of sale. Nor is it apparent from the evidence in the case, that the damages are excessive.

The motion is overruled, and
judgment on the verdict

Davis *versus* Nash.

Trespass, *quare clausum fregit*, may be maintained by the owner of land, for an injury done to the freehold, though the land be in the occupation of his tenant at will.

Trespass, *quare clausum fregit*. The plaintiff's farm was in possession of his tenant at will, who, by direction of the plaintiff, and with the plaintiff's materials, had erected a fence upon it.

The evidence tended to show that the defendant took down a part of the fence. Shepley, C. J. was requested to rule that this action of trespass, *quare clausum*, for taking down the fence, could not be maintained, if, at the time of the injury, there was a tenant in the rightful possession and occupation of the premises. The request was denied, and the jury were instructed that the taking down of a fence would authorize the proprietor to maintain such an action, though the possession was in his tenant at will.

The verdict was for the plaintiff, and exceptions were taken by the defendant.

Shepley and *Dana*, for the defendant.

Fessenden and *Willis*, for the plaintiff.

Wells, J. — At the time the trespass was committed, the premises were in the possession of a tenant at will to the plaintiff. The fence, which was taken down, was erected by the direction of the plaintiff, and a portion of the boards was purchased by him. The fence erected by him would become a fixture, and being attached to the freehold was a part of it, as much so as a building upon the land constructed by him, and the taking of it down was an injury to the freehold.

In the case of *Starr* v. *Jackson*, 11 Mass. 519, it was decided, that an action of trespass, *quare clausum*, lies for the owner of land in the possession of his tenant at will, where the injury affects the permanent value of the property. That decision was made when the State of Maine was a part of the Commonwealth of Massachusetts, and is binding upon us

as an authority in the same manner as our own decisions. And it is not perceived, that any practical inconvenience can arise by adhering to it. The case of *Hingham* v. *Sprague*, 15 Pick. 102, was decided upon the same principle.

There is nothing in the case of *Little* v. *Palister*, 3 Greenl. 6, opposed to the doctrine contained in *Starr* v. *Jackson*, for the acts done, and which constituted the alleged trespass, were not injurious to the freehold, and did not affect the rights of Little, the landlord.

The exceptions are overruled,
and judgment on the verdict.

MOSHER *versus* MOSHER.

A division of land in *equal* proportions, made by mutual releases of the tenants in common, limits the right of dower, which may accrue to the widow of either of them, to the part which was released to her husband.

But there is no such limitation to her right, if, for a valuable consideration, the division was *purposely* made in *unequal* proportions.

DOWER.

The tenant and the demandant's husband owned land as tenants in common: viz. the Mosher farm in unequal proportions; the Cox farm in unequal proportions; and a one acre store lot in equal proportions. There were mutual dealings between them, in which the balance was against the tenant. Their affairs were adjusted under the advice of referees. The demandant's husband released to the tenant a part of the land, and received from the tenant a release of the other part. The part released by the tenant was of the greatest value. This inequality was occasioned by his said indebtment. These facts were shown by parole testimony, and that sort of testimony was objected to by the plaintiff. This suit, which is brought to recover the dower in the part released to the tenant, is resisted on the ground that the releases operated as a

partition of the land, which had been held in common. The case was submitted for a legal decision.

J. Pierce, jr. for the demandant.

There was no partition as alleged by the tenant.

1. Because the deeds do not say so. Deeds of partition are governed by rules analogous to those which govern deeds of exchange. For these rules, see *Provost of Eaton College* v. *Bishop of Winchester*, 3 Wils. 384, also *Cass* v. *Thompson*, 1 N. H. 65.

Deeds of partition have been long recognized as special forms of conveyances. 2 Black. Com. 309, 324; Oliver's Conv. 416, 421. This is not a deed of partition. Cruise's Dig. title 32, c. 6, § 14, 17, c. 8, § 9 and 10. No agreement to make partition appearing from the deeds, such an agreement must be exterior, and to be recognized, must by the statute of frauds, be in writing.

2. There was no just division of the lands; different and various considerations entered into the contract, and its settlement. Their real intention was not to make a partition, but simply to settle money claims at issue between the tenants in common.

3. If a partition was made, yet the widow was not thereby barred of her dower, as she was not a party to it. Cruise's Dig. title 18, chap. 2, sect. 42; Kent's Com. vol. 4, p. 364, 365, notes, 8th ed.

4. Dower is favored at common law. Coke's Lit. sect. 93, note a; Stearns on Real Actions, chap. 5, sect. 274—278.

W. P. Fessenden, for the tenant.

The case calls for no anxiety in the court to sustain this suit. The demandant's husband had much the largest share of the land. And in that share her dower is indisputable.

There was a partition. Parol evidence is admissible to show it. The demandant, therefore, is not entitled to dower. *Potter* v. *Wheeler*, 13 Maine, 504; Rev. Stat. chap. 121, sect. 25; *Dolph* v. *Bassett*, 15 Johns. 21: *Gammon* v. *Freeman*, 31 Maine, 243.

Partition at common law was a bar. The land given was for land received. The same act which secured one piece, parted with the other.

It is like the case of a mortgage, where an instantaneous seizin confers no right of dower.

There was a partition. 13 Mass. 504. There were deeds of release. The principle is, that partition is a bar. 15 Johns. 21.

Such partition has been made by parol. Take the case of partition, where one takes all the land, and pays money to the other, or the case where one's share is set off by a separate lot, with a balance in money. Can there be dower?

The parol testimony did not contradict the deeds. It contravened no rule of evidence.

G. F. Shepley, in reply.

SHEPLEY, C. J. — The tenant and the husband of the demandant were brothers, owning as tenants in common three separate tracts of land, of unequal value. These were the Cox farm containing about one hundred acres; of the Mosher farm, one half, containing about seventy-five acres; and one acre of land with a store upon it. Benjamin was indebted to Daniel. To sever their interests in the common estates and to pay this debt in part, they made conveyances to each other on Dec. 13, 1826. Daniel conveyed to Benjamin, by a deed of release, his share of the Mosher farm; and Benjamin conveyed to Daniel, by a similar deed, his share of the Cox farm and his share of the one acre lot with the shop upon it. The difference between the value of the estates conveyed, as estimated by persons selected by the parties, was applied to extinguish in part the debt due from the tenant to Daniel.

The demandant, as the widow of Daniel, claims dower in that portion of the Mosher farm formerly owned by her husband.

This claim is resisted on the ground, that those conveyances only operated as a partition of the estates held in common.

Partition of an estate owned by tenants in common may be made by deeds of release as well as by deeds of partition and by process of law. Where a simple partition of a common estate is made, the right of the widow of each tenant to claim dower may well be restricted to the share assigned or conveyed to her husband. That must be presumed to have been of equal value to the husband's share of the whole estate. If partition be not made by assigning or conveying to each his own share, and the estate is conveyed in unequal shares, of unequal values, and especially when other considerations beside that of a division of the common estate occasion the conveyances, no principle is perceived, or authority presented, limiting the right of a widow to claim dower only in the portion conveyed to her husband.

It is indeed true, that it would not operate unjustly in this case, if the demandant's claim were thus restricted, for her husband acquired a greater estate than he released. The soundness of the principle to be applied to effect this, may be tested by supposing the lives of the persons to have terminated differently.

If the tenant had deceased before Daniel, leaving a widow, could her claim to dower be restricted to land conveyed to her husband? If so, her right to dower would be diminished by those conveyances, and for value paid to her husband for a more than equal share of the land, in the discharge of a part of a debt due from him, and she would be deprived of a part of her right to dower without her consent.

This being inadmissible, suppose her to have recovered dower in all the land conveyed by her husband, and that Daniel had then deceased, leaving the demandant as his widow, could her right to dower be restricted to the land. conveyed to her husband, which had already been diminished by an assignment of dower to the widow of Benjamin? If so, the conveyances would not have a like effect upon the rights of the widow of each party to them.

The apparently inequitable claim of the demandant does not arise out of any lack of equity in the principles of law,

or in their application; but out of the proceedings of the husbands in making those conveyances, and from the providential termination of lives in a manner not anticipated.

Tenant defaulted.

TOWNSEND *versus* WELLS.

In a suit against the drawer of an order, a waiver of demand cannot be inferred from his subsequent admissions of notice to him that the order was unpaid, and that it ought to have been paid; *unless* it be shown that he knew there had been no demand.

EXCEPTIONS from the District Court, COLE, J.

Assumpsit. — The defendant on the 10th of July, 1849, drew an order directing one French to pay to the plaintiff $20, for value received. On the 2d of February, 1850, the plaintiff said to the defendant, "I am sorry to have sued you on the order;" defendant replied, "I do not blame you at all; you ought to have had your pay long since;" the plaintiff asked, "have I not repeatedly told you, that French had not paid the order;" and the defendant answered, "you have." A nonsuit was ordered, and the plaintiff excepted.

O'Donnell, for the plaintiff.

1. The declarations of the defendant amounted to an admission of demand and notice. After being told that the order was not paid, he admitted he ought to have paid it. Presumption is, that the defendant had no funds or expectation of funds with the drawee. It was then for him to show funds.

2. If the declarations do not prove demand and notice, they prove a waiver of them. *Lundie* v. *Robertson*, 7 East, 231; *Piersons* v. *Hooker*, 3 Johns. 68; *Breed* v. *Hillhouse*, 7 Conn. 523; *Tebbetts* v. *Dowd*, 23 Wend. 379.

3. The case should have gone to the jury to find what the defendant intended to be understood by his language. If they could have been authorized to find either a seasonable

demand and notice, or a waiver of them, the nonsuit was improperly ordered.

J. Goodenow, for the defendant.

WELLS, J. — There is no evidence that any demand had been made on the drawee for payment of the bill, or that due notice had been given to the defendant of the non-payment. Nor is there any proof that the defendant had not funds in the hands of the drawee. The plaintiff must prove a demand and notice, or some excuse for the want of them. If he had shown, that the defendant had no funds in the hands of the drawee, it would then have been incumbent on the defendant, if the fact had been relied upon in his defence, to show that notwithstanding the want of funds in the hands of the drawee, he had reasonable ground to expect that his draft would be duly honored. The burden of proof is on the holder of a bill, who claims to be excused from proving notice to the drawer, on the ground of want of funds in the drawee's hands. Bayley on Bills, 303. And we do not understand any different rule to be stated in *Burnham* v. *Spring*, 22 Maine, 495.

It is contended, that the evidence should have been submitted to the jury, and that they might have inferred from the declarations of the defendant a waiver of demand and notice. But it does not appear that the defendant had any knowledge of the want of a demand. He should have had knowledge of the omission to make the demand before he could be holden upon a waiver of it. *Davis* v. *Gowen*, 17 Maine, 387; *Hunt* v. *Wadleigh*, 26 Maine, 271.

It cannot be implied from the language used by the defendant, that he was informed there had been no demand, and as such fact must be shown by the plaintiff, there was not sufficient evidence to justify the jury in finding a verdict against the defendant, and the nonsuit was properly ordered.

Nonsuit confirmed.

PIKE *versus* JOHN E. MCDONALD *& al.*

A judgment is a debt of a higher order, than was the contract upon which it is founded.

A discharge in bankruptcy does not bar a *judgment*, recovered *after* the defendant's application to be decreed a bankrupt, although it be founded upon a note, which *might have* been proved in bankruptcy.

ASSUMPSIT, for money paid.

In June, 1843, one Pease recovered judgment against the parties to this suit, upon a note in which this plaintiff was surety for these defendants. In 1846, J. E. McDonald obtained a discharge, under the Bankrupt law of the United States, upon his own petition, filed after said note became payable. In 1848, this plaintiff paid said judgment, and now brings this suit to recover for the money so paid.

The case was submitted to the court for a legal disposition, by nonsuit or default.

Shepley and *Dana*, for the plaintiff.

Swasey, for the defendants.

The bankruptcy of McDonald, the defendant, who was one of the principals in the note, fully discharged him from all legal liability upon that note. If the surety paid the note after such discharge of the principal, there then existed nothing more than a *moral obligation*, that the principal should remunerate him. This moral obligation, without an express promise, cannot be enforced at law.

A liability on the part of the principal pre-supposes that there was a debt against him, which the surety has paid. But, in this case, there was no debt of the principal. There had been one, but the bankruptcy had discharged it. A payment by the surety, *after* such discharge, raises no promise in law.

But, if the surety had a claim for reimbursement, it was *provable* in bankruptcy. Bankrupt Act, § 5. And by the Act, § 4, such claims, if not so proved, are expressly barred.

SHEPLEY, C. J. — It appears by the agreed statement, that

Simeon Pease recovered judgment against the plaintiff and defendants in June, 1843, founded upon a promissory note made by them on October 1, 1839, on which the plaintiff was surety for the defendants.

One of the defendants, John E. McDonald, filed his petition to be declared a bankrupt on February 22, 1843, and such proceedings were had thereon, that he obtained his discharge as a bankrupt on February 17, 1846.

The promissory note made to Pease might have been proved against John E. McDonald in bankruptcy, but instead of presenting his bankruptcy to prevent a recovery against him by Pease, he suffered that judgment to be recovered.

The promissory note became merged in and extinguished by the judgment, which became a new debt accruing since the petition in bankruptcy was filed, and not provable in bankruptcy, as decided in the case of *Holbrook* v. *Foss*, 27 Maine, 441.

That judgment being a debt, which the defendant, John E. McDonald, was legally bound to pay, has been satisfied by the plaintiff, as surety for the defendants, and he is therefore entitled to recover a judgment against John E. McDonald as well as against the other defendant.

Defendants defaulted.

NOTE. — HOWARD, J. having been of counsel to one of the parties, did not act in the decision of this case.

FARNSWORTH *& al. versus* JACKSON.

The assignment of a mere expectation of earning money, if there be no *contract* on which to found the expectation, is of no effect.

But such an assignment may be made valid by a ratification of it, *after* the money has been earned.

ASSUMPSIT, for money had and received.

One Johnson kept a boarding-house for college students. He had seventeen boarders, but there was no contract as to

the length of time they were to board with him. On the 26th June, they had boarded with him three weeks, and, in order to secure a debt to the defendant of $150, he assigned to him the accounts against said boarders, "intending to include as well whatever is due, as whatever may be due from them at any time within three months."

On the 28th of June, being indebted to Swett & Co., he assigned to them the same accounts and in the same language, adding, however, that "the assignment was subject to that made to Jackson," this defendant. Jackson, and also Swett & Co., on the days of their respective assignments, authorized Johnson as their agent to collect the accounts assigned.

Afterwards, in September, Johnson disclosed his property affairs to two justices of the quorum, upon an execution in favor of the plaintiffs. His right to so much of these demands as accrued after the 28th of June, $274,18, was appraised, and he assigned them to the plaintiffs, subject to the prior assignments.

Three of the accounts, amounting to $68, were paid to Johnson and receipted by him as agent of Jackson. Of that sum, $14 accrued before June 28. No part of the money, however, was received by Jackson. It was expended by Johnson for other purposes, without authority from Jackson, and before the commencement of the present suit, and the debt of $150, due to Jackson, remains wholly unpaid, nor has he any security for it other than what appears in the foregoing. All the other accounts which have been paid, were receipted by Johnson as agent of Swett & Co. The amount due to Swett & Co. when the assignment to the plaintiffs was made, was $343,02. They received $269,35. The whole amount due on the accounts was $377,77. The amount accrued before June 28th, was $103,59. All the payments which have been made, were made before the commencement of this action. The writ is dated Feb. 19, 1850. The parties agree that, upon the foregoing statement of facts, or so much thereof as is legally admissible, the court may render such judgment as may be lawful in the case, with liberty to

make such inferences from any of the facts legally admissible, as a jury might make.

Barrows, for the plaintiffs.

1. The students were under no contract to board with Johnson. They might have left his house at any moment. He had an expectation that they would continue with him. But that expectation was founded upon no contract, and was not assignable. It was but a mere possibility ; and, therefore, nothing passed by the assignments to Jackson and to Swett & Co., except what had then accrued. Dane's Abr. vol. 1, chap. 14, art. 1, sect. 2, p. 283; *Morrough* v. *Comyns*, 1 Wils. 211, given in Dane's Abr. vol. 1, chap. 14, art. 2. sect. 2, p. 284; *Flarty* v. *Odlum*, 3 Term R. 681; *Liddesdale* v. *Montrose*, 4 Term R. 248; *Cutts* v. *Perkins*, 12 Mass. 212; *Mitchell* v. *Winslow*, 2 Story, 630.

2. The plaintiffs, by virtue of the assignment to them, became entitled to all which accrued subsequent to the date of the assignment to Swett & Son.

3. Being so entitled, they may maintain this action for money had and received, against the defendant, whose agent wrongfully received the money. *Wiseman* v. *Lyman*, 7 Mass. 289; *Hale* v. *Marston*, 17 Mass. 575, 579; *Hawley* v. *Sage*, 15 Conn. 52; *Mason* v. *Waite*, 17 Mass. 563; Story on Agency, 2d ed. sect. 451, chap. 17, p. 554.

Barnes, for the defendant.

I. The assignment (by Johnson to Jackson) of debt afterwards to accrue, is valid; being for valuable consideration, and the debt accruing being upon contracts already entered into by Johnson. *Crocker & ux.* v. *Whitney*, 10 Mass. 316; *Cutts, adm'r*, v. *Perkins*, 12 Mass. 206; *Gardner* v. *Hoeg and trustee*, 18 Pick. 168.

Such assignments are valid, even as to matters of real estate ; as, rent accruing, (8 Cowen, 206,) crops growing ; trees growing, or "hereafter to grow." *Stanley* v. *White*, 14 East, 332.

II. The assignment by Johnson to plaintiffs is expressly

subject to the assignment to Jackson, and so bars plaintiffs from all demand upon Jackson, until after *his* debt is satisfied.

III. Such of the debtors as have paid at all, saw fit to pay under the prior assignments. Hence, the plaintiffs' claim, if any, is against the debtors, or against Swett & Co., not against Jackson.

Jackson has received nothing under his assignment. Hence he is not liable to the plaintiffs or any body else, for "money had and received." *Israel* v. *Douglass*, 1 Henry Blackstone, 239.

SHEPLEY, C. J. — The right of the plaintiffs to recover may depend upon the validity of the assignment made by Johnson to the defendant. There can be no legal assignment of that, which has no actual or legal existence. There may be a valid assignment of an existing claim to future compensation, not yet earned, and subject to a contingency, whether it ever will be earned. The cases cited and relied upon by the counsel for the plaintiffs are not opposed to this position.

The case of *Morrough* v. *Comyns*, 1 Wils. 211, decides, that a captor of a prize-ship might legally assign his share or interest in the prize-money before condemnation. This was afterwards prohibited by statute 20 Geo. 2.

The cases of *Flarty* v. *Odlum*, 3 T. R. 681, and of *Liddesdale* v. *Montrose*, 4 T. R. 248, decide, that an officer entitled to half pay could not legally assign that pay, which was to become due in future. Not because he had nothing capable of assignment, but because it was against public policy to permit it to be assigned.

In the case of *Crocker & ux.* v. *Whitney*, 10 Mass. 316, it is stated in the opinion, "Nor does it make any difference, if instead of a debt now due, the assignment is of money, which is expected to become due at a future day to the assignor."

In the case of *Cutts* v. *Perkins*, 12 Mass. 206, it is stated, that the former case was decided on the ground of its being "money expected to become due at some future time to the

assignor, it appearing, that there was an existing contract, upon which the debt might arise." The last remark exhibits the foundation, upon which such an assignment of a future contingent interest must rest; for without any existing contract to uphold it, there could be no existing interest to assign.

A similar doctrine is asserted in the cases of *Gardner* v. *Hoeg*, 18 Pick. 168, and of *Mitchell* v. *Winslow*, 2 Story, 630.

It appears from the facts agreed in this case, that "there was no contract between Johnson and said persons for board for any specified time." It also appears, that the students had been boarding with Johnson about three weeks, when the assignment was made of what was then due and of what might become due from them.

Was there then an existing contract between them and Johnson, the future benefit of which might be assigned? The fair conclusion to be drawn from the agreed statement is, perhaps, that the students verbally agreed with him for board at a certain price per week, but not for any specified time. There would seem then to have been an existing parole contract for board determinable at the pleasure of either party. It is not necessary, that money payable on a contingency, should be payable by virtue of a written contract to make it assignable.

If it be doubtful, whether there was a sufficient contract existing at the time to uphold an assignment of its future benefit, there would seem to be little reason for doubt, that the assignment to the defendant, if defective when it was made, was confirmed and established by the reference made to it in the assignment made to the plaintiffs after the contingency had happened and the money accruing for board had been earned and become due. The assignment made to the plaintiffs was declared to be made "subject however to any former assignment, that I have made of the demands aforesaid to Leavitt T. Jackson and Ebenezer Swett & Son."

The debts were then absolutely due, and he could then legally assign them, or confirm a former defective title to them.

Plaintiffs nonsuit.

HANNAH JOHNSON *versus* SHIELDS *& al.*

A widow's right of dower, before it is assigned to her, rests only in action.

Her release or conveyance of that right, except to a party in possession or in privity of the estate, from which it accrued, is without effect.

Such a right is not embraced by the R. S. c. 91, § 1, abrogating the common law rule, by which disseizees are prevented from conveying.

DOWER. The land was in possession of the tenants, under a conveyance from the demandant's husband, and she had a right of dower. She deeded that right to one Coffin, but he had no possession of the land. After notice to the tenants of that deed, she conveyed her right of dower to them. This suit is brought for the benefit of Coffin.

Upon these facts, the case was submitted for a legal decision.

True, for the demandant.

Dower, before it is assigned, is a chose in action. 9 Mass. 13; 2 Cow. 638; 10 Wend. 528; 13 Pick. 35; Gilb. Ten. 26.

As such chose in action, it is assignable; and if made *bona fide* and for a valuable consideration, the assignment will be upheld by the court. R. S. c. 95; Long on Sales, 3 and 4; 4 Kent's Com. 61, 468; *Powell* v. *Powell*, 10 Alabama, 49; 1 Peters' C. C. 199; *Stedman* v. *Fortune*, 5 Conn. 462; *Eveleth* v. *Story*, 7 Hill, 585; *Mandeville* v. *Welch*, 5 Wheat. 233; *Corser* v. *Craig*, 1 Wash. C. C. ——; Jackson on Real Actions, 316, 317; *Dyer* v. *Burnham*, 25 Maine, 9.

Hannah Johnson and the defendants, as privies to her, are estopped from denying the validity of her deed to Coffin.

Doe v. *Roser*, 3 East, 16; *Cox* v. *Jagger*, 2 Cow. 650; *Selleck* v. *Adams*, 15 Johns. 197.

The plaintiff in interest, who is the assignee of a chose in action, has a right to use the name of the assignor, in an action, to recover his right, and the assignor cannot, after assignment, defeat the action. *Webb* v. *State*, 13 N. H. 230; *Stiles* v. *Farrar*, 18 Vt., 3 Wash. 444; *Fitzsimmons' appeal*, 4 Burr. 248; U. S. Dig. 1847, vol. 1, (assignment) p. 50; *Anderson* v. *Miller*, 7 S. & Marshall, 586; U. S. Dig. 1847, p. 51.

Dana, for the defendants.

1. This is not an action under the R. S. (ch. 144,) being neither brought by the widow, nor for her benefit.

The statute remedy is confined and specific, and cannot in this way be enlarged.

2. But if this difficulty were removed, Coffin could not maintain this action. He acquired whatever rights he has, by the conveyance from Hannah Johnson.

By that he acquired no right at all. For, till dower is *assigned*, the widow has neither entry in the premises, nor right of entry. She has merely an inchoate personal right, which lies in action only. *Hildreth* v. *Thompson*, 16 Mass. 191; *Windham* v. *Portland*, 4 Mass. 384; and nothing in *action*, entry or reentry can be granted over or assigned. Coke Lit. § 347; 4 Cruise Dig. 89.

Besides, the decisions are direct that, before dower has been assigned, the widow may release to those already rightfully in possession, but she cannot convey it to others. *Green* v. *Putnam*, 1 Barb. 500; *Cox* v. *Jagger & al.* 2 Cowen. 638; *Jackson* v. *Vanderheyden*, 17 Johns. 167; *Croade* v. *Ingraham*, 13 Pick. 33; 4 Kent's Com. 447; 1 Greenl. Cruise, p. 189, n.; *Jackson* v. *Aspell*, 20 Johns. 413.

Shepley. C. J. — The demandant appears to have been entitled to dower in the premises. It does not appear, that her husband died seized of the estate, so that she was enti-

tled to a third part of the rents and profits of it, by virtue of the statute, chap. 95, sect. 6, before an assignment of dower.

The tenants present in defence a deed of release, duly executed by the demandant on June 15, 1850, by which she released to the tenants then in possession, all her right to dower in the premises.

It appears, that she had before, on May 13, 1850, by a deed of release duly executed, released her right to dower to Albert Coffin, who was not then in possession or connected with the title to the estate; and that the tenants had notice on June 11, 1850, that such a conveyance had been made to him.

By the common law, a widow, before her dower had been assigned, had no estate or interest in the land, of which she was dowable, and no right of entry upon it. She had only a right of action to recover her dower. *Sheafe* v. *O'Neil*, 9 Mass. 13; *Hildreth* v. *Thompson*, 16 Mass. 191; *Croade* v. *Ingraham*, 13 Pick. 33; *Stedman* v. *Fortune*, 5 Conn. 462; *Jackson* v. *Vanderheyden*, 17 Johns. 167; *Jackson* v. *Aspell*, 20 Johns. 412; *Cox* v. *Jagger*, 2 Cow. 638; *Yates* v. *Paddock*, 10 Wend. 528; *Williams* v. *Morgan*, 1 Litt. 167; *Shield* v. *Batts*, 5 J. J. Marsh. 13; *McCully* v. *Smith*, 2 Bailey, 103.

By the common law, no possibility, right, or title, resting in action merely, could be legally granted or released to a stranger, while it might be to one in possession of or privy to the estate, from which it accrued. *Lampet's case*, 10 Coke, 46; Co. Litt. 214; Com. Dig. Grant, D., and Assignment, C.

A conveyance or assignment of such a possibility, right, or chose in action, although not good at law, will be protected in equity, when it is not against the policy of the law, to permit an assignment or conveyance of it. *Thomas* v. *Freeman*, 2 Verm. 563; *Higden* v. *Williamson*, 3 P. Wms. 132; *Wright* v. *Wright*, 1 Ves. 409.

By the common law it has ever been considered to be

against its policy to permit mere rights of action to recover real estate or any interest in it to be conveyed or assigned; and such conveyances have been uniformly held to pass no title or interest. As they do not convey any interest or title to the estate, the rights of the grantee or assignee rest only in the covenants contained in the conveyance.

While an owner of land was disseized, nothing passed from him by a conveyance of it. And yet his grantee has frequently been permitted to maintain an action in the name of the grantor to recover the land. This he does by the good faith and forbearance of his grantor to convey it, before judgment is recovered to the disseizee; and not from any disability in the disseizee to convey it to the disseizor, after he has made a prior conveyance, by which nothing passed. Courts of law or of equity have not attempted to protect any rights claimed to real estate, acquired by such a conveyance made against the policy of the law. They could not do it without giving effect to a conveyance declared by the law to be inoperative as a conveyance. While inoperative as a conveyance, it may be valid as a contract between the parties to it.

The rule of the common law, which prevented an owner, who had been disseized, from conveying his land, has been abrogated in this State, by statute, chap. 91, sect. 1. This statute does not embrace the right to dower, for a widow before assignment has no title or interest in the estate, and it is the "title or interest, which the grantor has" in the land, that can be conveyed by the provisions of the statute.

Nothing can in such case be conveyed by a widow, but a chose in action of a description, an assignment of which, on account of its being suited to promote litigation, and to act injuriously upon the interests of widows and of owners of lands subject to dower, the law will not protect.

In the case *Buffington* v. *Smith*, 2 Brevard, 98, a conveyance by a widow of her right to dower appears to have been held to be an agreement between the parties on speculation, and it was decided, that the assignee could recover back no

part of the purchase-money, upon proof of a failure of consideration.

There was no legal or actual fraud committed by the tenants upon Albert Coffin by their obtaining a release of the widow's right to dower in their estate with knowledge, that she had before released the same to him, for he acquired no interest in their estate by that deed of release.

This case is more clearly relieved of fraud than was the case of *Eastburn* v. *Wells*, 7 Dana, 430. In that case a husband assigned his wife's claim as distributee of her father's estate. The assignee instituted a suit against the executor of the father in the name of the husband and wife to recover it. The executor paid the amount to the husband with a knowledge of the assignment, and it was held, that the assignee could maintain no action against the executor for so doing.

The authorities cited and relied upon by the counsel for the demandant to prove, that a right to dower may be conveyed, and that the rights of the vendee will be protected against a subsequent release of it made to the owner of the land, do not sustain that position. The decision in the case of *Stedman* v. *Fortune*, 5 Conn. 412, was made upon a statute of that State, which was decided to have the effect to make a widow a tenant in common of lands, of which the husband died seized and of which the widow was dowable.

The case of *Powell* v. *Powell*, 10 Ala. 900, decides that a widow may assign her interest in her deceased husband's estate, not that she may convey her right to dower in lands, of which the husband did not die seized.

The cases of *Mandeville* v. *Welch*, 5 Wheat. 277, and of *Comegs* v. *Vasse*, 1 Peters, 193, and of *Everett* v. *Strong*, 7 Hill, 585, relate to assignments of personal property and rights.

There is nothing presented to prevent the deed of release made by the demandant to the tenants from being effectual to extinguish her right to dower in the premises demanded.

Demandant nonsuit.

STATE *versus* SARGENT.

The rule that testimony, collateral to the issue, cannot be contradicted, is confined to testimony, introduced, in cross-examination, by the party who proposes to contradict it. It does not apply to testimony introduced by the other party.

Whether any of the facts connected with arrangements made preparatory to the commission of a crime, can be deemed collateral or immaterial; *quere.*

INDICTMENT for breaking and entering a store and stealing therefrom.

After introducing testimony tending to show the breaking and stealing and some other facts, the government introduced one Huston, who testified in chief among other things, *that* the offence was committed by himself and the defendant and one Whitehouse; *that*, before the breaking, the defendant said he had got a place selected, and that Whitehouse was knowing to it; *that* Whitehouse was then out fishing, and, as the defendant said, was to be back in a few days; *that* Whitehouse got home on the morning of *Thursday* before the robbery was committed at night; *that* there was a severe storm on *Thursday* and the witness went over to the house of Whitehouse on *Thursday* morning and saw him there.

The defendant offered to prove, by another witness, that Whitehouse returned from sea on *Tuesday*, before the Thursday when the robbery was committed; and *that* Huston, the government's witness, had conversed with him on *Wednesday.*

This evidence was objected to and excluded, to which exclusion the defendant excepted.

G. F. Shepley, for the defendant.

Tallman, Attorney General, for the State.

SHEPLEY, C. J. — When the testimony of an accomplice is introduced to convict a person of crime, its credibility may properly be tested by its conformity to truth in every particular statement.

If perceived to remain unimpeached, when its truth might be tested by facts, capable of being established by other testi-

mony, it would be more entitled to confidence, than it would be, if found not to be true, whenever its truth should be thus ascertained. As departures from truth were found to be more or less frequent or important, there would be occasion for greater or less confidence, that the essential particulars of the transaction were correct.

Circumstances related as having taken place, during arrangements made for the commission of crime, may not be absolutely essential as proof, that the alleged crime has been committed; and yet when introduced for the prosecution, and found to be open to contradiction by other testimony and to remain uncontradicted, and to be such, as would naturally be expected to occur under like circumstances, they would induce jurors to repose more confidence in the truth of the testimony, than they would be inclined to do, if all such means of testing its truth were omitted or excluded.

In this case the accomplice testified, that the crime had been committed by the accused and by himself and one Whitehouse. That the accused in conversation with him stated, that Whitehouse, who was then out fishing, would be back in a few days. The witness testified, that "Whitehouse got home on the morning of Thursday before the robbery was committed at night;" that he "went over on Thursday morning to Whitehouse's house and saw him there."

Testimony in defence was offered and excluded to prove, that Whitehouse returned from sea on Tuesday before the Thursday, on the night of which the crime was committed, and that the witness saw and conversed with him on Wednesday.

In argument it is insisted, that it was immaterial whether Whitehouse came home from sea on Tuesday or Thursday; that the statement respecting the time was a collateral fact and incapable as such, of being contradicted.

There is just reason to doubt, whether any of the facts connected with arrangements made preparatory to the commission of crime can be considered as collateral or immaterial and be for that reason excluded. They may often be impor-

tant to a correct knowledge of the transaction, and material to prevent the commission of the alleged crime without preparatory arrangement from being regarded as unnatural and incredible.

If the testimony of the witness introduced on his examination for the government might have been excluded, because it related to facts collateral or immaterial, yet when introduced without objection, it became testimony for the consideration of the jury ; and the rule that testimony collateral to the issue cannot be contradicted does not apply to testimony introduced by the opposite party, but is confined to testimony introduced by cross-examination of an opponent's witness, or otherwise by the party, which proposes to contradict it.

The testimony excluded in this case should therefore have been admitted.

Exceptions sustained, verdict set aside, and new trial granted.

GREEN *& ux. versus* CITY OF PORTLAND.

The licensing of an individual to occupy a part of a public street exclusively for his own benefit, by erecting and using a railroad for the transportation of rocks and gravel, is not among the powers granted to the city council of Portland by the ninth section of its charter, or by any other statute.

No action lies against the city for a person suffering special damage in his comfort or business by means of a railroad, so licensed, although the party licensed may have given bond to indemnify the city against liabilities for such damages.

CASE for special damage sustained by the plaintiffs in their business and comfort by means of a railroad upon a public street.

Myers & Co. had obtained from the city council a license to construct and exclusively occupy the railroad, for the purpose of transporting rocks and gravel, for their own benefit, and they gave to the city a bond to indemnify them against

all liabilities for damage, which might be sustained by others, through the erection and use of the railroad.

If the defendants would be liable to the plaintiff for such special damage, the action is to stand for trial; otherwise the plaintiffs are to become nonsuit.

O'Donnell, for the plaintiffs.

The R. S. c. 164, § 1, provides, that "obstructing or incumbering, by fences, buildings or *otherwise*, the public highways, private ways or streets, &c., shall be deemed *nuisances*, with certain exceptions."

The *exceptions* relate to "the right of erecting mills and mill-dams, and of flowing lands."

An action of the case lies for injury to "the *comfort*, the *property* or the *enjoyment of an estate*," whether the nuisance be public or private, if it be an injury to "*particular individuals only.*" R. S. 164, § 8.

The city charter, 1833, § 9, gives to the council no authority to license obstructions in any portion of a street, except by the depositing of "materials for making or repairing any street, sidewalk, crosswalk, bridge, water-course or drain; or for erecting, repairing or finishing any building or fences." But it was a purpose wholly different from these, for which the license was given to Myers & Co.

Courts may order such nuisance abated, after judgment upon *indictment* or *action* against *any person.* R. S. chap. 164, sect. 9.

The word "*person*" includes corporations. R. S. chap. 1, rule 13.

One suffering special damage may have his action upon the case. *Stetson* v. *Faxon*, 19 Pick. 147, and authorities there cited.

The above case varies from this, in the fact, that the city of Boston indemnified Faxon, and in the case at bar, Myers & Co. indemnified the city. 5 Denio, 216; 10 Pick. 388.

A municipal corporation is equally liable with an individual, having *licensed* the obstruction. *Thayer* v. *City of Boston*, 19 Pick. 511; *Baker* v. *same*, 12 Pick. 184.

In the case at bar the city authorities expressly authorized the erection of the railway through a public street for *private purposes*, unauthorized by any public necessity, and thus exceeded their corporate powers.

Codman, for the defendants.

SHEPLEY, C. J. — The railway alleged to be a nuisance was not built for the accommodation of the public, but for the use of the persons, who built and occupied it exclusively for their own private benefit. No question is therefore presented, whether a railway for the accommodation of the public travel and business, built by the consent of a town or city upon part of a highway or street can be regarded as a nuisance.

Admitting the railway described in the declaration to be a public nuisance, and that the plaintiffs have suffered special damage by its erection and continuance, the question presented is, whether the city is responsible for the damages suffered.

An action of *tort* may be maintained against a corporation for an act done by its direction or procurement or sanctioned by it. *Thayer* v. *Boston*, 19 Pick. 511.

This railway was not built with the funds of the city, or by its order, or by its officers. The city has received no rent, income, or benefit from it. It has no other connexion with it, than to grant the owners of it a license to build and continue it on its streets. It might well take the bond of indemnity to protect it from damages, for which it would be liable by statute for direct injuries thereby occasioned to the persons or property of individuals. The fact, that the city took such a bond, does not increase its liability, or make it responsible to those, who may in some other manner have suffered damage from it. It does not even impliedly authorize them to do any damage to others.

The license amounts to no more, than an authority, so far as the city was concerned, to do the acts for their own benefit and upon their own responsibility, without being subject to interruption or complaint by the city. If one person license another to pass over his land without compensation, for his

own convenience or benefit, he does not thereby constitute him his agent for that purpose. Nor would he thereby become liable to third persons for injuries suffered by them in consequence of the acts done under such license.

The city was not authorized by statute or by the ninth section of the act in addition to its charter, approved on February 9, 1833, to grant such a license. The power given by that section extends no further than to authorize persons or corporations to place in any street "any materials for making or repairing any street, sidewalk, crosswalk, bridge, water-course, or drain, or for erecting, repairing, or finishing, any building or fences."

If it had power to grant such a license, it must have derived it from its general powers to regulate its own corporate rights and interests. And those powers would not authorize it to make itself responsible for the acts of others, from which neither it, nor its citizens derived any benefit, and which were not done for the accommodation of the public travel and business.

Upon the case as presented, the city does not appear to be responsible for any damages, which the plaintiffs may have suffered. *Plaintiffs nonsuit.*

Mitchell *versus* Taylor.

The property of a vessel may pass to the purchaser, although the certificate of her registry or enrollment be not recited in the instrument of conveyance.

But unless the instrument of conveyance contain such a recital, no new certificate of registry or enrollment can issue to the purchaser.

In the certificate of registry or enrollment, surrendered to the collector of the customs, upon the sale of a vessel, the purchaser has no interest.

Such papers are of no value to either party.

Case, against the collector of the port of Wiscasset, for refusing to furnish to the plaintiff the proper papers, necessary for the navigation of his schooner, Palo Alto.

Barnes formerly owned the schooner. In July, 1847, he

mortgaged her to the plaintiff to secure two notes, payable Nov. 10, 1847. The mortgage was duly recorded, and a copy was filed with the defendant, and Barnes surrendered to him the enrollment and license, but the mortgage contained no recital of the certificate of enrollment.

On the 17th of Jan'y, 1848, the plaintiff, through Barnes, as his agent, applied to the defendant for papers necessary to the navigation of the vessel. But the defendant declined to give any.

SHEPLEY, C. J., presiding, ordered a nonsuit, which, if incorrectly ordered, is to be taken off.

Fessenden & Deblois, for the plaintiff.

1. As to the liability of public officers to individuals for delinquency in duty, we cite — *Tracy* v. *Swartwout*, 10 Pet. 80; *Jenner* v. *Jolleff*, 9 Johns. 381; *Burke* v. *Trevett*, 1 Mason, 96; *Bartlett* v. *Crozier*, 15 Johns. 250.

2. A vessel, when transferred, is entitled to a new certificate of registry or enrollment, and it is the collector's duty to issue it. Stat. of U. S. of 1792, c. 11, § 14; Stat. of U. S. of Feb'y 18, 1793; Stat. of U. S. of March 2, 1797.

3. There was a complete and valid transfer of the schooner to the defendant by the mortgage, although it omitted to recite the certificate of enrollment.

That omission affects only the national character of the vessel. *Colson* v. *Bonzey*, 6 Maine, 474; *Badger* v. *Bank of Cumberland*, 26 Maine, 434.

Barnes' right of redeeming had expired at the end of sixty days from the pay-day of the note. This was known to the defendant, for a copy of the mortgage had been filed in his office.

When the collector is legally satisfied of the transfer, he is bound to deliver, on demand, such papers as shall nationalize the vessel, and enable the owner to have the profitable use of her. And yet, when told the plaintiff would take her, he threatened to make a seizure, just for the want of the very papers he was bound to furnish.

If he did not choose to give a permanent enrollment, it was his duty to give one temporarily, that she might be taken to

the port of the owner. Statute of U. S. of February 18, 1792, sect. 3.

But, suppose the defendant was, by the omission in the mortgage, justified in refusing to issue a new set of papers, he was bound to deliver the old ones. The demand upon him was for *some kind of papers*, without specifying what ones. And he refused to grant *any*.

Our position is, that an American citizen, owning an American bottom, is entitled to such papers from the collector, as shall enable him to use his vessel in navigation.

Shepley and *Dana*, for defendants.

The authorities cited in the plaintiff's brief, fully sustain the nonsuit.

The question is, not in whom was "*the property*," but whether the plaintiff was in any condition to demand *the papers* of the collector.

His title was derived under the mortgage.

That mortgage contained no recital of any certificate of enrollment or registry.

The vessel was "incapable of being registered or enrolled anew" after such a transfer. Sect. 14, chap. 11, Statute of U. S. Dec. 31, 1792, Statutes at Large, vol. 1, p. 294; sect. 2, Stat. U. S. Feb. 18, 1793, Statutes at Large, vol. 1, p. 305.

Upon such transfer the former register or enrollment is to be given up to the collector to be transmitted to the Secretary of the Treasury to be canceled.

If the title *had* passed to the plaintiff, he was not entitled to the *old papers*, because they were, in such case, to be retained and canceled. And he was not entitled to *new papers*, because his conveyance did not contain a recital of the enrollment. The collector would have violated the law by giving him either.

The gentlemen seem to rely upon the 7th chapter of the Act of March 2, 1797. But that Act has no reference to a case like the present. In the first place, the Palo Alto was not transferred to the plaintiff "*by process of law*" but by a voluntary conveyance. In the next place, "the certificate of

enrollment was" *not* "retained by the former owners;" but had been surrendered to the collector; and thirdly, the "Secretary of the Treasury" had *not* "ordered and directed the collector to grant a new certificate of enrollment or license."

As to what is said about a temporary enrollment; in the first place, none was demanded; in the next place, the condition alone upon which such temporary papers can be issued, is that an oath should be taken, that the property remains as expressed in the enrollment proposed to be given up. Statutes at Large vol. 1, page 498.

WELLS, J. — At the time when the papers were demanded of the defendant, the right of redemption in the property mortgaged had terminated, and it became absolute in the mortgagees, although there was no recital in the mortgage of the certificate of enrollment. The property passes without such recital in the instrument of transfer. *Bixby* v. *The Franklin In. Co.* 8 Pick. 86; *Weston* v. *Penniman*, 1 Mason, 306; *Badger* v. *Bank of Cumberland*, 26 Maine, 428.

By the Act of Cong. of Dec. 31, 1792, § 14, when a registered vessel shall be sold, the certificate of registry must be recited at length in the instrument of transfer, "otherwise the said ship or vessel shall be incapable of being so registered anew," and unless she is registered anew when a sale or transfer takes place, she loses her character as a vessel of the United States. And by the Act of Feb. 18, 1793, § 2, in order for the enrollment of a ship or vessel, she must possess the same qualifications, and the same requisites in all respects must be complied with as are made necessary for registering ships or vessels.

The mortgage, which was the instrument of transfer, did not contain a recital of the certificate of enrollment, and the plaintiff therefore, was not entitled to a new enrollment, and a certificate of it. He cannot maintain an action for any new papers, to which he is not by law entitled.

Has he a right of action against the defendant for not de-

livering to him the old certificate and license? They had been given to the defendant by the former owner, the mortgager. The fourteenth section of the Act previously mentioned, requires the certificate to be delivered up to the collector when a new registry shall be made, and to be transmitted to the register of the treasury for cancelation. And the Act of the eighteenth of February, 1793, must be understood as requiring the same course to be taken, to procure a new enrollment. When the application was made to the defendant for the necessary papers, he was already in possession of the certificate and license. But he could not by law enroll the schooner anew. If he had complied with the request of the plaintiff, and delivered to him the certificate, the plaintiff could not, by a surrender of it to any other collector, have procured a new enrollment, and by the fifth section of the Act last mentioned, upon a change of ownership, the license was no longer in force. Neither the certificate of enrollment, nor license could have been of any service to the plaintiff. They furnished no aid to the enjoyment of the property he had purchased. Their legal operation ceased when the sale took place, and they are of no value to any one.

Whether the plaintiff would have had any interest in the papers, if the transfer had been properly made, as evidence to be exhibited for the purpose of obtaining a new enrollment, it is unnecessary to determine.

The third section of the same Act relates to cases where a change is made from a registry to an enrollment and license, or *vice versa*, while the ownership of the property remains. The plaintiff could claim no right under this section of the Act, if he had requested such change to be made, without an oath of the master, that the property remained as expressed in the enrollment proposed to be given up. No such oath was taken, and none could have been consistently with truth, for there had been a change of property.

The Act of March 2, 1797, provides for cases where a ship or vessel has been sold by process of law. The Palo Alto was transferred by contract. The law prescribes the

force and effect of it, but its origin lies in the consent of the parties. Besides, it does not appear, that the defendant has ever received any order from the Secretary of the Treasury, as is contemplated by this Act, to grant a new certificate or license.

There does not appear to be any ground upon which the action can be maintained, and the nonsuit must be confirmed.

STATE *versus* PHINNEY.

In a complaint charging a misdemeanor, the defendant is not precluded from traversing any material allegation, though made under a *videlicet*.

EXCEPTIONS from the District Court, COLE, J.

The defendant was prosecuted by complaint for selling spirituous "*liquor, not imported, viz., to Davis, one glass.*" He moved the court to quash the indictment, and after a conviction he moved that judgment be arrested. The reasons offered for the motions were —

1. That the facts charged do not amount to an offence.

2. That the allegations coming before the *videlicet* do not describe an offence.

3. That the allegations coming after the *videlicet*, cannot aid the allegations going before it.

The motions were overruled, and the defendant excepted.

A. B. Holden and *A. W. True*, for the defendant.

1. The charging part of the allegation in the complaint should state the name of the person to whom the liquor was sold. *Commonwealth* v. *Drew*, 21 Pick. 334; *same* v. *Philips*, 16 Pick. 211.

2. The substantive charge in the complaint, cannot be enlarged by matter under the *videlicet*. Such matters are not traversable. *Paine* v. *Fox*, 16 Mass. 132; 1 Chitty's Plead. 644, 349, 351; *Darkin's case*, 2 Saunders, 290, and cases cited in the notes to that case.

Tallman, Attorney General, declined answering.

TENNEY, J., orally. — The complaint is of peculiar structure. It is not certain that it contains a *videlicet;* we consider it rather a repetition. But counsel assume it to be a *videlicet*, and rely on some authorities. That in 21st Pick. is inapplicable. It relates only to the purchaser's name, and that from 16th Mass. relates only to the time.

The counsel supposes that what comes under a *videlicet* cannot be traversed. But that is not *now* considered to be the law. Every *material* fact, though laid under a *videlicet*, is traversable. 1 Chitty's Plead. (3d Amer. ed.) 586. The earlier doctrine is exploded.

Exceptions overruled.

PHINNEY, *Petitioner for a writ of Habeas Corpus.*

To justify the discharge, upon *Habeas Corpus*, of a respondent, imprisoned by a justice's mittimus to enforce the payment of a fine for unlawfully selling spirituous liquors, it is not sufficient that the mittimus fails to state the name of the purchaser, or the quantity sold, or the time and place of the sale; or that there was a prosecutor; *provided*, the mittimus shows the offence to be one for which the justice has jurisdiction to impose a fine.

Neither, to justify such a discharge, is it sufficient that the justice erroneously ordered the fine to be paid to *the State*.

THIS was an application for a writ of *Habeas Corpus*, to bring Phinney into court, because illegally imprisoned in the public jail.

He was held in custody, by virtue of a warrant of commitment, issued by a justice of the peace.

The matters recited in the mittimus were, that said Phinney had been found guilty, by said justice, of violating the provisions of the statute relative to the sale of intoxicating liquors, and had been ordered by the said justice to pay a fine of ten dollars to the State and costs of prosecution.

A. B. Holden, for the petitioner.

The mittimus was insufficient, because —

1st. It did not show that the process was originated upon the *complaint* of any person.

2d. It did not recite the time when, the place where, the person to whom, or the quantity in which, the intoxicating drinks were sold.

3d. The fine imposed, was illegal, because it was ordered to be paid to the *State*, whereas the stat. (chap. 202, sec. 6,) declares, that one half of the fine, so recovered, shall enure to the prosecutor, or complainant, and the other half to the town where the offence is committed. *Commonwealth* v. *Ward*, 4 Mass. 497; *Bridge* v. *Ford*, 4 Mass. 641; *Ex parte Watkins*, 3 Peters, 193.

SHEPLEY, C. J., orally. —

1. It is objected that the mittimus does not show that there was a prosecutor, or who was the purchaser of the liquor, or when or where, or in what quantity it was sold. In support of the objection, the petitioner's counsel has cited 4 Mass. 497 and 641. The former case has no applicability, because the offence there charged was one of which the magistrate had jurisdiction, not to render a final judgment, but merely to bind over. In the latter case, the recognizance did not present enough to show that the justice had any jurisdiction whatever. But in this petitioner's case, it is shown that the offence, of which he was convicted, was within the justice's jurisdiction.

2. The sentence was, that the petitioner pay a fine to the State. This was erroneous, still the judgment is valid until reversed. If it were here upon a *certiorari*, the erroneous part might be reversed, leaving the penalty unappropriated. But the petitioner is not injured by the misappropriation. On paying the fine and cost, he would be discharged. That is enough for him. *State* v. *Stinson*, 17 Maine, 154; *Ricker, petitioner*, 31 Maine, 37.

The petitioner, if present on *Habeas Corpus*, could not be discharged. *Petition withdrawn.*

Barnes *versus* McCrate.

A witness, testifying in the regular course of legal proceedings, and under the direction of the court, is not liable in an action of slander for the answers he may make to questions put to him by the court or counsel, provided such answers are pertinent and responsive to the questions.

Slander. General issue.

The case was tried before Wells, J.

The following facts appeared.

A schooner belonging to the plaintiff, with his goods on board, had been seized by the collector of the port of Wiscasset, for an alleged breach of the revenue laws, and the collector had put the goods into a store.

The Secretary of the Treasury ordered the property to be restored to the plaintiff, upon payment, made by him, of the costs and expenses connected with the seizure. The amount of the costs and expenses was under examination in the District Court of the United States.

The collector had charged $35,50 for the storage of the goods, and he called Mr. McCrate, as a witness, who testified that the store belonged to him; that he had charged the collector $35,50 for the storage; that it was a fair charge under the circumstances, but would be a large one, in common and ordinary cases. He was then asked by the court or by the counsel to give his reasons, why, *in this case*, and *under the circumstances*, more was charged than in common and ordinary cases; and he answered; — "the Messrs. Clark would not store the goods, for fear that Barnes would set their property on fire, and I did not wish to store them, because he might set my buildings on fire again. * * * * He set my building, the custom house, on fire, and he has set fire to two other buildings, and I can prove it."

It was for the uttering of these words, that this suit is brought. A nonsuit was ordered, which is to be taken off, if it was ordered improperly.

Deblois, for the plaintiff.

1. The words charged being false, it is no protection to the defendant, that he was a witness testifying on oath. That

circumstance aggravated the wrong, by giving more publicity to the slander.

The protection relied upon is contrary to sound sense; and the defendant must be amenable, unless shielded by authority of decided cases. I submit that the authorities are against such a protection. Those, whose first aspect is against us, are not sustained by the cases on which they were made to rest. Such is the case in 2 Starkie on Ev. 4th part, 874, which purported to decide that the defendant's malice was rebutted by the fact, that he was testifying as a witness. A witness stands on different ground from that of a judge, a party, an attorney, or a master. He has not their exemption, nor does he need it. The protection of masters rests on ground of high public policy; judges are bound to decide, and when guilt is found, they must declare the guilt; parties are prone to get inflamed and to speak in extravagant language; counsel partake largely in the feelings of their clients, and indeed some excitement is often necessary to the rendering of any forcible aids. To words of passion, uttered by a party, and to excited words uttered by counsel in argument, the law must and does furnish protection. But the case of a witness is different. To him, it is peculiarly appropriate, that he be passionless and unmoved. He is to be calm and guarded in every expression. No case can be found, which asserts protection to a witness for slanderous words.

2. The nonsuit was prematurely ordered. The testimony should have gone to the jury, that the plaintiff might have opportunity to prove *express* malice.

The following authorities were relied upon to sustain the above positions. 2 Starkie on Ev. 874, part 4; *Buckley* v. *Wood*, 1 Cro. Eliz. 230—248; 2 Institutes, 228; 1 Vin. Abr. 387; *Weston* v. *Dobniet*, Cro. James, 432; *Bradley* v. *Heath*, 12 Pick. 163; *Remington* v. *Congdon*, 2 Pick. 310; *Hoar* v. *Wood*, 3 Metc. 193; *Padmore* v. *Lawrence*, 11 Adol. & Ellis, 380; *Hastings* v. *Lusk*, 22 Wend. 410; *Ring* v. *Wheeler*, 7 Cowen, 725; *Bullock* v. *Koon*, 4 Wend. 531; *Commonwealth* v. *Blanding*, 3 Pick. 314; *Kendillon* v.

Maltby, 1 Carr. & Marshman, 402; *Hodgdon* v. *Scarlett*, 11 Barn. & Ald. 246; *Trotman* v. *Dunn*, 4 Camp. 211; Buller's N. P. 10; *McMillan* v. *Birch*, 1 Bin. 178, note a; *Weatherston* v. *Hawkins*, 1 T. R. 111; *Astley Bart.* v. *Young*, 2 Burr. 810; *Rex* v. *Skinner*, Loft, 55; *Harding* v. *Bullman*, Hutton, 11.

G. F. Shepley, for defendant.

The words spoken by the defendant, (for the speaking of which this action is brought,) were spoken by him *as a witness* in the course of a judicial proceeding.

They were "*pertinent*," being direct replies to interrogatories addressed to him as a witness, and which he was *bound* to answer.

The case finds, that he had testified, "that the charge for storage was, under the circumstances, a fair charge." That the court or the counsel then inquired of him *his reasons* for charging said price "for storage, and for saying that it was a fair charge *under the circumstances*."

He did not volunteer these reasons, but gave them as a *direct, pertinent and* unavoidable answer to the inquiries addressed to him, either by the court or by counsel with the sanction of the court.

No action will lie for words used by a party, witness, counsel or judge in the course of judicial proceedings, where the words used are pertinent to the matter, which is the proper subject of inquiry before the court. *Buckley* v. *Wood*, 4 Coke, 14, b.; *Cutler* v. *Dixon*, 3 Stephen's N. P. 2565; *Hodgson* v. *Scarlett*, 1 Holt, 621, & 3 Com. Law, 243; 2 Starkie's Ev. 631; *Arundell* v. *Tregone*, Yelverton, 117.

One element in the action of slander is malice. And it is a rule that the presumption of malice may be repelled by the circumstances. No matter whether the words were true or false, if the inference of malice be overcome.

There can be no action for stating what one is bound to state by his duty to the law or to society. The motive being good and the duty pressing, the ingredient of malice is not to be presumed, nor allowed to be inquired of. The duty of a

witness to speak is more stringent than that of the judge, counsel or party. *He* is bound to answer; *they* may refrain.

Suppose the witness *alone* knew the fact which he testified to, and could, therefore, never prove it. Is it possible he can be made accountable for the statement, especially if, as in this case, it was directly responsive to the question, and strictly pertinent to the issue?

W. P. Fessenden, on the same side.

Whether the answer, given by the defendant, was pertinent, is a matter of law for the court, and there was nothing for the jury.

We hold that the answer was calculated to show the item of charge to be a reasonable one, and that, therefore, it was pertinent to the issue.

The question then comes, whether for words so spoken, an action can be maintained. What is the principle involved? It is, that when a person is bound to the performance of an act, the doing of it is justified by the law, irrespective of the question of malice. But where the act is one of imperfect obligation, one which the person is at liberty to do or not to do, it is open to the aggrieved party to establish the imputation of malice. For words which a *party* may speak, he is exempted, because defending his rights, and the implication of malice cannot arise. And his *counsel*, as to the right of speaking, partakes of his client's immunity.

The pertinency of the answer, then, is a bar to this suit. 1 Barn. & Ald. 242.

But the plaintiff insists that the case should have gone to the jury on the question of malice. Yet I think he will not say there was not a *prima facie* exemption; and there was no evidence of malice, beyond the answer itself; nor was there any attempt to introduce any. The nonsuit was, therefore, rightly ordered. This result is indispensable, in order to protect legal proceedings.

Deblois, in reply.

The point is, whether we had a right to ask the Judge,

whether we might put to the jury the question of malice. The case was so arranged, as to present the question, whether we could maintain a suit *without proving malice.* The intention was to settle the question whether, *in any case*, such a suit would lie.

The defendant says there is but a single case to be found against a witness. But the reason is, that no such claim of exemption was ever before thought of. He claims an exemption. Let him show some authority for it. Elementary books are not to be relied on, unless sustained by authority. The gentleman's dependence on "pertinency" alone, is a dangerous doctrine. It sanctions all abuse and all malice. Pertinent words may be maliciously spoken. But who is to judge of the "pertinency?" I submit that such a question is for the jury alone.

To the objection, that the witness might not be able to prove the truth of his answers, we reply that the *onus* of proving the falsity and the malice of them would, in the suit against him, rest upon the plaintiff.

The defendant in this suit, does not deny that his answers were false. If he had denied it, we could not have brought the case here in this form. The malice is thereby admitted. Why then were we precluded, by the nonsuit, from presenting the malice to the jury?

TENNEY, J., orally. — It is not denied that there is, in some cases, a protection to witnesses for words duly spoken in the course of legal proceedings. Does that protection extend to this witness *under the circumstances?*

There can be no question that if a witness, taking advantage of his position, and departing from what rightfully pertains to the case, should voluntarily slander one of the parties, he would be liable. But when called upon, in the progress of a cause, and under the rules of the court, and confining himself to that which rightfully pertains to the case, he is not liable for the testimony he may give. To hold otherwise would tend to intimidate a witness and to deter from a disclosure of

the whole truth. He might have no means to prove his statements. He may have been robbed while alone. Should he testify to the fact, in the course of a regular trial of the offender, he would not be liable for his statement. This is a doctrine of the highest legal policy.

A witness is not supposed to know the exact line of proceeding. He is, therefore, under the direction of the court. In this case, a question was duly put to the witness, either by the court or by counsel. And it does not appear that, in his answer, he went beyond the scope of the question. If the question was put by the court, there could be no liability for answering it; if put by the plaintiff's counsel, the plaintiff can have no ground of complaint that it was answered; if put by the defendant's counsel, objection should have been made, and, if improper, it would have been excluded.

Nonsuit confirmed.

BROOKS *versus* BRIGGS.

In trover for an article mortgaged to the plaintiff, the mortgage alone is evidence, *prima facie*, of property in him, as against a subsequent vendee of the mortgager.

If, in such an action, the defence be set up that the mortgage debt has been paid, the burden of proof is on the defendant.

EXCEPTIONS from the District Court, COLE, J.

Trover for a wagon.

One Blake, while owning the wagon, conveyed it in mortgage to the plaintiff, to secure the payment of a promissory note. Blake afterwards sold it to the defendant. This action is brought to recover its value.

To prove title, the plaintiff introduced the mortgage, which had been duly recorded; but offered no other evidence, neither was any offered by the defendant.

The defendant objected to a recovery by the plaintiff, unless he introduced the note, or furnished some further evidence of Blake's indebtedness upon it. The Judge ruled,

that, in this stage of the case, it was not necessary for the plaintiff to introduce further proof.

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

Bennett, for the defendant.

It should have been required of the plaintiff to prove that the mortgage-note was unpaid. If unpaid, the note is presumed to be in his hands. If paid, the mortgage is of no force. The *defendant* did not give the note, and has no means of proving what payments may have been made by his vendor. It is reasonable, therefore, that the plaintiff, having possession of all the proof, should be held to produce it.

The amount which the plaintiff is entitled to recover in this action, if any thing, is the amount due upon the note. We wish to know, therefore, whether the note is unpaid, and if so, what indorsements are made upon it.

N. Morrell, for the plaintiff, cited R. S. chap. 125, sect. 31 and 32; Phil. Ev. 89; 18 Maine, 357; Shep. Touch. 1820; 20 Maine, 408; 18 Pick. 394.

Howard, J., orally. — The production of the mortgage was evidence, *prima facie*, of property in the plaintiff.

If the defendant would rely upon a payment of the mortgage debt, the burden of proof was on him. The instructions of the District Court were correct.

Exceptions overruled.

Buxton *versus* Hamblen.

The R. S. chap. 64, *by necessary inference*, prohibits the sale or purchase of pressed hay, unless branded, as is prescribed in the first section.

A contract to purchase hay, in violation of that law, cannot be enforced.

A contract for the sale and purchase of pressed hay, to be performed at a future day, upon which the delivery was to be made, cannot be enforced by the seller, if the hay at said time of delivery was not duly branded.

Exceptions from the District Court, Cole, J.

Assumpsit, upon an alleged contract by the defendant to purchase of the plaintiff from twenty-five to forty tons of pressed hay to be shipped to Massachusetts. There was evidence tending to prove the contract as alleged, and that the plaintiff afterwards purchased forty tons, and procured it to be delivered at the stipulated time and place, in readiness for the defendant, who though duly notified refused to receive it. The plaintiff also had at the same time and place sixty other tons of hay.

The defence set up was, that a part of the bundles of the hay was not "branded," as required by R. S. c. 64, which provides, section 1, "all hay, pressed and put up in bundles for sale in this State, shall be branded, on the bands or boards enclosing the same, with the first letter of the christian name and the whole of the surname of the person packing, screwing or otherwise pressing the hay; and also with the name of the place where the hay was pressed, or where the person packing or screwing the hay shall live, with the name of the State;" section 2, "all screwed hay offered for sale or shipping, unless branded in the manner mentioned in the preceding section, shall be forfeited."

There was no proof, that any of the bundles of the plaintiff's hay were branded; some of them were proved by his own witnesses not to have been branded. A nonsuit was ordered, and to that order the plaintiff filed exceptions.

O'Donnell, for the plaintiff.

1. The defendant's objection comes too late. The plaintiff had a hundred tons of pressed hay at the agreed time and place for delivery. It does not appear, that he might not have furnished the forty tons duly branded. The defendant ought to have appeared and made a selection. If the defendant had any objection to the article, he waived it by not making it known to the plaintiff. *Goodhue* v. *Butman*, 8 Maine, 116.

2. The plaintiff was not bound to prove that every one of a thousand bundles was branded. It was a question for the jury, whether he was ready, if called upon, to deliver *such* hay as the contract required.

3. The want of a brand did not vacate the contract, for it exposed to no penalty, but simply to a forfeiture. The *sale* of unbranded hay is not prohibited.

4. The statute is entitled, "of Fraud in pressing Hay." It requires a brand of the name of the person pressing it. Suppose several persons to have been employed in pressing this hay; whose name is the brand to bear?

The plaintiff did not press the hay, he purchased it as it was pressed by others. Is he to be deemed guilty of "*fraud* in pressing hay," or of *fraud* in selling it, because others had neglected their duty to brand it? Fraud is not to be presumed. *Goodhue* v. *Butman*, 8 Maine, 116.

M. M. Butler, for the defendant.

WELLS, J., orally. — The sale of pressed hay unbranded, is a violation of the statute, and equally so, whether to be visited by a forfeiture of the article or by a pecuniary penalty. The statute though *not in express terms*, yet by unavoidable inference, prohibits every such sale.

This is a suit brought to recover against the defendant for not completing a sale, prohibited by law. Such a suit can never be maintained. *Nonsuit confirmed.*

RAND, *Adm'r*, *versus* TOBIE.

In a citation to an execution creditor, notifying him of the time and place, at which his debtor intended to take the poor debtor's oath, it is not necessary that a statement should be made of the date of the judgment, or of the date of the execution.

A *certiorari* is grantable only when it is shown that some injustice would be done.

DEBT, on a debtor's six months relief bond.

An execution, dated 26th of March, 1849, was issued against Tobie in favor of "John Rand, as he is administrator of the estate of S. W."

The execution purports to have been issued upon a judg-

ment recovered March 23, 1849. Tobie was arrested and gave the bond to obtain his release.

One of the conditions in the bond was, that if said Tobie "shall within six months cite the said John Rand, administrator, creditor," &c.

In order that he might be discharged on taking the poor debtor's oath, he applied to two justices for a citation to be issued to said creditor, and in the application recited, that he, the said Tobie, "had been arrested by force of an execution which issued, on the judgment obtained against him on the 26th day of March, 1849, in favor of John Rand, administrator, for the sum," &c. Upon the same paper, and subjoined to said application, the justices issued their citation, directed "to John Rand;" and containing, among other things, the following words: "you are hereby notified of the desire of the above named debtor, as expressed in the foregoing application." In that form the citation was served upon the plaintiff, Rand.

The case was submitted to the court for decision, upon the stipulation; 1st, that, if the citation was legal and sufficient, the plaintiff should become nonsuit; if otherwise, the defendants were to be defaulted; and 2dly, "that the question of the sufficiency of the citation may be considered by the court in the same manner as upon a petition for a writ of *certiorari* to quash the proceedings of the justices."

Rand, for the plaintiff.

By the agreed statement of facts, the sufficiency of the citation is submitted to the court, without regard to the certificate of the justices.

And the plaintiff submits that said citation is insufficient and illegal, and the subsequent proceedings void; because: —

1. Citation is directed to plaintiff *individually*, and not as *administrator*; and in no part of said citation does it appear, of whom the plaintiff was administrator.

2. Citation states that the judgment was rendered March 26, 1849; whereas it appears by the execution that judgment was rendered March 23d.

If debtor has not duly cited the creditor, then the plaintiff is entitled to recover, as damages, the full amount of his debt.

Sweat, for the defendants.

WELLS, J., orally. — 1st. It is not requisite that either the date of the judgment or of the execution should be stated in the citation. In this case it may be equivocal which is expressed, and it seems immaterial which. For, as the question is to be treated, as if before us on a petition for *certiorari*, the error, if any, cannot avail the plaintiff. Such a writ is not grantable, except where it is shown that some injustice would be done.

2. It is contended that the representative character of the plaintiff does not sufficiently appear in the citation. But the application for the citation is annexed, and referred to in it. That furnishes a sufficient description.

Plaintiff nonsuit.

INHABITANTS OF WINDHAM *& als. petitioners for certiorari.*

The statute of 1847, c. 28, § 3, requires the report of committees (appointed upon appeal, to examine into the doings of the County Commissioners,) to be made at the term of the District Court, *next after their appointment.*

Unless made at such next term, a subsequent acceptance of their report by the District Court is irregular and void.

When the County Commissioners, having located a highway upon a petition, close their proceedings upon such petition earlier than is by law allowed, a writ of *certiorari* will be granted.

AT the County Commissioners' Court, June term, 1847, a petition was entered for the discontinuance of one road, and for the establishment of another, in Windham. The Commissioners discontinued the one and located the other, as prayed for, allowing time after all proceedings should be closed on said petition, viz.: to owners of the land over which the location was made, one year in which to take off the wood and timber; and to the town, two years in which to make the road; and to the county, two years in which to pay the land-damages. The Commissioners made report of these proceedings at their De-

cember term, 1847, and ordered that the same should be recorded as of that term, which was accordingly done. From that adjudication an appeal was taken by the town, and also by some of the land owners. The appeal was entered at the March term, 1848, of the District Court, by whom, at that term, a committee was duly appointed to examine into the doings of the Commissioners and to make report at the *then next June term* of the District Court, at which term the committee made a "report in part." Their full and final report was made at the October term, affirming the doings of the Commissioners, and at that term, October, 1848, the report was accepted by the District Court, by whom no further action was ever had upon the subject.

After said appeal was taken, the petition in the Commissioner's Court was continued from term to term until their June term, 1849, at which term, though they had received no certificate of the doings of the District Court, they ordered "all proceedings upon said petition to be closed."

This petition for a *certiorari* is filed by the town of Windham and by some of the owners of the land, on which the new road was laid. Among other causes they allege —

1. That the committee appointed by the District Court neglected to make their report, as required by law, at the term of the court *next* after their appointment.

2. That the proceedings were closed by the Commissioners at least one term earlier than was by law allowed.

3. That the Commissioners closed said proceedings without being certified of the doings of the District Court, and that the District Court never did certify their doings to the Commissioners, nor ever render any judgment on the matter appealed, so that the Commissioners, when they ordered the proceedings to be closed, had no authority to act in the matter.

Eveleth, for the petitioners.

Swazey, County Attorney, *contra*.

Shepley, C. J., orally. — The committee was appointed by the District Court, March term, 1848. Their report, which

was made, not at the next June term, but at the October term, 1848, affirmed the doings of the Commissioners. But it was one term too late. The Act required it to be made at the June term. The language of the statute, (c. 28, § 3, of the laws of 1847,) is emphatic, and admits of no construction. It is, that the committee "shall report at the *next term*" after their appointment. This provision, which was made for the purpose of avoiding delay, not having been complied with, all the subsequent proceedings in the District Court were irregular and void. And, further, that court in fact never made any adjudication of the case; nor did it certify any of its doings to the Commissioners.

The Act required all proceedings in the Commissioners' Court to be stayed *till a decision was had* in the District Court. During that stay, no applications for the allowance to claimants for damages, could be received. Such applications were necessarily to be withheld until the doings of the District Court had been certified to the Commissioners. But the persons injured were entitled to have the same available length of time in which to make their applications, as if no appeal had been taken.

The doings in the Commissioners' Court were therefore closed too early.

The time allowed to the town for making the road, and to the land owners for taking off the growth, and to the county for paying the damages, was to commence from the term when all the proceedings in the original process should be closed. The Commissioners, by closing the proceedings sooner than was by law allowed, unlawfully shortened the times allowed to the town and to the land owners, and to the county for the purposes aforesaid. It is not desirable, that proceedings, so irregular, should be sanctioned.

Writ of certiorari granted.

COBB *versus* WOOD.

An award of referees upon a parole submission is of no binding effect *against* a party, if he had no notice of the time or place of their meeting or of the decision which they made.

Even *that* party, when sued for the cause of action which had been so submitted to such referees, cannot avail himself of such an award, as to the amount of damages.

ASSUMPSIT, for the use of the plaintiff's land, by carting and cutting rocks upon it.

The defendant had occupied the plaintiff's land for said purposes.

The plaintiff demanded compensation, and there was evidence tending to show, *that* the defendant authorized him to refer the amount to three of the plaintiff's neighbors, of the plaintiff's own selection; and *that* the plaintiff accordingly selected three of the neighbors, who met and examined the land and agreed in estimating the damage at $15, but made no written award. The defendant was not present at their meeting, nor did it appear, that he was notified of the time or place of holding it, or of the amount at which they estimated the damage.

The defendant requested the Judge to instruct the jury, that, if the defendant offered to refer the amount of damage to three of the plaintiff's neighbors, and if the plaintiff accepted the offer and accordingly procured three of his neighbors to examine the premises and appraise the damage, and they thereupon made their award in good faith, this would constitute such a reference as would be binding on the parties, and they should return a verdict only for the amount of such award.

The Judge refused to comply with this request, and instructed the jury that there was no evidence of such a reference of the matter in dispute as would bind the parties, and that they must assess the damage, as if no reference had been made. The verdict was for the plaintiff for $25,00. The defendant excepted.

Adams, for the defendant.

1. This is a submission and award at common law. Courts will go far to give effect to such arrangements. *Brady* v. *Mayor*, 1 Barb. 584. It was binding upon the plaintiff. 8 Mass. 398; 6 Mass. 49; 17 Maine, 54; 12 Mass. 134; 18 Maine, 255.

2. If the Judge was not satisfied that the facts proved a binding award, it was his duty to submit them to the jury, with appropriate instructions. *Hill* v. *Hobart*, 16 Maine, 164; *Homans* v. *Lambard*, 21 Maine, 308; *Greene* v. *Dingley*, 24 Maine, 131.

Deblois, for the plaintiff.

HOWARD, J., orally.—The supposed award was of no binding effect. It does not appear that the defendant had any knowledge that the matter was ever submitted, nor who were the referees, nor was he notified of the time or place of their meeting, that he might appear and protect his right; nor of the conclusion at which the referees arrived. On that award the plaintiff could have maintained no action against the defendant. Indeed there was no completed award.

Exceptions overruled.

PREBLE *versus* HAY.

After the expiration of a *written* lease, no notice to the tenant is necessary for the purpose of terminating the tenancy.

In a tenancy *at will, it seems* that a written notice to the tenant to remove the buildings which he had erected, and to surrender the land to the landlord, will have the effect of a notice to terminate the tenancy.

EXCEPTIONS, from the District Court, COLE, J.

Complaint for forcible entry and detainer. General issue. There was evidence tending to prove, *that*, in November, 1843, the plaintiff leased the land to one Oxnard by a written lease for five years; and *that* the tenant was assignee of that lease, and under it had occupied the land for three or four years, paying the rents to the plaintiff quarter yearly.

It was proved that, in Dec. 1848, the following notice addressed to the defendant and signed by the plaintiff, was served on the defendant; viz. — "Portland, Dec. 27, 1848. You are hereby notified to remove the building now on my land, on the south-west side of Preble street, without any delay, and deliver up to me the possession of the premises;" and that, in May, 1849, another notice of the same import was served upon him. This complaint was instituted in July, 1849.

The jury were instructed, 1st, that if the defendant was assignee of the written lease, and held under it, and if the lease had expired prior to the notice of Dec. 1848, the action was maintained; and 2d, that if the tenancy was merely at will, the notice of Dec. 1848, was sufficient to terminate it. The verdict was for the plaintiff, and the jury found specially, that the defendant held under the Oxnard lease, and was the assignee of Oxnard.

Sweat, for the defendant.

The second instruction was erroneous. The notice of Dec. 1848, is not susceptible of the construction given to it. It was not designed to put an end to the tenancy, nor could it, in law, have that effect.

W. P. Fessenden, for the plaintiff.

WELLS, J., orally. — The second instruction was correct. The notice of December, 1848, was a notice to remove the building and surrender the possession of the land to the plaintiff, and it was sufficient to terminate the tenancy. But that is an immaterial point. The jury have found, that the holding was under a written lease, which had expired when the first notice was given. In such a case no notice of the termination of the tenancy is necessary. The first instruction was also correct.

Exceptions overruled.

Remick *versus* Brown *& al.*

Although an execution debtor, enlarged upon having given a debtor's six months relief bond, may have taken the poor debtor's oath within six months from the execution of the bond, yet, if he disclosed a valuable interest in any chose in action, and omitted to have it appraised, there is a breach of the bond.

Where an execution debtor has mortgaged a chose in action for the security of one of his creditors, and it be proved that the same was not of sufficient value to secure such creditor, the debtor's omission to cause the same to be appraised before taking the poor debtor's oath, will be considered of no *actual* damage to the creditor.

Debt upon an execution debtor's relief bond.

To prove that the condition of the bond had been performed, the defendants relied upon a discharge certificate issued by two justices. To defeat that certificate, the plaintiff introduced the original disclosure of the debtor, made before the justices, in which, among other matters, he stated that he "gave to his wife a note against Babcock, upon which she has collected some few dollars; $30 or $40 in all." It was admitted by the parties that "the Babcock note was a note payable to said debtor for $200, and that Babcock had not at that time, nor has he now any attachable property. The debtor also disclosed that a balance was due on some notes against one Dudley, which were "to be given up, if Dudley drinks nothing." The debtor further disclosed as follows, viz.: "Mr. McDonald has my household furniture, stock, &c. mortgaged to him and recorded; part he holds under receipt for me. Hall & Co. and G. & L.'s notes to amount of $6000, he has. I presume they are good. There was $6000 in the beginning; balance now about $2400. There are other notes among those embraced in assignment put on record, and not delivered yet. I have assigned to him all my demands." Mr. McDonald testified that the personal property assigned to him was insufficient for his security.

The case was submitted to the court for a legal judgment.

Clifford, for the plaintiff.

1. There were notes against third persons, in which the

debtor had an interest. It was his duty to cause that interest to be appraised. Not having so done, there was a forfeiture of the bond. 29 Maine, 368; 19 Maine, 265 and 46; 21 Maine, 480; 26 Maine, 200; R. S. ch. 148, sect. 29 and 30.

2. The plaintiff is entitled to full damages. R. S. ch. 115, sect. 78; Stat. 1848, ch. 85, sect. 2.

Deblois, for the defendant.

There is but one question. It relates to the amount of damage, if any, to be recovered. Before the plaintiff can recover, he must show *actual* damage. The notes against Dudley are to be given up, on condition that he drinks nothing. The consideration of this bargain was a legal one. I believe the condition has thus far been performed. At any rate, there is no property in the notes, capable to be assigned or appraised. The Babcock note was of no value. For it is the admission of the parties, that he had no attachable property.

Clifford, in reply.

There is nothing to show or to furnish a presumption, that the Dudley note is not collectable. The presumption is, till disproved, that all notes are good. If the condition annexed to it were legally binding, still the debtor's interest in it ought to be appraised. So of the note against Babcock. Though not now collectable, it may be hereafter.

WELLS, J., orally. —

It is well settled that a debtor, having an interest in a chose in action, must cause it to be appraised, before he is entitled to an administration of the oath.

The oath taken in this case by the debtor being unauthorized, there was a breach of the bond. By the R. S. chap. 148, sect. 39, the obligee in the bond was, in such cases, entitled to recover the full amount of the execution. But that rule has been changed by the Act of 1848, which provides, that, if the oath was *in fact* taken *before* a breach, the creditor can recover but the *actual* damage. In this case, the oath was taken within the six months, and *before* any breach.

The debtor discloses notes against Dudley and Babcock and some other notes, and at the conclusion of the disclosure asserts that he had assigned *all* his demands to McDonald. And McDonald testifies that all the property and demands assigned to him were not sufficient for his security. There was therefore, in the notes, nothing of value remaining in the debtor, and the non-appraisal of them could be of no injury to the creditor, who appears to have suffered no *actual damage* by the breach of the bond. *Plaintiff nonsuit.*

GREENE, *administratrix, appellant, versus* DYER.

The contingent claims, for which, by the R. S. c. 109, § 13, funds are to be reserved by order of the Judge of Probate, are those, concerning which it is uncertain whether they will ever be converted into debts.

Where a claim, not belonging to the contingent class, is disallowed by commissioners of insolvency, and is thereupon prosecuted and recovered in a suit at law, the creditor is not barred by any statute of limitation from having it at any time afterwards, added to the list of allowed claims.

His right to have it so added does not depend upon any reservation of funds, ordered by the Judge of Probate for contingent claims.

Neither is that right impaired by a distribution of the surplus assets, without any order of the Probate Court, among the heirs and legal representatives of the deceased, the estate, though represented insolvent, having proved to be solvent.

DYER, in 1850, presented to the Judge of Probate a petition setting forth, *that* he had a just claim against the estate of the intestate; *that* he presented the same before the commissioners of insolvency, and on an appeal from their decision, recovered, in an action at law, in 1845, the sum of $250,28 against said estate, which amount the administratrix was bound to add to the list of other sums allowed against the estate; *that*, during the pendency of said action at law, she was directed by the Judge of Probate to retain in her hands the sum of $1200, as a contingent fund from which to pay this petitioner the amount, or a proportionate dividend upon the amount, which he might recover in said action; and *that*

she has neglected to add said $250,28 to the said list of claims, and has also neglected to pay the same or any part of it to the petitioner.

The prayer of the petition then was, that she might be cited to settle an administration account.

The facts of the case appeared to be as follows: —

Administration on the estate was granted in 1840.

The administratrix represented the estate insolvent. The petitioner presented to the commissioners a claim which they disallowed, and he thereupon prosecuted the same in an action at law. On account of that claim, the administratrix was directed to retain in her hands $1200, till the result of the suit should be ascertained. Dyer recovered in the suit $250,28, in 1845. The order to retain the $1200 was then rescinded. Dyer never caused his judgment to be certified to the Probate Court, nor gave notice of it to the administratrix. Her sixth and last administration account was settled in 1847. The estate proved to be solvent, and the claims, allowed by the Probate Court, were all paid in full; and the residue of the assets were distributed, by order of the Probate Court, to the widow and heirs of the intestate, except $300, which the administratrix was ordered to reserve for "contingent" claims against the estate.

Of the $300, reserved as aforesaid, there remained in her hands after payment of expenses $276,75, which the heirs of the intestate claimed, and which she paid to their guardian.

This petition prays that she be cited to settle a further account, so that credit may therein be given to the petitioner for the amount of his said judgment, and that payment of the same may be ordered by the Probate Court.

A citation to show cause was issued, and, upon a full hearing, it was ordered by the Judge of Probate that the administratrix settle a further account.

From that order this appeal was taken, upon the following reasons alleged therefor: —

1. That she is not bound to pay the claim of said Dyer

because the same was barred by the statute of limitations, relating to executors and administrators.

2. That the estate, though represented insolvent, proved to be solvent, and all claims duly presented were paid; that more than nine years elapsed, after the filing of the administration bond by the respondent, before the petitioner entered his complaint to the Judge of Probate, and more than four years elapsed after his recovery of judgment in his suit against her, before he demanded payment of her, or cited her to account.

3. That said Dyer never certified the judgment, recovered by him against this respondent, to the Judge of Probate, nor filed the same in the Probate office, nor did he make any demand therefor on this respondent, until more than four years after the recovery thereof.

4. That in February, 1847, she settled her sixth and final account, and that the said balance of $276,75, was claimed by the minor heirs of the intestate, and was paid over to their guardian.

Willis and *Fessenden*, for the administratrix.

1. The administratrix relies upon the statute of limitations. R. S. chap. 146, sect. 29; 11 Maine, 150; 14 Maine, 252. More than four years elapsed between recovering the judgment and filing this petition.

2. As the estate proved to be solvent, the representation and commission of insolvency are to have no effect.

3. After four years, the assets not distributed become the property of the heirs. 15 Mass. 6, 58; 16 Mass. 172, 429; 5 Pick. 143.

4. The petitioner did not certify his judgment to the Probate Court. R. S. chap. 109, sect. 14, 15, 16, 19 and 24; 2 Metc. 255.

5. A final account has been settled, and the assets accounted for. Another settlement could not aid the petitioner.

Shepley and *Dana*, for the petitioner.

Shepley, C. J., orally. — 1. The four years limitation, re-

lied on in the first reason for the appeal, applies only to *suits brought*, and not to proceedings in the Probate Court. The cases of *McClellan* v. *Hunt*, cited by the counsel from the 11th and 14th Maine, were such suits. That statute was not intended to prevent the Judge of Probate from closing up matters in his own court. If it was so intended, all estates must be closed in that court in four years.

2. That assets, remaining more than four years in the hands of an administrator, belong to the heirs, cannot be received as a general proposition. The cases cited from Massachusetts do not apply.

3. Another alleged reason of appeal is, that the petitioner was delinquent by not filing the certificate of his judgment in the Probate Court.

This calls for a construction of R. S. c. 109, § 13, which requires funds to be retained for contingent claims. That class of claims embraces those only, concerning which it is uncertain or contingent, whether they will ever become debts. Of that kind are the liabilities of a surety. Such a claimant may present his contingent claim, and funds are to be reserved for it. *Such* a reservation is not to be continued more than four years. But this petitioner's claim was not of that class. It was not a contingent claim. In the case of a contingent claim, the contingency does not relate to the *amount* which may be due or which may be recovered, but to the uncertainty whether *any amount* will ever become due.

Was then that decree of the Judge of Probate, which requires the petitioner's debt to be paid, rendered illegal by the circumstance, that it had not been put, by certificate, upon the list of claims? The statute requires such a debt to be added. Whose duty is it to add it? On that point the statute is silent. But it is the duty of administrators to pay the debts of their intestates. If the appellant had added this debt and paid it, she would have been protected. We think she may be compelled to add it to the list of debts. The law does not prescribe within what time debts shall be added, nor require that they be paid from any reserved funds. The

omission of the Judge of Probate to direct that this debt should be added to the list, was a mere informality. It affected no rights. For such an informality, this court does not interfere. *Decree affirmed.*

SWEETSIR *& al. versus* KENNEY.

Of the right of referees to decide matters of law, arising in cases submitted under a rule of the court.

EXCEPTIONS from the District Court, COLE, J.

This action was submitted by a rule of court in common form to referees. They awarded that the defendant (who had presented a set-off account,) should recover $171,81, with costs. On the plaintiff's motion the award was recommitted for the correction of mistakes, if any had been made. The second award was of the same import with the first. The plaintiffs objected to its acceptance for the following causes, which they offered to prove.

1. That the referees undertook to decide according to law, and mistook the law, and have refused to correct their mistake.

2. That the referees acted with gross partiality, prejudice and oppressiveness, at the hearing of said cause and in making their award; the plaintiffs not alleging fraud or corruption in the referees, except as may be implied in the above.

In order to sustain this position, the plaintiffs set forth, in writing, certain facts relative to the proceedings of the referees, which they offered to prove, and from which they submitted that the court would infer that the referees acted with gross partiality, prejudice and oppressiveness. The principal facts thus set forth were in substance, *that*, at the second hearing before the referees, the several charges in the plaintiffs' claim, amounting to $252,56, were admitted to be just; *that* the plaintiffs were owners of a schooner, and had let her to the defendant at the halves; *that* the plaintiffs insured $1000 upon the freight; *that* the vessel and all the freight were lost; *that* the insurance money, minus the premium, was paid to the

plaintiffs; *that* the referees adjudged the defendant to be entitled to half that amount, and allowed it to him in the award; *that*, though requested, the referees refused to make such an alternative award, as would subject their views of the law to the revision of the court.

The statement also exhibited other circumstances, which seemed to show that the referees had an unyielding confidence in the correctness of the award, or a determination that the defendants should prevail in this suit.

The court declined to hear the evidence.

The award was accepted, and the plaintiff filed exceptions.

Barnes, for the plaintiff.

I am aware that motions of this kind have not always met the highest favor. But the extraordinary wrong in this case compels to the last resort.

The object is to see if the submission of matters to referees is allowed to produce injustice. Verdicts, when rendered against law, are set aside, as of course. Will not the court of last resort, in like manner, vacate unjust and illegal awards?

I. The referees mistook the law applicable to the case.

This we offered to prove *aliunde*. It has not, in this State, been decided that such mistake should appear, on the face of the award. The statute of Massachusetts, on which the decisions in 6 Metc. 165, and 7 Metc. 490, were founded, are wholly unlike ours.

Upon the facts which we offered to show, it is apparent that award was grossly against law and right.

II. We offered proof of gross partiality, prejudice and oppressiveness. Such grounds have often been held sufficient for setting aside awards, notwithstanding the remarks of WHITMAN, C. J., 23 Maine, 438.

The allegation of this cause of exception, must be presumed to mean such a *degree* of partiality as to produce an unjust decision, and such as can be shown by proof.

III. The Act of 1845 must have been designed to mitigate

the strictness of previous decisions on this point. It allows the rejection of an award, when required by *equity*.

IV. The offer which we made to prove the facts, alleged in our motion, having been rejected, those allegations, for present purposes, are to be considered as true.

M. M. Butler, for the defendant.

HOWARD, J., orally. — It is contended that the referees undertook to decide according to law. But that fact is not shown. They had all the powers of any court of law and of any court of equity. There is nothing by which it appears that they intended to conform to the principles of strict law, or that they may not have acted upon their view of the equity and justice of the case. Whatever we might think of the law, as to the defendant's supposed right to a share in the insurance money, it is not in our power to control the decision of that tribunal, to which the parties submitted both the law and the facts.

The charge that the referees acted with partiality, prejudice or oppressiveness, is not sustained.

Exceptions overruled.

MOULTON *versus* LOWE.

A person, who, without authority, prosecutes a groundless action in the name of another, is liable to the defendant in such action, for the expenses and damages to which he has thereby been subjected, beyond the amount of the taxed cost.

An omission by such defendant, to call, in court, for the authority to commence such a suit, is not a waiver of his right to recover against the person who wrongfully commenced it.

Any one of the purchasers of land by the same deed, though in unequal proportions, who have given their several notes for each one's share of the purchase-money secured by a joint mortgage of the tract, may, *without the concurrence of the others*, by bill in equity, set aside the mortgage as to himself, if the purchase of the land was procured by fraudulent representations of the grantor.

As such purchaser, if entitled to a remedy, may pursue it alone, and thereby vacate the mortgage as to himself, the relation between him and the other purchasers could not authorize him to prosecute bills in their names, and without their consent, to rescind the trade, as to them.

On a statement of facts agreed at *Nisi Prius*.

This plaintiff had a bond for a tract of land, to be conveyed to him or his appointees.

He bargained to sell it to Samuel Kimball and three other persons in unequal shares, and the obligors accordingly executed the conveyance to them, in a single deed, specifying, however, the several proportions of each grantee. The grantees paid a part of the purchase-money, and each one gave his separate note for his part of the balance.

All the grantees then made a joint mortgage of the tract to secure said notes.

Four bills in equity, (one in the name of each grantee,) were brought against this plaintiff and the said grantors, to rescind the purchase, on the ground that it had been procured by fraudulent representations. These suits were brought in the Circuit Court of the United States, and were pending from 1840 till 1845, when they were dismissed with costs. The present plaintiff, Moulton, in defending against each of those suits was compelled to pay large sums in solicitors' fees, above the amount of his taxed bill of costs. The said suits in equity were commenced and prosecuted by the procurement of the defendant, Lowe, who undertook to act as the agent of the several plaintiffs therein. He had authority to act in behalf of three of said plaintiffs, but it is, in this action, charged that the suit, in the name of Samuel Kimball, who resides at New Orleans, was wrongfully brought and prosecuted without his authority, and it is for this wrong, that this suit is brought against Lowe.

Samuel Kimball neglected to pay his note, given as aforesaid, and the other mortgagers, in order to avoid a forfeiture of the land, were compelled to pay it, which they did through the agency of Lowe.

During the pendency of said equity suits, no question was

made as to the authority of Lowe or of the solicitors he employed, to act for all the plaintiffs therein. Two depositions of Samuel Kimball are put into the case, for the consideration of the court, if legally admissible. The effect of these depositions will be perceived in the opinion.

E. H. Davies, for the plaintiff.

If the suit in Kimball's name was brought without his authority, by Lowe, he is accountable to the plaintiff for all the damage he has sustained by means of that suit. 8 Met. 31, 33.

To prove that there was authority, the burden is upon Lowe. The affirmative is with him. 1 Greenl. Ev. sect. 79.

But, even if it be for this plaintiff to prove that Lowe had no authority, such want of authority is fully shown by Kimball's deposition.

Fessenden & Deblois, for the defendant.

1. The property of the three other plaintiffs in equity was mortgaged for payment of S. Kimball's note. From this position, there resulted to them an authority to use his name in any manner proper to avoid the payment of the note. The bringing of the bill to set aside the sale for fraud, was a proper mode to effect that object. *Pierce* v. *Thompson*, 6 Pick. 193. "An action may be maintained by the several partners of a firm, upon a guaranty given to one of them, if it was given for the benefit of all." *Garrett* v. *Handly*, 4 B. & C. 664; *Bateman* v. *Phillips*, 15 East, 272; *Harper* v. *Williams*, 4 Adolphus & Ellis, New Series, 219; *Freeman* v. *Cram*, 13 Maine, 255; *Harmon* v. *Hill*, 14 Maine, 127.

2. Kimball ratified the suit after he knew of its existence. This is as effectual as an original authorization could have been. *Bryant* v. *Moore*, 26 Maine, 84; *Sanderson* v. *Griffith*, 5 B. & C. 909; *Anderson* v. *Watson*, 3 Carr. & Payne, 214; *McLean* v. *Dunn*, 4 Bing. 717; *Somes* v. *Spencer*, 1 Dow. & Ry. 32; *Wilson* v. *Tumman*, 6 Manning & Granger, 242.

Kimball knew of the suit in his name, as appears by his deposition given in June, 1842, and the case was not disposed of until 1845. He was having the benefit of the contest

and the chance of success. The omission to object to it, then, was a ratification. *Newhall* v. *Dunlap*, 14 Maine, 180; *Hasting* v. *Bangor House*, 6 Shep. 436; *White* v. *Stanwood*, 4 Pick. 380; *Cleverly* v. *Whitney*, 7 Pick. 36.

3. The plaintiff waived all objections to the commencement and prosecution of the suit, by omitting to call for the appearance of Kimball *at the first term*, and by defending without objection to the final termination of the suit.

This is the spirit of the rule as adopted in the case of *Knowlton* v. *Plantation No.* 4, 14 Maine, 20; *Strout* v. *Durham*, 23 Maine, 483.

In a court of equity, we argue, that the same necessity exists as in law for placing such exceptions to the prosecution of a suit before the court, by plea or answer; and that, by omitting to take the objection *in limine*, the party waives his right to do so in a more advanced state of the proceedings.

It would be unjust to permit a defendant to lie by and accumulate costs and expenses, until the final termination of the suit, on its merits, when a mere technical error, if noticed at the onset, would have put an end to the controversy.

4. The burden of proof rests on the plaintiff, to satisfy the court that the suit was instituted without authority.

Davies, in reply.

Though the land of the three other plaintiffs in equity was under the mortgage, whereby Kimball's note was secured, they had no occasion to use his name in a suit.

If there was fraud, which could vitiate the purchase of the land, they might, each one for himself alone, have taken the advantage of it, and thus have defeated the mortgage, as to themselves.

The making of Kimball a party, could not have aided them in avoiding the mortgage. They were therefore under no *necessity*, and if not under a *necessity*, they could have no *right*, to use the name of Kimball, without his consent.

As to the supposed notice to Kimball of the pendency of the suit, it is submitted that, taken in connection with his deposition, no ratification can be inferred from it.

It was not incumbent on the defendants in the suit in equity "in the institution of the process to have called on the counsel for their authority to sue the bill, in the name of Samuel Kimball." The cases cited for the defendant on this point relate to the subsequent prosecution of the same suit.

SHEPLEY, C. J. — The case is presented for decision upon an agreed statement, which is composed in part of two depositions of Samuel Kimball. In the one taken in this case, he denies any knowledge of the suit brought in his name against the plaintiff and others, until after it had been determined. He not only denies, that any person was authorized by him to commence it, but asserts that he would not permit his name to be used in such a suit, when others interested in the purchase of the lands proposed to commence one.

The suit must therefore, upon the proof, be regarded as commenced and prosecuted without authority from him.

Upon established principles the plaintiff will be entitled to judgment, unless some sufficient ground of defence is presented. *Bond* v. *Chapin*, 8 Met. 31.

In defence it is insisted, that there has been a ratification of the proceedings by Kimball.

His answers to certain questions propounded to him in the deposition taken in the case of *Hough* v. *Richardson & als.* are relied upon as proof of it. He was asked, whether a similar suit against the plaintiff and others had not been commenced in his own name; whether he had not joined with the others in those suits, and agreed to share the expenses of them. After answering in the negative, he says, "if such suits as are mentioned have been instituted, deponent is in no manner interested or privy thereto." If he must be considered as informed by the questions, that such a suit was pending, his omission to interpose and prevent its further prosecution cannot be regarded as a ratification of it, when his answers had distinctly informed the party prosecuting and the parties defending it, that he was neither interested in it nor privy to it. This was a repudiation of the suit in his own

name, if one existed, and no tribunal could be authorized to infer from his answers and subsequent silence, a ratification of those proceedings. That repudiation does not appear to have been withdrawn or modified.

It is then contended, that the plaintiff waived all objection to the prosecution of the suit in the name of Kimball by omitting to call for the authority of the attorneys to prosecute it.

The plaintiff would be entitled to infer, that a suit commenced by counselors of the court under their signatures was not commenced without authority. It does not appear, that he had knowledge, or could have had, that it had been, until there had been a publication of the testimony taken in the suit in equity. Nor does it appear, that he could then have presented the objection with effect before the final hearing.

An omission, if such there had been, to present a fatal objection to the further maintenance of the suit could not operate as a waiver of a right of action against one, who had prosecuted that suit in the name of another without authority.

It is finally insisted, that the joint mortgagers with Kimball had a right to use his name without his consent, to obtain relief from their liability to pay the notes given by him in payment for his share of the land.

The land appears to have been conveyed to the grantees by one deed, conveying it in distinct and separate shares. Each purchaser paid for his own share by cash and his own notes. All the purchasers conveyed the whole land in mortgage to secure the payment of their several notes. The other purchasers were not personally liable for payment of the notes given by Samuel Kimball. Their shares of the land might be taken for their payment by a foreclosure of the mortgage. If those shares could be relieved from that liability without the use of his name, they would have no occasion and no right to use it without his consent.

Their suits in equity appear to have been commenced to obtain a revision of the contract of purchase and sale on the

alleged ground of a fraudulent misrepresentation; to have the title acquired by the vendees reconveyed to the vendors; and to have the consideration paid and secured restored. If successful by a suit or suits in their own names they would no longer have retained any title to their shares of the land. Their mortgage would have been annulled; and their property could not have been taken to pay the notes of Samuel Kimball. As the shares were conveyed separately each purchaser could act independently of the others in any proceedings respecting his own share; and could obtain relief, if entitled to it, from payment for his own and any other share. All this might have been accomplished without the use of the name of Samuel Kimball, and without including his share of the land in any suit. The other purchasers were not entitled to decide for him that he should rescind the contract and reconvey his share of the land.

Being enabled, if successful in their suits, to obtain entire relief from liability to have their shares of the land taken to pay his notes, they were not authorized, without his consent, to institute an unnecessary suit in his name.

Defendant defaulted, to be heard in damages.

JORDAN *& al. petitioners for certiorari.*

The District Court, on an appeal from the doings of County Commissioners, as to highways, have no authority to award costs against the original petitioners.

Whether an appeal can lie to the District Court from the doings of County Commissioners, in the matter of a *town way; quere.*

THE petitioners wished a town road to be established, extending from a point in one town to a point in another town.

Upon their application the selectmen of one of the towns located the part within its limits, but the town refused to ratify their doings. The selectmen of the other town declined to make any location. The petitioners then appealed to

the County Commissioners, who ordered the road to be made in both of the towns.

One of the towns appealed, and the committee, appointed by the District Court, reported that the order of the County Commissioners ought to be wholly reversed. The District Court accepted the report, and awarded costs to the appellants *to be paid by the petitioners.*

To quash the proceedings of the District Court, so far as to vacate their said award of costs against the petitioners, this writ of *certiorari* is prayed for.

Morgan, for the petitioners.

Davies, contra.

By the court. — The District Court had no authority to adjudge costs *against the petitioners.* There is a provision, Stat. of 1847, c. 28, § 5, that if the judgment of the County Commissioners be *affirmed*, the *appellants* may be adjudged to pay costs arising after the appeal. But, in this case, the judgment of the County Commissioners was *reversed*, not *affirmed.* The discretionary power as to costs, given at the close of the section, extends only to allowances *from the county treasury.* The adjudication of the District Court, as to costs, was therefore erroneous, and the writ of *certiorari* must be granted. If it had been necessary to examine the point, it would perhaps be found that, *as to town ways*, no appeal to the District Court lies from the judgment of County Commissioners.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF LINCOLN,

APRIL TERM, 1851.

PRESENT:

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

FARLEY, *in equity, versus* NATHANIEL BRYANT,
BENJAMIN HARRIS,
WILLIAM TURNBULL *and*
MARY TURNBULL, *his wife.*

The lapse of many years between a conveyance of *improved* land and an application to have the deed reformed, for an alleged mistake in its description of the land, would impose a serious dissuasive upon the action of the court.

But in relation to *unimproved* lands, and especially where the occupation of the grantee and his assigns has indicated no claim under the description alleged to have been inserted by mistake, the lapse of time is comparatively of little weight.

To authorize the court to reform a deed upon the allegation of a mistake, the mistake must be precisely alleged and clearly proved.

Such proofs may be established by parole testimony.

In an adjudication upon such a point, the evidence from applying the description in the deed to the marks, monuments and reservations upon the face of the earth, to which it refers, thereby to discover its agreement or disagreement therewith, is an element entitled to great consideration.

So also it is of great importance to inquire whether the grantees and their assigns have or have not, in the management of the land, conducted as if considering the disputed part of the land to have been yet unconveyed by the deed, under which they claim.

The reservation of a right to pass upon an old path-way to *one* lot of land *may* not confer the right to pass further upon the same path-way to *another* lot.

Where, in a conveyance of land, a boundary is described in the language intended to be used, though under a misapprehension as to its construction and effect, a court of equity can make no correction.

Parole evidence is inadmissible to show that the grantor, in describing the boundaries, supposed that the words used would have an effect, different from that which the law affixes to them.

A mistake in describing the boundaries in a deed of conveyance, cannot be corrected to the damage of the assignees of the grantee, unless such assignees purchased with notice or without value.

Though the proof, to overcome an answer in chancery, must be equivalent to the testimony of two credible witnesses, yet it need not be direct and positive.

When a plaintiff in equity, in order to obtain relief, must have a decree against a defendant, he cannot use the testimony of that defendant, against the other defendants.

A defendant in equity cannot use a co-defendant as a witness, to prevent the obtainment of a decree against them both.

THE bill sets forth, in substance, that in 1832 the plaintiff sold a lot of land in Newcastle to Benjamin Harris, "beginning at the north-west corner of the plaintiff's garden, thence running north sixty-six and one-fourth degrees west one hundred and two rods to a stake; thence west sixty-six and one-fourth degrees south twelve rods to a stake and stones; thence north sixty-six and one-fourth degrees west about one hundred rods to a stake and stones, at or near the easterly edge of the alder growth, skirting Winslow's meadow; thence south-westerly by the edge of the alder growth to the Nichols line, and continuing on Nichol's line south-south-westerly thirty-six rods to the north-west angle of land, then in occupation of James Robinson; thence south-easterly [by various courses] to the point of beginning;" reserving "the privilege of a cart road from my house westwardly through the said conveyed land, where the travel usually goes, to my wood lot adjoining Alexander Barstow's south line, and also to a field adjoining James Robinson's north line," &c.; —

that Harris entered into and continued the occupation of the same, according to said boundaries, until 1837, when he bargained the same to the defendant, Bryant; *that* Harris delivered the Farley deed to Bryant, in order that Bryant should thereby procure a new deed to be made, by which Harris should convey to Bryant; *that* Harris executed a deed to Bryant, who retained both deeds, and sent them to the registry office to be recorded; *that* Bryant, in 1847, conveyed the land to Mary Turnbull; *that* Turnbull now claims to hold from the plaintiff a lot of land under his deed to Harris, which the plaintiff never meant to convey to Harris; *that*, on examining the record of the deed to Harris, it is found that the first line in the description of the land, being written in figures, purports to be 182, instead of 102 rods in length; *that* at the westerly end of the lot it is described as bounded by the edge of the Winslow meadow, instead of the alder growth: —

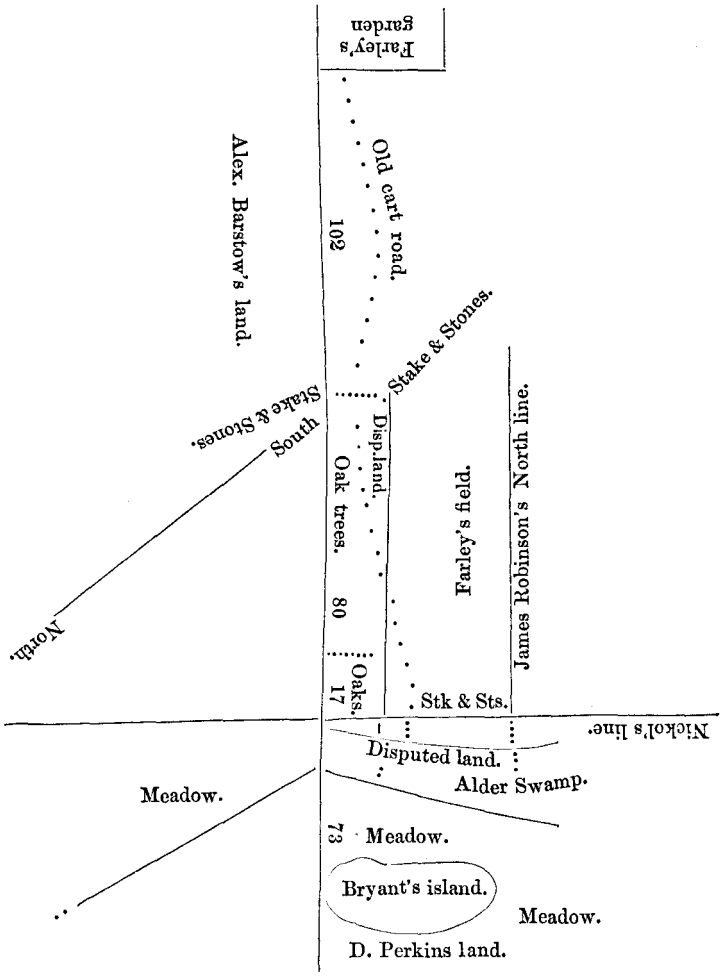
The plaintiff thereupon charges, that, in the description of the first line, a fraudulent alteration has been made, or that the deed was incorrectly recorded, or that there was a mistake by inserting 182 instead of 102 rods, and that in the description of the westerly end of the lot there was a mistake by inserting the words, "to the easterly edge of the Winslow meadow to a stake and stones; thence southwardly by the edge of said meadow to the Nichols line," instead of the words, "to a stake and stones at or near the easterly edge of the alder growth, skirting Winslow's meadow; thence south-westwardly by the edge of the alder growth to the Nichols line." Whereupon the plaintiff prays, that said Harris, Bryant and Turnbull may respectively be required to execute to the plaintiff releases and quitclaims of said last mentioned two tracts of land; viz: — the tract of 80 by 12 rods, and also the strip covered by the alder growth, above mentioned, and that they be enjoined from selling or attempting to sell the same, and for further relief.

The answer of Harris admits the mistake to have happened as alleged. The answer of Bryant admits the conveyance by Harris to him as alleged, but denies knowledge of any error or mistake. The answers of Turnbull and wife state

that in March, 1845, they entered into possession of the land, under a contract with Bryant for the purchase of it, and that in February, 1847, Bryant accordingly conveyed it to Mrs. Turnbull, and they deny all knowledge of any mistake.

Of the evidence, (occupying more than 1260 manuscript pages,) it is not deemed necessary to present any thing further than that which appears in the opinion of the court.

The subjoined diagram will sufficiently illustrate the boundary lines in question.



Ruggles and *Farley*, for the plaintiff.

It is a leading ordinance in our code, that equity can relieve against frauds and mistakes. 20 Maine, 363. Parole evidence is always receivable to explain latent ambiguities, of which this case presents a specimen. Equity alone can reform the deed. 1 Greenl. Ev. 293; 1 Maine, 278; 17 Pick. 222; Sugden on Vendors, 10th ed. 255.

In the deed from Farley to Harris, there was either *fraud* in the alteration of the cypher in "102," expressing the length of the first line of the lot; *or* the deed was inaccurately recorded; *or* there was a manifest mistake in the description of either the *first* or *third line* of the lot.

If there was fraud in altering the deed after it was executed and delivered, no subsequent grantee, with or without notice of the fraud, can take more by his grant than the immediate grantee of Farley could.

The same is predicated of an erroneous recording of the deed.

If it was a mistake in writing the deed, it is a *manifest* mistake in expressing the length of either the *first* or *third* line of the lot, as both cannot be right. This is made *manifest* upon the application of the deed to the face of the earth. In such case, all that can be required of plaintiff is to furnish such proof as will satisfy the court, as to which line the mistake was made. One or the other is too long by 80 rods, and the only question is, in which the error exists. The mistake being made apparent, no such strong, conclusive evidence is required, as has been held to be necessary to establish a mistake by *extrinsic* evidence alone, and to justify the interference of a court of equity. *Preponderating* evidence is sufficient to entitle the party to relief.

There is in this case not only the answer of Harris, the plaintiff's immediate grantee, admitting the truth of the allegations of bill, but a great mass of evidence, establishing the facts relating to the mistake and notice to the subsequent grantees.

But we contend that it was unnecessary for plaintiff to produce proof of notice to grantees of Harris, because : —

First, The mistake or error is palpable and manifest from the deed itself in its application to the face of the earth. And the deed therefore is sufficient notice to subsequent purchasers to put them on inquiry. If they disregarded the admonition, equity will not favor them to the injury of others. They are not on equal footing in equity.

Secondly, The deeds to the subsequent grantees contain the same description of the premises in all respects, being copied from the original deed to Harris. They show the same manifest errors, and the grantees accepted them with these imperfections. They will therefore be supposed, in equity, to have accepted the deeds subject to the same interpretation or correction. In this case the same rules of evidence, and principles of equity apply, as are applicable to devisees, assignees, heirs, and purchasers with notice, or voluntary grantees. They, like heirs, inherit the infirmities of the original deeds. Like assignees, or purchasers with notice, they take the same title with all its frailties, and subject to the same equities.

If notice to the Turnbulls should be held necessary to subject them to the equities arising between the original parties, notice to the husband is notice to the wife. The making of the deed to her alone, without the knowledge of the husband, she paying no consideration, should not enable Bryant to escape from the remedy sought by the bill. Under such circumstances the husband and wife are, for this purpose, joint tenants of the premises, and notice to one is notice to both. Otherwise she may be regarded as the trustee of the title for her husband, the consideration being paid by him, and not out of any property of hers. If Bryant and Turnbull supposed their knowledge and understanding, as to what was intended to be embraced by these deeds, could be *proved*, and thought it advisable to have the conveyance made to one whose knowledge could *not be proved*, and therefore had the deed made running to the wife of Turnbull, such a manœuvre cannot avail either in a court of equity, or court of law.

Bryant cannot be a witness for the Turnbulls, for he would be testifying in favor of his own cause; for, to the plaintiff, Bryant is as much a party defendant, as he was before he discovered and adopted this novel method of dodging from the front of his adversary.

One party cannot be a witness for another party in the same suit, when they stand in the relation of privies, either as grantors and grantees, assignors and assignees, or otherwise.

In regard to the error in describing the western head-line, that in some measure depends on the first error alleged, inasmuch as the length and termination of the third line has a material bearing upon it. The evidence touching the first error, therefore, applies to the second, and *vice versa*. It is also of the same character. The error is made manifest by the application of the deed to the face of the earth, and in the most favorable aspect for defendants, it is a question which the deed itself presents, and which does not depend on *extrinsic* evidence alone. Perhaps it may be regarded as a question of construction merely. In a court of law it would be so; but this court, as a court of equity, having acquired jurisdiction, will inquire as to what was the understanding of parties to the original deed.

Lowell, for the defendants.

This bill has not secured to itself the jurisdiction of this court.

It is not strictly a bill of discovery; and if it were, no discovery has been had, whereby to gain jurisdiction. Neither is jurisdiction given by the prayer for an injunction or for relief. The allegations, upon which that prayer rests, are matter for the jury. If the plaintiffs have any rights on account of mistake or fraud, the law affords a plain and adequate remedy.

In those countries where the civil law, or a code conforming to the general provisions of the civil law, had been originally adopted, it would seem that the courts have more freely received *parole* testimony to establish the existence of alleged mistakes in deeds, and have, upon that evidence, not unfrequently

reformed those instruments, as being within the known policy of their general system; while in other countries, where the common law was received as the *foundation*, with specific equity powers subsequently engrafted thereon, the courts *very seldom* reform deeds of alleged mistakes, upon *parole evidence alone*, as the practice would be inconsistent with their general system of jurisprudence, and with the habits and condition of the people. This may account for some of the conflicting cases found in the books. In this State, in the absence of any preliminary agreement in writing, by which a mistake can be made apparent, our deeds are not reformed of alleged errors, shown only by parole evidence, when the existence of the errors is denied by the answer. The statute of frauds is as binding in equity as in courts of common law; and deeds of conveyance and other solemn instruments, required by the statute to be in writing, will not ordinarily, as a *rule of practice* in chancery, be reformed of alleged mistakes, on *parole evidence alone.*

Benjamin Harris is incompetent as a witness for the plaintiff, and for two reasons: — 1, It would be against the policy of the law to admit him; and 2, on the ground of interest. The deed from Farley to himself, and his deed to Bryant with his answer to plaintiff's bill, place him in just such a situation as requires his own deposition to relieve him from liabilities. 1 Greenl. Ev. p. 536—7, sect. 391—2 and notes, and cases cited in the notes.

Nathaniel Bryant is a competent witness for William and Mary Turnbull; for having purchased *with* and sold *without* covenants, he has no interest in the land. He had assigned, without covenants, his cause of action against Farley.

But, if the allegations in the bill were all proved as to Nathaniel Bryant, still the bill could not be sustained, because *Turnbull and wife* are innocent purchasers, without notice.

The leading authorities in support of all these points are *Shelbourn* v. *Inchiquin*, 1 Brown's Chan. 338; *Farnham* v. *Child, ibid.;* 1 Story's Eq. Jur. p. 178 and 179, sect. 165; *Hanckle* v. *Royalasses Co.*, 1 Vesey, 377; *Davis* v. *Sim-*

mons, 1 Cox, 400; *Townsend* v. *Sturgeon*, 6 Vesey, 332, 338; 1 Story's Juris. sect. 152, 165, 118, 153 and 155; *Elder* v. *Elder*, 1 Fairf. 8; *Dwight* v. *Pomroy*, 17 Mass. 303; *Peterson* v. *Grover*, 20 Maine, 363; *Whitman* v. *Weston*, 30 Maine, 285; *Mosely* v. *Virgin*, 3 Ves. Jr., 184; *Brown v. Haven & als.* 3 Fairf. 179; *Simpson* v. *Vaughn*, 2 Atkins, 31; *Jones* v. *Stouson*, 3 Atkins, 389; *Hunt* v. *Rousmanier*, 8 Wheat. 211; *Rust* v. *Barlow*, 3 Brock. 454; *Durand* v. *Durand*, 1 Cox, 58; 2 Evans' Pothier, No. 18, p. 408, 447; *Malden* v. *Merrill*, 2 Evans' Pothier, 13; Cooper on Eq. Plead. 281 to 285; *Pickering* v. *Hanson*, 4 Taunt. 786; *West* v. *Emerson*, 2 Peere Williams, 349; *Barton* v. *Morris*, 15 Ohio, 408.

It is submitted that the "eastern edge of an alder growth, skirting Winslow's meadow," is quite too uncertain and pliant a boundary, to take the place of well known monuments. We might next expect for boundaries a growth of Canada thistles, or a region of dandelion grounds. There is already quite enough of looseness in boundary descriptions. It is hoped at least, that movable and floating objects will not be permitted to represent the dividing lines, between the owners of adjoining lands.

The sanction of the court, if given to this bill, will be of alarming tendency. Soon the most of our real actions and actions of trespass will be transformed into expensive equity suits.

There is a fearful maelstrom lying off the Equity Judicial coast of Maine. For protection against so great an evil, the appeal is confidently made to the wisdom and the firmness of this honored tribunal.

SHEPLEY, C. J., — The bill alleges, that two mistakes were made in the conveyance of a tract of land by the plaintiff to Benjamin Harris on Oct. 6, 1832.

The answer of Harris admits, that the alleged mistakes were made. The answer of Nathaniel Bryant admits, that Harris conveyed the same tract to him by the same descrip-

tion, and it denies all knowledge of any error or mistake. The answers of Turnbull and wife state, that an agreement was made in the month of March, 1845, between Bryant and Turnbull for a conveyance of the same land; that they entered into possession of it; and that on February 17, 1847, it was conveyed by Bryant to Mary Turnbull, and they deny all knowledge of any mistake.

The time elapsed between the conveyance made by the plaintiff and the filing of his bill on November 14, 1848, would induce the court to hesitate long, before it would decree, that a conveyance of *improved* lands should be so reformed as to affect the title of any portion of the land under improvement; for it would tend strongly to show, that there could have been no mistake, or that any claim to have it corrected had been waived or adjusted.

When, as in this case, that portion of the land alleged to have been conveyed by mistake, appears to have been *unimproved*, and not to have been so occupied by cutting trees, or otherwise, as to cause the mistake to be discovered; and especially when the occupation of the grantee and of his assignees has been such as to indicate, that the conveyance was made in accordance with the expectations of the grantor, time can have comparatively little weight.

To authorize the court to reform the deed, there should appear to have been a plain mistake clearly proved. The precise mistake or error should be clearly ascertained. When it is alleged, that certain words, letters or figures have been inserted or omitted by mistake, the proof should establish the facts alleged. If there be a failure to do this, and the testimony shows, that by a legal construction, the deed may operate contrary to the expectations of the grantor and convey land, which he did not intend to convey, a court of equity would not be authorized to reform the deed. For conveyances are not to be reformed and made to read in such manner as may best carry into effect the intentions of the parties as ascertained from parole testimony, when there is no satisfactory

proof, that they did not use the language, which they intended to use.

The testimony presented in this case, covers between twelve and thirteen hundred written pages. One would expect from the nature of the questions presented to find, that a very large portion of it could have no proper connection with them, or with the rights of the parties. An attempt has been made, not without difficulty, to select the material from the worse than useless portions. No attempt will be made to state from what witnesses the proof of many of the facts is derived. It could be of little use, and it would require too much time and space.

The testimony of two of the defendants has been taken by leave granted on rules exhibiting apparently sufficient causes; that of Harris for the plaintiff; and that of Bryant for the defendants. Both of these depositions must be excluded. If the plaintiff can obtain relief, he must have a decree against both of them. The competency of a witness, cannot depend upon his willingness or unwillingness to testify. The plaintiff cannot compel a defendant in equity to testify as a witness when, if successful, he must have a decree against him. The testimony of a defendant cannot be taken and used to prevent a decree against himself and others. *Paris* v. *Hughes*, 1 Keen, 1; *Palmer* v. *VanDoren*, 2 Edw. 192; *Miller* v. *McCan*, 7 Paige, 458.

The first mistake alleged in the bill is, that the first line of the second tract conveyed was described by figures as being 182 instead of 102 rods in length.

The testimony shows, that the tract conveyed was between the plaintiff's garden on the easterly end, and the edge of Winslow's meadow on the westerly end. That distance measured as contended for by the plaintiff, will not vary much from 202 rods; and as contended for by the defendants not much from 205 rods. The deed as made makes it 282 rods. This proves, that there must have been an error or mistake made in describing the length of lines between the garden and the meadow. The whole distance named in the deed would

extend more than seventy rods beyond the easterly edge of that meadow across Bryant's island and on to land owned by Daniel Perkins.

The deed refers to a stake and stones as monuments then existing at the ends of the first and third lines. The testimony proves, that such monuments, or the remains of them, were found there, when the land was surveyed by order of court, by measuring on the first line 102 rods, and on the third 100 rods, and also that a like monument was found at the end of the second line. And that no monuments were found at the ends of those lines measured as they are described in the deed.

In argument for the defence it is said, that the proof arising out of the whole testimony is not satisfactory, that those stakes and stones, or the remains of them, were the monuments named in the deed. This must be admitted. Yet their existence there, and the fact that none are found at the end of those lines, as described in the deed, taken in connexion with the other testimony, must be considered. If the proof had been entirely satisfactory, that those were the monuments named in the deed, there would have been no occasion for the plaintiff's application to a court of equity for relief on account of this mistake. The monuments in preference to the distances named in the deed would at law have determined the rights of the parties. That those monuments were not named in the deed as existing, when none did in fact exist, is shown by the testimony of Jones, who states that he made a survey of that land not long before it was conveyed, and that such monuments were at that time erected by him; and there are indications hereafter to be stated, that the person who wrote the deed, had the minutes of that survey before him.

The following reservation is contained in the deed: "the privilege of a cart-road from my house westwardly through the land above conveyed, where the travel usually goes, to my wood lot adjoining Alexander Barstow's S. line, and also to a field adjoining James Robinson's north line." It is manifest that the cart-road reserved was an existing one then well

known, for it is reserved, where the travel usually goes. Admitting the alleged mistake to have been made and the plaintiff's wood lot to be bounded as it would then be, there is found to have been such a road, which he might have traveled to his wood lot, while as the wood lot would be bounded, if no mistake was made, there was no such road leading to it. In argument for the defence it is said, that the road also reserved to the field as usually traveled passed over the wood lot as it is claimed by the plaintiff, and that this shows, that the land, over which the road to the field passed, was conveyed. If the right of way had been reserved only to pass to the wood lot, the plaintiff might not have been entitled to use it for a different purpose to go to his field. The reservation of the right of way also to the field was therefore appropriate, and its reservation does not authorize the inference, that any part of the wood lot as claimed by the plaintiff was or was intended to be conveyed.

It does not appear, that any of the white oak timber trees or other trees on the wood lot as claimed by the plaintiff have at any time been cut or removed by the grantee or by his assignees. They appear to have conducted with respect to the wood lot, as they might have been expected to do, with the belief, that it was not conveyed, while the timber trees on the adjoining land have been mostly cut and removed.

These are the more important considerations in addition to the admission of the grantee, apparently against his own interest, inducing the court to come to the conclusion, that there was a plain mistake and that it has been clearly proved.

The second mistake alleged in the bill consists in describing the third line as extending "to the easterly edge of the Winslow meadow, thence southerly by the edge of said meadow to the Nichols line," instead of describing it as extending "to the edge of the alder growth skirting the meadow," and thence "by the easterly edge of the alder growth to the Nichols line."

This, it will be perceived, is in substance an allegation, that the monuments and bounds at the westerly end of the tract were mistaken. The testimony does not prove, that any par-

ticular words were used by mistake instead of other words. The language used is suited to describe the bounds named, and the language, which, it is alleged, should have been used, is suited to describe different bounds. It is therefore in effect an allegation, that the tract should have been bounded differently at the westerly end, and that more land was conveyed than was intended.

The testimony to prove such a mistake is far from being satisfactory. Jones, who made, as already stated, a survey of the land not long before it was conveyed, states, that he did so for the purpose of having a deed made, and that he gave his minutes of that survey to the plaintiff, to make a deed by them. A copy of those minutes is presented in his testimony; and it appears, that the westerly boundary was described in them as "beginning at the south-west angle of E. Farley's land, at the edge of the Winslow meadow so called, thence southerly as the margin of said meadow runs to Nichol's line, thence as said Nichols line runs to north line of land occupied by James Robinson, 36 rods."

The precise language of the minutes was not used in making the deed, while it does appear, that so much of it was used as to render it highly probable, that those minutes were present, when the deed was written. By those minutes and by the deed, the land to be conveyed was to be bounded by the edge of Winslow's meadow, and was to extend southerly by the margin or edge of that meadow to the Nichols line, and thence to the north line of land occupied by James Robinson. Jones, in his testimony, states in substance, that his meaning was different, and that he intended to say the eastern edge of the growth skirting the meadow. Such testimony is inadmissible; and if it could be received, it would only prove, that the surveyor misdescribed the bounds in his minutes; and it would then appear that the deed was prepared as it was intended that it should be, following substantially the erroneous description of the surveyor. The edge or margin of the meadow could not well be mistaken for some other and different boundary, either by the surveyor or by the owner of the

land. The latter using that language, when he wrote the deed, could not well be mistaken or ignorant, that the land conveyed was bounded on the edge of the meadow. It is probable, that he did not expect, that the land between that meadow and the westerly ends of the lots occupied by James and by William Robinson would be conveyed. If so, his error consisted not in using language, which he did not intend to use, but in a misapprehension of the true construction and effect of that language. Such an error or mistake is not one which a court of equity can correct. There is therefore a failure to prove the second mistake alleged.

The mistake, which has been proved, cannot be corrected without proof, that those, who have acquired the title from or under Harris, did not purchase for a valuable consideration, or that they had knowledge of that mistake, or knew that they did not purchase the lot claimed by the plaintiff. This being denied by their answers, the proof to overcome them must be equivalent to the testimony of two credible witnesses. It need not, however, be direct and positive. Such testimony may not ordinarily be expected to prove, that a purchase was made under such circumstances as to prevent its being regarded as made fairly and in good faith.

The land purchased by Bryant of Harris would adjoin the land of Alaxander Barstow 182 or 102 rods. The fence between them on that line was to be divided. A division of it appears to have been made soon after Bryant purchased for the distance of about 100 rods only. Bryant does not appear to have known, where his bound at the westerly end of that line was; and he appears to have searched for it some forty rods further west, and to have agreed with Barstow to correct any error made in making that division. But no error appears to have been discovered or corrected since that time.

James Dodge appears to have occupied the land as a tenant under Bryant from the year 1837 to the spring of 1845. He states in substance, that Bryant told him, if he was in Barstow's place, he would make Farley pay for half of the wall

standing westerly of the fence divided and on the same line toward the Winslow meadow.

This Farley could be obliged to do only as the owner of the land on one side of that line.

There was no division fence between the wood lot or twelve rod strip, as is called in part of the testimony, and the other land conveyed. The cattle for pasturage appear to have passed without hindrance over that strip and some of the adjoining land conveyed. Alexander Barstow states, that his cow was, by leave obtained from Farley, pastured upon the strip during the summers of 1841 and 1842. Dodge states, that Bryant at one time observed to him, that Farley was not entitled to the pasturage of but one cow or calf, as there was but little feed on the strip, not more than enough for one cow, that it was covered with oaks and the leaves falling from them, so that little feed grew upon it.

Farnham states, that in the month of September, 1843, Francis Davis, deceased, desired to purchase a farm, and that he conversed with Bryant repecting the purchase of this farm, and examined it. That Bryant requested him, the witness, to show the farm to Davis; that he named to Bryant certain pieces of land that did not belong to the farm, and among them named "the strip on the north side that had the white oak on it, commencing just beyond a little plank bridge at a stake and running back to what is called the Nichols line." That Bryant said in answer, yes, that is it or about it. He further states, that he heard the conversation between Bryant and Davis, after Davis had examined the land, and his testimony respecting that conversation is in substance, that Davis stated to Bryant, that Farley owned the strip, and that he asked Bryant what he thought it could be bought for, and that he received for answer that he could not tell, that Farley was a pretty hard man to trade with, as he could see by the way he sold to Harris, alluding to this and the other land stated in the conversation not to compose a part of the farm.

In the year 1845 Bryant appears to have agreed with Abner

Stetson to cut, haul and sell to him the oak timber on the land purchased of Harris. Stetson states, that he and Bryant set off fourteen rods measuring across in four or five places from Barstow's line, and stuck quite a number of stakes in the snow to mark that line; and that Bryant told him and two men, who were there cutting, not to cut higher than that line, stating that he had called on Farley several times to get him to join in a survey, that he knew of no bounds and did not wish to get within his bounds. George W. Johnson and Joseph Hammond state, that they were cutting there for Bryant, and were directed by him not to cut within a certain number of rods, not recollected, of Barstow's wall, and not to cut over on to the Farley strip.

From the testimony of these witnesses, without adverting to other circumstances, it appears, that Bryant has spoken of that strip of land as owned by Farley; that he has conducted as he would be expected to do if he did not own it, and as he would not have been expected to do if he did own it. The result of the whole testimony, including his answer, fully authorizes the conclusion, that he must have known, that the twelve rod strip claimed by the plaintiff, either was not or was not intended to have been conveyed by the plaintiff to Harris.

It is also necessary to prove, that Turnbull and his wife are chargeable with the like knowledge, or that they are not purchasers for value. The contract for a conveyance appears to have been made between Turnbull and Bryant, while the conveyance was made to the wife of Turnbull. If the husband entered into possession of the land and continued to occupy it for nearly two years with a knowledge of the mistake, and the conveyance was then made to the wife for a consideration paid by her husband, her want of knowledge of the mistake will not be sufficient to prevent a decree, that the deeds should be reformed. For in such case, she does not present herself as a purchaser for value paid by her; and the husband cannot avoid the effect of his knowledge by consenting to or ratifying the conveyance made to his wife.

Alexander Farnham testifies, that Turnbull stated to him a few months before he moved on to the farm, that he and Bryant talked of trading; that he would have liked the trade much better, if those three pieces had not been taken out of it; that Farley was pretty cunning in reserving that strip that had the most timber on it; that he should like to have had that strip on account of the timber on it.

Benjamin Chapman testifies, that during the summer of 1845 he was with Turnbull upon his farm at a place described as being about half the distance from the east to the west end of the twelve rod strip, and that he pointed to a thick growth of timber standing north of the tops of the trees cut for Stetson, and that he said to Turnbull, you have some handsome timber there, to which Turnbull replied, that is Farley's.

It does not appear, that Turnbull ever cut any trees upon that strip, or that he ever exercised any acts of ownership over it before this contest arose.

Without the testimony of Albert Chapman, objected to on account of the time and manner of taking it, and also because the deponent was not of sound mind, the other testimony considered in connexion with the attendant circumstances, is quite sufficient to overcome the answer.

The plaintiff will therefore be entitled to enter a decree, that a plain mistake was made in stating the length of the first line named in the description of the second tract of land conveyed in the deed from the plaintiff to Benjamin Harris, by stating it to be one hundred and eighty-two rods instead of one hundred and two rods; that the deed be reformed accordingly; that the other defendants are not purchasers for a valuable consideration without knowledge of that mistake; and that all the defendants be perpetually enjoined from claiming to own the tract of land excluded from the conveyance by a correction of that mistake, and from the exercise of any acts of ownership over the same, and from conveying or attempting to convey the same; and that the plaintiff recover his costs,

excluding from the taxation thereof all testimony not connected with the correction of that mistake.

NOTE.—TENNEY, J. being a relative of one of the parties, did not act in the case.

INHABITANTS OF LEWISTON *versus* INHABITANTS OF AUBURN.

If a special Act, passed since the adoption of the Revised Statutes, and dividing one town into two or more towns, contain provisions at variance from those of the Revised Statutes, relating to the duty of supporting paupers, *as between such towns*, the provisions of the Revised Statutes must yield to the later enactment.

By the special Act of Feb'y 24, 1842, incorporating the town of Auburn, the town of Minot is bound to maintain persons, becoming chargeable after that day, who had then gained a residence in Minot, by residing on that part of it, which was not incorporated into the town of Auburn, although such persons were at the incorporation of Auburn, residing on the territory incorporated into the new town.

ONE Slater and his wife had gained a residence in the town of Minot, by having resided in the western part of that town more than five years. They then removed to a lot of land in the easterly part of the town, where they resided on the 24th of February, 1842, upon which day, the eastern part of Minot, including the lot on which Slater and wife lived, was incorporated, by an Act of the Legislature, into the town of Auburn. The second section of that Act 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." After the incorporation of Auburn, Slater and wife fell into distress in Lewiston, by which town they were furnished with needful supplies. This action is brought to recover for the supplies, so furnished. The case was submitted to the consideration of the court.

J. O. L. Foster, for the plaintiffs.

The paupers had gained a settlement in Minot, before Au-

burn was incorporated out of it, and "dwelt and had their homes within the bounds of 'Auburn,' at the time of its incorporation."

The statute provides that, "when any new town shall be incorporated, composed of a part of *one* or more old incorporated towns, every person legally settled in any town of which such new town is so composed, or who has begun to acquire a settlement therein, and who shall actually dwell and have his home within the bounds of such new town, at the time of its incorporation, shall have the *same* rights in relation to settlement, whether incipient or absolute, as he would otherwise have had in the old town where he dwelt. R. S. chap. 32, sect. 1. *Fourth mode* of gaining a settlement."

The case finds: —

1st. That Auburn was incorporated out of Minot.

2d. That the paupers were legally settled in Minot.

3d. That they actually dwelt and had their homes within the bounds of *Auburn* at the time of its incorporation.

Having by the statute the *same* rights in the new town that they had in the old one, it follows that their "legal settlement" is in Auburn. *Brewster* v. *Harwick*, 4 Mass. 278; *West Springfield* v. *Granville*, *ibid.* 486; *Windham* v. *Portland*, *ibid.* 385; *Westport* v. *Dartmouth*, 10 Mass. 391.

J. Goodenow, for the defendants.

Howard, J. — It is admitted that, upon the division of the territory of the town of Minot, and the incorporation of a portion of it, into the town of Auburn, on February 24, 1842, the paupers in question had their legal settlement in that portion remaining within the town of Minot; and that they "dwelt and had their home" within the limits of Auburn, at the time of its incorporation.

By the provisions of the Revised Statutes, 1841, chap. 32, sect. 1, mode fourth, the paupers would have acquired a legal settlement in Auburn; but the Act of incorporation 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." This act, being subsequent, controlled the provisions of the Revised Statutes, on the subjects to which it refers, and fixed the settlement of the paupers in Minot, as it was constituted when the Act took effect, and where a legal settlement had been previously gained.

There is no evidence in the case, tending to show that the paupers had acquired a legal settlement in Auburn, after it was incorporated, and the action cannot be maintained against that town. *Plaintiffs nonsuit.*

McLellan *versus* Longfellow *and trustee.*

Solicitors, counselors and attorneys are not permitted to disclose, without the assent of their clients, any communication made to them in reference to their professional employment.

To entitle a client to this protection, it is not essential that he be apprized of it, or that he enjoin secresy.

This protection extends to all communications made with a view to obtain professional aid or advice.

Trustee disclosure.

A disclosure had been made by the trustee, and proofs had been introduced to control it. The case is sufficiently unfolded in the opinion of the court, given by

Howard, J. — The supposed trustee presents this case upon exceptions to the rulings and decision of the Judge of the District Court, and insists that the whole matter as to his liability, embracing fact and law, may be re-examined and determined by this court. This may be done, "when in the discretion of the court justice shall require it." Stat. 1849, c. 117, § 2.

Upon an examination of the disclosure, and other proof introduced in the District Court, under the provisions of the R. S. c. 119, § 33, and amendment, 1842, c. 31, § 15, we are

satisfied that justice does not require that the exceptions should be sustained, so far as to open the case for re-examination and decision.

The testimony of Merrill, an attorney and counselor at law, was received and considered by the Judge of the District Court, in forming his decision, as stated in the exceptions. It appeared, that the parties resided in Bath, where Merrill was in the practice of law. He states in his deposition, that the defendant, "Hannibal Longfellow, came into my office in said Bath, and said to me, that he was going to make a sale of his interest in the Sagadahock ferry, and his furniture in his house, to John B. Glass, and wanted me to draw a bill of sale of the same, that he was somewhat embarrassed, and he did'nt know but they might be attached, that he and said Glass should agree upon the terms before coming into my office, and that they should hold no conversation in my hearing in relation to it, so that I could not be made a witness against them. That afterwards on the same day, said Longfellow came into my office, with said Glass, and requested me to make the bill or bills of sale, which I did as requested. That while drawing said bill or bills of sale I inquired of said Longfellow and Glass as to the terms to be inserted, on which said Longfellow took said Glass aside at two different times, once into the entry of said office, and once to a distant part of said office, and talked with said Glass in a low tone of voice, which conversation said deponent did not hear, but said Longfellow returned at each time after said private conversation and gave directions in presence of said Glass, as to the terms to be inserted, which was done according to his directions; that said deponent had reason to believe from the circumstances, that said conversations were relative to said sale." There were other portions of the deposition not material to the point now under consideration.

It is contended that these statements of the witness reveal a part of the professional intercourse between client and attorney, which should not be disclosed by the latter.

Attorneys, counsel and solicitors are not at liberty to divulge

communications made to them, in reference to their professional employmeat. The law will not compel them to make the disclosure, nor will courts permit it to be made without the assent of their clients.

To entitle a communication to this privilege, it is not essential that it should be made under any special injunction of secresy, or that the client should understand the extent of the privilege. But if it be made with a view to professional employment, and in reference to such employment in legal proceedings pending, or contemplated, or in any other legitimate professional services, wherein professional advice or aid is sought respecting the rights, duties, or liabilities of the client, it will fall within the privilege, and cannot be disclosed by counsel. This, however, is a rule of law for the protection of the client, which he is at liberty to waive. Bul. N. P. 284; *Cromack* v. *Heathcoate*, 2 Brod. & Bing. 4; *Shellard* v. *Harris*, 5 Carr. & Payne, 592; *Greenough* v. *Gaskell*, 4 Mylne & Keene, 98; Story's Eq. Pl. sect. 600; *Bank of Utica* v. *Mesereau*, 3 Barb. Ch. 592—600; *Parker* v. *Carter*, 4 Mumf. 273; *Foster* v. *Hall*, 12 Pick. 89; *Aiken* v. *Kilburne*, 27 Maine, 263; 1 Phil. Ev. 131; 1 Greenl. Ev. sec. 240.

In *Hatton* v. *Robinson*, 14 Pick. 424, it was held that the communication was not privileged, because it was made without any particular assignable motive, or in order to satisfy the attorney upon a point of fact, and not for the purpose of obtaining professional information. But in this case such was not the character or object of the communications to the counsel.

We can have no doubt that these disclosures were made to the attorney in reference to his professional employment, sought and obtained in the line of his profession, and that they would not have been made to him but for such employment. They constitute a part of the professional intercourse between the defendant and his attorney, which the latter could not properly reveal.

But excluding the testimony of the attorney, there will still remain evidence, sufficient, in the opinion of the court, to

show that Glass had in his possession goods and effects of the principal defendant, which he holds under a conveyance that is not *bona fide*, but fraudulent as to creditors of the defendant. Under the provisions of the Revised Statutes, c. 119, sect. 69, he is chargeable as trustee. *Page* v. *Smith*, 25 Maine, 256.

The exceptions, though sustained in reference to the ruling of the Judge of the District Court, respecting the testimony of the attorney, in other respects must be overruled, and the judgment below is affirmed.

Merrill, for the plaintiff.

Gilbert, for the trustee.

JOSEPH MOORE *versus* CHARLES THOMPSON.

If an agent for selling goods, with authority to take money only, shall sell his own goods and those of his principal, in one and the same sale, receiving payment in money and in other sorts of property, his principal is bound by the sale, provided the money received amounted to the value of his goods.

The money, or enough of it to pay for the goods of the principal, is considered to have been received for him.

This results, (in the absence of controlling proof,) from the presumption, that an agent conducts faithfully.

Though an agent, having authority to sell the goods of his principal, should, when fraudulently selling his own goods, for the purpose of defrauding his creditors, sell in his own name with them, the goods of his principal, such fraud could give to the principal no authority to rescind the sale.

ON EXCEPTIONS from *Nisi Prius*, WELLS, J. presiding.

The evidence tended to show the following facts, viz: — John M. Thompson was a trader in goods at retail. At a time when his stock of goods was small, the plaintiff purchased them, and authorized him by a sealed power of attorney to sell them for him. Said John M. Thompson soon afterwards purchased goods on his own account, which he placed for sale in the same store with the plaintiff's goods. About a year and a half after the plaintiff had made his said purchase, a

paper was given to the plaintiff on December 27, 1842, and signed by said John M. Thompson, showing a further arrangement between him and the plaintiff, and stating that he was to sell the plaintiff's goods for cash or produce.

On May 23, 1843, John M. Thompson, in his own name, sold all the goods in the store, (comprising his own and the plaintiff's goods,) to the defendant, who paid him therefor some money and some other property, and the residue by his notes. The money payment exceeded the value of the plaintiff's part of the goods.

The defendant kept the goods in the same store, and traded upon them until June 9, 1843, when he mortgaged the whole to one McIntire.

There was testimony tending to show that the sale by John M. Thompson was made for the purpose of defrauding his creditors.

This action is in assumpsit.

The Judge instructed the jury that, inasmuch as the plaintiff did not claim to recover of the defendant on the ground of a sale of the goods from him to the defendant by his agent, but on the ground that his property had gone into the hands of the defendant without his authority or consent, and that the defendant had converted his goods into money; if they found that John M. Thompson received in payment, toward all the goods which he sold to the defendant, a sum equal to the amount of the plaintiff's goods, then the plaintiff could not recover, because said John M. Thompson was authorized to sell the goods for cash or produce, and if he did receive as much cash as to the amount of the plaintiff's goods, which he sold to the defendant, the plaintiff was bound by such sale, though made in the name of John M. Thompson.

The plaintiff contended that said John M. Thompson had no authority to sell said goods except at retail. But the Judge instructed the jury, that he was authorized to make an entire sale of the whole at one and the same time and to the same person, provided he sold for cash or produce.

The plaintiff further requested the Judge to instruct the jury that, if the sale from John M. Thompson was fraudulent, the plaintiff would not be bound by such sale, and may recover for so many of his goods as defendant had sold for money, or money's worth. But the Judge declined to give said instruction.

Exceptions were taken by the plaintiff.

May, for the plaintiff.

The instruction was erroneous, because it assumed that John M. Thompson was authorized to include the plaintiff's goods in and with a sale of his own goods, provided he received as much pay in money, as the value of the plaintiff's goods.

This must be upon the ground that the law would appropriate the money to the payment of the plaintiff's goods. But it is contended that, if the sale to the defendant was a valid sale, then the plaintiff would have an interest in the money, lumber and notes, taken in the same proportion that his goods bore to Thompson's. This was an *entire* sale; and the payment was an entire payment.

John M. Thompson did not profess to make the sale by virtue of any authority from the plaintiff. He repudiated the plaintiff's claim, and set up his own ownership. Shall the purchaser now shield himself from liability to the true owner, by setting up an agency which the agent himself disclaims, and did not profess at the time of the sale?

John M. Thompson had no authority to sell the goods, except at retail. It was not the intention of the parties that he should make an entire sale; but the Judge ruled that he was authorized to make an entire sale of the whole at once and to the same person, provided he sold for cash or produce.

If we look at the language of the agreement, in itself considered, perhaps it would bear this construction; but when we look at the circumstances, under which the agreement was made, and the position of the parties, we contend that it should have been left to the jury to say, from the contract and

the circumstances, what was the meaning and intention of the parties. The jury might well have found that the intention was to have the goods sold in the usual course of country trade. At any rate, it was a fact for the jury.

The Judge should have instructed the jury, as requested, that, if the sale from John M. Thompson was fraudulent, the said John M. Thompson had no right to make such a sale, and having made it, the plaintiff had a right to recover for so many of his goods as were included in such sale, and had been converted by the defendant into money or money's worth. There is no evidence in the case that the plaintiff ever, in any way, ratified such sale. It was made without his knowledge or consent. The agreement cannot be construed as authorizing any sale but an honest one, and for lawful purposes. If, therefore, John M. Thompson took the goods of the plaintiff, and uniting them with his own, made *one entire* sale, and that sale was for an unlawful purpose, shall either of the guilty parties to such sale, even if the goods were *paid for* in a manner authorized by the terms of the contract, be permitted to set up such a sale as against the true owner? In other words shall an unconsenting party be bound by a fraudulent sale, made by a recreant agent, even though such agent receive a sort of pay, which the owner would have approved, if the sale had been honest?

A fraudulent sale is in law a void sale; and the only reason why a fraudulent vendor cannot repudiate such a sale, as against the purchaser, is that he is *particeps fraudis*, and cannot allege his own turpitude, to vitiate the sale; but in this case the plaintiff is no party to the fraud; he is not therefore estopped to set aside the sale and maintain an action of trover for his goods, or assumpsit if they have been converted to money or money's worth. Chitty on Con. p. 222 and 227, and cases there cited.

A sale fraudulent as to creditors is, by statute, chap. 161, sect. 2, a crime; and can a man who may be indicted and punished for being a party to such a sale, enforce it as against

the owner of the goods, who was not even a party *in name* or *in knowledge* to the sale?

Clifford and *Appleton*, for the defendant.

1. John M. Thompson had the right to sell. This is admitted.

2. He was not restricted as to the quantity he might sell at any one time.

His authority was in writing, and to the written instrument reference must be made for its extent. In this it appears that he was empowered to sell for *cash* or *produce*. If he sold for cash or produce, he did all that was required of him. To whom he should sell, or how much to any individual, the principal did not see fit to prescribe.

If reference is had to the *subject matter* of the power, the authority is still more clear. The object was to close up the old concern of Moore & Thompson. This was best accomplished by an early and general sale of the goods.

The case finds that he received from the defendant, at the sale, more money than the value of all Moore's goods, which he sold; and under these circumstances the sale was clearly valid.

If he had no right to sell said remnants but for cash, he shall be presumed to have received the cash on account of that portion of the goods.

3. The sale is affirmed by this form of action.

If the plaintiff did not mean to waive the alleged *tort*, he should have brought trover or trespass. In assumpsit he cannot recover for an unlawful appropriation of his property unless he waives the wrong. *Allen* v. *Ford*, 19 Pick. 217.

Not only too, must he waive the *tort*, but he must show, that the goods for which he claims, have been converted into money by the defendant. *Ibid*, and cases there cited; *Jones* v. *Hoar*, 5 Pick. 290.

In this case, there is no proof that the goods have been converted into money by defendant, *or money's worth*.

4. Moreover, the question "whether said defendant was a *bona fide* purchaser of said goods," was submitted to the jury.

So the case finds, and the jury, therefore, have negatived the fraud alleged.

WELLS, J. — The plaintiff contended that his agent, John M. Thompson, had no authority to sell his goods to the defendant in the manner in which the sale was effected, and so far as they had been converted into money by the defendant, he had a right to recover, although the defendant had paid the agent for them. The authority to sell was denied upon the ground, that it was made by an entire sale of the whole stock at one time and to the same person. The power to make it in that mode must depend upon the language used in the instrument by which the authority was given. The contract between the parties of Dec. 27, 1842, provides that the agent is "to sell said goods for cash or produce," &c. There is nothing in it that requires they should be sold at retail or to different persons, and no terms employed from which such inference can be drawn. The mode of selling is left altogether to the agent. If it had been intended to restrict the mode of sale, the intention should have been expressed in the contract. The agent sold a large amount of his own goods with those belonging to the plaintiff, but received in money a sum equal to the value of the plaintiff's goods. It is contended in argument that the money ought not to be considered as having been paid for the plaintiff's goods, but in part for the price of all the goods sold, and that the sale was authorized only to the extent of the plaintiff's proportion of the money received. No such question was raised at the trial, but if it did arise properly, the position is not admitted to be correct. In the absence of all proof to the contrary, the presumption would be that the agent acted properly, and that the money was received for the goods of his principal, and not for his own. But if payment had been made in part only for the plaintiff's goods, that circumstance would not enable him to recover in this action; for denying the right of the agent to sell, he claimed on the ground that the defendant had obtained possession of his goods and had converted them into money. He could only recover so

far as the defendant had realized money from them, and it does not appear that he had sold them for money, or that he had sold them at all. It is not shown that the defendant sold any of the goods which had belonged to the plaintiff between the 23d of May and the 9th of June, 1843, while he was in trade, nor was the mortgage of the goods to Eliab P. McIntire a conversion of them into money. The goods would be released from the mortgage by the payment of the debt, and the mortgager would be entitled to them. There is not evidence in the case upon which to base an instruction that, it is contended in the argument, should have been given.

The plaintiff further contends that the sale to the defendant was made by John M. Thompson to defraud his creditors, and therefore it is void as to him, and he has a right to regard it as if it had not been made. But the sale was valid between the parties to it, and as to all other persons who were not prejudiced by it. The plaintiff does not claim the goods sold as a creditor or purchaser. The only fraud that could have been committed, if there were any, was in relation to the agent's own goods, and it could not in the least degree have affected those belonging to the plaintiff. Because the plaintiff's goods were sold with the agent's, and the agent intended to defraud his creditors in the sale of his own goods, no detriment could possibly accrue to the plaintiff. If the agent did not transcend his power, and sold the plaintiff's goods for cash or produce according to the authority given him, the plaintiff has no reason to claim any thing of the defendant. No third person can impeach the validity of a sale made to defraud creditors unless it operates as an injury to him.

There does not appear to be any error in the instructions given, and the requested instruction was properly withheld.

Exceptions overruled and judgment on the verdict.

NUTTER, *Administrator*, *versus* BAILEY.

Under a defence that lumber sold and delivered, was not legally surveyed, arising in a suit brought to recover the price of it, the *onus* of proof is upon the defendant.

If the seller have authorized the purchaser to select a surveyor, the presumption is, that a surveyor was intended, by whom the survey could *legally* be made.

ASSUMPSIT, upon an account for lumber sold by the intestate to the defendant.

One Lee and the defendant with another person were appraisers of the intestate's estate. Lee testified, *that* while attending to that service, the defendant spoke of his indebtedness to the estate for lumber, and made up a written account in favor of the intestate, against himself, for boards purchased, showing a balance due from him of $1883,03, and stating that the same was correct; *that* that amount was by the appraisers inserted in their inventory, as a debt due from the defendant to the estate; and *that* the inventory was signed by the three appraisers, and in that form presented to the Judge of Probate. It appeared *that* the defendant resided in Bath, and *that* the intestate had resided in Phipsburg, an adjoining town; *that* the boards were manufactured at the intestate's mill in Phipsburg; and *that* the boards were at the mill.

Samuel Ames testified, that he was an inhabitant and surveyor of the town of Bath, and not a surveyor of Phipsburg, that he surveyed the said lumber at Phipsburg at the request of said Bailey, being employed by him for that purpose, that he had frequently been employed by said Bailey to survey lumber purchased by him, as well at Phipsburg as at Bath, that it had been customary for purchasers of lumber sawed at the Phipsburg mills, residing at Bath, to employ their own surveyors residing in Bath without objection.

It appeared also, that the plaintiff, as administrator, after the return of said appraisement, settled an account with the Judge of Probate, in which he charged himself with the amount of said account so furnished by said Bailey.

The defendant objected to the admission of the appraisers' return and the testimony of Ames.

On the foregoing evidence, so far as it is legally admissible, the whole court is to determine the right of the plaintiff to recover, and to enter a nonsuit or default, or in their discretion, to order the cause to stand for trial.

Randall and *Booker*, for the plaintiff.

The evidence to which the defendant excepts may be rejected.

The other testimony proves an acknowledgment by the defendant of his indebtedness, with a bill of the items thereof in his own handwriting. To this full and clear case, no defence whatever appears. This acknowledgment involves an admission of a legal survey.

But if the testimony be received, there is no evidence that the lumber was, or was not surveyed by a surveyor appointed in Phipsburg; it was surveyed by a sworn surveyor of Bath, which is believed to be sufficient, under the Revised Statutes, (chap. 66.)

It is probably unnecessary to examine the decisions on the general question of the validity of agreements made in violation of law, although it is believed the principles established by Lord Mansfield in the cases of *Smith* v. *Bromly*, (given in note to *Jones* v. *Berkley*, Doug. 696,) and *Browning* v. *Morris*, (Cowp. 790,) have been often misapprehended and misapplied. In case of an agreement, *malum in se*, as both parties must be *in pari delictu*, the courts will not interfere; but where it is only *malum prohibitum*, the courts will take care that the party, not specially in fault, shall not suffer injustice. In the former case his lordship remarks; "it is astonishing the Reports do not distinguish between the one case and the other."

But there seems to be no necessity of inquiring into this point in the present case. From the case of *Coombs* v. *Emery*, it seems that the value of the goods can be recovered unless it be shown that surveyors were appointed by the town of Phipsburg, which does not appear. (14 Maine, 404.) In

Whitman v. *Freeze*, (23 Maine, 185,) it is decided that "the burden of proof is on the defendant, to establish the fact of illegality, if he would thereby avoid his contract." No evidence is produced, except that Bailey got his own surveyor at Bath, to survey the lumber, which he might well have done for his own satisfaction, if it had been surveyed before. It may have been indeed the fact that Bailey agreed with Couillard to procure a surveyor; and if so, his procuring an illegal one, if indeed Eames were illegal, was his fault and not Couillard's, for which the plaintiff ought not to suffer.

Finally, both the cases last referred to, require the defendant to prove fully, the illegality of the contract, if he would avail himself of the penalty, and to show an agreement to sell without survey.

The tenor of the testimony on the other hand is rather that there was to be a survey. Nor should any presumption be raised against the plaintiff for not producing further proof, as his intestate is dead, and he cannot be supposed to know the whole transaction.

Tallman, for the defendant.

If the sale was prohibited by law, it was void. The plaintiff must establish his right to recover, and therefore must show that the boards were surveyed, as prescribed by the statute. There is no presumption that the boards were surveyed. Such a presumption arises only when the contrary supposition involves a criminal neglect of duty. *State* v. *Whittier*, 21 Maine, 341; 2 Stark. Ev. 685.

The appraisers' return was inadmissible as evidence. It was but a ministerial act of official duty. It was not a voluntary admission.

The testimony of Ames was inadmissible. Neither the defendant's assent, or the custom, could vary the statute provision, (chap. 66, sect. 2,) which requires all boards offered for sale to be surveyed by a surveyor of the town where the boards are. And there is no evidence that such a survey was made.

The confession of the supposed indebtedness was merely

that boards were delivered according to the bill. This is no evidence of a survey. And if it were, the defendant might be in mistake as to his liability.

If, in this case, a recovery be had by the plaintiff, the amount may be recovered back by the defendant. *White* v. *Franklin Bank*, 22 Pick. 181.

The parties are not *in pari delictu*. The penalty is upon the seller, not the purchaser. To allow the plaintiff to recover, would only encourage a circuity of action.

SHEPLEY, C. J. — This suit appears to have been commenced to recover the value of boards sold and delivered by the intestate to the defendant.

The defence appears to be, that the intestate was guilty of a violation of the provisions of statute chap. 66, in making that sale and delivery. If such were the fact, the law would not lend itself to carry into effect a sale made in violation of its provisions.

The testimony of Alfred Lee was clearly admissible to prove, that the defendant made out the account against himself and admitted it to be due to the estate of the intestate.

The burden of proof was upon the defendant to show, that the sale was made in violation of the statute provisions, if he would for that reason avoid payment. *Whitman* v. *Freeze*, 23 Maine, 185.

The testimony of Samuel Ames was legally admissible to prove the acts of the defendant, and that a survey was made by his direction.

It does not appear from his testimony or from any testimony presented in the report, that the intestate sold the boards under an agreement, that they should be surveyed by him, or that he had any connexion with that survey.

The purchaser of lumber may be dissatisfied with a survey made by order of the seller, and may cause it to be again surveyed by another person.

There is no proof, that the lumber sold to defendant was not also surveyed by a surveyor elected by the town of

Phipsburg. If that could be presumed, and that the intestate consented that the defendant should select the surveyor, the legal inference would be, that one was to be selected who could make a legal survey.

The real character of the transaction may perhaps be inferred from the testimony to have been, that the intestate agreed to sell the boards to the defendant and to permit him to cause them to be surveyed. The inference would then be that the intestate intended that he should have them legally surveyed. The defendant causes a survey to be made, which he alleges to have been illegal, and presents his own misconduct and violation of the provisions of the statute to prevent a recovery of the agreed price.

The testimony fails to prove, that the intestate was a party to any contract or proceeding in violation of the provisions of the statute, or that he intended to violate any of its provisions; the law therefore interposes no legal objection to a recovery by the plaintiff.

It is not necessary to determine, whether a surveyor elected by one town can make a legal survey in another town.

Defendant defaulted.

DENNETT, *petitioner for a writ of mandamus.*

In this State, writs of mandamus can be issued only to courts of inferior jurisdiction, or to corporations or to individuals.

The duty of opening and comparing votes for certain officers is imposed by law upon the Governor and Council, *eo nomine.*

The performance of a duty, so imposed, is not an act of the individuals, who may hold the offices of Governor and Councilor, but is an official act of the executive department.

Nor is such performance any the less an official act of that department, though the Legislature *might* have devolved it upon any other class of persons, *instead* of the Governor and Council.

For a correct performance of such official acts, the Governor and Council are not responsible to the judicial department.

This court has no authority, by mandamus, to control the official doings of the Governor and Council.

Dennett, petitioner.

THE petitioner represents, *that* he received a plurality of the votes, given for a County Commissioner, by the towns and plantations of the county of Lincoln, at their annual meetings held in Sept. 1850; whereby he was duly elected to that office; —

that lists of said votes were duly returned to the Secretary of the State; —

that it was the right of the petitioner to have it declared by the Governor and Council, that he was elected to said office, and to have the same certified to him by the Secretary of the State; —

that the Governor and Council, disregarding the rights of the petitioner, refused to declare him so elected; and, *that* the Secretary of the State has refused to certify such an election.

Wherefore the petitioner prays, that a rule be issued to the Governor and Council and to the Secretary of the State requiring the Governor and Council to show cause, if any they have, why a writ of mandamus should not issue from this court, commanding the Governor and Council to declare the petitioner elected to the office of a County Commissioner, and the Secretary of State to certify said election.

H. W. Paine, for the petitioner.

SHEPLEY, C. J. — This is a petition to the court, that a rule may issue, that the Governor and Council and Secretary of the State may show cause, why a writ of mandamus should not issue commanding the Governor and Council to declare the petitioner elected to the office of County Commissioner for the county of Lincoln.

If such a writ cannot be legally issued by the court the rule to show cause should not be made.

By the constitution the powers of the government are divided into three distinct departments, and no person belonging to one of these, can exercise any of the powers properly belonging to either of the others, except in cases expressly directed or permitted.

The authority conferred upon this court to issue writs of mandamus is limited to the issue of such writs to courts of inferior jurisdiction, to corporations, and to individuals.

The act approved on February 22, 1842, c. 3, § 2, provides, that "the Governor and Council shall open and compare the votes returned as specified in the first section of this act." It is by such comparison of the votes returned for each candidate, that the fact is ascertained, that some person has or has not been elected to the office of County Commissioner.

If the act of opening and comparing the votes returned be an official duty to be performed by the executive department, this court cannot entertain the inquiry, whether it has been correctly or incorrectly performed. That department is responsible for the correct performance of its duties in the manner prescribed by the constitution, but is not responsible to the judicial department.

The argument, that it cannot properly be regarded as an official duty of the executive department, because its performance might by law have been entrusted to other persons, is not regarded as sound. The performance of the duty might have been entrusted to others, and it might have been entrusted to the judicial department. It does not follow, that an act cannot be the official act of a department of the government because other persons might lawfully have performed the same acts, if performance had been by law entrusted to them.

This court has been authorized to lay out highways; and it could do so only as a court and in the exercise of its official duties; and yet other persons might have been authorized to perform those duties. Money is granted and works are directed to be performed by law under the direction of the President of the United States or of a Governor of a State. In such cases the law might have entrusted the supervision to other persons. This duty is not necessarily to be performed by an executive department of the government by any provision of the constitution. When the performance is by law entrusted to an executive department of *a* government *eo nomine*, the

performance of the duty is an official act. The individual or persons composing the executive department cannot perform the act without being clothed with the official authority.

The act of opening and comparing the votes returned for County Commissioners cannot be performed by the persons holding the offices of Governor and of Councilors, unless they act in their official capacities, for it is only in that capacity that the power is conferred upon them. The duty is to be performed upon the responsibility of their official stations and under the sanctity of their official oaths. The Governor and Council, and not certain persons, that may be ascertained to hold those offices, must determine the number of votes returned for each person as County Commissioner, and ascertain that some one has or has not a sufficient number to elect him.

The case of *Marbury* v. *Madison*, 1 Cranch, 137, does not appear to be opposed to these positions. The opinion in that case states, that "the province of the court is solely to decide on the rights of individuals, not to inquire how the executive or executive officers perform duties, in which they have a discretion. Questions in their nature political, or which are by the constitution and laws submitted to the executive, can never be made in this court." All interference with the executive department of the government is in that case expressly disclaimed.

If the individuals constituting the Governor and Council could be considered as acting, while opening and comparing the votes returned, in their individual and not in their official capacities, the rule prayed for should not be made, for an election of Governor and of Councilors has been declared since the act complained of was performed, and all the individuals composing the Council are not the same as they were, when the act was performed.

The application is for a mandamus to the Governor and Council and not to individual persons.

The Secretary of State could not be required to notify any person, that he had been elected to the office of County

Commissioner, until the Governor and Council had determined, that he had sufficient number of votes to elect him.

Rule denied.

COLE *versus* BRUCE *& al.*

Exceptions to the rulings of the Judge in the progress of a trial are waived by a motion, made and persisted in, to have the verdict set aside.

DEBT upon a poor debtor's relief bond.

The plaintiff requested certain instructions. They were not given.

The verdict was for the defendants. The plaintiff then moved to have the verdict set aside. This motion was overruled, and the plaintiff filed exceptions.

Ruggles, for the plaintiff.

S. E. Smith, for defendants.

SHEPLEY, C. J. — The case states that the suit was commenced on December 10, 1838. It does not appear by what means it could have been kept in the District Court for so long a time. Nor does it appear at what term of that court the action was tried, and the bill of exceptions allowed. The proceedings must have taken place since the Revised Statutes were in force, for the exceptions are allowed by the present Judge of the Middle District.

It is stated in the bill of exceptions, that "after the verdict was rendered the plaintiff's counsel moved, that the verdict be set aside and a new trial granted, because the verdict was against evidence and against law. But the Judge declined to set the verdict aside, deciding, that the same was not against law or evidence."

In the case of *State* v. *Call*, 14 Maine, 421, it was decided, that a party by making and persisting in a motion to have a verdict set aside, thereby waived his right to except to any ruling of the Judge during the trial.

The rights of parties are not greater under the provisions of the Revised Statutes.

It is provided, by chap. 97, sect. 18, that after exceptions are allowed "all further proceedings in said court shall be stayed, excepting, that any trial shall proceed, until a verdict is rendered."

If the exceptions were to be regarded as legally existing and not waived, the Judge could not legally entertain and act upon the motion.

By making and persisting in such a motion, the plaintiff virtually requested the Judge to disregard or reject the exceptions, for the motion could not be granted without annihilating them.

The exceptions to all instructions and rulings during the progress of the trial were therefore waived by making the motion, and proceeding to a decision upon it.

Exceptions will not lie to a decision of the Judge, refusing to grant a new trial; that being a matter submitted by statute to his judicial discretion. *Moulton* v. *Jose*, 25 Maine, 76.

This case has therefore been irregularly brought into this court, and it is *Dismissed.*

McKinney *versus* Page.

An award, made by referees, without notice to one of the parties, of their meeting to examine into the subject-matter referred, is not binding upon such party.

The appointment of a person "to see whether" certain work was according to previous contract, does not confer the powers of a referee; and the opinion he might give would not be conclusive, but may be controlled by evidence.

Exceptions, from the District Court.

Assumpsit. It had been agreed in writing, that the plaintiff should build for defendant a barn of specified dimensions.

The defendant had made several partial payments, and this suit was brought to recover the balance for building the barn.

The defendant introduced much evidence to show that the barn had not been built in such manner as the contract required. Upon that point, it appeared for the plaintiff, *that* one Averill and one Morrell had been selected by the parties "to examine the barn and see if it was finished according to the contract," "to see whether the contract had been complied with"; *that* they made the examination in presence of the parties, and decided, that the barn was not done as the contract required; *that* they pointed out many deficiencies; *that* sometime afterwards, without any notice to the defendant, or knowledge by him, they again examined the barn in company with the plaintiff, and indorsed upon the contract that it had been fulfilled by the plaintiff.

A witness also testified, that the defendant on a subsequent occasion, stated the matter to have been submitted to *referees*, by whom the point had been decided against him.

The Judge was requested to instruct the jury that, if the supposed referees, after having determined that the contract was not fulfilled, made a second examination without notice to the defendant and entirely *ex parte*, the defendant is not bound by their award. The Judge declined to give that instruction, but did instruct the jury, that if the referees made their award without fraud, and did not exceed the authority given them, their decision was binding and conclusive on the defendant though not present at the last examination.

Verdict was for plaintiff and the defendant excepted.

W. Hubbard, for the defendant.

H. Ingalls, for the plaintiff.

All the presumptions of law are in favor of supporting an award. An award of referees can be impeached only for corruption or partiality or for transcending their authority. 6 Greenl. 21; 13 Maine, 41–49; 17 Maine, 52, 54; 10 Pick. 348; 1 Peters, 222—228; 13 Johns. 27.

Howard, J., orally. — The persons selected to see if the contract was fulfilled seem to be viewed by the counsel, as having the power of referees. If so, they could not without

notice to the defendant, lawfully proceed to the examination, upon which their decision was to be founded. But they are not considered by the court to have been invested with the power of referees, and their doings therefore are not conclusive. Their opinion was subject to be controlled by evidence.

Exceptions sustained.

BLAISDELL *versus* LEWIS.

No action can be maintained for the breach of a contract to employ the plaintiff, at stipulated daily wages, unless there was some stipulation as to the length of time, for which the employment should continue.

EXCEPTIONS from the District Court.

Assumpsit for refusing to employ the plaintiff at certain daily wages according to contract.

The evidence tended to show that, by parole, it was agreed that the defendant would hire the plaintiff to labor for the defendant at Hallowell, but nothing was stipulated as to the continuance of the service. After the contract was made, the plaintiff, who resided at Bath, received a letter from the defendant, notifying that the defendant had postponed the time for the plaintiff's coming to Hallowell, till further notice. The plaintiff never went to Hallowell.

The Judge instructed the jury that, "if they should be satisfied from any evidence in the case that Lewis, after Blaisdell had notified him that he was ready to enter upon the execution of his contract, had informed Blaisdell that he would not be employed, and plaintiff had suffered damage, then they would render a verdict for the plaintiff, though he had never gone to Hallowell; — and further that, if they should be satisfied from the evidence, that Blaisdell did not go to Hallowell, but remained at Bath for any time at the request of Lewis, and for his accommodation, they would be authorized to give to the plaintiff the difference between what, under the contract, he might have earned during that time, and what, with the

exercise of due diligence, he might have earned in other employment.

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

Paine, for the defendant.

Gilbert, for the plaintiff.

There was no waiver by the plaintiff of his right to be employed. But he was ordered by the defendant not to go to Hallowell.

The instruction was therefore uncalled for and irrelevant.

The only question is, whether such instructions can operate to the injury of the plaintiff.

WELLS, J., orally. — An infirmity in this contract is, that it fixed no time during which the plaintiff's services should be rendered to the defendant. Suppose the plaintiff had gone to Hallowell, and tendered his services, there was nothing to prevent the defendant from discharging him at the end of a single day. In such a contract there is no value.

Exceptions sustained.

GOWEN *& al. Appellants from a decree of the Probate Court.*

A contract, made by a widow with the heirs and legatees, that, (although she had previously waived the provision made for her in her husband's will,) she would accept that provision, and make no other claim upon the estate, can have no effect upon the action of the Probate Court.

APPEAL from the Probate Court. Provision was made for the appellee in the will of her late husband. She waived that provision in due form in the Probate Court, and applied for an allowance out of the personal estate, and was allowed six hundred dollars. From that allowance, this appeal is taken by the heirs and legatees. An alleged reason for the appeal was, that, after having waived the provisions of the will, she retracted that waiver by an instrument under her hand and seal, and

stipulated with the heirs and legatees that she would accept and abide by the provisions of the will, and make no other claim upon the estate.

An indenture to that effect, under seal, between the widow of one part, and the appellants of the other part, was introduced.

Ingalls, for the appellants.

The indenture is a *retraxit* of the waiver.

It is a release of the very claim now in question.

It is a covenant not to prosecute such a claim.

To avail ourselves of the contract now in this process, will prevent circuity of action. *Hastings* v. *Dickinson*, 7 Mass. 153; *Sewall* v. *Sparrow*, 16 Mass. 24; *Croade* v. *Ingraham*, 13 Pick. 33; *Phelps* v. *Johnson*, 8 Johns. 43; *Cuyler* v. *Cuyler*, 2 Johns. 186; *Shed* v. *Pierce*, 17 Mass. 623.

Converse, for the appellee.

Shepley, C. J., orally. — The proceedings by the indenture were only *in pais*. They did not involve or affect any action of the Probate Court. They could not rescind the waiver, already on the public records. It is said the indenture operated as a technical release. But such a release, to have any effect, must operate on an existing *right*. A widow's claim for an allowance is not such a *right*. It is merely in the *discretion* of the court. Such a document could not defeat or prevent the proceedings required by the statute for the settlement of estates. *Appeal dismissed.*

Murray *versus* Cargill.

A tenant in common with others, of a meeting-house, may maintain trespass for injuring one of the pews, against a person having no title either in the pew or in the house.

Trespass from breaking and entering the plaintiff's pew, No. 47, in a meeting-house.

The plaintiff claimed under a deed from the proprietors, given to him in 1825. He also showed by the proprietor's books, that in 1824 he contributed $60 toward the erection of the house, that being one-half of one share.

The defendant claimed under a deed from the collector of a tax raised for repair of the house.

It appeared that the collector, after his sale to the defendant, paid to the plaintiff the surplus avails of the sale, after deducting the tax and expenses.

The case was submitted for a judgment to be entered by nonsuit or default.

Converse, for the plaintiff.

Ingalls, for the defendant, contended that the collector's deed passed the title; and that the plaintiff, by accepting the surplus avails, waived all irregularities in the tax proceedings.

SHEPLEY, C. J., orally. — The tax proceedings were ineffectual. The irregularities and insufficiencies are too many and manifest for question.

The receipt of the surplus avails could neither transfer title to the defendant, nor estop the plaintiff from asserting such title as he might have.

The plaintiff's deed of 1825 was inoperative as a conveyance. Neither party, therefore, shows title to the pew, No. 47.

But the plaintiff aided and took an interest to the amount of half a share, in the erection of the house. However many may have been the whole number of shares, he was a co-tenant of *some part* of the house. It is that co-tenancy, however small its proportion, that enables the plaintiff to recover in this suit. Pews being, by statute, made real estate, the plaintiff is entitled to full costs.

Defendant defaulted.

REED *versus* GILBERT, *Administrator.*

One of several heirs, to whom land and personal estate descended, may be a witness for the administrator, after having conveyed his interest in the land, and released to the administrator *as such*, his interest in the personal property.

An inventory of property duly returned to the Probate Office, is proof, *prima facie*, that no other property belonged to the estate.

EXCEPTIONS from the District Court.

Assumpsit against an administrator on an account against the intestate.

The inventory exhibited one lot of land and some personal property, belonging to the estate. The defendant offered one of the heirs as a witness. The plaintiff objected to his admissibility. The defendant then showed, that the witness had conveyed his interest in said lot of land to a third person, and had released to the administrator, *as such*, his interest in the personal property. It was not shown, that there was any other land belonging to the estate.

RICE, J. admitted the witness, and the verdict was for the defendant.

Merrill, for the plaintiff.

The heir was interested to defeat this claim against the estate. His distributive share would thereby be enlarged.

His deed of land was only of a single lot. There might be other lands belonging to the estate.

Neither did his release to the administrator discharge his interest in the personalty. For the administrator was but a trustee of the heirs. A release of property to one's own trustee does not diminish the interest of releasor, the *cestui que trust.*

Gilbert, for the defendant.

WELLS, J., orally. — The inventory is to be considered, *prima facie*, as embracing all the land belonging to the estate. It was not shown, in this case, that any land descended to the witness except that which he conveyed. It is not an *unseen*

and *mere possible* interest, which excludes a witness; it must be an *apparent* one. The deed therefore was a sufficient discharge of the witness' interest as to real estate.

What disposition the administrator would be bound to make of the avails of the personalty, need not now be determined. But in no event could a suit against him be maintained by this witness for his share. Such a suit would be barred by the release.

Exceptions overruled.

BRYANT *versus* COUILLARD.

No action upon a promissory note can be maintained by an indorsee who took it, knowing it to have been obtained by fraud.

Exceptions to an instruction given to the jury, on the ground that there was no evidence calling for such instruction, are not to be sustained, unless they show that there was no such evidence.

EXCEPTIONS.

Assumpsit by the indorsee against the indorser of a promissory note. The exceptions recite *some* of the circumstances, under which the note was obtained, but do not purport to present all the evidence in the case.

WELLS, J. instructed the jury that, if the note was obtained by fraud, and negotiated to the plaintiff with the knowledge, on his part, of the fraud, the action is not maintainable.

Verdict for defendant.

Ruggles, for the plaintiff.

The objection is, that there was no particle of evidence, which could call for such an instruction.

Tallman and *Smith*, for the defendant.

HOWARD, J., orally. — The instruction is admitted to be correct, if the evidence had been such as to furnish any occasion for it. But the exceptions do not purport to present all the evidence in the case. For any thing exhibited here, there might be testimony to which the instruction was strictly

adapted. The law raises no *presumption*, that instructions given to a jury were inapplicable or inappropriate.

Exceptions overruled.

LAW *versus* PAYSON.

It is not allowable for a party to prove, by his own witness, what that witness has said, or what the mere purpose of the witness' mind had been, on former occasions.

Upon the question whether a sale was fraudulent, it is not allowed that the party, claiming under the sale, should prove that the grantor, after the sale, performed an honest act, relative to the same subject-matter.

REPLEVIN, of a horse and sleigh.

Hunton & Greeley were co-partners in business. They owned the horse and sleigh, and Hunton sold the same to the plaintiff, taking his note payable to the firm. They were afterwards attached, as the property of the firm, by the defendant, a deputy sheriff, on a writ in favor of Reed & Co. This action of replevin was then brought. The defence was, that the sale to the plaintiff was intended to defraud creditors. Judgment was recovered on default by Reed & Co. in their said suit.

The plaintiff contended that Hunton sold him the property, through a well grounded conviction, that Greeley intended to misappropriate the same, with the other company property, so that their creditors should be defrauded, or that Hunton should be alone compelled to pay their debts. To prove this defence, the plaintiff introduced Hunton as a witness, and offered to prove by him: —

1. That he, the witness, applied to Mr. Vose, the attorney of Reed & Co., to advise them to come and secure their debt.

2. That the witness' purpose, in selling the horse and sleigh to the plaintiff, was to secure the property for the creditors, against the purpose of Greeley to defraud them.

3. That the witness, subsequently to the commencement of this suit, offered to turn out to a creditor of the firm, the note given by the plaintiff for the property in question

The testimony, thus offered, was rejected.

It appeared that Hunton had taken certain goods from the store, and the plaintiff offered to prove by him that they were so taken for the purpose of securing them from Greeley for the creditors. This testimony was rejected.

There was evidence tending to show that Reed & Co. had received, in property and demands, the full amount due them, and that their judgment was therefore fraudulent.

WELLS, J., presiding at the trial, was requested to instruct the jury, *that*, if Reed & Co. had received property to the amount of their demand, and sufficient to satisfy their execution, without the horse and sleigh, they have no right to question the plaintiff's title; —

that Hunton had a right to sell the horse and sleigh for the purpose of preventing a misappropriation of them by Greeley; — and *that*, (there being no proof that there were any oxen or any other horse, belonging to the partners or either of them,) the horse was exempt from attachment.

But the Judge instructed the jury, *that* the judgment in Reed & Co.'s suit was conclusive on the plaintiff, until it was reversed, or was proved to have been obtained by collusion or fraud; — *that*, if the sale by Hunton to the plaintiff was made to delay, defraud or defeat creditors, the plaintiff could not maintain this action; — *that* the plaintiff could not avail himself of the statute, exempting horses from attachment and execution, not having taken that defence till near the close of his argument, and there not having been any evidence laid before the jury in reference to that subject.

The jury found for the defendant, and the plaintiff excepted.

Ruggles, for the plaintiff.

The offered evidence ought to have been received.

The propriety of it grew out of the course of the defendant's evidence.

The sending by Hunton to the creditors was provable.

It was the purpose of Hunton not to defeat creditors, but to protect them and himself.

If a fraudulent intent be provable, so may an honest one be proved, by way of repelling. Intention in collateral matters may be proved. 4 Maine, 172; 17 Maine, 341.

If there was fraud in Hunton, the knowledge of it by the plaintiff ought to be shown.

Lowell, for the defendant.

WELLS, J., orally. —

1. The proof first offered was merely to show what declarations the witness himself had previously made; — and the —

2. Second offered proof was to show, not an act done, but a mere purpose of the mind. Such proofs are not admissible.

3. The third offered proof was to show that Hunton had, *after this suit*, offered to turn out to a creditor the note which the plaintiff had signed. But the transaction charged, as a fraud, had already been perpetrated. Fraud cannot be purged by subsequent honesties. Besides, it was but an offer to prove a third person's declaration.

4. The judgment recovered by Reed & Co. is to be held valid until reversed, or shown to have been procured by collusion.

5. The statute, which exempts the horse of a debtor from attachment, cannot avail the plaintiff. It was not shown that it was the debtor's only horse. And if it were, the sale to the plaintiff did not transfer to *him* the exemption.

6. Whether this plaintiff had knowledge of Hunton's intent to defraud creditors, was not drawn into question at the trial, and no request was made for instructions upon that point.

Exceptions overruled.

Drake *versus* Rogers, Morse & Burgess.

A co-defendant may be cited anew, and proceeded against, although the suit had been previously discontinued as to him, on an agreement for a valuable consideration.

It is not competent for another defendant to object to such a proceeding.

A discontinuance does not, of itself, discharge the debt sued for.

The indorsee, in a suit against the maker, may prove, that there was a mistake in the date of the note.

And this he may do, although by such proof, the pay-day of the note would be extended, whereby to cut off a defence, which would be good in a suit brought by the payee.

Assumpsit, by the indorsee, against the makers of a promissory note for $1000, alleged to have been dated September 25, 1841, payable in one year; and also upon the money counts.

At the September term, 1848, it was agreed, between the plaintiff and Morse, that the action should be discontinued as to Morse, and that Morse should take no cost. The discontinuance was accordingly entered on the docket, with "no costs for Morse."

Afterwards the other defendants pleaded the non-joinder of Morse. Whereupon the plaintiffs moved for leave to summon in Morse as a defendant. The motion was objected to, but allowed.

Morse appeared according to the summons, and moved, in writing, that he be discharged in virtue of the said contract of discontinuance. But the motion was overruled, and he was required to plead to the action.

He pleaded the general issue with brief statement. The other defendants pleaded in like manner.

The note was introduced and comported with the count in the declaration.

It was then shown, that the 25th of Sept. 1841, was Sunday. Whereupon the plaintiff moved for leave to amend by declaring upon a note given in Sept. 1842. Though objected to, the amendment was allowed and made. The plaintiff then, against objection, introduced evidence tending to show,

that the note was in fact given in Sept. 1842, and that the plaintiff purchased it, for value, within three months from that time.

The defendants then introduced evidence for the purpose of showing, that the note was obtained by the *payee* through fraud; and also, that the note was given without consideration.

WELLS, J. instructed the jury *that* the discontinuance, as to Morse, did not protect him from being again called on to defend the suit; *that* the other defendants could make no valid objection to such a proceeding; *that* it was competent for the plaintiff to show that the note was given in 1842, and not in 1841; *that* its legal effect and the liabilities and rights of the parties would be the same as if it had been dated of the time when it was actually given; *that* a failure of consideration, if proved, would not avail the defendant in this suit, if the note was negotiated, for value, before it was payable; and *that*, if the plaintiff purchased the note of the payee, and paid him the value of it, before it became payable, the fraud, imputed to the payee, would not affect the plaintiff's right to recover, if he was ignorant of the fraud.

The verdict was for the plaintiff and the defendants excepted.

Gilbert, for the defendants, Rogers and Burgess, and *Ruggles* for Morse.

Evidence was inadmissible to show that the note became payable a year later than its terms imported; especially as it affected the equitable rights of the defendants. The date is put to the note to show the intent. Stark. Ev. 551; *Styles* v. *Wardle*, 4 B. & C. 908; 10 Maine, 418; 21 Maine, 543. The plaintiff saw by the date how long the note had run, and took it as an *overdue* paper, subject to equities. He cannot therefore resist the equities. An indorsee's rights depend on the *written* paper only.

The discharge of Morse, for a valuable consideration, was a discharge of *all* the debtors.

The restoration of the name of Morse as a co-defendant was injurious to the other defendants, because the costs were thereby multiplied, and delay created, and the person cited in is not

liable to previous costs. The discharge and the recall of Morse would defeat the attachment of his property; and his insolvency might afterwards occur, whereby the loss of the attachment would operate injuriously to the other defendants. The amendment was wrongfully allowed. It introduced a new cause of action.

Tallman, for the plaintiff.

TENNEY, J., orally. — The discontinuance as to Morse was a valid contract, and it was fulfilled by the plaintiff. It was only in the nature of a nonsuit. A fair construction of the statute does not forbid his name being restored upon a new citation. The Judge's ruling on that point was correct.

The evidence to show an erroneous date to the note was admissible. The jury found there was a mistake in the date. The note, by intendment of law, was payable in a year from the *time* it was *given*. When purchased by the plaintiff it was not overdue or dishonored. The defences of fraud and of want of consideration cannot avail.

The amendment of the declaration was allowable. It was for the same cause of action. But it was not necessary. The writ contained the money counts, under which a note of either of the pay-days could be proved.

THE STATE *versus* COOMBS.

There being several persons in a town, each holding the office of a justice of the peace, it is not in conflict with any constitutional right, that one of them should be selected to exercise, exclusively of the others, the powers of that office within the town; or that the one so selected should be vested with some superadded powers.

It is not violative of any constitutional provision, that such selection should be made by the voters of the town.

The person, thus selected, derives his powers, not from the choice of the town, but from his previous appointment as a justice of the peace.

An allegation, in a complaint, that it was sworn to before the justice of a town court, and within the proper county, is, in the absence of other proof, sufficiently evidential of the justice's jurisdiction.

COMPLAINT, addressed "to John C. Cochran, Esq., a justice of the peace, and justice of the town court of East Thomaston."

It appeared, that the Legislature of 1849, of which Mr. Cochran was a member, enacted the statute, c. 128, establishing the town court of East Thomaston, and providing *that* the justice of the court should be selected by the legal voters of the town; *that* no person should be eligible, unless he were a justice of the peace and quorum; and, *that* he should in exclusion of others, have the powers of a justice of the peace together with some others superadded. Mr. C. was chosen by the legal voters, to be the justice of the town court.

The complaint was for selling intoxicating liquors.

Upon it Mr. Cochran issued a warrant, signed by him as a justice of the peace, and of the town court of East Thomaston.

The complaint did not specify, (otherwise than as above worded,) in what town the complaint was sworn to. The defendant was arraigned before Mr. Cochran and pleaded to the jurisdiction. The plea was rejected, and the defendant pleaded not guilty. He was convicted and appealed to the District Court. His objections to the complaint and to the jurisdiction were there overruled, and, after a verdict against him, he filed exceptions. In this court the exceptions were waived, and the legal points were presented on a motion in arrest. The grounds taken were —

1. It does not sufficiently appear by the complaint, in what town the complaint was entered or sworn to, and therefore did not show that there was jurisdiction. Upon this point the defendant's counsel cited Wharton Cr. Law, 63 & 64; Chitty Cr. Law, 338 & 339.

2. The two capacities in which Mr. Cochran undertook to act were incompatible. The defendant could not know before what tribunal to plead.

3. Mr. Cochran was not constitutionally appointed as justice of the town court. The constitution, art. 5, part 1, sect. 8,

provides that the Governor shall nominate, and, with the advice and consent of the Council, appoint all judicial officers. The legislative provision for an election by the voters, was unconstitutional and void. The provision that "no person shall be eligible to said office unless he be a justice of the peace and quorum duly qualified," will not help the unconstitutionality of the act. The powers and duties of the justice of that town court and justice of the peace, are widely different, as will be perceived by examining the statute. The judge of the town court may exercise important judicial functions, beyond the jurisdiction of justices of the peace.

4. Cochran, being a member of the Legislature when the office was created, was ineligible to its appointment, during the term for which he was elected. Const. of Maine, art. 4, part 3, sect. 10. The 2d sect. of art. 3d of the Declaration of Rights, provides that "No person or persons belonging to one of these departments," (the *legislative*, *executive* and *judicial*,) "shall exercise any of the powers properly belonging to the others, except in the cases herein expressly directed or permitted."

Gould, for the defendant.

Tallman, Attorney General, for the State.

HOWARD, J., orally. — The complaint shows that it was made and sworn to in the county of Lincoln, and before the justice of a town court. That was sufficiently descriptive of the justice's jurisdiction. The objection that Mr. Cochran was designated by the vote of the town has no force. It is from his office as a justice of the peace, and not from the act of the town, that his official powers are derived. Neither was the selection of Mr. Cochran invalidated by the fact that he was a member of the Legislature which passed the act establishing the town court. Additional powers are frequently conferred upon officers, without the need of a new appointment. *Motion in arrest overruled.*

STATE *versus* COOMBS.

A conviction for presuming to be a common seller of intoxicating liquors, within a specified period, is not a bar to a prosecution for a single act of selling such liquor within the same period.

EXCEPTIONS from the District Court, RICE, J.

Complaint, dated October 1, 1850, for selling intoxicating liquor, on the 30th of September, 1850. The defendant was found guilty, and sentenced to pay a fine of $20. From that judgment he appealed to the District Court. Afterwards at the term of the said court, held on the fourth Tuesday of the same October, the defendant was indicted for being a *common seller* of such liquors on said 30th of September, and on divers other days between that time and the finding of said indictment. To the indictment he pleaded *nolo contendere.* After that proceeding, the prosecution on said complaint came up for trial, and the defendant, by leave of court, pleaded the conviction upon the indictment. The county attorney, admitting that the indictment for common selling embraced the time of the selling charged in the complaint, tendered an issue upon the defendant's allegation that the said act of sale was one of the acts charged in the indictment, as constituting the offence of common selling. The issue was joined. There was evidence tending to prove the sale, as charged in the complaint.

The defendant requested the Judge to instruct the jury, that the conviction upon the indictment was a bar to the further prosecution of the complaint. But that request was not complied with. The instruction was that a particular act of selling and the presuming to be a common seller were separate and distinct offences; and that, if the act of selling, charged in the complaint, was proved, the burden was on the defendant to show that that act was one of the acts, which constituted the common selling charged in the indictment. The defendant excepted, after a verdict against him.

Gould, for the defendant.

Common selling is made up of individual acts of sale. The major offence includes the minor. Whart. Cr. Law, 114; 1 Chit. Cr. Law, 453, 4 and 5.

Where one offence is a necessary ingredient of another, a conviction for the latter bars all prosecution for the former. 2 Virgin. Cases, 159; 6 Dana, 295; 14 Pick. 90; 2 Metc. 413.

Tallman, Attorney General, for the State.

The replication asserts that the act charged in the complaint was not one of those which made up the offence of common selling; and the jury have so found. That ends the case.

WELLS, J., orally. — A single act of selling is an offence. Presuming to be a common seller is a different and higher offence. Both of these offences have their different and appropriate punishments. In the trial for common selling, the single acts of sale are not prosecuted. They are shown merely as evidence of the larger crime. Such proceedings do not expose to a second punishment for the same offence.

Exceptions overruled.

NOTE. — This complaint was founded on the fifth section of chap. 205, of the year 1846. That section was repealed by the Act, chap. 211, of the year 1851.

STATE *versus* BARNES.

In an indictment for a libel, an allegation that the defendant sent the same to several specified persons, and *thereby* published the same, is a sufficient averment of publication.

Such an allegation is not a mere conclusion of law. It is sustained by proof, that the defendant sent the libel to one only of the persons specified.

An allegation that the defendant wrote and printed a *libel*, may be treated as an allegation that he wrote and printed a *false and defamatory* publication.

In an indictment for a libelous publication, it is not necessary to set out the residence and addition of the person libeled.

Where several mere *modes of publication* are mentioned, it is not fatal to the indictment, that they are alleged in the *disjunctive*.

State *v.* Barnes.

A former conviction for the same offence, cannot avail in arrest of judgment. It should be specially pleaded.

EXCEPTIONS from the District Court, RICE, J.

Indictment, alleging that the defendant had composed, written and printed a false, scandalous, malicious and defamatory libel, of and concerning one J. B., charging him with having committed several offences, which are, by statute, made *felonies.*

The trial was had upon a plea of not guilty.

The defendant offered to prove certain acts of the said J. B., coming within the class of *misdemeanors*, but the evidence was rejected.

The indictment set forth that the defendant sent the libel to three persons named, and to divers other persons to the jurors unknown, in an envelope in the form of a letter, or printed circular, or pamphlet, directed to each of said persons, and did thereby publish the said libel, to the great injury, &c.

The defendant contended that it was incumbent on the State to prove the publication in the mode alleged, and that the libel was sent to each and every one of said three named persons. But the Judge instructed the jury that a communication of the contents of the supposed libel to one only of said persons was sufficient proof of publication. The verdict was against the defendant. Several causes were then alleged in arrest of judgment.

Gilbert, for the defendant, in relation to the points discussed in the opinion.

1. There was error in the instruction, that the publication was proved by showing that the paper was sent only to one person. The indictment does not technically allege a publication. It merely alleges some facts, and then avers, that *by means of those facts* there was a publication. As the publication is indispensable to the offence, those *means* become descriptive, and should therefore, *all* of them be proved. 1 Stark. Ev. 373, 375; 1 Chitty's Cr. Law, 232.

2. Publication is not sufficiently alleged. No time or place

is stated. A reference to certain acts of the defendant, and then an allegation, that *thereby* he published, is insufficient. This expression "thereby" cannot enlarge the import of the words describing the acts referred to. But those acts, of themselves, do not constitute a publication.

3. The averment, that the defendant did thereby publish, is but a conclusion of law, and that conclusion is erroneously drawn. It depends upon the import of the word used, which has no technical sense, and is of many different meanings, none of which necessarily import that the envelope was *opened* or even *received.* And if the envelope was never opened, and especially if it was never received, how could the sending become a publication? The rules of criminal law require more strictness. The description of an offence demands as much certainty as the case admits. 1 Chitty's Cr. Law, 169, 172; 5 Term R. 623.

4. The indictment charges the whole of the article to be the libel. It is a sound rule, not to be disregarded, that in an indictment charging a written "libel," the whole of it must be set out. In this case, that rule, so essential to the rights of the defendant, has been wholly violated.

5. It was necessary to allege who, among several persons of the same name, was the one libeled. This should have been done by stating his residence, rank, degree or employment. 1 Chitty's Cr. Law, 215 & 169; 1 Stark. Ev. 376.

6. The offence is stated merely in the disjunctive; whether the supposed libel was sent in a letter, circular or pamphlet, does not appear. This is a fatal defect. 1 Chitty's Cr. Law, 326.

7. The defendant is now under conviction in another county for writing and publishing the same libel. The question is submitted, whether he can be made to suffer twice for the same offence.

Tallman, Attorney General, for the State.

Shepley, C. J., orally. — The indictment alleges that the supposed libel was sent to several persons named. The de-

fendant contends that, though unnecessary to have alleged the sending to more than one person, yet having alleged the sending to many, the whole allegation must be proved.

Whatever allegation is *descriptive* of the offence must be proved. But the allegation of sending to *more* than *one* person was not descriptive of the offence. It was only an averment of the mode in which the offence was, in part, effected. The ruling of the Judge on that point was therefore correct.

2. The defendant contends that no publication is alleged. But we think otherwise. The allegation of sending the libel and that *thereby* the defendant published it, is a sufficient averment of publication.

3. It is however insisted, that the averment, made after alleging the sending to several persons, that the defendant "thereby published" the libel, was but a conclusion of law, and not the allegation of a fact.

If that view of the case was correct, it would be fatal to the prosecution. But it is otherwise. The allegation is that the defendant *did thereby publish.* That he did *thereby* publish to some one of the persons, was a fact necessary to be proved. It was not therefore a mere conclusion of law.

4. It is also insisted that, when the government allege the publishing of a written "libel," it should *all* be set out in the indictment.

The term "libel," as used in this indictment, imports a defamatory publication, written and printed. And it is not ground of objection that it is used in that sense. Suppose then those words were substituted. It is not requisite that, in an indictment for a defamatory publication, the whole of a book containing it should be set out.

5. Another objection is, that the indictment does not allege the residence or addition of said J. B. But such an allegation is not requisite.

6. Though described in the disjunctive, (letter, circular, *or* pamphlet,) that description is not of the essence of the offence, but is only of the mode of publication, viz: that the

libelous matter was published in one or the other of those forms; and it is quite unimportant which.

7. The former conviction should have been specially pleaded. It could not come in by way of evidence under a plea of not guilty.

Exceptions overruled. Case remanded.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF KENNEBEC,

MAY TERM, 1851.

PRESENT:

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

PALMER *versus* GOODWIN.

A contract, made by a citizen of Massachusetts, with a citizen of this State, for the payment of money, is not barred by a discharge under the insolvent laws of that State.

ASSUMPSIT, by the indorsee against the maker of the following note.

"Boston, Sept. 7, 1847. Three months after date, I promise to pay E. Moore & Co. or order one hundred and fifty dollars, value received."

The note was indorsed by the payees and by a second indorser. These indorsers, together with the plaintiff, were always residents of Maine. The defendant was of Massachusetts. After pay-day of the note, he applied for and ob-

tained a discharge under the insolvent laws of that State. The case was submitted for nonsuit or default, according to legal rights.

Danforth and *Woods*, for the plaintiff.

Whitmore, for the defendant.

SHEPLEY, C. J. — A contract made by a citizen of Massachusetts with a citizen of this State to pay a sum of money is not discharged by proceedings under the insolvent Acts of that State. *Savage* v. *Marsh*, 10 Metc. 594; *Fiske* v. *Foster*, *idem.* 597. This action is upon a promissory note made by the defendant, a citizen of Massachusetts, and payable to citizens of this State. *Defendant defaulted.*

SANFORD *& ux. versus* INHABITANTS OF AUGUSTA.

In an action, under the statute, to recover for "*bodily injury*," suffered through a defect in the highway, the jury, in order to give to the statute the beneficial effect for which it was designed, may also allow compensation for loss of time resulting from the injury, and for expenses suitably incurred to obtain a cure.

In such an action by husband and wife, to recover for "*bodily injury*" suffered by the wife, the damage recovered may include the loss of her labor resulting from the injury, and also the expenses of a cure.

In relation to *such an action*, that common law rule is not in force, which required that compensation for *such* loss of service and for *such* expenses, could be recovered *only* in a suit brought by the husband alone.

ON exceptions from *Nisi Prius*, HOWARD, J.

Case, under the statute, for damage through a defect in the highway.

The testimony tended to show, that the female plaintiff was injured by such a defect, and that she endured pain and was unable to labor for a season, and that physicians had been called to prescribe for her.

The defendants requested the Judge to instruct the jury that, in this action, the recovery of damage must be limited to the pain and to the personal injury to the *wife*; but the jury

were instructed, that they might assess damage to compensate "for the pain and suffering of the wife, and for the time she had lost, and for expenses of nursing and doctoring and other suitable expenses, incurred on account of the injury."

North, for the defendants.

1. The plaintiffs seek a statute remedy. The statute gives remedy only for a person receiving bodily injury or suffering damage in his property. R. S. c. 25, § 89; *Belfast* v. *Reed*, 20 Maine, 246. The remedy thus limited does not extend to loss of time, or to the charges for nursing or doctoring, or to what the Judge called "other suitable expenses," nor to any consequential damages.

2. An action by husband and wife *jointly*, cannot be maintained for the loss of her time, or society. For the loss of her services and society, and for the expenses, no recovery can be had except in a suit by the husband alone. This well known common law principle has not been varied by the statute.

Vose, for the plaintiffs.

Where husband and wife join for a tort committed upon her, the husband may demand damages also for an injury arising exclusively to himself by way of aggravation of damages. 1 Selw. 243; 2d Ld. Ray. 1031; 6 Mod. 127; *Russell & ux.* v. *Corne*, 1 Salk. 119, a leading case; Bacon's Abr. Baron and Feme, 502, letter K; 11 Mod. 264, case where it was alleged that money was expended in wife's cure; Comyn's Dig. vol. 2, p. 232, title Baron and Feme, letter V; *Lewis* v. *Babcock*, 18 Johns. 443; *Newman* v. *Smith & al.* 2 Salk. 642.

2. If a husband may demand damages in such case, by way of aggravation which belong exclusively to himself, the court may properly instruct the jury that they are to be taken into the account in making up their verdict. In this way circuity of action is avoided.

Howard, J. — The wife received personal injury through an alleged defect in a highway, which the defendants are by law obliged to repair, and the husband and wife claim

damages under the provisions of the R. S. c. 25, § 89. Can they, in this action, recover the entire damages "sustained thereby," by the wife and the husband.

In a suit for a personal injury to the wife during coverture, the husband and wife must join. But by the common law the wife could not join with the husband, in a suit for damages to him for the loss of her services or society, or for expenses incurred, occasioned by such injury. For these the husband could maintain a separate action in his own name.

The provision of the statute on which this action is founded, is, "If any person shall receive any bodily injury, or shall suffer any damage in his property, through any defect or want of repair, or sufficient railing, in any highway, town-way, causeway or bridge, he may recover in a special action of the case, of the county, town or persons, who are by law obliged to repair the same, the amount of damage sustained thereby, if such county, town or persons had reasonable notice of the defect, or want of repair."

Under the provisions of this statute, no one but the person injured can recover damages for the personal injury. And to authorize the maintenance of a suit for an injury to property, such injury must be occasioned to present property *in specie.* Damages resulting to property by causing a general diminution of the amount, by increasing expenditures, or causing delays and inconvenience, are not recoverable under this statute.

A father cannot recover upon the statute, for the loss of the services of his minor son in his employ, or for expenses incurred for medical aid, occasioned by an injury received in consequence of a defect in a highway. *Reed* v. *Belfast*, 20 Maine, 246. Nor can a husband maintain an action by virtue of the statute, for the loss of the services or society of his wife, or for expenses incurred on account of such an injury to her; for it would not be an injury to his person, nor a damage to his property, within the meaning of the statute.

Unless the person injured through a defective highway can recover in every instance where an action is maintainable, the

whole damages sustained, in many cases an important part of the damages, could never be recovered, and the provisions of the statute would be unavailing. The more reasonable construction of the statute, however, and that which will best comport with its spirit and design, and give to it full force and effect, is, that it was intended to relieve those suffering, from the common law disabilities in this respect, and in all cases where an action can be maintained, to allow the person injured to recover the entire damages sustained by the injury, by a suit in proper form. The wife, when injured, to sue with her husband, and the minor by guardian, or next friend.

In this case, the plaintiffs, upon proof of a right to recover, could legally claim, in the nature of damages, compensation for the personal injury and suffering, loss of time, and for necessary and suitable expenses incurred, and occasioned by the injury.

Such, it is believed, has been the practical construction of the statute. In *Verrill & ux.* v. *Minot*, 31 Maine, 299, the plaintiffs recovered for the whole damages sustained.

There was conflicting testimony at the trial, but there was evidence on which the jury might return a verdict for the plaintiffs. We cannot say that the verdict was against evidence, or the weight of evidence.

Exceptions and motion overruled.

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32 539
49 251

PORTER AND BENSON *versus* BUCKFIELD BRANCH RAILROAD.

The construction of a contract by referees, appointed under a submission at common law to *settle the dispute in relation to that construction*, is not re-examinable in this court.

Thus, the plaintiffs contracted with the defendants to construct for them a rail road; the defendants reserved the right to alter the line or the gradients of the road, without the allowance of any extra compensation, if the engineer should judge such alterations necessary or expedient; alterations were accordingly made, involving a large increase of expense. For that increase of expense, the referees allowed compensation to the contractors; *Held*, by the court, that the allowance of that compensation did not transcend the authority of the referees.

Thus again; the defendants in the contract reserved the right to substitute *piling* instead of *embankment*, on a specified part of the road; and the substitution was made, creating to the contractors an increased expense, for which the referees allowed a compensation; *Held*, that that allowance did not transcend the authority of the referees.

The submission stipulated, that the referees should take the contract, *as the basis of their action*. The contract required, that a fixed proportion of the cost of the road should be paid to the contractors, in the stock of the company. The referees, having ascertained the amount of that proportion, awarded that certificates for the same should be issued to the contractors; *Held*, by the court, that this part of their award did not transcend their authority.

The certificates of the stock were demanded, but were not furnished. *Held*, the measure of damage is, not their *par value*, but their *marketable value*.

It is not within the province of referees to award costs, unless so authorized by the submission.

The part of an award by which costs are allowed without authority, may be set aside, without invalidating the residue of the award.

The report of a case from *Nisi Prius* will be dismissed, though signed by the Judge, if it be found defective in any essential particulars.

On a Report from *Nisi Prius*, Howard, J., presiding.

On the 24th of October, 1848, the plaintiffs contracted in writing with the defendants to construct a railroad upon a specified location, and in a prescribed manner. The contract contained many specifications. Among them were the following: —

"The line of road or gradients may be changed, if the engineer shall consider such change necessary or expedient, and no extra allowance shall be claimed therefor.

"The company reserve the privilege of substituting piling for embankment, across the intervale land on a portion of sections No. 5 & 6.

"In reference to the quantities of excavation and embankment, as shown in the estimate, it is to be observed that they are but such an approximation as could be made from centre levels, and the company do not consider themselves bound to assure the contractor, that those quantities will not exceed the estimate, but desire that he will base his bid upon his own examination of the ground and profile as to the quantities, the character of the material to be excavated, as well as all other circumstances connected with the work."

For the foregoing work the defendants agreed, by the same contract, to pay the plaintiffs $40,000. The plaintiffs were "to receive fifteen per cent. of the total amount on their contract in the capital stock of said company," * * * the said stock to be issued on the final completion of this contract, and the full and entire assessments on such amount of stock to be retained by the said company from any moneys remaining in their hands, then due and payable to the plaintiffs.

The plaintiffs, as they now contend, completed the road as agreed; and also did other and extra work, not required by the contract, except for additional compensation.

Difficulties arose between the parties, each claiming compensations as will herein appear; whereupon they agreed "to submit the matters in dispute" to certain referees, *from whose decision there should be no appeal*, upon the following stipulations, viz: —

"The matter in dispute is in relation to the true construction of the contract between them for the building of the Buckfield Branch Railroad, and for several violations of the contract.

"It is also agreed that P. S. Noxon, Esq. as engineer, shall be engaged to examine the work and measure the work, and report the result of his examinations to the referees mentioned in this agreement, at such time and place as the referees may appoint. It is understood that the contract shall be presented for examination, as a basis for a settlement, and such damage as either party has sustained by non-fulfilment of contract to be so awarded."

The referees accepted the trust. Their report presented the following views and results: —

"By the original estimate exhibited to the contractors and referred to in the contract, the estimate cost of the whole work embraced in the contract was $41,711, which work Messrs. Porter & Benson, by their written tender, promised to do, and to build and complete the whole road according to the plans and specifications exhibited, including the ballasting where

necessary, but not the superstructure, for the gross or round sum of $40,000.

"The contract having been entered into, and the construction of the road commenced under it, the chief engineer of the company so changed and altered the alignment of the road, that the former proposed line on the original plan and profile was so departed from that the proposed and actually located lines seldom coincided, and at the same time the engineer also raised the general grade line of the road above what was originally proposed and contemplated, and furthermore the company claimed and exercised the privilege of substituting piling for embankment across the intervale lands already referred to; all of which changes, alterations, raising of the grade line, and substitution of piling for embankment were adopted and carried out for the general improvement of the road, and in the supposed interest of the company.

"The effect of these changes, alterations and modifications upon the interests of the contractors, was to increase the expense of construction on masonry some seventeen per cent.; on excavation and embankment some thirty per cent.; and on the total cost of the whole work under the contract some twenty-five per cent.

"By the terms of said contract the said company undertook and covenanted, that on or about the first day of each month during the progress of the work, an estimate of the relative value of the work done under the contract should be made, and that three-fourths of the amount of said estimate should be paid to the contractors, and it fully appeared in evidence that said contractors did commence their work under said contract, and followed up the same with all due diligence until they became embarrassed for the want of the necessary funds and capital to carry on the work advantageously, occasioned by the failure of said railroad company to pay said contractors the seventy-five per cent. estimated value of work done, which said neglect on the part of said company to furnish the stipulated funds, in accordance with their contract, continuing, the said Porter and Benson, in the month of Octo-

ber, A. D. 1849, abandoned the further prosecution of the work, and left the same unfinished, without having completed the road, and performed on their part the stipulations of the contract of October 24, A. D. 1848.

"And the undersigned further report and award, that in view of the whole evidence laid before them, and of the state of facts as proved, the neglect of said Porter and Benson to finish and complete all the graduation, masonry, and other work on said Buckfield Branch Railroad, required by the terms and stipulations of their contract, arose from and was wholly owing to the previous neglect of said Railroad company to fulfil the covenants of said company in not making the payments as stipulated in and by said contract on their part.

"And the undersigned further report and award that, according to the true construction of said contract, the changes in the line of road and gradients, which the company reserved to itself the power to make, when considered necessary or expedient by the engineer, and for which no extra allowance should be claimed by the contractor, must *in foro conscientiae* be restricted to such proper changes and modifications as would not materially increase the expense and enhance the cost of constructing said proposed railroad, and that material and expensive changes and alterations, such as those subsequently made and adopted in this case, were not in the contemplation of the contracting parties at the time of entering into said contract; because, among other reasons, it would place one of the contracting parties wholly at the mercy of the other, and because the consideration of $40,000 which said Porter and Benson were to receive from said company for the work to be done, under the circumstances of the case exclude the idea of all expensive changes and modifications of the line or gradients in the proposed road, their tender or bid being expressly based upon the estimates of the originally proposed alignment and gradients.

"And the undersigned further report and award, that although by the terms of the contract, the company reserved to itself the privilege of substituting piling for embankment across cer-

tain intervale lands, should a further examination of the ground render such a course advisable, yet according to the true construction of said contract, and on a careful collation of its several provisions, — while said company had such right to make their election as they should deem it most for the interest of the company itself, they had no right to impose an additional burden and expense upon the contractors for the sole and exclusive benefit of the company, without indemnifying the contractors therefor.

"With these views in relation to the true construction of the contract between the Buckfield Branch Railroad company, on the one part, and Messrs. Porter and Benson, contractors, on the other part, for the building of the Buckfield Branch Railroad, the undersigned further report and award, that there be allowed to said railroad company, for the non-fulfilment of the covenants and stipulations in said contract of Oct. 24, 1848, on the part of said Porter and Benson, the following sums, to be computed and taken and charged in set-off, against any claims on the part of said Porter and Benson against said company for damages or otherwise, to wit: —

"1. The amount of the estimate made by Mr. Noxon, as engineer, Nov. 17, 1849, at the special request of the Directors of the company as sufficient in his judgment to bring the road-bed in such shape as to fulfil all the requirements of the contract, being $1150.

"2. Also a further sum to be added to said estimated amount for imperfections in masonry, in piling, in clearing and grubbing, in covering up stumps and rubbish in embankments, and for other deficiencies of ballasting, &c., being $1350. Which two sums be charged as damages against said Porter and Benson, amount in the whole to the sum of $2,500. And the undersigned further report and award, that there has been paid to said Porter and Benson, by said railroad company, for and on account of work done under said contract of Oct. 24, 1848, the amount of $32,874,15, of which one hundred dollars was paid by one share in the capital stock of said company.

"And the undersigned further report and award, that the said railroad company stand chargeable to said Porter and Benson in the following sums, to wit: —

"1. In the sum of forty thousand dollars, being the price stipulated to be paid by said company to said Porter and Benson, according to the terms of the contract of Oct. 24, 1848.

"2. In a further sum to be added to said forty thousand dollars for the excess of work and enhanced cost occasioned by the new alignment of the road, the raising of the road-bed, the increase of masonry, of excavation and embankment, of trestle work, &c. and also for the increased expense of piling across the intervale lands mentioned, over embankment, which enhanced cost of construction, after a careful examination and computation, assuming the contract of Oct. 24, 1848, as a basis for a settlement, the undersigned have estimated at $9,500.

"And the undersigned further report and award, that on a final adjustment of all claims, as well for moneys due as damages sustained by either party, for non-fulfilment of the contract of Oct. 24, A. D. 1848, and for violations of said contract by either party, there now remains due to said Porter and Benson from said railroad company the sum of fourteen thousand one hundred and twenty-five dollars and eighty-five cents; which said sum of $14,125,85, according to the terms of said contract, and upon the basis of the same, is payable in manner following: — that is to say, seven thousand three hundred dollars in the capital stock of the company at par, of one hundred dollars a share, — said seven thousand three hundred dollars, part of the aforesaid $14,125,85, is to be retained and applied by said company to the payment in full of all assessments made, and to be made, to the amount of one hundred dollars per share, of said capital stock. And the undersigned award that the said railroad company forthwith issue to said Porter and Benson certificates of seventy-three shares in the capital stock of said company, the whole amount of one hundred dollars on each share being paid in the manner above mention-

ed. Such certificate to be delivered at the office of said company on demand there.

"And the undersigned further report and award, that the said railroad company pay to the said Porter and Benson on demand, after being notified of this award, the sum of six thousand eight hundred and twenty-five dollars and eighty-five cents, being the balance of $14,125,85, after deducting the aforesaid sum of $7,300 which said sum, when paid, the undersigned award, is to be received by said Porter and Benson, in full satisfaction and discharge of all claims and demands whatsoever against said company, growing in any manner out of said agreement of Oct. 24, A. D. 1848, and of all claims and demands for material or supplies furnished, or work done by or on behalf of said Porter and Benson, in the construction of the Buckfield Branch Railroad.

"And the undersigned further report and award, that the respective parties in this case, each pay their own witnesses, counsel and expenses, and furthermore, under the peculiar circumstances of the case, as presented to the undersigned by the evidence adduced, it appearing to the undersigned that the elucidation of the case was for the mutual interest of both parties, and necessary for the common understanding of their respective rights. The undersigned, therefore, award, that the expense of survey authorized and required of Mr. Noxon, as engineer, by the instrument of reference, amounting to sixty-six dollars, and the further expense of certain calculations made by Mr. Arrowsmith, amounting to thirty dollars, should be at the charge and expense of both parties.

"And the undersigned further award that the compensation of the referees in this case for fifteen days services each, at the rate of $5,00 per day each, together with five dollars each for incidental expenses, and twenty dollars more in addition for notifying the parties and referees, and drawing this report and award, be also at the joint expense of the parties.

"In accordance with these views and adjudications, the undersigned further award that the said Porter and Benson, paying to the undersigned, for the use of the parties interested,

the amount of the aforesaid mentioned sums, being three hundred and fifty-six dollars, the said Porter and Benson shall have the right to claim and demand of the aforesaid railroad company, the one moiety of said sum, being one hundred and seventy-eight dollars, which sum the undersigned award to be paid to said Porter and Benson, in addition to the sums herein before awarded.

"Done at Portland, this 26th day of January, A. D. 1850.

"All which is respectfully submitted by

"Wm. P. Preble,
"John Anderson,
"P. S. Noxon."

The defendants were duly notified of the award, and a demand was made upon them for the certificates of stock which were not delivered.

This action is ASSUMPSIT upon the award.

The defendants pleaded the general issue with a brief statement; alleging no such award as set forth in the plaintiff's writ.

The defendants objected to the said award as exceeding the authority given to the arbitrators, and as defective and illegal on its face, and generally to its sufficiency, admissibility and effect, and to the introduction of these papers, but the court admitted them to be read, subject to all legal exceptions, and for the purpose of carrying forward the case, ruled *pro forma*, that the submission and award might be read to the jury, and were sufficient to maintain the action.

The defendants proposed to show that said stock was of less value than one hundred dollars per share, and contended that if the plaintiffs were entitled to receive the said stock, that their claim was limited to the actual market value of said stock at the time of the demand. But for the purpose of this trial, the court ruled that the measure of damages, if any were recoverable, on account of not delivering the same on demand, would be the par or full amount of one hundred dollars for each share of stock not delivered.

The defendants then called John Anderson, one of the arbi-

trators, who testified in relation to the hearing before the referees, that the referees in making up the award, adopted the report of P. S. Noxon, engineer, as the basis of the award. That they took Noxon's report of the quantities of work and applied the contract prices, and made up the amount in that way; — that much testimony was before them that Noxon had been engineer of the company; — that no objection was made to the correctness of his report, and that the referees took it for granted that the admeasurement was correct.

The defendants also called W. P. Preble to the same points, who confirmed the statements of Mr. Anderson, and also testified that the company brought on testimony to show that there was not so much work as represented by Noxon, and that he directed Noxon to make all the surveys either party wanted.

The defendants then called A. P. Robinson, civil engineer, and proposed to show by him and other witnesses that the report of Noxon was untrue in every essential particular, and that the basis on which the arbitrators made their award was false and untrue; — that so far from there having been any excess of work done on the road by the contractors, beyond the requirements of the contract, the entire amount of all work done on the road was less than the original estimates on which the work was let, and less than the amount which would have been required to have completed the contract upon the original line and survey.

The case was then withdrawn from the jury and submitted to the court; judgment to be entered according to the rights of the parties.

Codman and *May*, for the plaintiffs.

Parris and *Poor*, for the defendants.

Howard, J. — This report was not drawn up, and presented for signature, until several months after the trial; and, although then signed and allowed, it was subsequently discovered, that it did not contain a full statement of the case, and of the rulings of the presiding Judge, and it must be

dismissed. But two questions were presented at the argument, upon which an expression of the opinion of the court, in this stage of the proceedings, has been strongly urged. 1. Whether the award is void upon its face. 2. What would be the measure of damages, if the plaintiffs should recover in this action upon the award.

This was a submission at common law, and by its terms, the referees had power to award conclusively, upon "the matter in dispute" between the parties; which is stated to be "the true construction of the contract between them, for the building of the Buckfield Branch Railroad, and for several violations of the contract." The agreement of submission recites, that, "it is understood, that the contract shall be presented for examination, as a basis for a settlement, also all the receipts given to the company by Porter and Benson, on account of said contract, and all other legal evidence which either party can produce, in relation to this matter in dispute; and such damage as either party has sustained by non-fulfilment of contract to be so awarded."

The referees accepted the trust confided to them; met and heard the parties and their counsel; gave a full and deliberate construction to the contract of October 24, 1848, which was submitted to them, and awarded such damages as in their opinion, either party had sustained by non-fulfilment of that contract. Such construction, if honestly and fairly made, must stand, as the decision of the tribunal selected by the parties for that purpose, and this court can neither change nor reverse it. But it is contended, that the referees exceeded their authority, and extended their decision beyond the scope of the submission, and that the award is, therefore, void.

The articles of agreement, or contract, as it is termed, of October 24, 1848, provide, that the plaintiffs "should construct and finish in the most substantial and workmanlike manner" the railroad according to the specifications stated, for $40,000. It is specified, that "the line of the road or gradients may be changed, if the engineer shall consider such change necessary or expedient, and no extra allowance shall

be claimed therefor." And "the company reserve the privilege of substituting piling for embankment across the intervale land on a portion of sections No. 5 and 6, should a further examination of the ground render such a course advisable." After awarding to the defendants the amount of payments made to the plaintiffs and $2500, for "non-fulfilment of the covenants and stipulations in said contract of Oct. 24, 1848, on the part of said Porter and Benson, to be computed and taken and charged in set-off against any claims, on the part of said Porter and Benson, against said company for damages, or otherwise," the referees "further report and award, that the railroad company stand chargeable to said Porter and Benson, in the following sums, to wit," $40,000, being the price stipulated to be paid to them in the contract, and a further sum to be added to said $40,000, for the excess of work and enhanced cost occasioned by the new alignment of the road, the raising of the road bed, the increase of masonry, of excavation and embankment, of trestle work, &c., and also for the increased expense of piling across the intervale lands mentioned, over embankment, which enhanced cost of construction, after a careful examination and computation, assuming the contract of October 24, 1848, as a basis for a settlement, the undersigned have estimated at $9,500."

Whether there was excess of work done, and whether the work was performed at enhanced cost, occasioned by such new alignment and substitution of piling for embankment, and whether the plaintiffs were entitled to increased compensation therefor, under the contract, were questions to be determined upon a true construction of the contract, by the referees, and taking that as the basis for the settlement contemplated by the agreement of submission.

So, the neglect, on the part of the company, to furnish funds, in accordance with the contract, might constitute a violation of it, and it was, therefore, competent for the referees to "report and award on a final adjustment of all claims, as well for moneys due as damages sustained by either party for non-fulfilment of the contract of October 24, 1848, and for violations of said contract by either party."

It is objected, further, that the referees had no authority to award in what manner the damages should be paid. This objection would have more force if the agreement of submission had not stipulated that the contract should be presented as the basis of the settlement; or if the terms of that contract had been invaded by the adjudication. As it is, the award provides that the defendants may, or shall pay in accordance with their contract and agreement, and the objection fails. If the method of payment, thus provided, is more favorable to the defendants, than the payment in money, they may not suffer on that account; but if less favorable, and even if not authorized by the submission, such provision, as to the manner of payment, would not necessarily invalidate the whole award. It might be good in part, and bad in part; valid for the amount awarded, and void for the provision prescribing the manner of payment, if by annulling that provision, the rights of neither party to the award are impaired. *Pope* v. *Brett*, 2 Saund. 293, note 1; *Banks* v. *Adams*, 23 Maine, 259.

In thus awarding, the referees appear to have acted within the scope of the authority conferred upon them, in giving a construction to the contract, and awarding upon its basis the damages either party had sustained by its non-fulfilment; and their award is not rendered invalid by any thing presented by these objections.

At common law, referees or arbitrators have no power to award costs, unless conferred by the agreement of submission. The award in this case, respecting costs, was not authorized, and is not binding upon the parties. But as this does not affect the substance of the award of damages, or the substantial justice of the case, it cannot impair the validity of the award in other respects. *Chandler* v. *Fuller*, Willes, 62; *Fox* v. *Smith*, 2 Wilson, 267; *Addison* v. *Gray*, 2 Wilson, 293; *Gordon* v. *Tucker*, 6 Maine, 247; *Walker* v. *Merrill*, 13 Maine, 173.

It has been held that, if no provision be made by the award

respecting costs of reference and award, they are to be paid by the parties equally. *Grove* v. *Cox*, 1 Taunt. 165.

On the subject of damages the referees "report and award, that on a final adjustment of all claims, as well for moneys due, as damages sustained by either party, for non-fulfilment of the contract of October 24, 1848, and for violations of said contract by either party, there now remains due to said Porter and Benson from said railroad company, the sum of fourteen thousand, one hundred and twenty-five dollars and eighty-five cents, — which said sum of $14,125,85, according to the terms of said contract, and upon the basis of the same, is payable in manner following: — that is to say, seven thousand, three hundred dollars in the capital stock of the company, at par, of one hundred dollars a share; — said seven thousand, three hundred dollars, part of the aforesaid $14,125,85, is to be retained and applied by said company to the payment in full of all assessments made, and to be made, to the amount of one hundred dollars per share, of said capital stock. And the undersigned award that said railroad company forthwith issue to said Porter and Benson certificates of seventy-three shares in the capital stock of said company, the whole amount of one hundred dollars on each share being paid in the manner above mentioned. Such certificates to be delivered at the office of said company on demand. And the undersigned further report and award that the said railroad company pay to said Porter and Benson on demand, after being notified of this award, the sum of six thousand, eight hundred and twenty-five dollars, and eighty-five cents, being the balance of $14,125,85, after deducting the aforesaid sum of $7,300, which said sum when paid, the undersigned award, is to be received by said Porter and Benson, in full satisfaction of all claims and demands whatsoever, against said company, growing in any manner out of said agreement of October 24, 1848, and of all claims and demands for material or supplies furnished, or work done, by or on behalf or said Porter and Benson, in the construction of the Buckfield Branch Railroad."

This is not an award that the defendants should pay to the plaintiffs $14,125,85, as claimed by them, but that they should pay that sum, less $7,300, and issue to the plaintiffs, seventy-three shares of the stock of the company, exempt from assessments, in accordance with the contract of the parties. The sum of $7,300 being nominally retained as an equivalent for such assessments, though in fact never due to the plaintiffs upon the contract, or by the award.

The measure of damages, then, will be $6,825,85, and the value of the seventy-three shares of the stock, thus circumstanced, with interest from the date of the demand proved. Any other rule would cast upon the defendants a burden not imposed by the award, and wholly inconsistent with the terms and spirit of the contract, upon which the award was to be based, and upon which it was in fact made. But, for the reasons given, the report must be dismissed, and the cause may be submitted to a jury.

Bassett *versus* Carleton.

If a statute, which confers a special privilege, also imposes specified duties, and provides a remedy for the neglect of them, that remedy alone must be pursued by persons who would seek redress for such neglect.

In the charter of a private corporation, it is competent for the Legislature to establish a new tribunal, with exclusive power to decide whether the corporation shall have failed to perform the duties required by the charter.

Thus, in a charter authorizing the erection of a dam, subject to the duty of turning logs over the dam, and of supplying water for the driving of them, the selectmen of the town may rightfully be constituted the exclusive judges, (in controversies between the corporation and other parties,) to decide whether a sufficiency of water had been furnished, and whether the logs were seasonably turned over the dam.

In such controversies, testimony that the logs were not seasonably turned over the dam, and that the supply of water was insufficient, cannot be received in a court of law, even though the selectmen were never called, by either party, to act upon the subject.

On a Report from *Nisi Prius*, Howard, J.

This is an action to recover damages of the defendant, who

had erected a dam and sluice on his own land on the Carleton stream in Troy. The action is brought upon the alleged grounds, that the *sluice was insufficient;* that the defendant did not *seasonably turn the plaintiff's logs over the dam;* and that he *did not furnish sufficient water* for the driving said logs to the twenty-five mile pond; by reason of which he alleged that he sustained the damages sued for.

The plaintiff offered in evidence the Act of 1848, chap. 185, entitled "an Act to improve Carleton stream in Troy, for running logs and other lumber." He then introduced a witness, who testified that the plaintiff brought to the defendant's dam a quantity of logs, and that a portion of them were driven over the dam and through the sluice. He was asked by the plaintiff whether sufficient water was furnished by the defendant for running the logs into the pond below the dam, and what damage resulted to the plaintiff from the deficiency of water.

The defendant objected to any testimony upon the question *whether sufficient water had or had not been furnished to drive the logs,* and *whether the logs had or had not been seasonably turned over the dam.* The objection was based on the ground that the statute provides that the selectmen of Troy shall decide between the parties on such questions.

The presiding Judge being of this opinion, the case was, by agreement of the parties, reported, that the court might determine whether it is or is not competent for the plaintiff to go into evidence upon those questions. The question whether plaintiff should be required to call the selectmen of Troy, if the defendant did not have and maintain a suitable and convenient sluice, is also to be submitted to the full court.

Lancaster, for the plaintiff.

The suit is for the wrongful conduct of the defendant. His duties were prescribed by statute. An action lies for a party injured by the neglect of such duties.

This was not a case for the action of the selectmen. Their jurisdiction was prospective, and arose only when logs were *to be run,* and when a dispute had arisen about running them. It

was not retrospective in relation to damage already arisen for prior neglects of duty.

Bradbury, for the defendant.

Whether the defendant had a sufficient sluiceway was not a matter within the jurisdiction of the selectmen. We made no objection to testimony on that point. The case will not be sent back for the introduction of evidence not offered or objected to at the trial.

Whether the defendant seasonably turned the logs over, and whether he furnished sufficient water, was for the selectmen alone to decide. The plaintiff should have called them at the time. They would have enforced his just rights upon the spot. Such was the design of the statute. Evidence on those points were therefore rightly rejected.

Lancaster, in reply.

The defendant, by undertaking to drive the logs without consulting with the selectmen, waived all necessity for their action. After he had scattered the logs upon the rips and shoals, it was too late to call on the selectmen.

HOWARD, J. — The defendant had erected and maintained a dam and sluice on the Carleton stream, in Troy, upon his own land, under a charter from the State, to improve the stream for running logs and other lumber. He was authorized to receive and recover a certain rate of toll for the passage of such lumber, and made liable to pay all damages that any person might sustain, by any failure, on his part, to construct and maintain the dam of the required height and capacity, or to erect and maintain a suitable and convenient sluice. Before any person could be entitled to the benefit of the sluice for floating lumber, he was required to pay the owner of the dam and sluice toll, as provided by the Act, statute 1848, chap. 185, sect. 1, 2, 3, 4.

The fifth section of the Act contains a provision, that "persons driving logs shall be entitled to sufficient water to drive their logs to the twenty-five mile pond, so called, but said Carleton shall not be obliged to turn logs through said sluice,

unless there is a considerable proportion of the logs above ready to be turned over; and in case there arises any dispute between the owners of said sluice and the log owners, as to the time of turning over logs, the quantity to be turned over, or the amount of water to be let through to drive the same out, the selectmen of the town of Troy shall decide between the disputants, and may appoint one of their number to superintend the execution of their decree, and all parties interested shall be held to pay the expenses of said selectmen."

No question is raised as to the sufficiency of the dam, or the right to receive toll.

The selectmen of Troy, for the time, were constituted a tribunal to determine upon the spot, when, and in what quantity, the logs were to be turned over the dam, and the amount of water to be let through, to drive them to the pond. They had exclusive jurisdiction over the subject, and were to exercise that jurisdiction upon the immediate occasion, on application of either of the parties if they disagreed.

If the plaintiff had required more seasonable action on the part of the defendant, or more water than he was willing to furnish, the decree of the selectmen might have settled that controversy or dispute, by removing the cause and preventing damages. If the plaintiff has neglected his rights and his duty in this respect, he cannot recover damages which are the result wholly or in part of his own neglect. So if a statute confer special privileges, and provide a particular remedy for their invasion, those neglecting that remedy may be without redress for the invasion.

It was not competent for the plaintiff to introduce evidence on the points raised at the trial; which were: — 1, whether sufficient water had or not been furnished to drive the logs; and 2, whether the logs had or not been seasonably turned over the dam.

The selectmen of Troy had no jurisdiction conferred upon them, by the Act referred to, respecting the sufficiency of the sluice, and the plaintiff was not required to submit that matter to their consideration, as a preliminary proceeding, or to

obtain their decision upon any other matter of controversy, in order to support an action for damages for the insufficiency of the sluice.

But as no question was made, respecting the sufficiency of the sluice, the case should not be sent back to a jury on a point not raised, and to hear evidence, to the introduction of which no objection was offered at the trial, and when, perhaps, no such evidence exists. To dispose of the case in that manner, would seem to be oppressive to the defendant, and without any apparent benefit to the plaintiff.

Plaintiff nonsuit.

BLANCHARD *versus* DOW.

When an officer of a corporation is required to be chosen by ballot, and the record of his election does not specify the mode, the legal presumption is that he was chosen by ballot.

A collector of taxes, who receives a surplus of money upon the sale of property for a tax, and who omits to render to the owner, "an account in writing" of the sale and charges, is a trespasser *ab initio*.

TRESPASS for taking the plaintiff's horse. The defendant admitted the taking, and set up, as a justification, *that* he was the collector of taxes of the West Pittston Village Fire Company, established by the Act of 1847, chap. 34, of Special Acts; *that* the defendant was liable to taxation in that company, and had been assessed in the tax bills, $44,15; *that* defendant refused to pay the same, and *that*, after duly advertising, &c., he sold the horse for $65,00, and *that*, after deducting therefrom the tax and cost, there remained in his hands $16,78, which he offered to pay to the plaintiff.

The defendant contested the validity of the Special Act, and the regularity of the proceedings of the assessors and collector, and particularly that the record does not show the defendant to have been chosen by ballot. The fourth section of the Act requires the collector to collect the tax in like manner as State taxes are collected by towns. Much testimony,

both documentary and oral, was introduced. It did not appear by the collector's return, or by any other evidence, that the defendant, when offering the overplus, $16,78, to the plaintiff, presented any account in writing of the sale and charges, as required by Revised Statutes, chap. 14, sect. 67. The case was submitted for the decision of the court.

Paine, for the plaintiff, among other things, argued that the defendant was a trespasser *ab initio*, because he did not restore the surplus to the plaintiff immediately, or render to him an account of the sales and charges.

Evans and *Bradbury*, for the defendant.

SHEPLEY, C. J. — It is said that the defendant was not legally chosen collector, because the record does not state, that he was chosen by ballot according to the provisions of the first article of the by-laws.

The presumption of law is, that he was legally chosen, when there is nothing in the record to show, that he was not. *Mussey* v. *White*, 3 Greenl. 290.

When the overplus was tendered to the owner of the goods distrained, there is no proof made by the return of the collector, or by the other testimony introduced, that it was done "with an account in writing of the sale and charges."

This is required by the provisions of the statute, chap. 14, sect. 67. The collector cannot make out a justification without showing, that he has complied with the provisions of the statute. Failing to do so, he becomes a trespasser *ab initio*. *Smith* v. *Gates*, 21 Pick. 55.

It is not necessary to notice the other points presented.

Defendant defaulted.

Williamson *versus* Dow.

A collector of taxes is liable in trespass, if he sell upon his warrant a greater number of the chattels than sufficient to pay the tax, with the fees and charges.

Trespass for taking the plaintiff's four cows.

Defendant justified on the same grounds, as in the preceding case of Blanchard against him, ante, page 557. His return upon the warrant stated that the tax was $58,02; that the charges were $5,99; that he sold the four cows for $121, and offered to restore the balance, $56,99, to the plaintiff. Neither the return nor the evidence showed that he gave to the plaintiff any "account in writing of the sale and charges." Defendant proved *that*, when the first cow was set at auction, one Blanchard bid her off at $65, and immediately offered the pay in American gold; and *that* the defendant declined to receive it until he had sold the other three cows, one at $20, one at $20, and one at $16.

The plaintiff called a witness who testified that the cow first sold was worth 15 or 16 dollars; and the others were respectively worth $25, $20, and $25. Both witnesses testified that the cows had been in the plaintiff's possession from the time of the sale.

The case was submitted.

Paine, for the plaintiff.

Evans and *Bradbury*, for the defendant.

Shepley, C. J. — By the collector's return it appears that he distrained and sold four cows as the property of the plaintiff. The first was sold for more than sufficient to pay the tax and expenses, and payment for that one was offered to him before he sold the others. He offers evidence to justify his proceedings, that the first one sold for more than fourfold of its actual value. He nevertheless received from the purchaser the amount for which it was sold, and this he might have received as well before as after the sale of the others.

An officer is not authorized to decide that property sold by

him is bid off for more or less than its value. It is his duty to obtain the best price, he can, for it. When he has sold sufficient property and can have his pay for it, he is not authorized to proceed and sell more. Such a course might subject the owner to unnecessary losses. The residue of the property should be restored to the owner.

There is also the same defect noticed in the case of *Blanchard* v. *Dow*, in the neglect to return, with the overplus, an account of sales and expenses.

The collector therefore fails to make out a justification for the sale of any portion of the property.

It becomes unnecessary to notice the other points presented.

Defendant defaulted.

HARRIET M. RICHARDSON *versus* MOSES C. RICHARDSON.

The writ *de homine replegiando* lies only for the benefit of a person unlawfully imprisoned or restrained of liberty.

It can be brought in *his* name only, though it may be at the procurement of another.

It cannot be used for the benefit of another person, although such other person may have, by contract, a lawful claim to his services or to the custody of his person.

A female infant, of the age of seventeen months, residing with her father, and under his care and protection, is not so imprisoned or restrained of liberty by him as to authorize any person to replevy her person; even if the father had previously assigned to such person the care and education of the child.

Whether such an assignment can be lawfully made, *non dicitur*.

WRIT DE HOMINE REPLEGIANDO.

The officer's return upon it was, that he had replevied the plaintiff, and delivered her to Noah Woods, Esq. The defendant pleaded *non cepit*, with a brief statement, avowing the taking of the plaintiff by the defendant, as her father and natural guardian. No issue was joined.

Evidence was introduced by the plaintiff's counsel, though objected to by the defendant, tending to show, that her father

and mother, the evening before the mother died, (the plaintiff then being but a few days old,) assigned and gave the child, by parole, with its care and education, to its maternal grandmother, Mrs. Farnsworth, who assented to the gift, and thereupon carried the child from its father's house in Hallowell to her residence in Bridgton, where she kept and cared for it several months, until the defendant, who is the father of the child, reclaimed it, and carried it back to his own house, where it resided under his care, till replevied by this writ. Under that alleged gift, Mrs. Farnsworth claims the custody of the child, and this suit is brought by her, in the name of the child, to regain that custody. The defendant offered evidence tending to show, that the gift was a qualified one, and subject to a recall by him. No objection was taken to the suitableness of the defendant or of Mrs. Farnsworth to have the custody of the child. The defendant requested the Judge to instruct the jury, that their verdict must be for him. This was declined, and, for the purposes of this trial, the jury were instructed, that it was competent for the father to make an irrevocable gift of his child, and that, if the father and grandmother intended the gift to be unconditional and unqualified, the verdict should be for the plaintiff. The verdict was for the plaintiff, and the defendant excepted. Much of the arguments are omitted here, because addressed to points, upon which the court gave no opinion.

Paine, for the defendant.

The writ *de homine replegiando* was well known to the common law. In this State it is also provided for by statute. It lies only for persons unlawfully "imprisoned, restrained of liberty, or held in duress." Whether "unlawfully imprisoned, restrained of liberty, or held in duress," is the true issue. The statute contemplates but two parties. The court cannot inquire into the rights, real or supposed, of third persons. In some respects, this process is *in rem*. The judgment must follow the issue. It may set the plaintiff free, but can do no more. It cannot consign him to the custody of any one. If this plaintiff is set free and taken from its father, he can no

longer protect it; and the court can supply no other guardian. The grandmother is not compellable to take the child. Where shall it go? It becomes a waif, and without fault of its own, merely through the officious intermeddling of others.

Under the instructions of the Judge, a foreign issue was tried. It was between other parties, to test their rights, not the rights of the plaintiff. The verdict settled no fact, denied by the plea. The evidence did not even tend to prove any illegal imprisonment or restraint of the child, even if its parent had the right to assign, and did assign it irrevocably. The writ complains of a wrong done to the child alone; not of any infraction of a contract, with a third person. The verdict, being rendered merely upon such a supposed infraction, should therefore be set aside.

Evans, for the plaintiff.

The defendant admits that he restrained the child, and claims the right, as its father, to do so. Whether he had such right, was the question to be tried; if he had not, then his defence fails.

This is the proper mode to try the right, which third persons may have to the services or custody of one under a restraint of liberty. It may, by the statute, be brought in the name of any one. Our allegation was that Mrs. Farnsworth was entitled to the custody; and that the restraint, imposed on the child by the defendant, precluded her from obtaining that custody. This was the only issue. If the defendant kept the child against the consent of the person lawfully entitled to its custody, there was unlawful restraint. For such cases this writ was provided. It is a writ of right; a writ of liberty, extending its beneficence beyond the powers of a *habeas corpus*, which is merely at discretion.

The eighth section of the statute authorizes the defendant, in replevin, "*if entitled*" to the custody of the plaintiff, as the child of the defendant, to have a re-delivery. Why these words, "*if entitled?*" They show that, under some circumstances, the father may not be entitled. 6 Barbour's Rep. 368; 25 Wend. 101.

The semi-barbarous maxim, that a father is of right entitled to the custody of his children, has yielded to the more mild and enlightened doctrine, which places them at the discretion of the court. The construction of the statute is yet open. Humanity demands that it be such as to sustain the instructions given to the jury, and such a construction will not be in conflict with any rule of law, established in this State.

Emmons, in reply.

This form of process differs from that of *habeas corpus*. The latter is a prerogative writ, generally in the name of the State; tried by the court without a jury; judgment is at the discretion of the court; and the process may issue *toties quoties*.

But the writ, *de homine replegiando*, is *ex debito justitiae;* in the name of the party restrained of liberty; triable by the jury, on principles, not of discretion, but of strict law; and the judgment is a bar to a future process of the same kind.

The evidence of a gift to Mrs. Farnsworth was inadmissible. It did not illustrate any claim as between these parties. The gift, if any, was a contract, to which the plaintiff was not a party. The evidence rather tended to disprove the *plaintiff's* right, by showing the right to be in another person. The true inquiry was, whether the plaintiff had a right to control her own movements, or whether the defendant had that right.

If the statute could allow the rights of a third person to be acted upon, the action should be in his name. The rights of none but parties to the suit can be considered. In this case, by the instructions, the verdict established nothing, as between the parties. A new trial ought therefore to be awarded.

WELLS, J. — By our statute, chap. 142, the writ *de homine replegiando* lies in favor of a person unlawfully deprived of his liberty, and it must be prosecuted in his own name and for his own benefit. It does not lie in favor of a party to recover one, who owes service to him by contract. It may be sued out by any person in behalf of a plaintiff, but still it must be

for his benefit, and the assistance must be rendered to him by the person procuring it.

If the plaintiff, when the action was commenced, was not unlawfully imprisoned or restrained of her liberty, it cannot be maintained. It appears by the exceptions, that she was then about seventeen months old, and was residing with her father and under his care and protection. He is under legal obligations to support and maintain his children, and generally is entitled to the custody and control of their persons. But it is contended that he has made a parole contract with the grandmother of the child, and has transferred the custody to her, and in violation of his agreement, has taken the child from the grandmother, to whom the child had been given by him and his deceased wife. It is moreover contended, that this contract is in its nature irrevocable on the part of the father, and that he cannot retain the possession of his daughter in opposition to it.

If it were admitted, that such contract was legal and binding upon the parties to it, the consequence would not follow that this action could be maintained, though damages might be recovered for the breach of it. Our law does not appear to have provided any remedy for the specific execution of such contract. The refusal of the father to perform it does not convert a lawful custody of one's child into an unlawful imprisonment. The plaintiff has no right to interfere with the contracts of her father, made with a third person, or to prescribe his line of duty. She has no legal connection with them, and although they may have relation to her, she is not a party to them in the contemplation of law. This writ has regard to the relations between the parties themselves, and cannot be sustained, unless the plaintiff is entitled to her liberty in her own right, and by the law applicable to her as a child, and to the defendant as her father. If the power to an entire control of herself during minority can ever be obtained, it must result from a legal agreement to that effect between her and her father. She cannot call in aid a contract made between her father and a third person; the observance or the

breach of it, however her happiness may be affected, cannot determine her rights.

This action appears to have been commenced, not to relieve the plaintiff from an actually existing unlawful imprisonment or restraint, but to coerce the defendant into a performance of the alleged contract. Neither the language nor the spirit and intent of the statute can justify such use of it. It was enacted for the exclusive benefit of the party held in a custody, not authorized by the legal relations between the parties to the record. The Legislature did not intend, that a third person might resort to this process, and using the name of an infant, and under an alleged agreement with the father, take the infant from the arms of the parents. There is nothing in the statute that requires or warrants such construction. And in the opinion of the court, this action cannot be maintained, and the jury should have been so instructed, agreeably to the request of the defendant.

Upon *habeas corpus* the court may exercise a discretion in relation to the disposition of a child, which it is unable to do in this action. But it is gratifying to know, that the respectability and good character of those, who are contending for the custody of the plaintiff, furnish a sufficient guaranty of her proper treatment in the hands of either.

Exceptions sustained, verdict set aside, and a new trial granted.

GILES, *per pro. ami, versus* VIGEREAUX.

No appeal to this court, from a judgment of the District Court, upon an agreed statement of facts, can be sustained, in an action originating before a justice of the peace.

ASSUMPSIT, for sailor's wages.

This action came into the District Court by an appeal from the judgment of a justice of the peace. The facts were then agreed in the District Court, with a stipulation that judg-

ment should be rendered upon nonsuit or default, as the court should adjudge to be legal.

Whitmore, for the plaintiff.

Danforth & Woods, for the defendant.

WELLS, J. — This action was originally commenced before a justice of the peace, and brought into the District Court by appeal. No exceptions appear to have been alleged to the opinion of the Judge of that court. It is not stated in the case presented, that there was any appeal from the judgment of the District Court, but it may be inferred that such course was taken. By statute chap. 97, sect. 13, there may be an appeal from a judgment of the District Court on an agreed statement of facts. But that section relates to actions originally commenced in the District Court, and not to those commenced before a justice of the peace. *Putnam* v. *Oliver*, 28 Maine, 442. No provision is made in the statute for an appeal of this action from the District Court to this court otherwise than by a bill of exceptions, and the remedy for the aggrieved party must be pursued in that manner. This court has not at present any jurisdiction over the action. *Adams* v. *Adams*, 15 Pick. 177.

Action dismissed.

PLUMMER *versus* INHABITANTS OF WATERVILLE.

Whether, in rendering a judgment, the Court of County Commissioners had jurisdiction, must appear from their records.

A petition to the Commissioners, placed upon their records, stating certain facts and invoking their action, in a matter within the scope of their duty, growing out of such facts, gives them jurisdiction.

A judgment of the Court of County Commissioners, in a matter shown to be within their jurisdiction, is in force, until reversed, although there be omissions and informalities in the recitals of their records, as to the preliminary proceedings.

DEBT. — The record of the County Commissioners shows, that the plaintiff by his petition had represented to them, *that*

the selectmen of the town had located a road, and had made return thereof to the town; *that* the town had accepted the same; and *that* said road was located across the plaintiff's land by which he sustained injury: — Wherefore he prayed, that a jury might assess the damage; —

The record further shows, that after due proceedings, a jury assessed the damage at $100. That their verdict was accepted; and that the Commissioners ordered the same to be paid by the town to the plaintiff.

This action of debt is brought upon that order of the Commissioners.

The defendants put in the proceedings of their selectmen and of their town meeting, on the subject of said road.

The case was submitted to the court for nonsuit or default.

H. A. Smith, for the defendants.

The Commissioners could have no jurisdiction, because the papers show that in fact, no town road was established on the plaintiff's land.

The jurisdiction of the County Commissioners should appear by their record. *State* v. *Pownal*, 10 Maine, 24. But the record does not show that any road had been legally laid out by the selectmen, or accepted by the town, over the plaintiff's land.

If the Commissioners had jurisdiction, it was appellate only. Their proceedings therefore should have been in the nature of an appeal from some adjudication, as to the damage, made by the selectmen. But there was no such adjudication, and was therefore nothing to appeal from. R. S. chap. 25, sect. 31; 8 Maine, 271; 26 Maine, 179; 3 Maine, 440; 6 Mass. 7. The acts of 1786, sect. 7, and of 1821, chap. 118, sect. 9, did not require such an adjudication.

The counsel also contended that the road had not been legally established by the town, because the selectmen did not give seasonable notice of the time and place for locating the same; nor did they return their location seven days prior to the town meeting, nor adjudicate the amount of land damages; also because the town meeting for accepting the road was not

legally notified, and because the road was only accepted conditionally, and that in a different place from where it was located.

Morrill, for the plaintiff.

SHEPLEY, C. J., orally. — One objection taken by the defendants is, that the town had not in fact established any legal road over the plaintiff's land, and that therefore the County Commissioners had no jurisdiction.

A sufficient answer is, that the plaintiff's petition *stated* to them that such a road had been established. This required them to examine into the matter, and of course gave them jurisdiction. Whether their conclusion was correct, is not now in question.

Another objection is, that the Commissioners' record fails to show affirmatively that there was such a town road.

True, the record should state that the facts alleged in the petition were found to be true. But a record is not void for mere informality. The record of the petition shows that they had jurisdiction. A judgment was rendered, and though informal in its recitals, it is in force, till reversed.

Another objection is, that the proceedings should have been in the form of an appeal.

The statute remedy is called an "appeal." But it is an appeal to no other extent, than that it allows the same question to be examined by another tribunal.

Again, it is objected that the selectmen had proceeded irregularly; that the action of the town in accepting the road was unauthorized, and that they accepted the road in a different place from that located by the selectmen, and accepted it but conditionally.

These are matters, offered merely in evidence to show that the Commissioners had no jurisdiction. But their record fails to show any such irregularities or defects. They cannot therefore be allowed to operate upon the judgment of the Commissioners, rendered against the defendants.

Defendants defaulted.

PETTINGILL *versus* PATTERSON, *Executor.*

A bond, given to two persons, is not rendered inoperative by the previous decease of one of them.

It is available to the survivor.

It is no defence to an action upon a bond, that the fulfilment of it is also charged upon real estate.

DEBT on bond, given to Howard Pettingill and Anne, his wife, and the survivor of them, by the defendant's testator, and four other persons. The obligors were the children of said Howard. The bond was conditioned to furnish support and comfort to his wife, during her lifetime. This action is brought by her.

The said Howard devised his lands to several of his children in different proportions, and charged the lands with the performance of the bond. The will was dated in February. The bond was dated and executed in March, more than a month after the death of said Howard, and it recites that the said Howard had, on the day of its date, devised his estates to the obligors, upon the understanding they should maintain his said wife.

If the action can be maintained upon these agreed facts, the case is to go to a jury to fix the damage, otherwise the plaintiff is to become nonsuit.

Lancaster & Baker, for the plaintiff.

Vose, for the defendant.

At the time of executing the bond, Howard Pettingill was dead, and the plaintiff was no longer his wife. There were then no obligees, and the bond was a nullity. There was no consideration for it.

Again, the recitation contained in the bond, as to the devise to the obligors, was an impossibility. The bond was therefore void.

The will charges the testator's lands, and gives the executor power to sell, in order that this bond should be fulfilled. To that remedy, provided in the will, the plaintiff must resort.

WELLS, J., orally. — No authority is shown, nor do we see how the position could be maintained, that a bond, given to two persons, one of whom had previously died, is therefore inoperative. It fails only as to one. It is not defeated as to the survivor.

It is said there was no consideration for the bond. But the seal sufficiently evidences a consideration. Besides there was an ample consideration in the devises and legacies of the will, given on condition that this very bond should be fulfilled.

Again, it is said the bond cannot support an action, because the fulfilment of it was charged upon the real estate. That was but an alternative mode of enforcing it; a mere cumulative remedy. There is no ground for the defence.

Continued for trial.

THE STATE *versus* SHAW.

When the appropriate record shows, that the town authorities have licensed the highest number of persons which the law permits for selling intoxicating drinks, and does not show, that any additional number has been licensed, it is not competent for a defendant in a prosecution for selling such liquor, to show by an *unrecorded* license, that he had authority to sell.

A license to sell such liquor is of no validity, if granted *before* the delivery, to the town *treasurer*, of the bond prescribed by law.

EXCEPTIONS from the District Court, RICE, J.

Complaint under the Act of 1846, chap. 205, sect. 5, for the sale of intoxicating liquor, on or about July 25, 1850.

The defendant offered in evidence a license from the licensing board, purporting to have been issued Nov. 9, 1849. The Judge refused to receive it in evidence, unless the defendant should prove that it was duly granted, and that a bond was given as required by the 3d section of the Act.

The defendant then proved the execution of such a bond dated on said 9th of Nov. and that it was delivererd to one of the selectmen soon after its execution, and offered said bond with the license in evidence.

The county attorney introduced the records of the licensing board, by which it appeared, that on said 9th of Nov., five other persons, (being the highest number authorized by the law,) were licensed, and there was no record of a license given to the defendant.

Whereupon the Judge excluded the bond and license offered by the defendant.

The defendant then offered to prove, *that* the license was granted him by the board at the time of its date; and *that*, the town clerk being absent, the board chose one of the selectmen as a clerk *pro tempore*, by whom a record was kept, which the defendant offered in evidence, but the Judge excluded the evidence.

The Judge was requested to instruct the jury, that the production of the license was *prima facie* evidence, that the bond had been duly given. This was declined. The verdict was against the defendant, and he excepted.

Titcomb, for the defendant.

The license, of itself, was at least *prima facie* evidence, that it was duly granted, and that the bond had been rightfully given.

It was therefore wrongfully rejected by the Judge.

A license is itself primary evidence. The record is but secondary. An omission by the clerk to record a license cannot defeat its validity. *State* v. *Crowell*, 25 Maine, 171.

A license, if granted by the proper authorities, is effectual, although the preliminary proceedings may have been irregular. *Goff* v. *Fowler*, 3 Pick. 300.

If exceptions show error, they will be sustained, although in some *other* aspect of the case, the error might be immaterial. 1 Peters, S. C. 183; 6 Alaba. N. S. 226.

Vose, County Attorney, for the State.

Shepley, C. J. — Suppose the license *was prima* evidence, that the previous requisites to its validity had been complied with, still the first rejection of it was of no damage to the defendant, because he afterwards offered it in connection with the bond.

But even when *so* offered, it was rightly rejected, because it was shown, by the record, that other persons, up to the full number allowed by law, had been duly licensed.

But the defendant's license, by his own proofs, was of no validity. It was not issued by a competent board. There was no authority in the board to choose a town clerk *pro tem.* Besides, the statute provides that no license shall be granted *until* the bond should be executed and delivered to the *treasurer.* The bond in this case, was not received until *after* the license was granted; and it was *never* delivered to the *treasurer.* *Exceptions overruled.*

NOTE. — The section of the statute, being the 5th sect. of chap. 205, of the year 1846, under which this complaint was instituted, was repealed by chap. 211 of the statutes of the year 1851.

DICKEY *versus* FRANKLIN BANK.

In trover, the conversion is sufficiently established, by proving that the defendant had claimed the property as his own, and attempted to dispose of it for his own benefit.

TROVER for a promissory note of $200 given by Bourne to the plaintiff, and by the plaintiff indorsed in blank, — called note B.

The cause came on before HOWARD, J., and was submitted for decision by the full court upon the testimony; which was to the following effect.

Plaintiff owed the bank on a note called note A, wherein Dammon was a surety. Plaintiff held the note now in controversy, and sent it by Dammon to the bank, to have the amount of it indorsed upon note A. Dammon delivered it to the cashier, with directions how it should be applied. The cashier said he understood about it. It was never so applied, but the bank sued and collected the note A.

The plaintiff then, by his agent, demanded the note B of the president and of the cashier, but never obtained it.

The bank had a controversy and a reference with Bourne,

and claimed to own the note B, and produced it before the referee, to offset it against Bourne. But that being resisted, the note was withdrawn from that controversy.

Paine, for defendant.

Trover will not lie. The action should be on the contract. The note became the property of the bank by purchase, and they were to apply it on the note against the plaintiff. Hence the bank claimed to own it and to offset it. If the bank did not pay for it, as agreed, they are liable in assumpsit. This would allow the bank to set off such claims as they may have against the plaintiff.

The plaintiff supposes the president and cashier had no authority to *purchase*. If so, had they the power to make the bank *convert* the note? But it was within the official power of the cashier to make such a trade. There was then no conversion. 17 Mass. 502; 24 Maine, 566.

But if the note was *not* purchased, the plaintiff's remedy is against the cashier only. To illustrate; suppose plaintiff had lodged with the cashier a bale of silk, with orders to appropriate the avails upon his note, which was not done. The remedy would not be against the bank. And such is the law in this case.

Danforth, for the plaintiff.

SHEPLEY, C. J., orally.—The cashier had no authority to receive the note for the bank, except by allowing it on the note A. This was not done, and it never became the property of the bank. The bank had the note in possession; claimed to own it, and attempted to apply it to their own benefit by a set-off against a debt due from themselves. This constituted a conversion. *Judgment for plaintiff.*

FARRAR *versus* INHABITANTS OF GREENE.

The standard of care required of travelers upon the highway, is such care as persons of common prudence generally exercise.

If a defect in the plaintiff's carriage, though it were unknown to him, or if any other want of care on his part, *contribute*, jointly with a defect in the highway, to produce an injury to the plaintiff, the town bound to keep the way in repair is not accountable.

CASE, tried before HOWARD, J., for damage sustained by an alleged defect in the highway.

As to the degree of care exercised by the plaintiff, and particularly as to the fitness of the wagon which he used, much testimony was given by the respective parties. There was evidence tending to show that the plaintiff had knowledge of the state of the road. The plaintiff requested instruction to the jury, that the ordinary care, required of the plaintiff, was "that care which the mass of community ordinarily use, or would use under the same circumstances, and having the same knowledge of the state of the way, which the plaintiff had in this case." The Judge instructed the jury that he did not so understand the law, but that ordinary care was such as persons of common prudence would generally exercise, under such circumstances; and that the plaintiff was bound to have a wagon sufficient, with ordinary care, for the service he was about to perform; that if the wagon was defective, and if such defect contributed, *in any degree*, to produce the injury, the plaintiff cannot recover. The verdict was for the defendants, and the plaintiff excepted.

May, for plaintiff.

1. To know who are persons of common prudence, we must see what men commonly do; must make our comparison upon the mass of community. From the Judge's instruction, the jury must have understood that ordinary care is something more than ordinary; something a little extraordinary; — that common prudence means something more than common, that is, something a little uncommon.

Still the instruction by the Judge might not in itself be

exceptionable, had he not announced, that it was a different doctrine from that presented by the plaintiff's counsel, thus leading the jury into error.

2. The import of the other instruction was, that the wagon must have been sufficient to withstand whatever defect might be in the road. Hence, as the wagon was broken, the jury must have considered it unsuitable. It does not appear that the jury believed that the plaintiff knew the road to be defective. He was not bound to have a wagon, capable to overcome defects which he knew nothing of. A wagon, sufficient for travel upon an undefective road, was all he could be required to have. It is not a want of care, that there was in the wagon some concealed and unsuspected defect. *Palmer* v. *Andover*, 2 Cush. 600; *Hunt* v. *Pownal*, 9 Ver. 418. Though another cause should contribute to the injury jointly with the defect in the road and for which the plaintiff is not responsible, yet the plaintiff is entitled to recover. 18 Maine, 286.

SHEPLEY, C. J., — I hold there may be a defective carriage, an ill-broken horse and careless management, and yet the plaintiff may be entitled to recover. So, on the other hand, there may be a defective road, which even contributed to the accident, and yet the plaintiff not entitled to recover. The plaintiff must show, that the accident occured *wholly* by the defect of the road, and *without any fault* on his part.

May. — The case in 2d Cushing, was that of a secret defect, and yet the town was held liable.

Paine, for the defendants.

1. It is wholly unimportant whether the plaintiff did or did not know of the defect in his wagon. He used it at his peril. The town is not responsible for its defects. This point is fully settled in the case *Moore* v. *Abbott*, 32 Maine, 46.

2. The instruction did not require, that *any thing*, as to degrees of care, should be found, *unless* the want of care produced the injury.

The gentleman does not object to the instruction as to the

standard of ordinary care ; but that his own favorite definition was not verbally adopted, though one of the same import was given.

To refer to the care exercised by prudent men, is definite and intelligible. To refer to the care which the mass of community would use, is but a confusion of language.

HOWARD, J., orally. — The requested instruction, as to the standard of ordinary care, was not the most appropriate ; it was too latitudinarian. If given, we doubt whether it could be sustained. The instruction given is the usual and appropriate one ; clear and unexceptionable.

The plaintiff contended that his wagon *was* a sufficient one. The Judge said it *ought* to be. It is ingeniously argued that the instruction required the plaintiff to have a wagon which would withstand all defects of the road, and prove itself sufficient for the service intended. But such is not the import. He was required to have a wagon, which, "*with ordinary care*," would prove to be sufficient; not one which, without the use of care, should resist every obstacle. But *if* sufficient, the town would not necessarily be liable ; and if insufficient the plaintiff is not necessarily precluded from recovering.

But, so far as the instructions went, they were correct. Are they to be set aside, because some of the conditions pertaining to the case, were not expressed ? *Some* instructions were given. If *others* were desired, a request for them should have been made. *Exceptions overruled.*

LYON *versus* SIBLEY.

After evidence has been given by both parties, a nonsuit cannot rightfully be entered.

EXCEPTIONS from the District Court.

Assumpsit to recover the value of a mill log. The plaintiff called a witness, who testified to the plaintiff's ownership of

the log, and that it was used in 1849, as one of the boom-sticks of which the defendant's boom was made, that the defendant had occupied and used the boom for the years, 1847, 8 and 9, and that he, the witness, had paid to the defendant boomage for logs secured in that boom within those years.

The defendant called a witness, who testified, *that* he and one French built the boom in the spring of 1849, where a boom had previously been; *that* they used the plaintiff's log, as one of the boom sticks; *that*, after a month or two, they sold the upper part of the boom, including the plaintiff's log, to one Ward, who occupied the boom the rest of that season.

On cross-examination, he stated that Ward and the defendant were co-partners and worked together before the sale to Ward; that, after that sale, they worked together upon the part of the boom so sold to Ward, and that they each paid one half of the price.

The Judge ordered a nonsuit, and the plaintiff excepted.

H. W. Paine, for the plaintiff, contended, that the testimony of the plaintiff's witness made a sufficient case to go to the jury.

Vose, for the defendant.

The form of the action is misconceived; it should have been in trover or trespass. No promise to pay can possibly be implied. And the tort is of a character which cannot be waived. The nonsuit was therefore properly ordered. 5 Pick. 285.

TENNEY, J., orally. — It is the right of a Judge to order a nonsuit after the plaintiff's testimony shall have all been given, if he deem it incompetent to maintain the suit. Such a proceeding would, of course, be subject to the plaintiff's right of excepting.

But can a nonsuit be entered after the defendant has been allowed to introduce evidence? So far as we know, this question is now, *for the first time*, presented to the full court

for decision. We think, in that stage of the case, a nonsuit cannot be ordered, not even if the Judge should consider the plaintiff's evidence insufficient. The plaintiff's case might derive aid from the defendant's testimony. The defendant might put interrogatories to a witness, which the plaintiff could not. After evidence on both sides, the defendant has a right to insist that a verdict be rendered. Of the effect of the evidence in this case, we form no opinion. Our decision is based solely upon that principle, which secures to the court and to the jury their respective provinces.

Exceptions sustained.

ROBINSON *versus* BROWN *et al.*

If one be seized of a tract of land, and another, claiming the same by a registered deed, enters upon a part thereof, his entry does not constitute a disseizin of the whole, at his election, *unless* the part so entered upon be continued in his possession.

TRESPASS for breaking and entering the plaintiff's close and cutting trees. The case shows *that* the plaintiff, in 1842, purchased and entered into possession of a lot of land; *that* the *locus in quo*, is a strip five rods wide at the eastern extremity of said lot; *that*, at the time of the purchase, that strip was enclosed by the same fence with the said lot; *that* plaintiff has always maintained that fence and used the strip in connection with said purchased lot, by pasturing his cattle upon it and taking firewood from it, and continuing the occupation of it uninterrupted, except as testified by Asa R. Hoxie. Hoxie testified that, in June, 1848, he claimed to own the strip, and cut a few trees upon it, one day; that in July he caused it to be run out by a surveyor, and in August conveyed it by warranty deed to the defendants, who thereupon, (as the case states,) recorded their deed and cut and hauled away from a part of it the wood, as alleged in the writ. Thereupon defendants' counsel requested the court to instruct the jury, "that if Asa R. Hoxie did, a short time before he

conveyed to defendants, enter upon the land in dispute, and cut trees as stated by him, and if he continued in possession, and afterwards had the land surveyed, and then deeded it by warranty deed to the defendants, and they recorded their deed, and entered under the same, claiming title, then plaintiff was disseized thereby, and could not maintain this action."

The instruction was not given, and the defendants excepted.

Bronson and *Lancaster & Baker*, for the defendants.

Williams and *Bradbury & Morrill*, for the plaintiff.

WELLS, J., orally. — The defendants rely upon the acts done by Hoxie, and upon the defendants' entry into the lot under a recorded deed. No doubt an entry into a part of a lot, under a recorded deed of the whole, and the holding of that part in possession, is a constructive entry into the whole lot. But this case does not show such a holding, but only that the defendants entered under a claim of title, and cut and hauled away the wood. No disseizin of the plaintiff was created by these acts. To make these acts avail as a disseizin, it was requisite at least that the defendants should have not only entered into possession of a part, but continued in that possession. *Exceptions overruled.*

SHOREY *versus* HUSSEY.

If an officer have served a replevin writ, the legal presumption is, that he complied with the law by taking a replevin bond, although his return do not expressly state that fact.

A writ may be quashed, *upon motion*, for an insufficient service; but it must be made within the time allowed for pleading in abatement.

A party, having called the subscribing witness to prove the execution of an instrument, is not thereby precluded from proving by other persons that such witness had elsewhere made statements at variance from his testimony.

REPLEVIN, before HOWARD, J.

The defendant pleaded the general issue. Afterwards, finding that the officer's return did not state that a replevin bond

had been taken, he moved that the writ be quashed for that reason. The motion was overruled.

To prove title to the property, the plaintiff introduced his bill of sale, also the subscribing witness, who, in answer to the plaintiff's interrogatory, testified to its execution. He was then cross examined as to the consideration, delivery, &c.

To defeat the effect of that cross examination, the plaintiff, against the defendant's objection, introduced witnesses, who testified that said subscribing witness had made statements elsewhere, inconsistent with his testimony given in said cross examination. The verdict was for the plaintiff, and the defendant excepted.

Morrill and *Libbey*, for the defendant.

1. The writ was not duly served, and the court had no jurisdiction. R. S. chap. 130, sect. 3 and 10; *Purple* v. *Purple*, 5 Pick. 227.

2. The defect may be taken advantage of on motion, and if there be no jurisdiction, the court will dismiss in any stage of the proceedings. 11 Mass. 285; 21 Maine, 39.

3. The plaintiff could not lawfully impeach his own witness. 5 Pick. 194; 15 Pick. 534; 1 Stark. Ev. 146; 7 Cowen, 239; 17 Maine, 19; 27 Maine, 458.

Lancaster & Baker, for plaintiff.

Shepley, C. J., orally. — The statute, chap. 130, sect. 3 and 10, provides that a replevin writ shall not be served, unless a bond be given, &c. But no statute requires the officer to state affirmatively in his return, that he had taken a bond. If he serve the writ, the implication is that the bond was given. In the absence of proof, he is presumed to have acted as the law requires.

The object of the return is merely to bring the defendant into court, or make him responsible for not coming.

But, if the officer's return was insufficient, the objection comes too late. Though the objection may be taken on motion, it must be taken as early as if by plea in abatement.

The defendant has invoked the 27th rule. But it is inap-

plicable. That rule relates only to classes of cases, entirely dissimilar to this.

The remaining part of the case raises the question, whether a party, having called a subscribing witness, may prove that such witness has elsewhere made statements at variance from his testimony. But that point is settled in the case, *Dennett* v. *Dow*, 17 Maine, 19. *Exceptions overruled.*

THE STATE *versus* WING *& al.*

It is not strictly legal for a defendant, in a criminal suit in the District Court, to file exceptions both to the rulings of the Judge at the trial and to his rulings upon a motion in arrest of judgment.

Where, in such a suit in that court, exceptions are filed, both to the rulings at the trial and to the rulings on the motion in arrest, this court will hold the former exceptions to have been withdrawn or waived, and will act only upon the latter.

In a motion in arrest, it is requisite that the causes for the arrest be specified.

EXCEPTIONS from the District Court, RICE, J.

Indictment for a riot. The defendants objected to the admission of certain testimony, and also moved the court to arrest the judgment after verdict, though without specifying any reason for the arrest. The testimony was admitted, and the motion in arrest was overruled. To the admission of the testimony and to the overruling of the motion, the defendants filed exceptions.

H. W. Paine, for the defendants.

Vose, County Attorney, for the State.

SHEPLEY, C. J., orally. — The exceptions in this case were taken to certain rulings of the Judge of the District Court, during the progress of the trial before the jury, and also to his rulings on the defendants' motion in arrest of judgment after verdict.

Such exceptions have been so frequently presented as to call for a distinct examination of their allowability.

The authority to file exceptions from the District Court in criminal cases, is given by R. S. chap. 172, sect. 40. The mode of procedure is to be the same as is prescribed for civil suits. Chap. 97, sect. 19.

This last named section, taken in connection with its preceding section, to which it refers, provides, that when exceptions are allowed, all further proceedings in that court shall be stayed, *except* that the trial, if before the jury, may proceed to verdict. This language supposes that exceptions for causes, *occurring* before verdict, are *taken and allowed* before verdict. And although they may not be put into their final form, until *after* verdict; yet they are to be taken as constructively made *before* the verdict, as occasions therefor were supposed to arise. Else, why does the statute allow the case to proceed to verdict, *notwithstanding* the exceptions? Hence, when the verdict is affirmed, all further proceedings must be stayed. The signing of the exceptions, already allowed constructively, is not to be viewed as a further proceeding. It is but merely the authentication of what had been previously done. After affirmation of the verdict, when exceptions have been thus allowed, the District Court can proceeed no further; can take no new action, nor hear any new motion. How is it, then, that in such cases, motions in arrest of judgment are made, argued, acted upon and excepted to? Where is the authority for such proceedings? They are forbidden by the statute. While the exceptions, already taken, are unwaived, such motions in arrest, and all the decisions of the District Court thereon, together with the exceptions to such decisions, must be considered merely void. There is an incongruity between motions in arrest and exceptions taken at the trial. *Such exceptions* suppose that, upon the allegations of the indictment, the verdict was *erroneously* obtained; the *motion* supposes it was *rightly* obtained. The *exceptions* claim to *set aside* the verdict; the *motion* acquiesces in its affirmance. The exceptions present the verdict as an injury to the defendant; the motion considers it harmless, and that, taken in connection with the whole record, it furnishes no ground for judgment against the defendant.

As exceptions taken at the trial and exceptions taken to the rulings upon the motion in arrest, are incompatible, it must be held, that both be dismissed, or that the one or the other have been withdrawn or waived. If it should be held that either of the exceptions have been withdrawn, it is reasonable to consider that those taken first in order of time are the ones withdrawn. For, where a later proceeding must, in its own nature, vacate an earlier one, the later one must be presumed to be the one relied upon.

And it is the conclusion of the court to hold, in all such cases, that the exceptions, taken at the trial, are withdrawn or waived, leaving for the action of the court only the exceptions taken to the rulings in arrest of judgment. The defendant is considered as having virtually said to the Judge, "there is a new matter, on which I choose to rely. But, as the exceptions which I have filed would prevent me from presenting it here, I withdraw them, and pray the action of the court on the new matter." The Judge assents, and acts upon the new matter, which is the motion in arrest. Whether he does or does not arrest the judgment, it would, after that proceeding, be absurd to revive the former exceptions.

We are then, in this case, brought to consider the motion in arrest. But no cause for it is stated. The motion was a call upon the Judge to exercise his legal ingenuity and intellectual acumen to ferret out some possible ground for granting the motion. But he was under no such obligation.

Motion overruled.

THE STATE *versus* SAVAGE *& al.*

An indictment, alleging the breaking and entering *into* and stealing *within*, "a building," (without stating that it was a building in which goods, merchandize or any valuable thing was kept for use, sale or deposit,) charges, not a compound, but a simple larceny.

EXCEPTIONS from the District Court, RICE, J.

Indictment, charging that defendants, Dec. 1, 1850, "the

wooden building of one Harrison Jaquith, in the night time, did break and enter, and five bushels of wheat, &c. of the goods and chattels of the said Harrison Jaquith, then and there in the building aforesaid being found, feloniously did steal, take and carry away in the shop aforesaid."

The verdict was against the defendants. They then moved in arrest of judgment, because the indictment does not allege that the wooden building was "a building in which goods, merchandize or any valuable thing was kept for use, sale or deposit. The motion was overruled. The defendants filed exceptions to many of the rulings given at the trial, and also to the overruling of the motion.

Lancaster & Baker, for the defendants.

Vose, County Attorney, for the State.

TENNEY, J., orally. — For reasons given in the case, *State* v. *Wing*, ante, page 581, the exceptions to the rulings at the trial do not come up for consideration. The only question, then, arises upon the motion in arrest of judgment.

It is said the grand jury intended to indict for a compound larceny, under the statute, chap. 156, sect. 2, which provides against the breaking and entering into, and stealing within any building, in which goods, merchandize or any valuable thing is kept for use, sale or deposit; and that, while the proof shows the building to have contained the goods, the indictment is defective in not setting forth that it was a building of that description.

The statute intended to throw around buildings, usually occupied for holding goods, a stronger protection than was deemed necessary for some other classes of buildings. But it does not appear that this building was designed and kept for such a purpose. It might have been a mere shed, into which the articles were placed for a night, to avoid exposure to the weather.

The indictment therefore does not sufficiently charge a compound larceny. It does however sufficiently charge a simple larceny, and the motion in arrest must be overruled.

The State *versus* Fielding.

Where an offence is, by law, made more highly punishable, if committed upon a person of a particular class, than if committed upon a person of another class, an indictment for the offence may be maintained, though it do not specify to which of the classes, the injured person belongs.

Upon a conviction on such an indictment, the milder punishment only will be awarded.

Indictment for an assault upon one Joanna Roberts, with intent, *her* the said Joanna Roberts feloniously to ravish and carnally know by force and against *her* will.

The defendant moved the court to quash the indictment, because it does not set forth whether said Joanna was of the age of ten years, or under that age. The motion was refused, and the defendant filed exceptions.

The defendant also moved in arrest of judgment.

Morrill, for the defendant.

It was essential to allege in the indictment what was the age of Joanna. If under ten years, the punishment *must be* in the State's prison; if over that age, it *may be* in the State's prison *or* in the county jail. It cannot, therefore, be known what punishment to inflict.

Vose, County Attorney, for the State.

Wells, J., orally. — The offence may have been one, to which the greater of the penalties mentioned by the counsel should attach; and it may have been one to which the less penalty should attach.

Of one or of the other, the defendant is guilty. He cannot complain of a decision which should hold him for the minor offence, and of that offence he is adjudged guilty.

Exceptions overruled.

The argument in support of the motion in arrest, is, that Joanna Roberts is not alleged to be a female. But the name is that of a female, and in the indictment she is twice spoken of as a female, by the use of the feminine pronoun.

Motion overruled.

FRANKLIN BANK *versus* LAWRENCE *& al.*

An action upon a negotiated note cannot be brought in the name of a person having no interest in it, except by his consent.

ASSUMPSIT upon a negotiable note against the makers. It was indorsed to the bank by the payees, who had subsequently settled it with the bank by their draft on W. & H. Stevens.

There was no proof that the bank had authorized or assented to the bringing of this suit. A nonsuit was directed, which is to be stricken off if improperly ordered.

Danforth and *Woods*, for the plaintiffs.

By the production of the note, the plaintiffs are to be considered rightfully in court.

The bank has an interest in the note. The draft was not necessarily a payment. The presumption is, that the bank is still the holder, and prosecuting for those concerned, the money when collected to be applied to the draft, or otherwise for their benefit.

The suit is maintainable without any interest in the bank. *Beekman* v. *Wilson*, 9 Metc. 436; *Southard* v. *Wilson*, 29 Maine, 56; *Vancleef* v. *Therasson*, 3 Pick. 12; *Watkins* v. *Hill*, 8 Pick. 522; *Brigham* v. *Marean*, 7 Pick. 42; *Rogers* v. *Burkee*, 10 Johns. 400; *Harriman* v. *Hill*, 14 Maine, 127.

It is not necessary to prove the consent of the bank. *Thornton* v. *Moody & al.* 11 Maine, 253; *Fairfield* v. *Adams*, 16 Pick. 381.

Even if the note had been paid, its negotiability would not have been destroyed, and there is nothing in the case to rebut the presumption, that it has a second time been transferred to the bank. *Guild* v. *Eager*, 17 Mass. 615; *Eaton* v. *Carey*, 10 Pick. 211.

If the action should be maintained, the defendants have no reason to complain, as there is no pretence that *they* have paid the note, or will suffer any damage.

North, for the defendants.

WELLS, J., orally. — The plaintiffs have no interest in the note, nor have they consented that the suit should be brought in their name. It cannot, therefore, be sustained. The property in the note became the indorsers', as soon as they had settled it at the bank. With the consent of the bank, it might have been sued in the present form; but not without that consent. *Bradford* v. *Buckman*, 3 Fairf. 15. Otherwise a party might be made a litigant, and subjected to cost, without any interest in the subject, or even any notice of it.

Nonsuit confirmed.

FLETCHER v. GUSHEE.

A negotiable note in the hands of an indorsee, "*to whom it came before the pay-day, for a valuable consideration, without notice that the maker had any objection to the payment of it,*" is good against the maker, although it was obtained from the payee and put into circulation by fraud.

ASSUMPSIT by the indorsee against the maker of a negotiable note payable at four months. The case states, that "it came to the hands of the plaintiff before the pay-day, for a valuable consideration, without notice, that the maker had any objection to the payment of it."

The defendant offered to prove, that it was an accommodation note, for which he received no value, and that it was obtained from the payee and put into circulation by fraud.

The trial was before HOWARD, J., who rejected the evidence. The case was then taken from the jury and submitted to the court, upon an agreement that, if the offered evidence was rightfully rejected, the defendant should be defaulted; otherwise the action to stand for trial.

Bachelder, for the plaintiff.

Whitmore, for the defendant.

As the note was obtained from the payee and put into circulation by fraud, the want of consideration is a defence open

to the defendant, unless the plaintiff, taking the onus upon himself, shows, that it came to him *in the regular course of business*, and that it came to him *without knowledge of the fraud.*

Neither of these facts has he even attempted to show. *Aldrich* v. *Warren*, 16 Maine, 465; *Munroe* v. *Cooper*, 5 Pick. 412.

HOWARD, J., orally. — The plaintiff was the *bona fide* holder, for value, and before the maturity of the note. The evidence was, therefore, rightfully rejected.

Defendant defaulted.

APPENDIX.

SOMERSET, 1850.—TARBELL, *petitioner*, *ex parte*.

If a husband or wife, from whom the other party has procured a divorce, would seek relief from the disabilities imposed by the statute upon the decree of such a divorce, the application must be returnable in the county in which the applicant resides.

THE Court, by SHEPLEY, C. J., orally. — The petitioner formerly lived with his wife in this county, where she has resided ever since. His residence is now in another county. She here sought and obtained a divorce from him for the cause of desertion. This process has been served upon her, and it is not unsuitable that she should have notice of the proceeding. It is not strictly a libel for a divorce, because he no longer has a wife. It is to be considered rather as an application to be relieved from the disability imposed upon him by the statute upon her procurement of the divorce. But her rights are not to be affected by the result. It is indeed a matter in which the community have an interest, so far as the cause of morality may be involved. Still it is an *ex parte* proceeding. It is authorized by the statute relating to marriage and divorce. Proceedings under that Act are to be brought in the county in which one of the parties lives. He being the only party, the process can rightfully be returnable only in the county where he resides. *Petition dismissed.*

LEVI J. MERRICK, *petitioner for review*, *versus* JOSIAH FARWELL.

THE petition sets forth the following facts : —

The petitioner was surety to one Moore, since deceased, in a recognizance to prosecute exceptions from the District Court.

The exceptions were entered and overruled, and the cost arising subsequent to filing the exceptions was taxed against the petitioner. He tendered the cost to Farwell's attorney, who refused to receive it, but brought an action on the recognizance into the District Court, where the money, which had been tendered, was seasonably lodged with the clerk.

The parties there agreed and signed a statement of facts. The

District Court decided against the recognizors, and awarded the penalty $200 with costs. From that decision they appealed, the opposing attorney waiving sureties. The appeal was entered in this court, and afterwards dismissed on motion, because, through accident, the petitioner had omitted to file the recognizance entered into on the appeal. Thereupon judgment in the District Court was made up according to its original adjudication. The petitioner prays for a review, relying that the tender that he had made was a legal defence.

Review granted.

NOTE. — This petition was entered in this court, May Term 1850, in this county. The notice to Farwell of this petition was ordered at the Oct. Term of the court 1849, sitting in the county of Kennebec.

A DEFENDANT, in order to obtain a continuance, offered to prove an oral agreement made between herself and the plaintiff's counsel, as to an admission of defendant's title.

PER CURIAM. — For no purpose whatever, not even to obtain a moment's delay, could evidence be received of such an agreement, unless it be in writing.

HOBBS, *in review*, *versus* BURNS.

DEARBORN, of New Hampshire, for the plaintiff in review, offered a deposition, purporting to have been taken in New Hampshire, before one Perley, as a justice of the peace.

There was no evidence of the qualification of Perley, as a justice of the peace or otherwise, to take depositions, though it was proved that he actually took this one.

For that reason, Abbott, in behalf of the defendant, objected to the deposition, and the court rejected it. *Action continued.*

PENOBSCOT. — ROSAMOND RUSS *versus* PERLEY A. DOW.

SLANDER. — A verdict for plaintiff was rendered last term. The action was then continued on motion for a new trial. That motion is now withdrawn.

Briggs, who was of counsel for the plaintiff, now appears, as *amicus curiae*, and suggests the death of the plaintiff, and the propriety of entering a judgment *nunc pro tunc*. He suggests too, that actions of slander do not survive, and cites 6 Greenl. 427; 16 Pick. 170; 7 Mass. 373.

WELLS, J., orally. — The case, 16 Pick. 171, is in harmony with the practice, and establishes the right to allow the motion before us.

Judgment to be made up as of last term.

WADLEIGH *versus* FOWLES.

WHERE an officer has permitted goods, which he has attached, to go back to the debtor's possession, upon a receipt given therefor; the amount he is entitled to recover of the receiptors, is not to exceed the amount for which he is liable to the creditor.

IN a petition by a defendant for a new trial, (*supersedeas* of execution having been ordered,) if it be found that judgment had been taken for too large a sum, the court will order the execution to be canceled, the action to be brought forward, and judgment entered for the just amount.

BABCOCK *& al. versus* TRACEY.

AT the term next after that, at which an action was entered in favor of a plaintiff, who resided out of the State when the suit was commenced, it is too late for a motion to dismiss the suit for want of an indorser to the writ.

In the suit versus PAGE & ELLIOT, *trustee.*

PAGE and Moore were co-partners. Moore died. Page declined to administer. Elliot was then appointed administrator. The. plaintiff brought this action against Page, and cited Elliot as trustee of Page.

Hobbs, for plaintiff, suggests that Elliot had compromised certain claims against the estate, and procured them to be discharged on paying a part only of their amounts, and had, nevertheless, charged the full amounts in his account rendered to the Probate Court.

Hobbs had propounded to the trustee the interrogatory, whether he had in fact paid to the widow of Moore the sum of one thousand dollars, as he had charged in his administration-account, and the trustee had refused to answer it. Hobbs then moved the court to order the answer to be made.

SHEPLEY, C. J., inquired if the object of the trustee suit was to withdraw the settlement of Moore's estate from the Probate Court.

WELLS, J., expressed the opinion that the trustee, in judging whether to answer or not, must act at his peril.

The court declined to pass any order on the subject.

BABCOCK *& al. versus* FOWLES.

On exceptions submitted without argument. — Plaintiffs were allowed to amend their writ, by striking out the averment that they were partners in trade.

LARRABEE *versus* DUDLEY.

THIS action, which was upon a mortgage of real estate, was submitted to referees, with power to do, in the case, what they might think should be right; each party reserving the right to offer testimony, as to usurious interest, which the defendant alleged to have been secured in the mortgage-note.

The referees awarded the conditional judgment, fixing the sum to be paid by the defendant to entitle him to redeem.

The tenant objected to the acceptance of the award, because, in fixing the said amount, the referees had allowed the demandant more than $500, extra and usurious interest, and to prove that fact, he offered one of the referees as a witness.

The court excluded the evidence. *Report accepted.*

WASHINGTON, 1850. — IVORY HURD *versus* CHARLES STOCKWELL.

A NOTE was given payable in one year, partly in boots and shoes, and partly in boarding and horse keeping, the proportions not being specified. Neither the defendant nor the plaintiff gave notice of any election as to the mode of payment. After about four years the plaintiff sent an agent for the pay, who offered to receive the whole amount in boots and shoes. The defendant refused to pay in that way, and claimed to pay a part in boarding and horse keeping. Whereupon the plaintiff brought this action upon the note. *Held*, that it was not maintainable.

Granger & Dyer, for plaintiff.

B. Bradbury, for defendant.

WALDO, 1850. — NEWHALL *versus* AYER *& al.*

THIS was a motion by the defendant for a new trial.

When the case was coming on for argument, the counsel for defendant said that, through inadvertence, he had not filed his report of the evidence, supposing he had done so until a few days before the court. The plaintiff objected to any further proceeding upon the motion. But the court ruled, that under this state of facts, defendants should not be deprived of their motion, and that if the report offered was not satisfactory to the other side, an opportunity might be had to make up the case.

The parties then agreed it should be argued in writing.

Dickerson, for plaintiff.

Kelley, for defendant.

INHABITANTS OF SWANVILLE *versus* INHABITANTS OF WASHINGTON.

TENNEY, J., orally. — This is an action brought by the plaintiffs to reimburse the expenses by them incurred in the support of a pauper, alleged to belong to the town of Washington. It was tried several terms ago; when a verdict was returned for plaintiffs, and a motion was made to set it aside as against evidence.

It appears from the testimony, upon the trial, that the person, alleged to be a pauper, had a settlement in Washington in the home of her father, and as one of the members of his family. The family subsequently moved into the town of Swanville, and there is no dispute that the supposed pauper lived there long enough to gain a residence, unless it was defeated by receiving supplies as a pauper within five years from the time such residence commenced.

The evidence relied upon to show that supplies had been furnished within the five years, came from one of the overseers of Swanville. This overseer, without calling upon the supposed pauper, directed her brother to supply her wants upon the credit of the town. After notice was given to defendants, one of their overseers came up and agreed to settle. It did not appear that either of the parties had paid for any supplies. But it is not every omission of evidence that will give a party a new trial. It would be dangerous to establish such a principle, and it is not on that ground that we place our decision. There was nothing in the evidence, to show that the overseers of Swanville acted in concert, or had authority to furnish any supplies. The person who knew the most about the condition of the supposed pauper, died before the trial. The plaintiffs introduced several witnesses upon this branch of the case, and among them, the father, who testified that the care of the supposed pauper was with him, and he knew nothing of any supplies. He was confirmed by evidence from the other side. There was no direct evidence that the individual stood in need of immediate relief, but circumstances of poverty were shown, and that she had an illegitimate child. From the view of al

the testimony, the court cannot doubt that it greatly preponderated in favor of the defendants, and that it must have been through some misapprehension of the jury, that the verdict was returned for the plaintiffs. The case must therefore be sent to another jury.

Verdict set aside and new trial granted.

JOSEPH P. HARDY *versus* AMOS SPOULE *& al.*

Verdict for plaintiff for $1,00. CONSPIRACY.

Motion by plaintiff to set aside verdict as against evidence and the weight of evidence.

Also because of improper intimacy between the foreman of the jury and one of the defendants, they having lodged in the same room while the cause was on trial.

The hearing of any argument on the two first points was objected to by defendants' counsel, because the evidence was not reported in full.

TENNEY, J., orally. — The report does not purport to present all the evidence. The defendants therefore were not obliged to offer a counter report. The objection that the verdict was against evidence and the weight of evidence cannot be considered.

It also appeared that during the deliberations of the jury, the foreman sent for and obtained a copy of the Revised Statutes, without the knowledge of the Court.

Merrill, for the plaintiff.

1. The jury are not competent to construe the law for themselves; they are bound to take the law from the court; the obtaining of the statutes was therefore wrong. 1 Pick. 337; 5 Pick. 296; 5 Pick. 302.

2. The foreman and one of the defendants roomed together while the cause was on trial, which is a sufficient reason for setting aside the verdict. The least intermeddling with the jury is held sufficient. 13 Mass. 218; 12 Pick. 496.

3. The challenge of the foreman by defendants' counsel shows a preconcerted plan to obtain undue advantages in the trial. The challenge, though made by the counsel, must have been at the instigation of defendants. Had there not have been an unlawful purpose, the foreman would have disclosed their situation at the hotel. Had that been done, he would undoubtedly have been set aside.

In 17 Mass. 303, a rule is laid down applicable to this case. There the juror only rode home with the prevailing party *once*; here the intimacy was *continued* for successive nights.

Considering that nominal damages only were assessed, we are authorized to believe that the sending for the statutes was designed to affect the costs, and if a verdict is framed for that purpose, it will be set aside. 1 Pick. 547.

There was no testimony which placed the damages so low as $20. The foreman pretended to the jury that the costs were all that was pending in the case, and they were tricked into this verdict, they

supposing it would carry full costs. All this arose from the improper admission of the Revised Statutes into the jury room.

I also refer the court to sect. 76 of chap. 115, of R. S. to show that all improper influences are to be kept from the jury. And, if it has been decided that riding together is a sufficient cause to set aside the verdict, then surely the sleeping in the same room, night after night, falls within the same reason and ought to have a like effect.

Dickerson, for defendant, maintained that, where the alleged misconduct has not affected the verdict, mere irregularity will not set it aside. 17 Mass. 306; 20 Maine, 493; 6 Maine, 309; 6 Maine, 140.

The fact that the prevailing party rode home with a juror was held not to be sufficient, but when supplies were gratuitously furnished by a friend it was enough.

But a verdict will be sustained though the jury are tampered with, unless the party is in fault. *Bishop* v. *Williamson*, 8 Greenl. 162.

The admission of the Rev. Stat. into the jury room, if improper in itself, cannot now be considered, as it is not made one of the grounds of the motion. 27 Maine, 370.

As to the rooming together; — this was not by the procurement of the party or juror, but by the landlord. The evidence is, that there was no conversation between them, and it was necessary for them to lodge in this manner, or find no lodging any where.

Ruggles, for the same, said, that corruption had been charged between the foreman and the party, and likewise the foreman and counsel. It is assumed by the counsel on the other side, and is explained as constructive corruption, because the party and juror are corrupt, therefore the counsel are likewise. It ought to be a sufficient answer to all this, that it rests wholly in the statement of plaintiff's counsel, and not one particle of evidence to support it.

As to the intimacy of the foreman and defendant, alleged by the counsel, the evidence adduced actually disproves it.

It is argued that the statutes were sent for to affect the costs. This too is wholly gratuitous. The jury had a right to read the statutes, they ought to have known what was in them before they came to court. But this was not done by the knowledge or consent of the party; if it was an irregularity no injury has been done. It has even been held, that when a juryman received pay as a witness as well as a juryman, it was not sufficient cause to disturb the verdict.

Again, as to the challenge of the foreman, it was done when the writ was about to be read; he was questioned as to the feeling between the parties. Before the counsel should complain, he should himself have put the question to the juror. Having neglected so to do, he cannot afterwards bring it up. Such are the authorities.

I have great respect for the veracity of plaintiff's counsel, and he has stated what he could prove of improper management in the jury room, if allowed to go into it; but I must be allowed to say, that I do not believe he could make any such proof.

The opinion of the court was delivered orally by

WELLS, J. — A motion is made to set aside the verdict for sev-

eral reasons. The principal one, and that mainly relied upon, is, that the foreman of the jury, who tried this cause, lodged in the same room with the defendant, during the progress of the trial. Questions as to the intercourse of jurors and parties are frequently brought before the court. In *Southwick* v. *Hilton*, the party rode home with the juror, and it was held not to be a sufficient cause for setting aside the verdict.

The mere fact of intercourse has never been deemed sufficient. Situated as we are, during the trials of causes, boarding promiscuously, as jurors and parties inevitably do, it is impossible to interdict all intercourse whatever, however much we may regret it. The ground of the complaint here was not brought about by either the party or juror, and there is no evidence, either direct or inferential, which authorizes the belief that the jury were influenced in any way by the causes presented in this motion. It also appears in this case by the testimony, that a copy of the Revised Statutes was sent for and obtained by the foreman, without leave of the court. Now, without deciding whether such a proceeding is proper or not, it is a sufficient answer, that this is not one of the causes assigned in the motion; and that, even if it had been assigned, it is a proceeding with which the party is not connected. If an irregularity, it might well be considered of insufficient importance to disturb the verdict.

Motion overruled, and judgment on the verdict.

CUMBERLAND, 1851. — SKOLFIELD, *appellant.*

THE case, as stated by *W. P. Fessenden*, for the appellant, was, that the appellant was appointed guardian to some minor children, whose father had deceased. He was a tenant in common with them, of a farm, and he duly inventoried their interest in it.

After twenty years from the time of his appointment, he was cited before the Judge of Probate to settle a guardianship account. He appeared and represented that he and the family of the minors had resided on the same farm and in the same house; that he had for twenty years and more furnished supplies to them as they needed; but had kept no account, and could render none.

The counsel then inquired of the court, *as a matter of practice*, whether the statement on oath of the guardian, that he had kept no account, and that he had furnished the supplies, is, *prima facie*, to be received as true, or whether it must be proved by other testimony.

SHEPLEY, C. J., orally. — It is the duty of a guardian to keep an account, and when supported by his oath, it is *prima facie* evidence. But if he have kept no account he is in fault, and his liability is for the *actual damage*, to be ascertained by the proofs which may be introduced. On the question of the damage, his oath is not to be received as evidence.

PARSONS *& ux., appellants, versus* PLUMMER.

CASE, as stated by *S. Fessenden*, for the appellants.

A child, a little girl of eight or more years of age, was living with her mother. Without any notice to the mother, the Judge of Probate appointed a guardian to the child, and the guardian took the child, and carried her into the country. From that decree of the Judge of Probate, there was no appeal; but an application was made to him to discharge the guardian. That application was rejected, and to that rejection this appeal is taken.

Though the statute does not expressly require notice to the mother in such a case, yet every principle of legal administration demands it. Otherwise, whose child can be safe? We contend that, *without such notice*, the Judge of Probate had no jurisdiction, and that his doings were merely void. We therefore ask that the guardian be discharged, and we present the claim as a matter *strictissimi juris.*

Case, as stated by *Barnes*, for the respondent.

Though perfectly willing the merits should be investigated, yet, for the present, we must interpose a dilatory plea.

Within the time allowed for an appeal from the decree appointing the guardian, that decree was known to the plaintiffs. They however took no appeal, but sued a replevin of the person, and took the child away. That replevin suit was abandoned, and we got the child back upon a writ of *habeas corpus.* Our plea will be that the plaintiffs were estopped, because, after knowing the condition of the case, they interposed no appeal, though there was sufficient time for one.

THE COURT thereupon appointed a commissioner to take the evidence.

ROGERS *versus* LIBBEY.

THIS case was transferred from the District Court, upon a report of the Judge, for a decision by this court. The report presented the evidence, both oral and documentary, and then stated that the parties, each claiming that, upon the evidence, the law was in his favor, had agreed that the action should be reported into this court for a legal decision, and that the judgment should be rendered for the party, whom the court might adjudge to be entitled to it.

BY THE COURT. — We must decline to adjudicate upon the testimony. It was not the design of the statute, (under which this case purports to be brought here,) that research into a case should be made by this court to discover how many and what legal points might be elicited. The questions to be passed upon here, are to be raised in the District Court. They are then to be severally and distinctly

stated, as questions of law for adjudication here. But in this case, none such are presented, and therefore none can be decided.

By agreement of parties the case was then continued, with a view to have the intended questions reported.

LINCOLN, 1851. — LAW *versus* PAYSON.

AT the opening of the argument by the defendant's counsel, one of the Rules of Practice was adverted to, as follows, by

SHEPLEY, C. J. — The Rule, established by the court and in force for several years past, requires either that the argument of counsel be presented in writing, or that, previously to entering upon it, there be furnished to each member of the court and to the Reporter a brief, exhibiting the legal points and authorities relied upon. This is a useful Rule, and a strict observance of it is required.

In this case, such briefs not having been furnished, we presume a written argument is intended.

KENNEBEC, 1851. — TIBBETTS *& ux. versus* WILLIAMS.

WRIT OF ENTRY.

The case was argued to the jury, and the Judge concluded his instruction to them at the close of the forenoon session. They were then permitted to separate, by consent of parties. On opening the court in the afternoon, the plaintiff requested the Judge to give some further specified instructions to the jury. The defendant objected to such a course, and the instructions were not given.

The verdict was for the defendant, and the plaintiff excepted to the Judge's omission to give the proposed instructions.

May, for the plaintiff.

The requested instructions were pertinent and correct. Suppose the jury had come into court, disagreed; it would be the duty of the court, on request, to give such instructions. This position is too plain for argument.

SHEPLEY, C. J. — We can hardly admit that it is so plain. No doubt the Judge might give new instructions, and they might be excepted to; but it is not quite so certain that counsel might interpose new requests, which might open new discussions, arguments and replies.

Evans, for the defendant.

BY THE COURT. — The charge to the jury was closed. If new instructions, at that stage, were allowable, it was merely in the discre-

tion of the court to give them. Exceptions do not lie to the exercise of a power, merely discretionary.

Exceptions overruled.

OXFORD, 1851. — TENNEY *versus* FROST.

THE defendants, in the District Court, filed exceptions to the Judge's refusal to take off the default.

SHEPLEY, C. J., orally. —To the exercise of a mere judicial discretion, exceptions do not lie. The action is dismissed, because improperly brought to this court.

Costs for the plaintiff.

THE STATE *versus* FULLER.

THE defendant was convicted under R. S., chap. 167, sect. 10, for attempting to commit a crime, in the execution of which he was interrupted and prevented. Evidence of his acts was introduced.

His counsel contended that the defendant was not amenable, if the acts proved were not of themselves a part of the act which constituted the principal crime, but were merely preliminary to that act.

The COURT held that the statute provision may apply to acts by which the crime is attempted to be committed, although those acts might not have proceeded, previous to the interruption, so far as to constitute a part commission of the principal crime itself.

May, for defendant.

Tallman, *Attorney General*, for the State.

SOMERSET, 1851.

MOTION to set aside a verdict rendered in this court, for the alleged reason, that a copy of the verdict rendered in the District Court in the same case, "by some means, without the knowledge of the petitioner, got into the jury room, at the time the jury retired, or while they were deliberating upon their verdict."

Hutchinson, for the petitioner.

Abbott, contra.

TENNEY, J., orally. — In appealed cases, it is proper, that the papers, coming up from the District Court, should be laid before the jury here.

We do not say the papers must necessarily include a copy of the verdict. But the insertion of it cannot be an impropriety. The copy of the verdict is not, therefore, of the class of papers, sometimes found in a jury room, having no connection with the case, though capable to create a bias. The jury could not suppose it ought to have any influence with them. It does not appear that it found its way to the jury room, through any improper means or motives. If done by mistake, as it may have been, it was not such an irregularity as should disturb the verdict. *Motion overruled.*

STANLEY *versus* DAVIS *& al.*

REPORT from the District Court.

DEBT on bond, with general issue pleaded. The writ was dated of a Lord's day. The defendants filed a written motion that the writ be quashed, because it appeared to have been issued on the Lord's day, but they did not allege or offer to prove that it was made between the hours of midnight preceding and the sunsetting of that day. The motion was overruled. The parties then submitted the case to be reported to the Supreme Judicial Court, upon the stipulation that if said overruling was erroneous, the plaintiff shall have permission to prove that, in fact, the writ was made, not on the Lord's day, but upon some other day within eighteen months from the date of the bond; and that if, upon the foregoing facts and such others as may be proved by the plaintiff under said reserved permission, the court shall adjudge that the action is maintainable, the defendants shall be defaulted, otherwise a nonsuit shall be entered.

BY THE COURT. — This matter is brought irregularly into this court. The report presents no "legal questions" for adjudication. The agreement of the parties contemplates, that in a certain contingency, additional evidence may be offered. In what court shall it be heard? The report presents no legal question for adjudication. The case is brought irregularly into this court, and must be

Dismissed.

STARRETT *versus* DUNLAP.

PETITION by the plaintiff for a review.

SHEPLEY, C. J., orally. — The plaintiff, at a former term of the court, had consented to a nonsuit. It now appears by the evidence, that that consent was obtained by false testimony, or at least by false representations on the part of the defendant. Such a consent, when procured by such means, furnishes no insuperable obstacle to the granting of a review. *Review granted.*

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The obtaining of a conveyance of land upon a verbal promise, that the purchaser would subsequently secure the purchase money by a mortgage, and a refusal afterwards to give such mortgage, do not constitute a sufficient ground for enjoining the purchaser from selling the land, unless some *fraudulent* or *deceptive* practice was used to obtain the conveyance.

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INSOLVENCY.

Though a claimant should present a note to commissioners of insolvency for allowance. with his oath that it was due, he would not, for that reason, on an appeal from the decision of the commissioners, be precluded from claiming upon the account for which the note was given.

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SHIPPING.

1. If, in a river, there be a common and known passage way for vessels to a wharf, there is, *ordinarily*, no right in any person to obstruct it by anchoring a vessel upon it, or so near to it as to expose another vessel to danger, by compelling her to depart from the passage way. *Knowlton* v. *Sanford*, 148.
2. In case of *absolute necessity*, however, a vessel may lawfully anchor upon such passage way, remaining no longer than the necessity exists. *Ib.*
3. In any such case of necessity, it is the master's duty to exercise reasonable skill, prudence and care to give all others their just rights of navigating the river. Whether he performs that duty, is a question of *fact* for the jury. *Ib.*
4. Though the distress of the vessel were *not* so stringent as that she *could* not have been stopped and anchored elsewhere than in the passage way, it is still matter, not of law for the court, but of fact for the jury, to determine whether the master, *under the circumstances*, performed his duty to others in occupying the passage way. *Ib.*
5. Even if *without necessity*, a vessel should have anchored in such passage way, *that* would not authorize neglect in any other vessel, attempting to pass upon such passage way. Such other vessel is bound to the use of ordinary care and skill, though the first vessel was in the wrong. If, through want of such care and skill, on the part of the vessel attempting to pass, a collision should occur, her owners would be liable to the owners or shippers of the anchored vessel, for their damages. *Ib.*
6. Where a steamer, by user, has acquired the right to pass upon a particular passage way to a wharf, it is for the jury to decide whether other navigators are bound, *under the circumstances*, to know that there *is* such a passage way, and *where* it is. *Ib.*

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2. The provisions of R. S. ch. 66, requiring staves to be surveyed or culled previous to a sale, apply, not to pine staves made for fish barrels, but only to certain descriptions of oak staves. *Gilman* v. *Perkins*, 320.

3. An action may be maintained to recover the price of such pine staves sold to the defendant, though they were not culled or surveyed. *Ib.*

4. Under a defence that lumber sold and delivered was not legally surveyed, arising in a suit brought to recover the price of it, the *onus* of proof is upon the defendant. *Nutter* v. *Bailey*, 504.

5. If the seller have authorized the purchaser to select a surveyor, the presumption is, that a surveyor was intended, by whom the survey could *legally* be made. *Ib.*

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