REPORTS

OF

CASES IN LAW AND EQUITY,

DETERMINED

BY THE

SUPREME JUDICIAL COURT

OF

MAINE

By ASA REDINGTON,
REPORTER TO THE STATE.

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JUDGES

OF THE

SUPREME JUDICIAL COURT,

DURING THE PERIOD OF THESE REPORTS.

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

JUDGES OF THE DISTRICT COURT.

HON. STEPHEN EMERY, *Western District.*
HON. RICHARD D. RICE, *Middle District.*
HON. JOSHUA W. HATHAWAY, *Eastern District.*

JUDGES OF PROBATE.

YORK,	WILLIAM C. ALLEN,
CUMBERLAND,	JOSIAH PIERCE,
LINCOLN,	ARNOLD BLANEY,
KENNEBEC,	DANIEL WILLIAMS,
SOMERSET,	CHARLES GREEN,
OXFORD,	JOB PRINCE,
FRANKLIN,	MOSES SHERBURNE,
PISCATAQUIS,	EPHRAIM PACKARD,
PENOBSCOT,	E. G. RAWSON,
WASHINGTON,	JOHN C. TALBOT,
HANCOCK,	PARKER TUCK,
WALDO,	JOSEPH MILLER,
AROOSTOOK,	SAMUEL G. TUCK.

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Lincoln,	EDMUND B. BOWMAN,
Kennebec,	WILLIAM M. STRATTON,
Oxford,	WILLIAM K. KIMBALL,
Franklin,	GEORGE W. WHITNEY,
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Franklin,	FRANCIS G. BUTLER,
Somerset,	GEORGE WHITNEY,
Piscataquis,	JOSEPH CHASE,
Penobscot,	JOHN S. CHADWICK,
Washington,	JAMES NICHOLS,
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Waldo,	WILLIAM RUST,
Aroostook,	NELSON HERRIN.

COUNSELORS AND ATTORNEYS.

The following alterations have become necessary in the list of Counselors and Attorneys as published in the 32d vol. of Maine Reports.

YORK.

Omit the names, Joshua T. Lincoln, *Cornish.*
Frederick Green, *Saco.*
Samuel S. Thing, *Sanford.*
Insert the names, James O. McIntire, *Alfred.*
Tompson Lincoln, *Cornish.*
——— Wadsworth, "
Joseph Dane, *Kennebunk.*
William B. Sewall, "
William H. Wiggin, *Sanford.*
William H. Strout, *York.*

CUMBERLAND.

Omit the name of William H. Bennett, *Mechanic Falls.*
Insert the names, William Boyd, *Portland.*
Llewellyn Dean, "
Frederick Fox, "
Thomas H. Talbot, "
Llewellyn True, "
Charles G. Came, "

LINCOLN.

Insert the names, George E. B. Jackson, *Bath.*
William S. Sargent, *Rockland.*

KENNEBEC.

Omit the names, John P. Craig, *Readfield.*
Samuel H. Currier, "
J. E. F. Dunn, *N. Wayne.*
William Clark, *Hallowell.*
John Otis, "
George W. Bachelder, *Gardiner.*
Thomas J. Herrick, *Waterville.*
Insert the names, William B. Snell, *Monmouth.*
Josiah H. Drummond, *Waterville.*

PENOBSCOT.

Omit the names, Matthias Weeks, *Orono.*
George W. Brown, *Bangor.*
David McCrillis, "
George W. Wilcox, *Dixmont.*
Benjamin F. Mudgett, *Hampden.*
Insert the names, George W. Wilcox, *Bangor.*
Benjamin F. Mudgett, "

OXFORD.

Omit the names, Charles Andrews, *Paris.*
S. P. McKenney, *Turner.*

FRANKLIN.

Omit the names, Joseph A. Linscott, *Phillips.*
William S. Marshall, *New Portland.*
Insert the names, Nathan Cutler, *Farmington.*
John L. Cutler, "
Alanson B. Farwell, "
Joseph A. Linscott, "

SOMERSET.

Omit the names, Charles Green, *Athens.*
Peter Dunn, Jr., *Mercer.*
Insert the names, George A. Hobbs, *Canaan.*
Samuel A. Bickford, *North Anson.*
William S. Marshall, *North New Portland.*

WASHINGTON.

Omit the names, Robert N. Smith, *Calais.*
Albert G. Lane, *Machias.*
Peter Thatcher, "
Solomon Thayer, *Lubec.*
Insert the names, Albert Pillsbury, *Machias.*
Peter Thacher, "
Jotham Lippencott, *Columbia.*

HANCOCK.

Omit the name, A. F. Drinkwater, *Bluehill.*
Insert the names, A. F. Drinkwater, *Ellsworth,*
William H. Cheney, "

ABBREVIATIONS AND REFERENCES.

Ash.,—Ashmead, Penn.
An. Dig.,—Annual Digest.
Am. Jur.,—American Jurist.
Ang. on Com. Car.,—Angell on Common Carriers.
Ang. on Lim.,—Angell on Limitations.
Ang. on Wat. Co.,—Angell on Water Courses.
Ang. on Tide Waters,—Angell on Tide Waters.
Ang. & Am. on Corp.,—Angell & Ames on Corporations.
Ala.,—Alabama.
Aik.,—Aiken, Vermont.
Anthon's N. P.,—Anthon's Nisi Prius.
A. & E.,—Adolphus & Ellis, Eng.
Ark.,—Arkansas.

Bald.,—Baldwin, Circuit Court of U. States.
Brock.,—Brockenbrough, do.
Blackf.,—Blackford, Indiana.
Barb. Chan.,—Barbour's Chancery, N. York.
Barb. S. C.—Barbour's Supreme Court, N. York.
Bin.,—Binney, Penn.
Brev.,—Brevard, S. Carolina.
Bur.,—Burrow, Eng.
B. & Al.,—Barnewall & Alderson, Eng.
Bouv. Am. L. D.—Bouvier's American Law Dictionary.
Beav.,—Beavan, Eng.
B. & C.,—Barnewall & Creswell, Eng.
B. & Ad.,—Barnewall & Adolphus, Eng.
B. & P.,—Bosanquet & Puller, Eng.
B. & B.,—Broderip & Bingham, Eng.
Bing.,—Bingham, Eng.
Bac. Ab., — Bacon's Abridgment, Eng.
Barr,—Barr, Penn.
B. Monroe,—Kentucky.

C. C.,—Circuit Court of U. S.
Ch.,—Chancery.
Conn.,—Connecticut.
Cush.,—Cushing, Mass.
Craig & P.,—Craig & Phillips, Eng.
Cowp.,—Cowper, Eng.
Comstock,—N. York.
Cranch,—U. States.
Caine's Ca.,—Caine's Cases, N.Y.
Cow.,—Cowen, N. Y.
Camp.,—Campbell, Eng.
Co. Litt.,—Coke on Littleton, Eng.
C. & P.,—Carrington & Paine, Eng.
Chit. Plead.,—Chitty on Pleading, Eng.
Chit. Cr. Law,—Chitty on Criminal Law, Eng.
Chit. on Bills,—Chitty on Bills, Eng.

D. & E.,—Durnford & East, Eng.

Doug.,—Douglass, Eng.
Dal.,—Dallas, Penn.
Dal. U. S.,—Dallas, United States.
Dev. & Bat.,—Devereaux & Battle, N. Carolina.
Des. Eq.,—Desausure's Equity, S. Carolina.
Day,—Connecticut.
Denio,—N. York.

Eq.,—Equity.
Eng.,—English, Arkansas.
Esp.,—Espinasse, Eng.
East,—East, Eng.
E. C. L. R.,—English Common Law Reports,
Eq. Dig.,—Equity Digest.

Fairf.,—Fairfield, Maine.

Greenl.,—Greenleaf, Maine.
Greenl. Ev.,—Greenleaf on Evidence.
Grat.,—Grattan, Virginia.
Gris.,—Griswold, Ohio.
Geor.,—Georgia.
Gal.,—Gallison, C. C. U. States.
Gil.,—Gilman, Illinois.
Gill,—Maryland.
Gill & John.,—Gill & Johnson, Maryland.
Green,—New Jersey.

Harr.,—Harrington, Delaware.
Ham.,—Hammond, Ohio.
Hal.,—Halstead, N. Jersey.
Hil. on Mort.,—Hilliard on Mortgages, Mass.
How.,—Howard, United States.
Har & McH.,—Harris & McHenry, Maryland.
Har. & John.,—Harris & Johnson, Maryland.
Har. & Gill,—Harris & Gill, Maryland.
Hill,—New York.

Iredell,—North Carolina.

Johns.,—Johnson, N. York.
Jones,—Penn.

Johns. Ch.,—Johnson's Chancery, N. York.
Johns. Cases,—Johnson's Cases, N. York.

Kent's Com.,—Kent's Commentaries, N. York.

Leigh,—Virginia.
Litt.,—Littell, Kentucky.
Louis.,—Louisiana.
Ld. Ray.,—Lord Raymond, Eng.

Myl. & K.,—Mylne & Keen, Eng.
M. & S.,—Maule & Selwyn, Eng.
M. & G.,—Manning & Granger, Eng.
M. & M.,—Moody & Malken, Eng.
M. & R.,—Moody & Robinson, Eng.
Met.,—Metcalf, Mass.
M. & W.,—Meeson & Welsby, Eng.
Mason.,—C. C. U. States.
M. & C.,—Mylne & Craig, Eng.
Mass.,—Massachusetts.
McLean,—C. C. U. States.
Mart. & Yerg.,—Martin & Yerger, Tenn.
Mumf.,—Mumford, Virginia.
Mon.,—Monroe, Kentucky.
McCord,—South Carolina.
Mart.,—Martin, Lousiana.

N. H.,—New Hampshire.

Phil.,—Phillips, Eng.
Peters,—Peters, U. States.
Port.,—Porter, Alabama.
Pick.,—Pickering, Massachusetts.
Paige Ch.,—Paige Chancery, N.Y.
Pen. & W.,—Penrose & Watts, Penn.
Peere Williams,—Eng.
R. S. or Rev. Stat.,—Revised Statutes.
Russ. & Myl.,—Russell & Mylne, Eng.
Ry. & M.,—Ryan & Moody, Eng.
Russ. & Ry.,—Russell & Ryan, Eng.

Rawle,—Penn.
Ros. Cr. Ev.,—Roscoe on Criminal Evidence, Eng.
Russ. on Cr.,—Russell on Crimes, Eng.
Root,—Connecticut.
Rand.,—Randolph, Virginia.
Rob.,—Robinson, Louisiana.
Strob.,—Strobhart, S. Carolina.
Smith,—Smith, Indiana.
Saund.,—Saunders, Eng,
Sme. & Mar.,—Smedes & Marshall, Mississippi.
Shep. Tou.,—Shepard's Touchstone, Eng.
Sum.,—Sumner, C. C. U. States.
Sarg.,—Sargent, Penn.
S. & R.,—Sargent & Rawle, Penn.
S. C.,—Same Case.
S. P.,—Same Point.
Story,—C. C. U. States.
Scam.,—Scammon, Illinois.
Strange,—Eng.
Stark. Ev.,—Starkie on Evidence, Eng.

Taunt.,—Taunton, Eng.
T. R.,—Term Reports, Eng.
Tenn.,—Tennessee.
Ves. sen'r.,—Vesey, sen'r., Eng.
Ves. jr.,—Vesey, jr., Eng.
Ver.,—Vermont.

Washburn,—Vermont.
Whar. Dig.,—Wharton's Digest, Penn.
Wood. & Min.,—Woodbury & Minot, C. C. U. States.
Wash. C. C.,—Washington C. C. U. States.
Wheat.,—Wheaton, U. States.
Wend.,—Wendell, N. York.
Watts,—Penn.
Watts & Sar.,—Watts & Sargent, Penn.
Wils.,—Wilson, Eng.
Wills,—Eng.

Yeates,—Penn.
Yer.,—Yerger, Tennessee.

CASES

REPORTED IN THIS VOLUME.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF YORK,

1851.

PRESENT:

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

PRATT *& al. in equity, versus* PHILBROOK.

A contract obtained by fraudulent representations cannot be sustained by the fraudulent party to the injury of the party imposed upon.

To avoid a contract for misrepresentation, it must appear — *that* a deception was intended and was practiced; — *that* it was successful, and *that* it operated a damage to the party deceived.

Though a party may have been deceived by fraudulent representations, it is not usual for courts to interfere in his behalf, if he had full means of ascertaining the truth and detecting the fraud, and yet neglected to do so.

A contract made for the sale and purchase of property, though founded upon the misrepresentations of the seller, cannot be wholly rescinded, for the reason of such misrepresentations, if, prior to the completion of the sale, the purchaser had become acquainted with the whole facts, and yet confirmed the bargain.

BILL IN EQUITY to set aside the conveyance of certain property, made by the plaintiffs to the defendant, in consideration of his conveyance to them of certain parcels of lumber and rights connected therewith, then on its way by sea to California, and for further relief.

The material facts, upon which the bill purports to be founded, are alleged to be, in substance, as follows: —

The defendant owned eighty thousand of shingles, part of a cargo of lumber on board the ship Hampton. The contract between the master and some shippers of lumber on board, secured to the latter the right to ship lumber, including the shingles, and gave sixty running lay-days, free from demurrage, in which they might take the lumber from the ship after her arrival at the port of destination; with the stipulation, however, that the freight should be paid as fast as the lumber was delivered, and that, if the freight was not paid within forty-five days from the arrival, the master might sell enough of the lumber to pay the same. Though this contract embraced the shingles, the defendant's name did not appear in it as a party.

Deshon & Co. of Boston owned one half the lumber constituting the cargo of a bark, called "the Chief," then on her way to California. The defendant held a contract by which they agreed to sell to him one-sixth of that cargo, and by the same contract, the defendant agreed to pay them therefor thirty-six hundred dollars, as soon as they should receive the account of sales of said cargo; — it being the understanding that, if the net avails of said sixth of the cargo should exceed $3600, the surplus was to be paid by Deshon & Co. to the defendant; and if said avails should fall short of $3600, the defendant was to pay to them the deficiency.

The foregoing were all the rights of any importance, pertaining to the defendant in relation to either of said cargoes of lumber.

To induce the plaintiffs to convey to the defendant the property, which, by this bill, they now seek to reclaim, he represented to them, *that* the master and owners of the ship had, by a contract with the shippers, relinquished their lien upon

the cargo for freight, and agreed to receive the freight at New England, in a given time after receiving news of the ship's arrival at California; *that* said master and owners had bound the ship to wait sixty days after such arrival, within which time the shippers might take their lumber without charge for demurrage; and *that* the shingles came within said contract, and could not be landed nor in any way disposed of within the sixty days, but by authority of the owners of the same.

And in furtherance of the same design, the defendant, in relation to the sixth part of the cargo on board the bark, represented to the plaintiffs that the same belonged to him, and that he had full right to convey the same, free from any charge for freight.

And in connection with said representations, the defendant, in writing, on the 19th of January, 1850, proposed to the plaintiffs that, in exchange for a certain hotel with its lot and furniture, owned by them, he would transfer to them the shingles and the sixth of the bark's cargo, stipulating that he would pay the freight on the one-sixth of the bark's cargo, and on the shingles in the Hampton.

This proposal was upon condition that it should be accepted in eight days from its date.

The plaintiffs had no knowledge of the property thus offered to them, nor of the defendant's title or rights therein, except what they had so received from him. But relying upon the supposed fulness, accuracy and truth of his representations, they forwarded to him a written acceptation of the proposal.

After such acceptance of the proposal, and before the expiration of the eight days, one of the plaintiffs requested the defendant to show him the contract between the shippers and the master and owners of the Hampton. To this request, the defendant replied that he could not show it, for it was in the hands of a man at Augusta. He however reiterated the representations previously made, and to remove all fears from the plaintiffs' mind, stated that, for any inaccuracy

of statements, he was abundantly able to make redress; that, besides his real estates at Augusta, he was owner of fifty thousand feet of boards on board the Hampton.

The conveyances were executed by the respective parties to each other on the 28th of January, agreeably to the proposal.

The plaintiffs were influenced to their conveyance by the defendant's declaration as to his titles to the lumber, and the rights connected therewith and as to his ownership of said boards.

After the exchange conveyances had been prepared, the schedule of the cargo on board the bark being before the parties, the plaintiffs noticed that among the charges was included an item of $325 for insurance, and they claimed to have the benefit of the policies. The defendant replied that no part of them had been assigned to him, and that he supposed Deshon & Co., in case the bark should be lost, would expect to retain the insurance money to pay what he owed them. And thereupon they received from the defendant, the conveyance in a new draft, relative to the sixth part of the cargo of the bark, by which the defendant conveyed the same to them, to be delivered, *(freight paid by the defendant,)* to the plaintiffs or their authorized agent, on the arrival of the bark at her place of unlading in California, but to be sold with the rest of the cargo by the consignee already appointed by the shippers, and the proceeds, deducting his commissions and charges, to be paid to the plaintiffs or their agent at California, it being agreed that the defendant was to pay Deshon & Co. $3600, according to his contract with them, and to secure to the plaintiffs all the benefits which he might have had from the insurance on the one-sixth of said cargo.

On the 2d of February, and a few days after the exchange-conveyances had been made, the plaintiffs received a letter from Deshon & Co., stating that the defendant had no legal title to the sixth part of the cargo of the bark, and no right to make an absolute sale of it, but offering, as a substitute for the existing agreement, to make a conveyance of the sixth part to

the defendant on his paying the $3600. The defendant thereupon gave to the plaintiffs an assignment of his contract with Deshon & Co., with whom the plaintiffs arranged that Deshon & Co., on receiving from the defendant the $3600, should give to the plaintiffs the benefit of one-sixth part of the policies. The plaintiffs thereupon, by advice of the defendant, procured insurance upon the profits of the sixth of said cargo, to the amount of $5000, at an expense of $177, — and upon the shingles at an expense of $120.

To secure a right disposal of the property at California, the plaintiffs, immediately after the acceptance of the defendant's proposal and before the conveyances were exchanged, dispatched an agent to that place with full power to act for them in the premises.

The $3600 were never paid by the defendant to Deshon & Co.

The bill charges that the defendant in truth had no boards in the Hampton, and alleges that on the 10th June, 1850, the defendant informed the plaintiffs that he never owned the boards in the Hampton, but "held them only for some fellows on board."

The Hampton arrived at California about the 5th of March, 1850, and on some day prior to the 18th of April, the master sold the shingles to pay their freight.

The plaintiffs' agent, having arrived at California, immediately inquired for the Hampton, and found that the master had, within the sixty days, discharged the cargo, and gone upon another voyage. He found the bark, and demanded, for his principals, from the master and consignee, the sixth part of her cargo, as conveyed by the defendant. But neither of them recognized such an ownership, and they refused to yield to the demand.

In the plaintiffs' efforts to secure the benefits of their trade, they incurred large expenses.

On the 9th July, 1850, they offered the defendant to return to him the conveyances received from him, and all other papers in relation to the shingles and sixth of the bark's cargo,

and to release any supposed rights the plaintiffs had thereto, and demanded a reconveyance of the hotel, its lot and furniture, and that the defendant should pay to them their reasonable expenses and damages; all of which the defendant refused to do. And the plaintiffs say they are and will be ready to deliver to him said bills of sale, papers and release, whenever he will comply with said demand, and pay them reasonable damages, expenditures and rents, and their costs in these proceedings.

This bill is founded upon the frauds, misrepresentations or mistakes of the defendant, as above mentioned, by means of which the plaintiffs allege that they were induced to make the exchanges and to incur the expenses.

The prayer of the bill is, that said exchange-conveyances may be set aside, and that the defendant be decreed to pay damages and expenses, and that such further relief be extended to the plaintiffs as equity requires.

A general demurrer was filed and joined.

Leland and *J. Shepley*, in support of the demurrer.

Eastman and *W. P. Fessenden, contra.*

TENNEY, J. — By this suit, the plaintiffs seek to rescind the contract by which conveyance of the "Thornton House" and the lots of land connected therewith in Saco, and furniture in the house, was made to the defendant, in consideration of the sale of certain lumber on the way to California for a market, and interests therein; and also for damages alleged to have been sustained by the plaintiffs. The ground on which relief is prayed, is that the plaintiffs were induced to part with their property by reason of misrepresentations made fraudulently, or by mistake, in reference to the lumber, which was supposed by the plaintiffs to be transferred to them.

A contract obtained by fraudulent representations cannot be upheld to the injury of the one imposed upon. But to take advantage of fraud in a contract, it must be shown that the other party intended a deception and was successful therein, to the damage of the party defrauded. 2 Stark. Ev. 467.

A bargain founded in a mutual mistake of the real facts,

constituting the very basis or essence of the contract, or founded upon misrepresentations of the seller, material to the bargain, and constituting the essence of it, will avoid it. *Daniel* v. *Mitchell & al.* 1 Story, 172.

But it is equally clear, that contracts, by which a man has understandingly parted with his property, where he was not the victim of deception at all, although fraudulent representations were actually made by the other party, will not be held nugatory; nor will they be so, if the fraud really perpetrated has deceived the one, who has transferred his property, if the deception has had no effect to cause damage. And if a party is imposed upon by the fraud of the other, where the former had the full means of detecting the fraud and ascertaining the truth, and neglected to inform himself of it, when he might easily have done so, courts have not interposed in behalf of the injured party. And it has been held, that if a seller of property was not in possession at the time of a sale thereof, no action will lie against him, though it be not his own, without express warranty, for there is room to question his title. 2 Stark. Ev. 471, 472; *Medina* v. *Stoughton*, 1 Salk. 210; *Morley* v. *Atlenborough*, 3 Welsby, Harlstone & Gordon, 499.

The defendant is alleged in the bill to have made certain representations in reference to a quantity of shingles laden on board the ship "Hampton," and to a part of a cargo on board the bark "Chief," both on their way to California, and supposed to be near their ports of destination, of which property, the plaintiffs took bills of sale from the defendant, containing covenants of warranty, in exchange for the property conveyed by them, including the deed of the "Thornton House" and land connected with it, with like covenants.

The bill states, that the defendant represented to the plaintiffs, that there was a contract between the several owners of the cargo, on board the "Hampton," and the owners and master of that ship, in and by which the latter relinquished their lien upon said cargo, for freight of the same, and bound themselves to receive such freight of the former in Maine or Massachusetts, a certain number of days or months after news of

the ship's arrival should have reached them; and by which contract they bound the master to wait at such place of unlading with said ship, and cargo on board, sixty days after such arrival, for the several owners of the cargo, their agents or consignees, to appear and take delivery thereof, free from any charge of demurrage, and that the shingles were under that contract, and could not be landed, nor in any way disposed of before that time.

The bill further states, that at the time the parties met to make their instruments for the exchange of the property, which had previously been agreed, the plaintiff Emery asked the defendant to show him the contract between the several owners of the cargo of the "Hampton," and the master and owners of that ship, and the defendant replied, that the contract was in the hands of Judge Redington. And upon the request of Emery that the time, in which the bargain was to be finally closed by the agreement, should be extended so as to enable him to see the contract, the defendant declined, but reaffirmed, that his previous statements and representations were true, and further said, that besides all his property at Augusta, he had fifty thousand feet of boards in the ship, besides the shingles. Whereupon Emery remarked, if there is any mistake as to the freight of what you propose to convey to us, or as to the title, you will have ample means to set the matter right in California, as soon as the vessels arrive, to which said Philbrook made no objection and was understood to assent.

The defendant is alleged in the bill to have said further to the plaintiff Emery, that he owned one-sixth part of the cargo of the bark "Chief," which portion he had purchased of one of the owners thereof, free from any charge of freight.

By the contract referred to, touching the shingles, the master and owners of the ship "Hampton," agreed to deliver them to such person and at such accessible point on the bay of San Francisco, as the shippers may direct, allowing to the shippers sixty lay-days at said point, the freight money to be paid as

fast as the lumber is delivered, the master having the right to hold the same as security for the freight. If within forty-five days from the arrival and notice to the consignee, the freight be not settled, the master is authorized to sell the lumber, enough to pay his freight, having due regard (in the place, time and mode of sale) to the best interest of the shippers. And the bill states, that on June 10, 1850, the defendant informed Emery, that he never owned the boards represented by him previously to be fifty thousand, laden on board the "Hampton," and that he "held them only for some fellows on board."

The interest of the defendant in the cargo on board the bark "Chief," was under a contract with Deshon & Co., by which the latter agree to sell to him one-sixth part of that cargo, and to deliver the same from the bark's tackles at such port as the said bark shall sell her cargo at on the North-West coast, or wherever she shall deliver her cargo for the owners. And the defendant in consideration of the agreement of Deshon & Co., agreed to pay the sum of $3600 for said sixth part of the cargo, as soon as the account of sales were rendered to said Deshon & Co., who were to have the control of the funds, and after taking out expenses of getting the funds home, and when they became due to them, they were to pay to the defendant, the balance due him; and if it amounted to less than $3600, he was to pay the deficiency.

It is averred by the plaintiffs, that they were ignorant of the contents of the contracts in relation to the shingles and the sixth part of the cargo of the bark; also of the title to the fifty thousand of boards represented to belong to the defendant in the "Hampton," until long after the conveyance of the Thornton House, the land and the furniture, and in that conveyance, they were induced solely by the representations of the defendant as contained in the premises in the bill.

It is very manifest, that the statements alleged to have been made by the defendant as the inducement to make the exchange of property, were materially different from the truth as exhibited by written documents, and the statement afterwards

made by him. But if the bill shows, that before the execution and exchange of the instruments of transfer, the plaintiffs or either of them were in any manner informed of the want of truth in the defendant's representations, they cannot be the ground for a rescindment of the whole bargain. Or if, afterwards, a knowledge of the true state of the facts was possessed by them, and they affirmed the previous bargain unconditionally, it must be treated in the same manner as though it was originally made under the same state of knowledge. Facts known to the plaintiffs when they affirmed the contract, if such was done, cannot of themselves be a reason for a rescission thereof.

The contract under which the shingles were to be carried in the "Hampton" was expressly referred to as being in the hands of a former party thereto, residing in Augusta; it does not appear, that the plaintiffs were informed where this contract was till it was too late to send for it, and complete the bargain within the time, during which the defendant was to be bound; but in his written offer, dated Jan. 19, 1850, it is stated, that "I am to pay the freight on one-sixth of the cargo in the Chief and on the shingles in the Hampton." This was entirely unnecessary, if there was to be no lien in favor of the master and owners of the vessel for the freight of the shingles, and has the appearance of a personal engagement, that the defendant would see that the lien, which might exist, should not interfere with the title to be given to the plaintiffs.

It is stated in the bill, that immediately after the acceptance in writing of the defendant's written offer to exchange and the terms of the same, and before the transfers were made, the plaintiffs dispatched their agent to California, for the express purpose that he might be there in season, and as their agent, to take possession of the shingles and the sixth part of the cargo of the "Chief." At what time the agent arrived there does not appear. But the first act attempted under his agency is represented to have been on April 25, 1850.

About the 5th day of March, 1850, the ship Hampton arrived at California, and within sixty days, the shingles were sold

for freight; and on April 17, 1850, one Bodfish wrote to the defendant informing him thereof. The time of this sale is not specified, but it must have been within forty-five days after the arrival of the shingles, according to the dates mentioned in the bill, which was the earliest time, they could be sold for the freight under the contract.

At the time the sale was made, the defendant was in nowise responsible therefor. It was a manifest violation of the contract made by the master and owners of the ship, as it really was. If the plaintiffs had fully known all its provisions, at the time the defendant's offer to them was accepted, there is no allegation, that this sale could have been defeated. It is nowhere stated, that full knowledge of the contract would have enabled the plaintiffs to have sent their agent in season to California with funds to have paid the freight and prevented the sale. It is stated that no time was lost after the parties had agreed to make the transfer, before the agent departed for California, and on inquiry for the Hampton, after his arrival, he was informed that she had discharged her cargo, and had proceeded upon another voyage. The bill does not show, that any injury has accrued to the plaintiffs, from any concealment or misstatement of the contents of the contract, so far as it respects the time, when the master and owners of the ship was authorized to sell the shingles for the payment of the freight.

It is stated, that Emery was mainly influenced to make the exchange of property, without further investigation, by the declaration of the defendant, that he had fifty thousand feet of boards in the ship "Hampton;" but it is not averred, that if he had known fully the contents of the contract in reference to the shingles, he would not have executed the contract to exchange property. Have the plaintiffs been injured by the representations respecting the boards? They were not sold to the plaintiffs either absolutely or conditionally; no contract having been made concerning them, none has failed of fulfilment. That there were that quantity of boards in the Hampton, held by the defendant, is not denied. In what man-

ner they were held for others does not appear. They may have been entirely subject to the control of the defendant, with authority to appropriate the proceeds at pleasure; and therefore to indemnify the plaintiffs on account of the lien upon the shingles for the freight from their avails. It is not stated in the bill, in what mode the boards were to be made available in California, nor how they were to be disposed of. They may have long remained unsold after their arrival. It does not appear, that the plaintiffs' agent had advices from them on the subject, or that any measures were taken to secure them or their value, if sold, for the benefit of the plaintiffs. They may have been sold, as were the shingles, for the payment of their own freight. And if done as early as the sale of the shingles, it has not been shown that there was any opportunity for the defendant's consignee to have received notice of any appropriation thereof being made for the plaintiffs' benefit, before they were disposed of. It cannot be inferred, that any misrepresentations in this respect have resulted in an injury to the plaintiffs.

When the contract between the defendant and Deshon & Co. is examined in all its parts, it cannot be contended that the former was the absolute owner of one-sixth part of the cargo of the bark "Chief."

After the parties had prepared their instruments to carry out their bargain to make the exchange of property, the schedule of the property on board the "Chief," being before them, and the plaintiff Emery being reminded by the item of insurance, that he ought to have the benefit of the insurance so far as it applied to the portion of the cargo, which was about to be sold to him, and it also occurring to him, that it was important for him, that he was secured in a fair and equal sale of the part of the cargo, in which he was to be interested, with other portions, another contract was made and executed, by which it was agreed by Emery, that the sixth part of the cargo was to be delivered, freight paid by the defendant, to Emery or his authorized agent, on the arrival of said bark at her place of unlading in California, but to be sold with the rest of the cargo

by the consignee, already appointed by the shippers, and the proceeds, deducting his commissions and charges, to be paid to Emery or his agent in California; it being agreed that the defendant was to pay Deshon & Co. $3600, according to his contract with them.

At this time, which was before the exchange of the property, Emery must have been advised, that there was a claim upon the sixth part of the cargo, in favor of Deshon & Co. If the title was absolute, or so believed by Emery, in the defendant, it was unnecessary that there should be a stipulation, that the payment of the consideration should be made by the defendant. There is the appearance, that Emery had suspicions at least of the facts as they actually existed, and was careful, that there should be an express agreement, which would render the defendant personally liable, that any incumbrance upon the property should be removed.

But on Feb. 2, 1850, Emery was fully informed by a letter from Deshon & Co. of the condition of the property and the claims thereon. Immediately after, Emery complained to the defendant of his misstatements, and at the call of Emery, the contract with Deshon & Co. was placed in his hands, and a new arrangement was thereupon made. The contract of Deshon & Co. was assigned to Emery, and the defendant agreed to pay the sum of $3600. Nothing was then said by Emery in reference to the original bargain of exchange, being invalid on account of fraud or mistake. It is clear, that Emery chose not to forego the opportunity of making profit from the transaction. He preferred to rely upon the personal obligation of the defendant to relieve the property of the claim of Deshon & Co., to an entire rescission of the whole bargain, and a reconveyance of the real estate and the furniture in the house.

By this new arrangement and the assignment of the contract of Deshon & Co., the former agreement must be regarded as ratified, and the parties to stand as they would have done, had this new agreement been part of the contract, under which the exchanges were made. No condition was annexed to the

contract; and the failure of the defendant to fulfil his promises or his covenants to pay money, cannot of itself be sufficient to authorize rescission of the conveyance made by the plaintiffs. Whatever took place in California, beyond what was contemplated by the plaintiffs and the defendant, was not by the procurement of the latter. If the master of the "Chief" or the person to whom the cargo was consigned in California, improperly declined to permit the agent of the plaintiff to take possession of a sixth part of the cargo, no blame therefor can attach to the defendant. If it was in consequence of the failure of the defendant to pay the claim of Deshon & Co.; it was the violation of a personal undertaking and cannot be a sufficient ground for rescinding the contract for fraud or mistake.

The bill must be deemed insufficient upon demurrer, and must be dismissed without costs for the defendant.

STATE *versus* WARREN.

To constitute a dwellinghouse, within the purview of the statute which imposes a penalty for burning any building within the curtilage of a dwellinghouse, there must be an actual occupation of it by some person or persons. It is not sufficient that it was designed for a dwellinghouse, and capable of being occupied for that purpose.

ON EXCEPTIONS from *Nisi Prius.*

Indictment for burning a barn, on the 18th March, 1849, within the curtilage of a dwellinghouse.

It appeared upon the trial that the house had been occupied for keeping persons infected by the small pox, but that they had all been removed from the house three or four weeks before the barn was burnt; that during that period of three or four weeks the house had not been occupied by any person, as a dwellinghouse.

The jury were instructed that, if the house was intended to be occupied as a dwellinghouse, and was capable of being so occupied on the 18th March, 1849, it must be considered a

dwellinghouse within the intention of the statute, although no persons were then in the occupation of it. Exceptions were filed to that instruction.

N. D. Appleton, for the defendant.

The inquiry should not have been, what the house was designed for, or was capable of being, but whether it was *then* a dwellinghouse.

To constitute a building a dwellinghouse, it must be a habitation for man, and usually occupied by some person lodging in it at night, though such occupant may for a time be absent, leaving furniture therein, with an intention of returning. 4 Black. Com. 224; 1 Leech, 185; 2 Russell, 914, 922.

Under an intimation from the Court that the instructions were erroneous, and could not be sustained, the Attorney General entered a *nol. pros.*, and the defendant was discharged.

LYMAN *& al. versus* PARKER AND MASON *as his trustee.*

In the process of foreign attachment, when the party summoned as trustee has pleaded that he has no goods, &c., unless it should be otherwise adjudged upon his disclosure, his refusal to answer an interrogatory, (the Court having neither ordered, nor been called upon to order, that he should answer it,) will not charge him as trustee, unless the question have a tendency to elicit some fact, relative to the issue.

ON EXCEPTIONS from the District Court, COLE, J.

Mason pleaded that he had in his hands and possession no goods, effects or credits of the defendant, unless it should be otherwise adjudged upon his answers to the interrogatories which might be put to him, and therefore submitted himself to examination upon oath.

The interrogatories were thirty-six in number. A part of them he declined to answer. The Court neither gave, nor was called upon to give, any order that he should answer them.

Being charged as trustee he excepted. The decision con-

sisted chiefly in comparing and reconciling the facts stated in the disclosure. The only *legal question* decided, may be gathered from the following extract of the opinion, read by

TENNEY, J. — Certain questions were put to Mason, while he was making his disclosure, which he declined answering, under the advice of counsel. It is not perceived that the questions had any legitimate tendency to elicit facts relevant to the question, whether Mason was trustee or not. There was no order of Court that he should answer those questions, nor was any such order sought by the plaintiffs.

Exceptions sustained.

Trustee discharged.

D. Goodenow, for the plaintiffs.

N. D. Appleton, for the supposed trustee.

PALMER *& als. versus* HORACE A. PINKHAM & JOHN SAYWARD.

A witness will not be permitted to testify what course of action he should have taken, if certain specified facts had not occurred.

A party is responsible for the ideas which his language was suited to convey, and did convey to the mind of another person, if such person has thereby been led to perform, or omit to perform, any act in relation to his interest.

ON EXCEPTIONS from *nisi prius*, SHEPLEY, C. J., presiding.

The plaintiffs are merchants in Boston. The defendants reside in York county in this State. Pinkham represented to the plaintiffs, in writing, that he was in copartnership with the defendant, Sayward, under the name of Horace A. Pinkham & Co., and wished to purchase goods for the company. The plaintiffs furnished him with goods, and charged them to Horace A. Pinkham & Co.

This suit is brought to recover for those goods. Pinkham was defaulted; Sayward defends and denies the alleged copartnership.

The case shows the following facts: —

Soon after giving the credit, the plaintiffs having some distrusts as to the existence of a copartnership between the defendants, directed Mr. Appleton, an attorney at law, residing in the same county with the defendants, to ascertain how the fact was, and to take care of the plaintiffs' rights.

Mr. Appleton testified *that* he went to the town where the defendants resided; *that* he took with him an officer and was prepared to make an attachment; *that* he called first on Pinkham, who affirmed that the copartnership existed; *that* he afterwards called on Sayward, and stated to him the object of his visit, and inquired of him if he was a partner with Pinkham; *that* Sayward answered "yes," and said the plaintiffs would have no trouble about their debt, and that it would be paid, and then went into some exposition of his property affairs; *that* he, Mr. Appleton, then went away without making any attachment.

Some witnesses, for the defendants, testified they were present at the conversation between Sayward and Mr. Appleton, and they gave a different version of it. Mr. Appleton was asked by the plaintiff the following question: — "whether or not should you have attached the property in the store, had it not been for Sayward's statement that he was a partner?" The defendant objected to the question, and it was excluded by the Court. The verdict was for the defendant, and the plaintiffs excepted to that exclusion.

There was also a notice for a new trial, (upon which evidence was introduced,) upon the alleged grounds, —

1st. Because the verdict is against law and against the direction of the Court.

2d. Because the verdict for the defendant, John Sayward, was not only without any sufficient evidence to support it, but against the uncontradicted evidence, and most manifestly against the weight of evidence.

3d. Because justice has not been done between the parties.

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

Clifford and *D. Goodenow*, for the defendant Sayward.

SHEPLEY, C. J. — The defendant Pinkham appears to have been a trader in the town of Waterborough and to have failed in business there during the year 1847.

In the month of October, 1848, he appears to have applied to the plaintiffs in Boston, to purchase goods, representing to them, that the other defendant, John Sayward, was a partner with him, doing business under the name of Horace A. Pinkham & Co.

The defendant Pinkham had been defaulted. The defendant Sayward at the trial denied, that he had ever been a partner of Pinkham, that he had ever authorized him to represent him to be a partner, or that he had ever held himself out to be a partner.

On or about the 24th of October, 1848, the plaintiffs sold goods to Pinkham on credit, charging them to Horace A. Pinkham & Co. Under date of November 17, 1848, they addressed a letter to an attorney, Mr. Appleton of Alfred, enclosing a copy of the representation made to them by Pinkham, and requesting him, if it were found to be untrue, to call for payment.

Mr. Appleton in his testimony stated, that their letter was received on Saturday evening; that on Tuesday following he called upon Pinkham and was assured by him, that the representation was correct; that he desired him to send for the defendant, while he proceeded further on business; that on his return he saw the defendant, stated to him the object of his visit, and inquired of him if he was a partner of Pinkham, and received an answer, that he was. That he also made certain inquiries respecting his property and debts, which were answered; that he returned without making any attachment of property, and wrote an answer to the plaintiffs on November 21, 1848, which was produced and received as testimony to show that the plaintiffs afterwards sold other goods to Pinkham, relying upon the representations made by the defendant to Mr. Appleton, and by him communicated to them.

The counsel for the plaintiffs propose to inquire of Mr. Appleton, "whether or not should you have attached the pro-

perty in the store, had it not been for Sayward's statement that he was a partner?" This they were not permitted to do, and their right to do so is presented by a bill of exceptions.

The testimony proposed to be introduced would have presented no fact for the consideration of the jury. After the lapse of nearly two years, the witness could only express an opinion respecting what he should have done under circumstances, which did not at the time call upon him to come to any such conclusion, or to form any such opinion. Persons' rights would be very insecure, if they were to depend not upon facts or declarations, but upon opinions or conjectures of a witness respecting what he should have done under other circumstances than those actually presented for his consideration. The rights of the parties could not depend upon any undisclosed purposes or intentions of the witness. The proposed inquiry was properly excluded.

The case has also been presented under a motion to have the verdict for the defendant set aside as having been found against evidence or the weight of evidence.

There were three witnesses introduced by the defendant, who testified, that they heard the conversation between Mr. Appleton and the defendant. They stated positively, that they heard the commencement of that conversation, and the language used by Mr. Appleton, when he inquired of the defendant, whether he was a partner, and the language used by the defendant in answer.

Whatever may be the impression of the court respecting their perfect accuracy, there can be no doubt, that the jury were the proper judges of it, and that they cannot be regarded as acting under any prejudice or improper influence, if they concluded, that the testimony of those witnesses was worthy of credit.

Those witnesses stated, that the first question respecting this business put by Mr. Appleton to the defendant, with some change in the collocation of the words, was, "are you in company in the store with Pinkham?" and that the answer was "yes."

It is admitted, that the jury were fully authorized from the testimony to find, that the defendant had never in fact been a partner with Pinkham.

Their finding upon the point, whether he had held himself out to Mr. Appleton to be a partner, can only be supported upon the ground, admitting the testimony of the defendant's witnesses to have been correct, that he misapprehended the meaning of the question, supposing it to refer to the interest of Pinkham and himself in the store or building in which the business was transacted.

The facts out of which this alleged misapprehension arose, appear to be these: —

Joseph Sayward, a brother of the defendant, being the owner of half an acre of land with a house, barn and store upon it, conveyed it in mortgage to William M. Scribner, on August 14, 1846. Scribner, on the 22d day of the same month, assigned that mortgage to Abiel Hall, who, on Dec. 27, 1847, assigned the same to Cyrus K. Robinson, who had, on Dec. 4, 1847, purchased at auction the right in equity of Joseph Sayward to redeem the estate.

Pinkham had purchased of Joseph Sayward his right to redeem the estate from that sale and from the mortgage, and made arrangement with the defendant Sayward to have him purchase Robinson's right to the mortgage and to the equity of redemption, and convey them to him upon certain terms. The defendant Sayward, on August 29, 1848, received a conveyance from Robinson of his right, title and interest, and on the fourteenth day of September following took an assignment from Robinson of the mortgage. The defendant Sayward, therefore, when he had the conversation with Mr. Appleton, was the owner of the estate subject to Pinkham's right to redeem it. They had no joint interest in it; each owned separately.

The proper signification of the word "company," when applied to persons engaged in trade, denotes those united for the same purpose or in a joint concern. It is so commonly used in this sense or as indicating a partnership, that few per-

sons accustomed to purchase goods at shops, where they are sold by retail, would misapprehend, that such was its meaning. The defendant must be supposed to have understood its meaning as used in common parlance. If he could have supposed, that the inquiry had reference to the store only and not to the business transacted in it, he could not have answered correctly, that he was in company in the store with Pinkham, because he must have known, that they had no joint or common interest in it.

The defendant must be responsible for the ideas, which his language was suited to convey to other minds.

If there was any thing equivocal in it, and other persons were fairly entitled to receive it as making known to them, that he was a partner of Pinkham in the business transacted in that store, he cannot be relieved from the consequences resulting from his own language fairly interpreted.

The jury would be authorized to find that he used only a single affirmative word, but he must be regarded as understanding the question to convey the ideas, which would be commonly communicated by it; or, in other words, as understanding the language in the sense, in which it would be generally understood.

When the case is thus presented, it is difficult to believe, that the jury could have found a verdict for the defendant, without being unduly biased by the consideration, that a different verdict would deprive the defendant of a considerable portion of his property without any valuable consideration received therefor; or that they did not act under some other improper influence or prejudice.

Verdict set aside and new trial granted.

Mary Pike, *in equity, versus* Abner Collins, Pelatiah Moore and John Pike.

A bond given to husband and wife for their maintenance during each of their lives, belongs to the wife, if she survive the husband, unless reduced to possession by him.

To reduce it to possession, the husband must do some act, indicating an appropriation of it to himself or disaffirming her right.

The recovery of a judgment by him in the name of both, upon such a bond, without taking out execution, shows a disposition not to appropriate it to himself.

In a mortgage made to the husband alone to secure such a bond, the wife has a sustainable interest.

After the death of the husband and a foreclosure of the mortgage by his administrator, the administrator and those holding by purchase under him, will hold the land, charged with the maintenance of the widow, in proportion to the value of their respective parts. The liability of such holders commences from the time of their respective purchases.

A tenant of one who holds land subject to such a charge, is properly made a party to a bill brought by the widow to enforce her claim, for the decree may be such as to terminate his tenancy.

In equity, the husband may be trustee of the wife, and the trust in his hands may be enforced, as if he were a stranger, and his representatives are subject to the same liability.

Where a registered mortgage deed of land mentions the bond, (which it was intended to secure,) although without specifying its contents, subsequent purchasers are chargeable with notice of its provisions.

The material facts, upon which the plaintiff's claim rests, are in substance as follows: —

James Pike, owning a farm, in 1831 conveyed it to his son, Dominicus Pike, and, in part consideration therefor, received from Dominicus a bond to *himself and his wife*, this plaintiff, in the penal sum of $1000, conditioned to maintain them and each of them during their lives; also a mortgage of the land to *himself*, conditioned that the mortgager should pay to said James $1000, or otherwise fulfil and keep the covenants in said bond. This mortgage was recorded March 8, 1847. Before it was recorded, two small parts of the farm were set off on executions against Dominicus; one of five acres to said Moore, and the other of six and a half acres to one Warren, said creditors then having no knowledge of the mortgage.

In February, 1838, James and his wife recovered judgment against Dominicus upon the bond, for $100 damages with costs. James died in December, 1838, and Daniel Smith administered upon his estate. Dominicus assigned to William Pike his right of redeeming the farm, excepting the two pieces which had been set off on execution.

In an action upon the mortgage, brought by James' administrator, against William, a conditional judgment was recovered by assent of this plaintiff, for $66,67, due to James' estate, and $83,33, due to this plaintiff. Upon that judgment the mortgage was foreclosed in 1844.

The administrator, by leave of Probate Court, in February, 1847, conveyed the right of his intestate, in the residue of the farm, to James Pike, a son of the intestate, for $43 in cash, and a promissory note of $107, signed by the purchaser and one John Merrill. Said James, jr., then, without consideration, conveyed his right to Merrill, who, at the request of said James, jr., mortgaged the same to said administrator, to secure payment of the $107 note, and then quitclaimed his remaining right to Eunice, the wife of said James, jr., who paid nothing therefor. Merrill and James, jr. and Eunice, all had knowledge of the mortgage. James, jr. and Eunice went into occupation of a large part of the farm, and in 1849 paid the mortgage and caused it to be discharged.

John Pike, one of the defendants, in Sept. 1849, well knowing of the first mentioned mortgage, took a conveyance, without any consideration, from James, jr. and Eunice of two small parcels of the farm, comprising about eight acres; and afterwards conveyed the same to Royal B. Hanson. He bought them by request of this plaintiff, and has paid her for the same.

Afterwards in the same Sept. (1849,) Collins, one of the defendants, through the agency of Moore, the other defendant, (both of them having knowledge of the first named mortgage,) procured from James, jr. and Eunice a conveyance of her rights. Moore occupies as tenant to Collins.

The foregoing are to be considered as the material facts.

The bill, however, alleges many other things, and imputes the usual quantum of fraudulent intentions.

It prays that Collins and Moore be decreed to convey to the plaintiff whatever rights they acquired by the conveyance from James Pike, jr. and Eunice Pike ; and to surrender to her the residue of the farm, and to pay reasonable rents and costs, or that the farm be decreed chargeable with all the sums due to the plaintiff and for her future support, and for further relief.

Emery, for the plaintiff.

Bourne and *Chisholm*, for the defendants.

I. The plaintiff's rights, if she have any, are attainable at law.

Of this suit at equity, the Court has therefore no jurisdiction.

1st. Assumpsit lies to enforce a trust, chargeable on land, and running with it. *Swazey* v. *Little*, 7 Pick. 297 ; *Ewer* v. *Jones*, 2 L'd Raym. 937 ; *Felch* v. *Taylor*, 13 Pick. 133 ; *Hinkly* v. *Fowler*, 15 Maine, 289.

2d. She charges an ejectment. If Collins had no title, trespass for invading her possession would lie.

3d. Writ of entry lies against a fraudulent purchaser, by one seized under an equitable title.

If the plaintiff may not sue upon her own possession, the law provides for an action by the administrator. *Holmes* v. *Fisher*, 13 N. H. 9 ; *Sanders* v. *Filley*, 554 ; *Dewey* v. *Van Deusen*, 4 Pick. 19 ; *Luques* v. *Thompson*, 26 Maine, 514.

It is, in such case, of no importance whether the estate be interested or not. 18 Maine, 227.

II. But if the Court has jurisdiction, the suit must fail, —

1st. For want of a previous demand of the support required. 13 N. H. 9 ; 13 Pick. 299 ; 26 Maine, 514 ; Ann. Dig. 1848, 280, 288.

2d. The suit should have been by the administrator or jointly by him and the plaintiff. 13 N. H. 9 ; 16 Mass. 335 ; 15 Mass. 290.

3d. The condition of the mortgage was to pay James Pike $1000, or to support him and the plaintiff.

The $1000 were paid by the foreclosure, for the bill alleges the farm to have been worth more than that sum. By the foreclosure the land became the mortgagers, as if no conveyance had been made. The bond was merged in the judgment, and therefore has no longer any operative existence. *Bubier* v. *Bubier*, 24 Maine, 42.

The plaintiff assented to the judgment, and is estopped by it.

III. If plaintiff have any right, it must result from a wrongful disposition of the land, after the extinction of the mortgage.

But the mortgage was assets, in the administrator's hands, and he sold the rights under it, as he was bound to do, for the payment of debts.

IV. The plaintiff has no equities. She was not the meritorious cause. She furnished nothing, she relinquished nothing, not even her right of dower. *Chapman* v. *Emery*, Cowper, 280.

The law of dower is equity itself. To enlarge it would be inequity. She is now entitled to dower.

V. The bill alleges that the administrator agreed to hold the land for the plaintiff. If so, it was but his personal contract. To that she must resort. 7 Pick. 1; 2 Peere Williams, 148.

VI. The land was sold at auction under license, for payment of debts, without any alleged fraud or collusion. Such conveyances confer valid title. 1 Story on Eq. § 422; 2 Story on Eq. § 1016; 2 Peere Williams, 148; 5 Howard, 233.

VII. The claim is by mortgagee against mortgager. But no process in equity lies to *foreclose*. As applicable to this case, the equity power of the Court extends only to secure the right of *redeeming* by one in the relation of mortgager.

The case shows no *trust*. It is but the case of an ordinary mortgage. 23 Maine, 48 and 174; 25 Maine, 341; 2 Story on Eq. 279, in notes; 4 Met. 586; 28 Maine, 363.

The mortgagee could have acquired an absolute title by foreclosure. How could there then have been a trust. The

rights were wholly at law. If she ever had a right to redeem her husband's interest in the mortgage, her right was subsequent to his, and was lost by the foreclosure.

But if she now has such a right, she cannot maintain this bill, because no tender has been made, and the party standing in the relation of mortgager, has not refused to account.

The stipulations of the first mortgage were to the husband, and, so far as her maintenance was concerned, were for his benefit.

VIII. A specific performance or reconveyance cannot be decreed, when a part of the consideration has been paid. *Marston* v. *Humphrey*, 24 Maine, 513. The bill alleges that the bond was but a part of the consideration for the first conveyance. And even the bond itself was paid by the foreclosure. The payment also of the $150 to the administrator would forbid a decree of reconveyance. The bill fails to disclose what constituted the balance of the consideration. How can the Court adjust the terms of a decree?

IX. The bill is defective for the want of proper parties. James Pike, jr. and Eunice, his wife, should be parties, for they have been receivers. So also Daniel Smith, the administrator, should be joined. He being dead, his administrator should be summoned in. John Pike should be a party, that he may be decreed as to his proportion of the maintenance. Dominicus should be joined, for it does not appear that he has fully performed.

WELLS, J. — The plaintiff alleges in her bill, that in 1831, her husband, James Pike, conveyed his farm to his son Dominicus, and in part consideration for the conveyance, took from Dominicus a bond to himself and the plaintiff for their support and maintenance, during their lives and the life of each of them, and also a mortgage to himself of the farm, to secure the performance of the conditions of the bond. After the death of the husband, his administrator *de bonis non* recovered judgment against the grantee of Dominicus for the farm, the conditions of the mortgage not having been per-

formed. The mortgage appears to have been foreclosed by the administrator, who, by virtue of a license from the judge of probate, sold the same as the estate of the husband. These facts are established by the proof.

The condition of the mortgage is in substance, that Dominicus shall pay to James one thousand dollars, or "otherwise fulfil and keep the covenants in a certain bond given by the said Dominicus to the said James and his wife, then this deed and also a certain bond, bearing even date with these presents, given by the said Dominicus to the said James and his wife, to pay the same sum aforesaid, at the time aforesaid, shall both be void," &c.

One of the defendants claims title under the sale of the administrator.

The plaintiff contends that the title to the farm is held in trust for her support.

The bond to the husband and wife would belong to the survivor. *Draper* v. *Jackson*, 16 Mass. 480. And although it was given during coverture, it would survive unless reduced into possession by the husband. *Hayward* v. *Hayward*, 20 Pick. 517. To reduce it to possession, the husband must do some act indicating an appropriation of it to his own use, or disaffirming the right of his wife. *Stanwood* v. *Stanwood*, 17 Mass. 57; *Wedman* v. *Wedman*, 9 Ves. 174. A judgment in the name of both, without suing out execution, shows a disposition not to appropriate it to himself. 1 Roper's Husband and Wife, 204 and 208. The husband brought an action on the bond in the name of himself and wife, but it is not stated that an execution was taken out, and if it had been, it would only indicate his intention to take the damages, which had then accrued, and could not be construed as an expression of a purpose to divest her of the residue, which might subsequently arise upon future breaches. As the husband did not discharge the bond, as he might have done, nor reduce it into his possession in a legal sense, it must be considered as the property of the wife.

The mortgage was made to the husband alone, and the con-

dition could have been performed by the payment of a thousand dollars to him, or the performance of the condition of the bond by supporting them. Neither of the conditions was performed by the mortgager. And in the action upon the mortgage, the conditional judgment was rendered for the damages due for not rendering the support. Did the administrator hold the mortgage in equity for the plaintiff? He must be considered as holding it for the same purposes as the husband did, after the recovery of the judgment in his name. The penal sum of the bond is a thousand dollars, and the condition of the mortgage as to the payment of the same sum, appears to have been intended to leave it optional with the mortgager to pay the penalty of the bond, or to render the support. The husband then held the mortgage for the joint benefit of himself and wife, to secure the payment of the penalty to both or the support of both. If the mortgage had been made to the husband and wife, according to the case of *Draper* v. *Jackson*, upon the death of the husband, the wife would have taken it by survivorship. It was made to him, but with the evident purpose to be held for their joint benefit. The debt is the principal thing, and the mortgage is but incident to it, and in equity the mortgage belongs to the owner of the debt. *Johnson* v. *Candage*, 31 Maine, 28. Where a debt is due to two persons, and a mortgage is made to one of them to secure it, and the estate is foreclosed, it would not accord with equity, that he should hold the whole estate, and he would be considered as holding in trust the share of his co-creditor. In law the husband and wife are treated for most purposes as one person, but in equity the husband may be the trustee of the wife, and the trust be enforced in the same manner as if he were a mere stranger. Story's Eq. Juris. sect. 1367 and 1380. The husband must therefore be regarded as holding the legal estate for his own benefit and in trust for the security of the interests of his wife under the bond. The administrator by the recovery of seizin and possession stands in the place of the mortgagee, and holds the estate also in trust for the plaintiff, and the person to whom the administrator has conveyed,

and his grantees, having a knowledge of the trust, hold it in the same manner.

There is no evidence that the husband was in debt, or that he contemplated any fraud in relation to future creditors, when he conveyed his farm to Dominicus, and took from him the bond and mortgage. His death took place about seven years after the conveyance. His estate was represented insolvent and the avails of the land were needed for the payment of debts, but the debts must have been contracted long after the conveyance was made. They do not appear to have existed at that time. Such a conveyance cannot be impeached as fraudulent by subsequent creditors. *Usher* v. *Hazeltine*, 5 Greenl. 471; *Bennett* v. *Bedford Bank*, 11 Mass. 421; *Parker* v. *Nichols*, 7 Pick. 111; *Parkman* v. *Welch*, 19 Pick. 231. The husband, not being then in debt and not intending any fraud, had the right to make provision for his wife. Nor does the arrangement appear to be without any consideration on her part. She was entitled to dower in the premises conveyed, but relying upon the provision made for her, she has not enforced an assignment of it.

The bond to the husband and wife is mentioned in the condition of the mortgage, which was recorded March 8, 1847. And such registration operates as constructive notice upon all subsequent purchasers of any estate, legal or equitable, in the the same property, according to the American doctrine in cases in equity. Story's Eq. Jur. § 403. And the provision, made by our statute, c. 91, § 33, in relation to instruments in writing creating or declaring trusts, is, that such recording shall be equal to actual notice. The purchasers must be regarded then as having notice of the bond, and although the whole of it was not inserted in the condition of the mortgage, there was enough to give notice of its existence, and to put purchasers upon inquiry in relation to it. Thus notice of a lease will be notice of its contents. Story's Eq. Jur. § 400. It also appears by the proof, that John Merrill, James, Eunice B. and John Pike and Peletiah Moore had actual knowledge of the condition of the bond and mortgage, and that Moore acted as

the agent of Collins in procuring the purchase. Notice to the agent is constructive notice to the principal. It is not stated when the five acres were taken by the levy of Moore, but it was before the mortgage was recorded, and it does not appear, that he had any knowledge of its existence at that time. He will therefore hold the part levied upon unaffected by the mortgage. And the part taken by the levy of Johnson Warren is in the same condition.

It was the purpose of the husband, that the land should be holden for her support, not that she should have the land. If she should take the mortgage by survivorship, she would have the whole estate, which it does not appear to have been his intention, to give to her. Had the condition of the mortgage been to pay a sum of money, she would have been entitled to the money or the land after his decease. She has now a right to her support or to the land, and if she obtains the former it is all she was to have. The land might be worth much more than her support. The fact, that the mortgage was made to himself alone, indicates his purpose of retaining the legal estate under his own control, and in case of his death, that it should pass to his representatives, who might hold it by maintaining her. She comes into a court of equity and asks its aid, and it is not equitable, that she should have any more out of this estate of her husband than what he has bestowed upon her. His bounty was limited to her maintenance, and that she is entitled to receive out of the estate.

It is contended, that Smith, the administrator, Eunice, James, John and Dominicus Pike should be made parties to the bill. But neither of them have any interest in the premises, and cannot be affected by the decree. All the interest, which the three first named had in the premises has been conveyed to John Pike and Collins. It is alleged in the bill and admitted in the answers of Moore and Collins, that the estate has been foreclosed, and if so, neither Dominicus, the mortgager, nor William, his grantee, has any interest in it. Nor has John any interest in it. His interest has been conveyed to Royal B.

Hanson. The present holders of the estate have no community of interest with the past holders of it.

Hanson claims his title under John, who says in his deposition, that he purchased of James and Eunice by the request of his mother, and that he has paid her for that portion of the land purchased by him. If he has satisfied her for her interest in it, there could be no just reason why the land conveyed to him, and by him to Hanson should be subject to any claim on her part, and as Hanson would not be bound to contribute to her support, there is no necessity for making him a party to the bill.

The defendant Collins having a part of the estate, which is charged with the support of the plaintiff, is bound to furnish it according to the requirements of the bond. And his obligation to do so commences from the time when he took his title. She will be entitled to the damages in arrear from him in proportion to the value of his interest in the land held by him, and he will be liable in the same proportion for the future performance of the conditions of the bond. Whatever sums have been paid by him towards her maintenance will be deducted from the damages due to her, and he will be bound to pay interest on the balance.

The plaintiff claims to hold the defendant Moore as a party to the bill on the ground of fraud, and that he is the tenant to Collins. But as Collins had a right to purchase the estate, there could be no fraud in Moore in acting as his agent in making the purchase. And the claim for the maintenance of the plaintiff exists against the person holding the title, and not against a mere tenant or occupant under him. But as it might become necessary to deprive him of his term, to secure the support of the plaintiff, in case Collins should be unable to furnish his proportion, he was properly made a party to the bill, and as he had notice of the plaintiff's title, his interest under the lease must be subject to the rights of the plaintiff.

A master must be appointed to determine what proportion

of the support must be paid by Collins for the future, and also the amount of the past damages.

SMITH, *plaintiff in error*, *versus* THE STATE.

When death ensues by the act of one in the pursuit of an unlawful design, without intent to kill, it is murder or manslaughter, as the intended offence was felony or a misdemeanor.

Any crime, *liable* to be punished in the State prison, is a felony.

The using of any means, with intent to *destroy* the child of which a female is pregnant, and the *destroying* of the child thereby before its birth, unless done to preserve the life of the mother, constitute a *felony*.

If by the use of such means and with such intent, the death of the mother be occasioned, it is *murder*.

The using of means, with intent to procure the *miscarriage* of a pregnant female, and the procuring of the *miscarriage* thereby, unless done to preserve the life of the mother, is a *misdemeanor*.

If, by the use of such means and with such intent, the death of the mother be occasioned, it is *manslaughter*.

If, upon such a charge in an indictment, a verdict be rendered of murder, it will be reversed for error.

To procure an abortion, as to a female, pregnant *but not quick* with child, was not, at the common law, an offence, if done with her consent.

By our statute, the procuring of an abortion is an offence, whether the child had quickened or not, and whether with or without the consent of the mother.

WRIT OF ERROR.

On a former occasion, Smith, the plaintiff in error, was tried upon an indictment for the murder of one Beringera D. Caswell. The indictment contained four counts. Upon the third court he was convicted of murder in the second degree, and judgment was rendered that he suffer confinement at hard labor for life. As to the three other counts, there was no verdict. 32 Maine, 369.

To reverse that judgment, this writ of error is brought. The alleged causes for the reversal were twenty-two in number. Three of them only, viz: the 17th, 18th and 19th, need be adverted to. They allege error in the third count of the

indictment. That count charged substantially, *that* Smith feloniously performed a described act upon said Beringera, she being pregnant, with a felonious intent to cause her to miscarry and to bring forth her child; *that*, by means of said act, she did bring forth said child dead; *that*, by the said act, said Beringera sickened and died; and *that*, in manner and form aforesaid, the said Smith, by his malice aforethought, murdered her.

The said 17th, 18th and 19th alleged causes for reversal were, in substance, that said count did not present a charge of murder, but a charge of manslaughter only, and that therefore the verdict and judgment thereon, were erroneous.

This became the only material question discussed in the opinion of the Court. The arguments were elaborate and able, extending to all the alleged grounds of reversal. But so much of them only, as bears upon the point, discussed in the opinion, can here be presented.

Clifford, for the plaintiff in error.

It is a rule of the common law, 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, but without any intention to kill, this killing will be either murder or manslaughter, according as the *intended* offence is a felony, or only a misdemeanor. *State* v. *Smith*, 32 Maine, 369.

In this case, it is not alleged that there was any design to kill; the count is framed upon the basis that the intent of Smith was, not to kill, but to commit a subordinate offence, that of causing the deceased to miscarry.

When a statute describes a particular intent, as an element of a crime, the indictment must follow the exact language of the statute. *People* v. *Enoch*, 13 Wend. 173; *People* v. *Allen*, 5 Denio, 76; *Comm.* v. *Tuck*, 20 Pick. 362; 1 Stark. on Plead. 219, 222–3–4; *U. S.* v. *Gooding*, 12 Wheat. 476; Archb. on Plead. 20; 1 Chitty Co. Plead. 231, (margin 289;) 3 Chitty's Cr. L. 722; *People* v. *Lohman*, 2 Barb. S. C. R. 216; same case, 1 Comstock, 379; *Rex* v. *Neville*, 1 Mod.

295; *Rex* v. *Alsop*, Holt, 405; 3 Dyer, 363, Pl. 25; *Rex* v. *Tucker*, 1 L'd Raym. 442; *U. S.* v. *Mills*, 7 Pet. 142; 1 Chitty's Cr. L., 280, (4th ed.;) *Brown* v. *Comm.* 8 Mass. 65; *Comm.* v. *Maxwell*, 2 Mass. 131; *Comm.* v. *Putnam*, 1 Pick. 139; *Comm.* v. *Balkam*, 3 Pick. 283; *Updegraff* v. *Comm.* 6 S. & R. 5.

The subordinate offence charged is but a misdemeanor, and therefore the principal offence cannot be murder. Davis' Prec. forms 2 & 3; 3 Chitty's Cr. L. 556, (Margin, 798;) *Comm.* v. *Parker*, 9 Metc. 263; *Comm.* v. *Banks*, 9 Mass. 387; *People* v. *Jackson*, 3 Hill, 92; 1 Black. Comm. 129; Foster's Cr. L. 268; 3 Chit. Cr. L. 729, (4th ed.;) *People* v. *Enoch*, 13 Wend. 175; Wharton's Prec. of Indict. 109, n. 5, and forms 108 to 113; Dav. Prec. p. 34; 1 East's P. C. chap. 5, sect. 17—2; 1 Russ. on Cr. & M. 522, chap. 5; 3 Chitty's C. L. 798, forms of C. L. Court; 1 Bouvier's Dic., Abortion.

Under the 17th, 18th and 19th causes assigned, we contend: —

1. The offence charged being manslaughter only, the verdict is illegal.

2. The judgment being for murder, though but in the 2d degree, cannot be sustained.

3. The sentence exceeds the *maximum* of the punishment of manslaughter, and therefore is erroneous.

Tallman, *Attorney General*, for the State.

The counsel has contended, that as the offence charged is a statute offence, it must be alleged in the exact words of the statute. Whatever may have been the reason for such a rule in England, it is not the law in this country. The only sensible doctrine is that, if the allegation bring the offence within the statute "substantially," it is sufficient. That is the doctrine held in this State. *State* v. *Temple*, 12 Maine, 214.

But homicide may be murder at the common law, independent of any statute. And the reason for using the very words of the statute therefore fails. If the allegation be sufficient in substance to bring the offence within the statute, nothing more can be necessary or useful. It is, however, said the pre-

cedents are otherwise. What then? Do precedents make the law, and who makes the precedents? Cannot the form of the precedents be changed, or new ones added? Or must they alone remain unalterable while all else is continually changing? And were they always so? Did they always make the law? If not, at what time did their authority commence?

It is true the precedents will show what forms have been sustained, but will not show that all others are necessarily improper and illegal.

The precedents, however, are not uniform.

The third count directly states that the miscarriage, caused by the prisoner, was the means of her death, and that in that manner the prisoner feloniously, wilfully and of his malice aforethought, did kill and murder the deceased.

Neither is the objection that the count does not follow the words of the statute in describing the subordinate offence, fatal to the indictment.

It charges the deceased was quick with child, and being so, a miscarriage was produced by the prisoner and the child brought forth dead; consequently he must have destroyed the child before its birth, and the intent so to do must be presumed and need not be averred, — 1 Chitty's Cr. Law, 233; Russ. and Ry. C. C. 445, — and therefore the offence is brought substantially within the statute, which is all that is now required.

The case of *People* v. *Lohman*, 2 Barb. S. C. 216, and 1 Comstock, 379, was an indictment for abortion, and does not apply where the subordinate offence is set out by way of inducement. There so much strictness is not required as in an indictment for the commission of the subordinate offence. Wharton's Precedents, 54.

This count, however, if not good under our statute, is sufficient at common law. It describes an illegal act, performed by the prisoner, which resulted in the death of the deceased — and an act of such character as renders the homicide murder.

It is not correct to say, that the act, resulting in death, must be a felony, in order to render the killing murder. Ros-

coe's Cr. Ev. (2d Ed.) 653. If an action, unlawful in itself, be done deliberately and with intention of mischief, and death ensue against or beside the original intention of the party, it will be murder. Foster, 261.

An act, the probable consequence of which may be and eventually is death, may be murder, though no killing may have been primarily intended. 1 Russell Cr. 482; 3 Chitty's Cr. L. 729.

More especially if it happen in the execution of an unlawful design, which, if not a felony, is of so desperate a character, that it must ordinarily be attended with great hazard to life. *United States* v. *Ross*, 1 Gall. 629.

Man commits murder, when he does an unlawful act, in a case so circumstanced, that he may expect death to ensue, and be the effect of it, and death does so ensue. 7 Dane, 126, ch. 212, art. 3, § 20.

It is not necessary therefore, that the unlawful act would have been a felony if perfected, in order to render the killing consequent on that act, murder. *People* v. *Rector*, 19 Wend. 560.

This disposes of so much of the argument of counsel, which endeavors to reduce this offence to manslaughter, because the original act was not a felony; that is an immaterial point in this case.

Thus death caused by attempting abortion is murder. 1 Hale P. C. 429; 1 Russ. Cr. 454; 9 Mass. 387; 9 Metc. 101; *Comm.* v. *York*, ib. 265; *Comm.* v. *Parker*, 2 Ashmead, 227; *Comm.* v. *Keeper of the prison*, Foster, 261.

The subordinate offence, then, if sufficiently described, does warrant the verdict, that the prisoner was guilty of murder; and that it is described with sufficient certainty, I have already shown.

The only remaining objection is, that this count describes murder in the second degree, and therefore in violation of the statute.

The degrees of murder are to be found by the jury, not from the allegations in the indictment, but from the facts prov-

ed at the trial. If there was evidence of express malice, then there would be murder in the first degree; the act would be described in the same manner, though the circumstances in the testimony would be different.

Is there then any thing in this count that would prevent showing at the trial any facts from which the jury might infer express malice in the prisoner? that an intention on his part existed to take the life of the deceased? Surely not; what but the facts on trial governed the jury in their verdict?

But if such a verdict could not be given on this count, is it necessarily illegal?

How can a count be drawn, where death occasioned by procuring abortion, when death was not originally intended? The facts must be set out, or those facts perhaps, would of themselves, show the offence to be murder of the second degree.

Is there therefore no punishment for such an act? Could such have been the intention of the legislature? Certainly not, but only that the jury should measure the degree of crime, and should certify by their verdict, what that degree was.

The crime of murder is one, but the punishment of its degrees, are graduated by its attending circumstances. Is the prisoner injured because the indictment is formed in the mildest degree? Is that any objection to the indictment?

It is common practice thus to draft indictments. If this count was then in the second degree, I apprehend that would not be an objection to it.

I have thus endeavored somewhat briefly to show, —

1st, That the verdict of the jury was correct.

2d, And that there is no error in the indictment.

3d, That the subordinate offence is sufficiently within the statute, but if not, —

4th, It is good at common law.

5th, That the third count is sufficient in form and substance.

Tenney, J. — The record shows that the jury found a ver-

dict of guilty of murder in the second degree against the prisoner, upon the third count of the indictment. Thereupon judgment was rendered, and sentence, that he be punished by confinement to hard labor for the term of his natural life, in the state prison, was pronounced.

The seventeenth, eighteenth and nineteenth causes of error assigned are, that the charge in the third count of the indictment is manslaughter, and not murder in the second degree, and that the judgment and sentence thereupon are erroneous.

The third count in the indictment charges the prisoner with having feloniously, wilfully, knowingly, maliciously and inhumanly forced and thrust a wire up into the womb and body of one Beringera D. Caswell, she being then pregnant and quick with child, with a wicked and malicious and felonious intent to cause and procure her to miscarry and bring forth the child, of which she was then pregnant and quick. And it is charged that by the means of forcing and thrusting the said wire, into her womb and body, she did bring forth the said child of which she was pregnant and quick, dead. And it is further charged that by the forcing and thrusting of the said wire by the defendant into her womb and body, she afterwards became sickened and distempered in her body, and by the same means so used, she suffered and languished, and afterwards by reason thereof, she died. And it is averred, in the same count of the indictment, that the defendant in manner and form as aforesaid, feloniously, wickedly and of his malice aforethought, did kill and murder, contrary to the form of the statute, &c.

It is important to decide, whether in this count, the prisoner is directly accused of having inflicted violence upon the mother, and thereby caused her death, or whether in putting into execution an unlawful design, death took place collaterally, or beside the principal intention.

If medicine is given to a female to procure an abortion, which kills her, the party administering it, will be guilty of her murder. 2 Chitty's Cr. Law, 729; 1 Hale's P. C. 429.

This is upon the ground, that the party making such an attempt with or without the consent of the female, is guilty of murder, the act being done without lawful purpose and dangerous to life, and malice will be imputed. *Commonwealth* v. *Parker*, 9 Metc. 263 ; 1 Russell on Cr. 454.

When death ensues in the pursuit of an unlawful design, without any intention to kill, it will be either murder or manslaughter, as the intended offence is felony or only a misdemeanor. Foster, 268. Thus if a man shoot at poultry of another, with intent merely to kill them, which is only a trespass, and slay a man by accident, it will be manslaughter ; but if he intended to steal them, when dead, which is felony, he will be guilty of murder. Kel. 117 ; 2 Chitty's Cr. Law, 729.

At common law, it was no offence to perform an operation upon a pregnant woman by her consent, for the purpose of procuring an abortion, and thereby succeed in the intention, unless the woman was "quick with child." *Commonwealth* v. *Bangs*, 9 Mass. 387; *Commonwealth* v. *Parker*, before cited. And under the ancient common law, if a woman be "quick with child" and by a potion or otherwise, killeth it in her womb ; or if a man beat her, whereby the child dieth in her body, and she be delivered of a dead child, this is a great misprision but no murder." 3 Inst. 50. In both these instances the acts may be those of the mother herself and they are criminal only as they are intended to affect injuriously, and do so affect the unborn child. If, before the mother had become sensible of its motion in the womb, it was not a crime ; if afterwards, when it was considered by the common law, that the child had a separate and independent existence, it was held highly criminal.

Similar acts with similar intentions by another than the mother, were precisely alike, criminal or otherwise, according as they were done before or after quickening, there being in neither, the least intention of taking the life of the mother. If in the performance of these operations and with these designs, an abortion took place, and in consequence of the abor-

tion, the mother became sick, and death thereupon followed, it was not murder, because the death was collateral, and aside of the principal design, and success in the principal design did not constitute a felony. This distinction is very clearly expressed, in the case of the *United States* v. *Ross*, 1 Gal. 624.

"If a number of persons conspire together, to do any unlawful act, and death happen from any thing done, in the prosecution of the design, it is murder in all, who take part, in the same transaction. If the design be to commit a *trespass*, the death must ensue *in prosecution*, of the original design, to make it murder in all. If to commit a *felony*, it is murder in all, although the death take place *collaterally* or beside the principal design. More especially will the death be murder, if it happen in the *execution of an unlawful design*, which if not felony is of so desperate a character, that it must ordinarily be attended with great hazard to life; and *a fortiori*, if death be one of the events, within the obvious expectation of the conspirators."

In the third count of the indictment, the prisoner is charged with no assault upon the mother of the child. There is therein no allegation that any wound of any description had been inflicted upon her, or any injury done, suited of itself to cause death. It is manifest, that of whatever he is accused in reference to the intention of causing miscarriage, and the measures employed to carry out that intention, and the success attending it, it was by the consent of the mother, if not by her procurement.

This count alleges the design to cause the miscarriage, by means of the forcing and thrusting up into the womb, of the wire, and the subsequent miscarriage; also the sickness and distemper ensuing immediately afterwards, followed by the death of the mother. It is alleged that the means used to procure the miscarriage were the cause of death; but it was evidently intended to be charged as the remote cause. The charge substantially is, that the miscarriage was the proximate cause of the death.

In the case of *Commonwealth* v. *Parker*, the indictment is

in very nearly the same language as that employed in the count we are now considering, as touching the charge of the subordinate offence, excepting in that, there was no allegation, that the mother was "quick with child," whereas in this, it is so alleged. By reason of that omission, it was held, and we think properly, that no offence at common law was charged. Consequently in this, so far as it regards the subordinate offence, the defendant is charged with what at common law was an offence, by causing the abortion of a child, so far advanced in its uterine life, that it was supposed capable of an existence separate from the mother; and not with any crime arising from an injury to the mother herself.

The conclusion is, therefore, that in this count the defendant is accused of causing death in the pursuit of an unlawful design, without intending to kill; and that the death was not in the *execution of that unlawful design*, but was collateral or beside the same.

That part of the indictment upon which the judgment and sentence against the prisoner is based, is for a violation of the statute, which has in this respect, essentially changed the common law. There is a removal of the unsubstantial distinction, that it is no offence to procure an abortion, before the mother becomes sensible of the motion of the child, notwithstanding it is then capable of inheriting an estate; and immediately afterwards is a great misdemeanor. It is now equally criminal to produce abortion before and after quickening. And the unsuccessful attempt to cause the destruction of an unborn child is a crime, whether the child be quick or not. R. S. ch. 160, sec. 13 and 14.

We now come to the consideration of the question, whether the subordinate offence, as charged in the third count in the indictment is a felony or otherwise, under the statute.

By the Revised Statutes, ch. 167, sec. 2, the term felony, when used in any chapter, in the title of "crimes and offences," &c. shall be construed to include murder, rape, arson, robbery, burglary, maims, larceny, and every offence punishable with death, or by imprisonment in the state prison.

Every person, who shall use and employ any instrument with intent to destroy the child of which a woman may be pregnant, whether such child be quick or not, and shall thereby destroy such child before its birth, shall be punished by imprisonment in the state prison, not more than five years, or by fine, &c. R. S. ch. 160, sec. 13.

It is obvious, if the prisoner be charged with the murder of the mother in proper form, in the commission of the subordinate crime, and the subordinate crime is such as is described in the statute referred to, and that is properly charged, the judgment and sentence upon this count is authorized, and there is no error therein. But if the subordinate offence as charged, does not constitute a felony under the statute, the judgment and sentence are erroneous.

The offence described in the statute, chap. 160, sect. 13, is not committed unless the act be done with an "intent to destroy such child" as is there referred to, and it be destroyed by the means used for that purpose. It is required by established rules of criminal pleading, that the intention, which prompted the act, that caused the destruction of the child, as well as the act itself and the death of the child thereby produced, should be fully set out in the indictment, in order to constitute a crime punishable by imprisonment in the state prison, under the statute. The allegation, that a certain instrument was used upon a woman pregnant, and that the use of that instrument caused her to bring forth the child, dead, is not a charge, that the one using the instrument intended to destroy the child. The inference of such design, from the use of the instrument, and its effect, is by no means necessary.

The third count in the indictment alleges the act to have been done with the intent to cause and procure the deceased to *miscarry* and *bring forth the child* of which she was then pregnant and quick; and that by means of that act, she brought forth the child, dead. But there is no allegation, that the act was done, with the *intention* that she should bring forth her child, dead, or with an intent to destroy it, unless

the words *miscarry*, and *bring forth the child*, necessarily include its destruction.

The expulsion of the *ovum* or *embryo*, within the first six weeks after conception, is technically *miscarriage;* between that time and the expiration of the sixth month, when the child may by possibility live, it is termed abortion; if the delivery be soon after the sixth month, it is termed premature labor. But the criminal attempt to destroy the *fœtus*, at any time before birth, is termed in law a *miscarriage*, varying as we have seen in degree of offence and punishment, whether the attempt were before or after the child had quickened." Chitty's Med. Jur. 410. Other writers on the subject give a similar definition of the term "miscarriage." Hoblyn's Dictionary of terms used in medicine and other collateral sciences. The converse of this last proposition cannot be true, as there are undoubtedly many miscarriages, involving no moral wrong.

If the term *miscarriage* were to be understood in the indictment, in its most limited sense, it cannot be denied, that in effect, it must be identical with the destruction of the *fœtus*. But this indictment itself has given to the word "miscarriage" the more general signification. It charges, that *the miscarriage*, was of the woman who was pregnant, and "quick with child." The term "quick with child" is a term known to the law, and courts are presumed to understand its meaning. A woman cannot be "quick with child" until a period much later than six weeks from the commencement of the term of gestation. The more general meaning of the word miscarriage must therefore be applied. The indictment charges no time, after the quickening, when the miscarriage took place. It may have been at any period, when the birth would have been premature. The language of the indictment, when taken together, construed in its ordinary, or in its technical and legal signification does not forbid this. And labor is premature, if it take place at any period before the completion of the natural time.

It is admitted by Doct. Paris, a writer of high repute on

medical jurisprudence, from the number of established cases, it is possible, that the *fœtus* may survive and be reared to maturity, though born at very early periods. Many ancient instances are stated of births even at four months and a half with continued life even till the age of twenty-four years. And the parliament of Paris decreed, that an infant at five months possessed the capability of living to the ordinary period of human existence; and it has been asserted, that a child delivered at the age only of five months and eight days may live; or according to Beck and others, if born at six months after conception. Chitty's Med. Jur. 410 and 411. Many of the facts, upon which the opinions of writers upon medical jurisprudence are founded, may be erroneous, and the opinions incorrect. We cannot take judicial notice of either. But it is not too much to say, that a child may be born living, when its birth may be so soon after conception, that it is premature. The *fœtus* may be expelled by unlawful means, so soon after conception, that extra uterine life cannot continue for any considerable length of time, and yet after birth it may once exercise all the functions of a living child. We have found no authority, that this may not be termed a miscarriage, if the word is not confined to its most limited meaning. And if it be so, it is not perceived, that it ceases to be correct, if the life of the child prematurely born is further prolonged. It is quite clear therefore, that the word *miscarriage* in its legal acceptation, and as used in this indictment, does not necessarily include the destruction of the child before its birth; and a design to cause its *miscarriage* is not the same thing as a design to *destroy* the child.

The other term used in the indictment, "to bring forth the said child," does not imply even a premature birth. Consequently it gives no additional strength to the charge.

It follows, that the indictment, not containing an allegation of a design, which is an essential ingredient in the offence first charged, in the third count, to make it a felony, the subsequent and principal accusation is that of manslaughter only;

and the seventeenth, eighteenth and nineteenth errors are well assigned.

Many other errors are assigned and relied upon. In the discussion of the principles involved in the questions raised, the counsel for the plaintiff in error and the attorney general have exhibited great research, learning and ability. It might be desirable to the profession, and particularly to those interested in criminal pleading, that there should be an opinion upon each of the errors assigned; but it is unnecessary for a disposition of the case.

Judgment reversed, and the Court order that the prisoner be discharged from his imprisonment and go thereof without day.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF CUMBERLAND,

1851.

PRESENT:

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

STURTEVANT *versus* SAMUEL A. MERRILL AND REBECCA McGREGOR.

If, upon the line between adjoining lots of land, there has been no obligatory division, for the maintenance of a partition fence, the owner of each lot is bound to keep his cattle from crossing the line.

It is a trespass, if the cattle of the one cross into the land of the other.

This rule is not dislodged, though the owners of the lands may have maintained a line-fence, by severally building such parts as to be satisfactory to each other.

The wrongful removal by the plaintiff of the part of the fence built by the defendant will not constitute a license for the defendant's cattle to cross the undivided line, after there has been such a lapse of time, as to give to the defendant, a reasonable opportunity of building a new fence.

EXCEPTIONS from *Nisi Prius* term, SHEPLEY, C. J. presiding.

Trespass, *quare clausum*, for injury done by defendant's cattle.

It appeared that the plaintiff owned land adjoining the farm, formerly belonging to Mr. McGregor, and now belonging to his widow, one of the defendants, and that she lived upon the farm, as also did Merrill the other defendant, who owned the cattle, and carried on the farm.

It was not proved that, prior to the alleged trespass, any legal assignment for a division fence had been made; but it was proved that the former owner of the plaintiff's land had united with Mr. McGregor in building what they considered their several parts of a division fence, and that, after the plaintiff purchased, he claimed that the whole fence belonged to him, and three or four years prior to the supposed trespass removed to his own barn about 600 feet of that part, which Mr. McGregor had built. No fence was afterwards made upon that part of the line. Merrill put his cattle into his own field, after haying season was over, and they passed into the plaintiff's land, across the line, where the fence had been removed. That is the cause for which this suit is brought.

The defendant's counsel requested instruction to the jury, that, if the plaintiff removed the fence, without right, he cannot maintain trespass for the acts done by the cattle.

That instruction was not given, but the jury were instructed that, if a person should remove the fence existing between his own land and that of his neighbor, in which cattle were usually found, they might be authorized to find that such removal of the fence operated as a license for the cattle to pass on to his land, until such time had elapsed as would enable the party, whose fence was removed, to rebuild it; but it would not so operate or constitute any legal defence, if three or four years had elapsed between the time when the plaintiff removed the fence, and the time of the alleged trespass.

The verdict was in favor of Mrs. McGregor, and against

Merrill, with an assessment of one cent damage, and he excepted.

W. P. Fessenden, for the defendant Merrill.

The object of the law is that fences be mutually maintained. This is accomplished when they are voluntarily maintained, as much as when done by compulsion.

Suppose the plaintiff had driven the cattle into his own land, could he maintain trespass? The taking away the fence is of the same effect. It was a license that the cattle should go there, so long as the plaintiff should keep the fence in his own barn. Every one is bound for the necessary results of his own acts; and no one can take advantage of his own wrongdoings. The defendant might well suppose that, if he should rebuild the fence, the plaintiff would tear it away. What shall he do? In Dane's Abr. vol. 5, page 629, there is a form of a plea from Rastall. It sustains our ground.

Butler, for plaintiff.

The defendant might have rebuilt the fence. If the plaintiff wrongfully took away the fence, it was but a trespass against Mr. McGregor, in his lifetime. How can such a trespass against McGregor justify this trespass, committed three or four years afterwards by Merrill?

But the fence line was never divided. Defendant's duty was, then, to keep his cattle on his own land, at peril. *Lord* v. *Wormwood*, 29 Maine, 282.

If the defendant would rely upon a constructive license, it should have been specially pleaded. 1 Chit. Pl. 543.

TENNEY, J. — The verdict in this case was in favor of McGregor, and against the other defendant, who took exceptions to the instructions given to the jury, and also to the refusal to give those requested.

By the statute, chap. 30, sec. 6, if a person is injured in his lands by certain descriptions of domestic animals, named, he may recover his damages in an action of trespass, against the owner of the beasts, unless they were lawfully on the adjoining lands, and escaped therefrom in consequence of the neglect

of the person, who had suffered the damage, to maintain his part of the partition fence. The neglect, which is made a bar to a recovery in an action of trespass of this kind, can arise only from a division, which imposes the obligation upon the party injured to build and maintain upon a certain well defined portion of the line a legal fence. If no division, such as the statute recognizes has been made, the omission is not to be treated as the fault of one party, more than that of the other. And if no fence is built thereon, it may be, because the parties have agreed to occupy and improve their several lands adjoining each other in common; or because they intend to hold according to their rights at common law. The latter may be the legal presumption, in the absence of all evidence upon the question. If a fence is built and maintained upon the line between the occupants of contiguous lands, without a valid division, according to law, partly by one and partly by the other, no statute rights or responsibilities will result therefrom.

In the case at bar, there being no division, the parties were in the enjoyment of no rights under the statute, in their occupation. There is no evidence of any agreement or understanding that the lands were intended to be occupied in common. The beasts passed into the plaintiff's land at a place where there was no fence upon the line between his land and that of the defendant; and the plaintiff is entitled to recover, unless some ground, beside the provision of the statute will protect the defendant. *Lord* v. *Wormwood & al.* 29 Maine, 282. And the party excepting, insists that the removal of the fence by the plaintiff, precludes him from recovering damages. If the plaintiff had driven the cattle of the defendant Merrill on to his land, or they passed there by his procurement, at the time they were found there, he could not prevail. But such is not the state of facts. There is no evidence, that the removal of the fence was for the purpose of allowing the cattle of the defendant to pass into the plaintiff's land three or four years afterwards. The unlawful removal of the fence was the ground of an action in favor of the party injured at the time. And it may be true that had it not been for

the removal of the fence by the plaintiff, it would have remained sufficient against cattle, till the acts complained of, and under such a state of things, the defendant's cattle may have escaped into the plaintiff's land, in consequence of the removal. But the effect is too remote from the cause. The taking away of the fence is to be treated as any other trespass of the plaintiff upon the land from which the cattle passed, such as cutting down trees, or tearing up the soil, at the time; and could not justify any act or neglect long subsequent of the other party, with which it had no direct connection. As long as there was no division of the fence, the plaintiff had a right to take away the part belonging to him, if it could be done without a trespass upon others lands; and he would then be entitled to maintain an action of trespass, if the cattle of the contiguous proprietor should pass upon his close without permission. And if he removed the fence of the latter, unlawfully, it would have the same effect upon the rights of both, so far as their occupation of the lands was concerned. The instructions requested were properly withheld; and those given were not erroneous. A license to permit the defendant's cattle to pass on the lands of the plaintiff, while he might wish to rebuild the fence after the removal, can be inferred from no facts in the case. There is nothing showing that such was the plaintiff's intention, but on the other hand, there was evidence that the fence was removed, because he claimed it as his own property. When so many years elapsed subsequent to the time, when the fence was removed, the jury could not have presumed legitimately, that the plaintiff designed thereby to allow the defendant to suffer his cattle to pass over the line. *Exceptions overruled.*

Judgment on the verdict.

Oatman *versus* Moody F. Walker and Gerry Cook.

The day, upon which a deed is delivered, may be properly referred to, as the day of its date.

The date of a deed is not intended to express the hour or minute, when it was executed, but rather the time of its delivery.

In a contract dated *November* 25, 1848, conditioned to pay money, if, at the expiration of one year from the date, the contractee shall perform a specified act, the doing of the act by him on the 26*th of November*, 1849, is a seasonable performance, and entitles him to recover the money.

When such contract is made by several persons jointly, and the act to be done by the contractee is that of offering a deed of conveyance, it is not necessary to make the offer to more than one of them.

When a party has obligated himself to receive a deed of land and to pay therefor a stipulated sum, and the deed, though refused, was duly tendered and placed in a position to await the call of the obligor, the damage to be recovered, in a suit upon the obligation, is the contract price and interest.

On Report from *Nisi Prius*, Shepley, C. J. presiding. Covenant broken.

The defendants, with one Clapp, had conveyed to the plaintiff a lot of land, by a deed dated Nov. 6, 1848, and acknowledged Nov. 25, 1848, for the consideration of $1600.

On that 25th of November, the defendants gave to the plaintiff a joint sealed obligation, that if, at the expiration of one year from the date of said deed, he should prefer to reconvey said land to said Clapp, *Moody* and Walker, and shall offer to do the same, the obligors would accept the reconveyance and pay therefor the said sum of $1600. It appeared in the case that Clapp had no interest in the land, but executed the deed merely to aid in the division of certain estates.

On the 26th of Nov. 1849, the plaintiff executed a warranty deed of the land, running to Clapp, Walker and Cook, and tendered it to Walker who refused to accept it.

Clapp testified, subject to objection, *that* he had no interest in the land, or in any supposed reconveyance of it, *that* he never assented to be in any way bound by the obligation, and *that* he should not have taken the deed, if offered to him; and *that* he shall not accept any interest in the land.

This action is brought upon that obligation, and is submit-

ted for a legal decision. If the defendants are held liable, the rule of damages is to be fixed by the Court. It appeared upon the argument, that the deed is now on the files of the Clerk, ready for delivery to the defendants, whenever they may wish to receive it.

Shepley and *Dana*, for the plaintiff.

Clifford, for the defendants.

No tender of a reconveyance was made to Cook, or notice that the plaintiff preferred or proposed to reconvey. *Brown* v. *Gammon*, 14 Maine, 276. The reconveyance was attempted too late.

The terms of the contract clearly show the necessity that the plaintiff should make known to each defendant, that he preferred to reconvey, and should make the offer to each.

The offer to convey was a condition precedent. 5 Pick. 395; 21 Pick. 90.

When Walker refused the deed, it was the plaintiff's duty to offer it to Cook.

It was of the essence of the contract that the offer of reconveyance should be made to both. They each had an interest to know whether the land was incumbered, by attachments or otherwise.

The obligation requires the deed of reconveyance to be made to Clapp, *Moody* and Walker; not to Clapp, Walker and Cook.

This was obviously a mistake. So the plaintiff's counsel concedes, and he asks the necessary correction to be made by the Court.

We also consider a correction necessary. Clapp had no interest in the land, was not one of the obligors. It was never contemplated that, in any event, any part of the land should be reconveyed to him. In such a supposition there would be an evident absurdity. The reconveyance, if any, was to be made to Walker and Cook, they alone being interested. Here is, by admission of both parties, a need of judicial interposition to reform a contract, at least to give it an effect according to its design. From the testimony of Clapp, taken in connection with the bond, the real design of the parties become perfectly

obvious. That design, when legally made apparent, the Court will effectuate. Parol testimony was admissible to show it. 2 Cow. 228, per WOODWORTH, J.; 8 Mass. 214; 10 Mass. 379; 11 Mass. 302; 11 Pick. 154; 16 Maine, 146; 13 Maine, 367; 20 Maine, 61; 24 Wend. 423; 3 Story's Rep. 181; 10 Metc. 170; 14 Maine, 185, 233; 19 Maine, 394; 17 Conn. 201; 19 Johns. 313; 1 Term Rep. 701; 13 Pick. 261, 530; 4 N. H. 23; 4 Mass. 110, 196; 7 Greenl. 421; 11 Maine, 426.

So the court, in such a case, will look into the motives that led to the contract. 2 Gill & Johns. 382; Levinz. 272; 2 Story's C. C. R. 286; 6 Cow. 483.

The word "reconveyance," in this case, cannot be taken in its technical sense. The conveyance was to be to the obligors.

Walker and Cook owned the land, and received the $1600 of the plaintiff for it. It would be absurd to suppose they stipulated to pay back that money on the plaintiff's deeding to them only two thirds of the land.

The defendants did not contract that Clapp should accept the conveyance, and he testifies that he should not have taken the deed, and should accept no interest in the land. The effect is that one third of the land still remained in the plaintiff, notwithstanding the deed he offered.

SHEPLEY, C. J. Is it clear, that if conveyance be made to three, and one of them refuse to accept, that one third remains in the grantor. Suppose it made to A, B and C, and there be no such person as C, who takes the estate?

Clifford. The rule is that, if promise be made, and no promisee is named, it operates to the use of the party from whom the consideration moved. By the converse of the rule, the deed must be made to the persons to whom in equity it belongs.

The obligation on which this suit rests is incongruous. Unless its meaning can be ascertained by extraneous proof, it is merely void. 1 Comyn's Dig. Agree. C. If the extraneous proof be used, it clearly shows the deed was made to the wrong persons, and thus the action fails.

In cases like this, the rule of damage in this State is yet an open question. The proper distinction has not been kept up as to cases against *vendors* and cases against *vendees*. In this case, the plaintiff still owns the land. His attempted conveyance was not accepted, and therefore did not divest his title. Suppose, prior to the decision in this case, the land should be attached as property of the plaintiff. Doubtless his creditors could hold it. The established rule is to allow for breach of a contract the exact and real loss sustained. In this case, it would be the difference between the value of the land and the contract price. Some evasions of this rule have been effected by a bungling mode of compelling specific performance through the medium of a tender, and by treating the tender as a performance. But a tender is no performance. By a fiction, it is viewed as equivalent. But this is only for the special purpose of giving an action, not of fixing the damage. It is but a *quasi* performance. 21 Wend. 457; 17 Maine, 232; 1 Denio, 59. Suppose the defendants had waived the tender of a deed, and no deed had been made, what damage could the plaintiff recover? As it was, the deed passed nothing. Can the plaintiff keep the land, and yet recover its value? 19 Maine, 268; 15 Maine, 296.

Shepley, C. J. Suppose a deed made by A to B and deposited with C to be delivered to B, and B afterwards accepts it. Did the estate pass at the time of the deposit with C, or at the time of the acceptance by B? Suppose a father deposits a deed for his son and dies.

Clifford. As between the parties, it might pass by the deposit. But otherwise as to creditors. In the supposed cases, there was no refusal. In this case there was an express refusal.

Tenney, J. — The contract containing the covenant alleged to have been broken, recites, that Charles Q. Clapp and the defendants, conveyed to the plaintiff certain real estate in Portland, by deed dated Nov. 25, 1848, and covenanted "that if at the expiration of one year from the date of said deed,

said Oatman shall prefer to reconvey said land and house," — "and shall offer to do the same, that the undersigned shall accept such reconveyance of said land and house, and shall pay to said Oatman therefor the sum of sixteen hundred dollars."

This action is for the recovery of the consideration, which was to be paid to the plaintiff, upon his offer to reconvey the land. The defendants, who executed the contract, deny the right to maintain the action, and their counsel, in the argument, contend that the offer relied upon by the plaintiff, made on Nov. 26, 1849, was not such as to create a fixed liability in the defendants.

The deed from Clapp and the defendants, which was read in the case, purports to be dated on Nov. 6, 1848, but is acknowledged on the 25th of the same month. The delivery was probably on the day last mentioned, and it was undoubtedly the intention of the parties, that the reconveyance should be made, if at all, within one year from the time the deed took effect, which was not improperly called in the contract its date.

It is well settled, that the words "from the date," and "from the day of the date," have precisely the same meaning. The date of a deed is not the hour or minute, when the deed was executed, but a memorandum of the day, when the deed was delivered. This day, in a legal sense, is an indivisible point of time, there being no fraction of a day. Upon this principle, the day on which the instrument is dated, in the computation of time, is excluded. *Bigelow* v. *Wilson*, 1 Pick. 485; *Wiggin* v. *Peters & al.* 1 Metc. 127; *Winslow* v. *China*, 4 Greenl. 298; *Pease* v. *Norton*, 6 Greenl. 229. Nov. 26, 1849, was therefore the day on which the plaintiff was bound to make the offer of a reconveyance of the estate, if he intended to hold the defendants liable for the payment of the consideration.

Upon the offer of the plaintiff to reconvey the premises to his grantors at the time stipulated, the defendants covenanted, that they would accept the reconveyance, and pay the consideration. He could not have supposed, when that contract

was entered into, that he was obliged to do more, than was necessary according to its terms, to make effectual the reconveyance. The object provided for in the contract, was a restoration of the parties to the situation, which they held before the conveyance to the plaintiff. Whatever would accomplish this on his part, the defendants fulfilling their contract according to its true meaning, was all which could be required of him, to entitle him to the consideration. If the reconveyance failed after he had done what was necessary for him to do, to make it perfect, by the omission of the other party, the latter cannot excuse themselves from liability, on the ground that he has neglected any form, which they may suppose he should have observed.

The contract on the part of the defendants is joint and not several. They constituted together but one party. The contract contemplates but one offer to reconvey on the part of the plaintiff. He had not the power to make it simultaneously to both, unless they had been together on the day when the offer was to be made, which he could not compel. The plaintiff met Walker on the day on which the offer was to be made, having a sufficient deed, which he presented, and expressed his readiness to fulfil the contract on his part. The deed was refused by Walker.

If Walker had accepted the deed and paid the consideration, the acceptance would have divested the plaintiff of all interest in the estate, and the reconveyance would have been perfect. It was the privilege of the plaintiff to have made an absolute tender of the deed, and to have relied upon the personal contract of the defendants for the payment of the consideration. The case finds that he did make an unconditional tender of the deed to Walker, which he declined to accept. In that case, if the deed had been received, the title would have passed from the plaintiff, as effectually as it would have done, if the consideration had been paid.

The contract required no demand of the consideration of the defendants by the plaintiff. The tender of the deed, made in a proper manner, was the entire fulfilment of the condition

precedent, and entitled the plaintiff to the consideration; and to the maintenance of an action therefor on refusal or neglect to pay it. Though Cook had no knowledge of the tender, the acceptance of the deed would have been as beneficial to him, as though he had personally received it jointly with Walker.

A delivery therefore of the deed to one of the defendants would have been attended with every effect, to which both were entitled by the contract. It follows, that a refusal by one of them in the absence of the other, is a refusal to do that, which was alone necessary for a reconveyance, and which is a breach of the covenant, that the defendants made with the plaintiff. And a breach by one of the defendants, cannot of itself require an offer to the other, when the contract on both sides would have been wholly fulfilled, were it not for that breach.

The question of damages is submitted to our consideration, and has been argued by counsel. The deed which was tendered by the plaintiff to Walker and refused, is now upon the files of the court ready for delivery, when the defendants wish to receive it. In the case of *Alna* v. *Plummer*, 4 Greenl. 258, the defendant bid off a pew at auction; a memorandum thereof was made by the auctioneer, and a deed properly executed was tendered to the purchaser, which he refused to receive. The damages awarded were the purchase money and the interest thereon. The principle of this case was fully affirmed in the reasoning of the court in the case of *Robinson* v. *Heard*, 15 Maine, 296. But in that case, the deed had not been tendered or made and executed, and the rule was not applicable.

When a party, who has contracted in writing for the purchase of land, has done every thing on his part to entitle him to a conveyance, on a refusal of the other party, he can demand successfully specific performance. It is certainly reasonable, that the same right should be held by the one, who is to make the conveyance, and receive the consideration. In the latter case, when the deed has been tendered and refused,

and now awaits the call of those who covenanted to accept it, it is just, that the latter should be compelled in a suit at law, when damages alone can be awarded, to pay the price, which he had contracted to give, as the damages sustained by him, who had in good faith fulfilled the contract on his part, together with interest thereon.

Defendants defaulted.

MITCHELL *versus* REUBEN LIBBEY.

A recovery and satisfaction of a judgment against one of several joint trespassers upon land, will discharge an action by the same plaintiff, previously commenced against another of the joint trespassers for the same act.

ON statement of agreed facts.

The defendant and one Stillman Libbey had jointly torn down the plaintiff's fence.

For that trespass, this action, *quare clausum*, was commenced March, 1849, for the June term of the District Court.

Subsequently, (in July, 1849,) the plaintiff brought, for the October term of the same court, an action of the same kind against *Stillman* Libbey for the same trespass, in which he recovered judgment, and collected the full amount of it upon execution.

The parties agree that, if those facts can constitute a bar to this suit, a nonsuit shall be entered; otherwise the action is to stand for trial.

A. W. True, for the plaintiff.

The objection, if of any force, should have been in abatement. *Gordon* v. *Pierce*, 2 Fairf. 215.

The eighth rule of the District Court provides that "pleas in abatement may be filed at any time prior to the call of the new entries; and if containing matter of fact, not appearing of record, must be verified by oath."

This action was the one first commenced. When it was

entered, no other was pending. There was, therefore, nothing which could be pleaded in abatement. A second action is never pleadable in abatement to a former one. Story's Plead. Abatement, 66 ; Gould's Plead. 285, chap. 5, sect. 127.

In actions, *ex delictu*, an action lies against each wrong-doer. To make the remedy effectual, there must be a right to pursue each action to judgment, irrespective of the others.

The payment of the execution was *inter alios.* 4 Greenl. 425.

The damage assessed by the jury against Stillman, was not a fifth part of the real damage. We claim to have the damage assessed, as against this defendant, whose acts of trespass were much the most injurious.

This suit was pending nearly two years before the other judgment was paid. It was rightfully commenced, and we are entitled to cost.

Here was no technical release. But this case is settled by 8 N. H. 372. The case 1 Johns. 291, is also precisely in point. See also 8 Cowen, 111. Further citations are unnecessary.

Woodman, for the defendant.

TENNEY, J. — It is agreed that the trespass, for which this suit was brought, was the joint acts of the defendant, and one Stillman Libbey. Each was therefore liable for the whole damage done by both, as occasioned by himself, and on recovery therefor, the entire damage is allowed in the verdict; and there can be no separate estimate of the injury committed by each. On the satisfaction of the judgment recovered against Stillman Libbey by the plaintiff, for the joint trespass, the claim for damages was fully canceled, as effectually as it would have been by an instrument acknowledging payment, and by a valid contract of discharge. The pendency of an action against a joint trespasser, cannot change the principle. *Gilpatrick* v. *Hunter*, 24 Maine, 18.

It perhaps was in the power of the plaintiff to have omitted to take his judgment against Stillman Libbey after the verdict,

and to have obtained a judgment in the present action for the same damage and costs. But not having done so, the foundation of this action is entirely taken away, by the plaintiff's own acts, and no damage can be awarded for what has been perfectly satisfied by payment.

Costs for the plaintiff in an action of trespass, being dependent upon damages, cannot be allowed in this action for the plaintiff.

Plaintiff nonsuit.

FREEMAN *& al. versus* THAYER.

A levy of land, to which the execution debtor, at the time of the levy, had no title, gives to the creditor, no rights in the land, although the debtor *after* the levy, should acquire a title.

The statute of 1844, c. 123, sect. 16, prescribing what evidence shall be sufficient to sustain a town-collector's sale of land for payment of taxes, is applicable to sales, made *previously*, as well as to sales made *subsequently* to that statute.

When the book of original assessments is lost, a proved copy, as secondary evidence, may be used.

Though on a trial involving the validity of such a sale, a part only of the requisite proofs be positive and direct, yet, if the suit be brought more than thirty years after the sale, the jury are at liberty to presume that the tax was duly authorized and assessed, and that all the other proceedings requisite to the validity of the sale, were properly had.

ON Exceptions from the Nov. Term, 1850, SHEPLEY, C. J., presiding.

Trespass for a quantity of saw-logs, which had been cut in the forest by one Chesley in 1847 and 1848. The act of the defendant, relied upon to support this action, is that he, being a deputy sheriff, attached the logs as the property of Chesley.

The ownership of the logs was in question, and it became necessary to inquire to whom belonged the lot of land, from which they were cut.

In 1816, the lot was sold at public auction and conveyed to Daniel Jackson, by Tilson Waterman, as collector of the town, for the non-payment of taxes assessed in 1813.

One Grosvenor, in 1836, levied and set off the land to himself upon an execution against Chesley. After this levy, viz, in 1840, Jackson conveyed the land to Chesley and, in 1842, Grosvenor by deed of general warranty conveyed it to the plaintiffs.

The grounds, upon which the plaintiffs proceed are 1st, that by the levy of Grosvenor in 1836, and the conveyance by him in 1842, to the plaintiffs, they became vested of a legal sezin, sufficient to maintain a writ of entry against Chesley, or to maintain trespass for the timber cut by him; and 2dly, that the collector's deed of 1816, conveyed no title to Jackson, and, that therefore, Jackson's deed, made in 1840, to Chesley was without effect.

The plaintiffs proved some occasional occupations of the lot by Chesley prior to 1836, but these occupations were not of such continuous character as, of themselves, to create a title against the proprietor. They therefore became unimportant as to this trial.

The defendant contended, *that* at the time of Grosvenor's levy in 1836, the title was in Jackson; *that* the levy was therefore inoperative; *that* Chesley acquired a title and sezin by Jackson's deed in 1840, and *that* such title and sezin are now in Chesley, not being invalidated or impaired by a levy made several years previously, and at a time when the execution debtor had no rights in the land.

The statute of 1844, chap. 123, sect. 16, provides; that, "In any trial at law or equity, involving the validity of any sale of real estate for the non-payment of taxes, it shall be sufficient for the party claiming under it, to produce in evidence the collector's deed, duly executed and recorded; the assessments signed by the assessors, and their warrants to the collector; and to prove that such collector complied with the requisitions of law as to advertising and selling such real estate."

The defendant proposed to introduce and rely upon the proofs, pointed out in that section of the statute. To this course the plaintiffs objected, insisting that the sale could be supported only by such proofs as the law required at the time of the sale.

The objection was overruled.

The defendant then introduced the collector's deed, made in 1816, acknowledged in 1845, and recorded in 1848. He then introduced proof to the court, that the assessment, signed by the assessors was lost, and offered a paper, proposing to prove it was a copy. The plaintiffs objected to the proof and to the paper. But the proof was admitted, and the paper was read to the jury. The defendant then proved by positive testimony that some of the notifications, required by law to be given by the collector, were duly posted up; but he failed to prove by direct and positive testimony that the other requisite notifications were given. The deficiencies in that respect, are sufficiently indicated by the requests made to the Judge for instructions to the jury.

The jury were instructed *that* the title to the land became important only as proof of ownership of the logs cut upon it; *that* the title exhibited by the plaintiffs would be sufficient to enable them to maintain an action of trespess against a stranger to the title for an entry upon the land, and would therefore be sufficient to enable them to maintain an action of trespass against such a person to recover the value of the logs; *that* their right to maintain the present action would depend upon the question, whether the defendant had proved that Chesley had an elder and better title to the land than the title exhibited by the plaintiffs; *that* there did not appear to have been such an occupation or possession by either of the parties, or those under whom they held, as to enable them thereby to obtain a title; *that* neither party appeared to have been an original proprietor or owner of the land or to have obtained title by any conveyance from such owner or proprietor; *that* the title presented by the defendant depended upon the assessment and sale of the land for neglect to pay the taxes assessed; *that*

the law required only that the defendant should exhibit the assessment and prove that the proceedings, by which the sale was made, were regular and legal, *that* the defendant did not exhibit an assessment, but exhibited only what was alleged to be a copy of it, as committed to the collector — and testimony to prove the loss of the original assessment; *that* if satisfied that the assessment was irrecoverably lost, and that the paper committed to the collector was a copy of it, that should have the same effect as the assessment; *that* if they came to that conclusion, they should proceed to consider, whether the subsequent proceedings were all legal and regular; *that* the testimony did not positively prove that there had been a perfect compliance with the requirements of the law — it did not show that all the advertisements had continued posted the number of days required, or that it had been published three weeks successively in the paper required by law, in which the publication should be made; *that* there might be found other defects; *that* the proceedings having taken place more than thirty years ago, if they were satisfied from the testimony, that there was a strong probability that all the other acts required by the law had been performed, they would be authorized to presume, after such a lapse of time, that all the proceedings had been regularly and legally conducted; but *that* they were not required to make any such inference or presumption, — it was a matter submitted to their consideration and judgment whether, under all the circumstances, they ought to come to such a conclusion; *that* if they came to the conclusion that the assessment was lost and that the document committed to the collector was a true copy of it, and that the proceedings to make the sale were all regular and legal, the deed from the collector to Jackson would be effectual to convey the land, otherwise not; *that* if they found the conveyance from the collector to Jackson became effectual, and that the deed from Jackson had been regularly executed and delivered, the defendant would be entitled to their verdict, otherwise their verdict should be in favor of the plaintiffs. The jury found a verdict for the defendant.

The Judge was requested by the plaintiffs to give the following instructions to the jury:—

1. That the validity of the deed from the collector to Jackson must be determined according to the provisions of law, as they existed at the time the land was advertised and sold, and when the deed was given.

2. That in order to maintain title to the lot under the tax deed, the defendant must prove the granting of money by the State, county and town, the legal assessment of the taxes and the fulfilment of all the requisitions of the law in as full a manner, as they would have been obliged to do under the law as it existed at the time the sale and deed were made.

3. That although delinquent highway taxes were inserted in the bills committed to said collector, if said taxes were ever legally assessed they formed a part of the assessment of the highway tax in 1812, and not a part of the assessment of money tax in 1813.

4. That, inasmuch as the records of the town were in court and used in the case, it was necessary for the defendant to show that a highway tax was raised and assessed in 1812, and the collector's sale was illegal, because no such evidence was shown.

5. That said sale is void and illegal, because no proof was introduced, that the town chose any assessors in 1812.

6. That the sale is void and illegal, because there was no proof introduced, that there was any valuation taken by any assessors for the town in 1812.

7. That the sale is void and illegal, because there is no proof introduced, to show that an assessor's office was kept in Poland in 1812, and no proof that the assessors, if there were any in that year, ever caused attested copies of the assessment of the highway tax and valuation for the year 1812, if any such assessment or valuation existed, to be lodged in the town clerk's office. That the sale for the delinquent highway tax is void, because there is no evidence that the same was ever committed to a surveyor of the year 1812, to be collected in labor on the highway.

8. That the sale for the delinquent highway tax was illegal, because there is no evidence that the same was not paid in money or labor to the collector of taxes, or a surveyor of highways for the year 1812.

9. That the sale for the State and County tax is void, because it is not shown what sums were granted, nor whether any sums were ever granted for State and County purposes in 1813.

10. That the assessment of the town tax was illegal and the sale void, because it appears by the records of the town produced, that the town in that year raised only $375; and the delinquent highway tax, as appears by the collector's bills, produced, was only $25,95; and the amount of the bills committed to the alleged collector to collect was $479,23, as shown by the bills produced by the collector.

11. That if the jury should be satisfied that the plaintiffs have proved by the records of the town, and the bills produced in the case, that the assessors overlaid the tax of 1813 more than five per cent. beyond the amount raised by the town, and the delinquent highway tax of the preceding year, the assessment was illegal and the sale void.

12. That if the jury should be satisfied that the plaintiffs have proved that the assessors of 1813 did not keep any office, and that they did not cause attested copies of the assessment and valuations to be lodged in the town clerk's office, the tax and sale were illegal.

13. That the sale for the delinquent highway tax was illegal, because said tax being against a non-resident, ought to have been inserted in the collector's bills for 1812, and the land sold by the collector of that year.

14. That the records of the vote of the town produced, showed that no person was legally chosen and sworn as collector in 1813.

15. That although Tillson Waterman was chosen as constable, yet he was not a collector of taxes.

16. That as the warrants were directed to Tillson Water-

man as collector of taxes, as the commitments were made to him as collector of taxes, as the advertisements produced, and the notifications produced, and the deed to the purchaser, show that he undertook to act as a collector of taxes, the deed cannot operate as a constable's deed, and the sale was void.

These requested instructions the Judge refused to give, except so far as they are covered by the instructions already given.

To the instructions given and to the refusal to instruct, the plaintiffs excepted.

Woodman, for the plaintiffs.

Shepley and *Dana*, for the defendant.

HOWARD, J. — At the trial it became important to ascertain whether the logs in controversy were the property of the plaintiffs, or of Chesley. For that purpose, the title to the land on which the logs were cut became material. The plaintiffs claimed under Grosvenor, who levied upon the land, as the property of Chesley, in 1836, and conveyed to them in 1842. The defendant contended that Chesley had no title to the premises until they were conveyed to him by Jackson, in 1840. Jackson claimed under a deed from Tillson Waterman, as collector of taxes in Poland, in 1813, given in pursuance of a sale for taxes, March 19, 1816. This deed bore date April 1, 1816, was acknowledged March 21, 1845, and recorded December 13, 1848.

It is provided by the statute of 1844, ch. 123, sec. 16, that, "In any trial at law or in equity, involving the validity of any sale of real estate for non-payment of taxes, it shall be sufficient for the party claiming under it, to produce in evidence the collector's deed duly executed and recorded; the assessments signed by the assessors, and their warrants to the collector; and to prove that such collector complied with the requisitions of law, as to advertising and selling such real estate."

The defendant assumed that this statute furnished a rule of evidence for him, in presenting and sustaining the title de-

rived from the sale for taxes; and the presiding Judge concurring in this view, directed the trial accordingly.

The provisions of the section quoted are general, and intended, by express terms, to apply to any trial, of the description named, in law or equity, that might transpire. They may furnish a rule of evidence for subsequent proceedings in court, to establish titles to real estate dependent upon sales for non-payment of taxes; but they do not impair the obligation of contracts or disturb vested rights, when applied to cases involving the validity of prior sales. There never was imposed upon the defendant, an obligation to prove the title under which he claims, in a particular mode; nor had those contesting that title a vested right to require that it should be supported by a particular kind or amount of evidence. The legislature had the power, and the right to prescribe the evidence to be received, and the effect of that evidence, in proceedings in our courts. They may prescribe and change remedies, and such regulations would not necessarily affect the obligation of contracts. It has been well said, that there is no such thing as a vested right to a particular remedy. There can be no such thing as a vested right in one to compel another to pursue a particular remedy, or to take a given line of defence, in any case. *Potter* v. *Sturdivant*, 4 Greenl. 154; *Thayer* v. *Sevey*, 2 Fairf. 284; *Oriental Bank* v. *Freeze*, 6 Shepley, 109; *Morse* v. *Rice*, 8 Shepley, 53; *The People* v. *Livingston*, 6 Wend. 526; *Ogden* v. *Saunders*, 12 Wheat. 213, 349.

The argument for the plaintiffs assumes that, as the title of Chesley depended on the validity of the sale for taxes, it was originally defective, and that, but for the statute of 1844, referred to, the defendant could never have asserted, successfully a title in Chesley. It disregards the consideration that the trial proceeded upon the evidence then furnished, and not evidence which might have been produced at a prior date. If this question of title had arisen before the expiration of twenty years from its origin, evidence might perhaps, have been introduced, which time and accident may have rendered inaccessi-

ble. Then the facts, unaided by presumptions of fact, might have constituted the evidence to sustain the title originating in the collector's sale.

It has been determined that, after the lapse of thirty years from a collector's sale of land for taxes, it may be presumed from facts and circumstances proved, that the tax-bills, valuation, warrants, notices, &c., were regular; that the assessors and collector were duly chosen at legal meetings; that the collector was sworn; that a valuation and copy of the assessment were returned by the assessors to the town clerk, and that every thing which can be thus reasonably and fairly presumed, may have the force and effect of proof. *Gray* v. *Gardner*, 3 Mass. 402; *Knox* v. *Jenks*, 7 Mass. 492; *Colman* v. *Anderson*, 10 Mass. 105; *Pejepscot Proprietors* v. *Ransom*, 14 Mass. 147; *Blossom* v. *Cannon*, 14 Mass. 178; *Battles* v. *Holley*, 6 Greenl. 145; *Soc. for Propagating the Gospel* v. *Young*, 2 N. H. 310; *Bergen* v. *Bennett*, 1 Cain. Cas. Err. 18; *The case of Corporations*, 4 Coke, 78; *Rex* v. *Long Buckby*, 7 East, 45; *Read* v. *Goodyear*, 17 Serg. & Rawle, 350; 3 Sugden, V. & P. 16—43, 6th Amer. from 10th Lond. edition.

In the opinion of the Court, the presiding Judge gave appropriate directions to the jury, and did not err in refusing to give the instructions proposed, except so far as they were embraced in the instructions given. Whether the jury made inferences and presumptions which they were not authorized to do, from the facts and circumstances proved, is not a question presented by the exceptions.

Exceptions overruled, judgment on the verdict.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF LINCOLN,

1851.

PRESENT:

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

HUSTON *versus* YOUNG.

In an action against the maker of a note, payable at a specified length of time after its date, brought by an indorsee, who obtained it for value before its apparent pay-day, and without knowledge of mistake in its date, the maker, in order to establish a defence that the action was prematurely brought, is not allowed to prove, that by mistake, the note bore a date earlier than the day upon which it was actually made.

ON report from the District Court, RICE, J.

ASSUMPSIT, by an indorsee against the maker of a note bearing date Jan'y 14, 1847, payable in two years from date with interest.

The defence was, that the suit commenced Oct. 8, 1849, was premature.

It was agreed that, if the testimony is admissible, the defendant can prove that the note was made Jan'y 14, 1848, and that the figures 1847, in the date, were inserted by mistake instead of the figures 1848.

Whether that testimony was admissible, against objection by the plaintiff, was the question submitted for decision; the defendant having agreed, that if it was not admissible, a default should be entered.

Lowell, for the plaintiff.

The presumption of law is, that the note was negotiated to the plaintiff at its date, and that he received it for value in the usual course of business, without knowledge of any mistake or defect in it. Against *such* an indorsee, the evidence of mistake is not admissible. Upon this point, no argument or citation of authorities can be necessary.

Ruggles & Gould, for the defendant.

1. The note was antedated by mistake. It had not become payable when the suit was brought.

2. The date not being of the essence of the contract, the mistake is proveable.

3. The indorsee could take no greater rights than the promisee had at the time of the indorsement.

Wells, J. — The question presented in this case is, whether the defendant can be permitted to show, that the note in suit was antedated by mistake, and that the time of payment had not elapsed when the action was commenced.

The plaintiff presents the note in evidence duly indorsed, and the legal presumption is, that it was indorsed before it became due. *Ranger* v. *Cary*, 1 Metc. 369. The plaintiff is therefore to be considered as having taken the note before it was payable according to its terms, and there is no evidence, that he is not a *bona fide* holder and purchaser for a valuable consideration. He had no knowledge of any mistake in the date, and had a right to consider it as correctly written. He was authorized to regard the note as a true exposition of the contract between the original parties, and he cannot be pre-

judiced by any error in it, arising from their mistake of which he was ignorant. The testimony offered was inadmissible, and a default must be entered. *Defendant defaulted.*

STUART *versus* LAKE.

If a party would exclude an interested witness from testifying, his objection must be presented at the earliest opportunity.

If not so presented, there arises a presumption that the objection is waived.

It is a general rule, that if the objecting party, in order to prove the interest of a witness, has examined him on the *voir dire*, it is too late for him, for the purpose of showing that interest, to prove from other sources, any facts which were known to him at the time when the witness was examined.

It is not competent for an objecting party, in order to exclude a witness, to prove that the witness has made admissions of his interest in the case.

Where one had brought a suit, for his own benefit, using, without authority, the name of a third person, as plaintiff, and, upon a failure of such action, the nominal plaintiff had been compelled to pay the bill of cost, an action lies for such nominal plaintiff to recover the amount of such payment against the party by whom the suit had been brought.

For such a recovery, assumpsit is an appropriate remedy.

In such a case the *implied* promise is a sufficient basis for maintaining the action.

Ingalls, for the plaintiff.

Russell, for the defendant.

TENNEY, J. — The plaintiff offered as witnesses Warren D. Stuart and Lewis Littlefield. The defendant's counsel objected to their competency on the ground of interest, and offered to prove the declarations of the plaintiff and also of the witnesses, that the demand sued for in this action was the property of the witnesses, they both testifying, "*on their preliminary examination*," that they had no interest whatever in the event of the suit. The Court refused to admit the testimony for the purpose of showing the witnesses to be incompetent.

The language of the exceptions, upon this point, is obscure, and the meaning equivocal. The most obvious import of it perhaps would be, that the testimony "on the preliminary ex-

amination," was the statements of the witnesses on the *voir dire*, in answer to the defendant's questions, previous to any evidence from them at the call of the plaintiff. But it is said in the written argument of the defendant's counsel, that "the preliminary examination" was made in behalf of the plaintiff; and in the reply of the plaintiff's counsel, the truth of this is not denied, but an attempt is made to sustain this ruling, on this ground. In this view of the matter, the evidence to show the interest of the witnesses was subsequent to their examination in chief, and was not admissible, there being no suggestion that the defendant was not previously informed of all the evidence, which he offered upon this point. "If the party is aware of the existence of the interest, he will not be permitted to examine the witness and afterwards object to his competency, if he should dislike his testimony. He has his election to let an interested person testify against him or not, but in this as in all other cases, the election must be made, as soon as the opportunity to make it, is presented; and failing to make it at that time, he is presumed to have waived it forever." Greenl. Ev. sec. 421. This is not inconsistent with the rule, that "notwithstanding every ineffectual endeavor to exclude the witness on the ground of incompetency, if it should afterwards appear incidentally, in the course of the trial, that the witness is interested, his testimony will be stricken out, and the jury will be instructed, wholly to disregard it." Ibid; *Donelson* v. *Taylor*, 8 Pick. 390. The doctrine last stated is upon the ground, that the interest of the witness is discovered by means previously unknown to the party objecting.

If the "preliminary examination" of the witnesses was on the *voir dire*, the evidence offered by the defendant to prove them incompetent was equally inadmissible. "The rule recognized and adopted by the general current of authorities is, that when the objecting party has undertaken to prove the interest of the witness, by interrogating him on the *voir dire*, he shall not upon the failure of that mode, resort to the other, to prove facts, the existence of which was known, when the witness was interrogated." Greenl. Ev. sect. 423. *Bridge*

v. *Wellington*, 1 Mass. 219. In Massachusetts and this State, it is believed, that this rule in practice has been uniformly adhered to.

Proof of the declaration of witnesses introduced by the other party, for the purpose of excluding their testimony can be admitted on no principle. A party cannot be deprived in this mode of facts known to a witness, who is otherwise competent.

If the jury included in their verdict, the last item in the plaintiff's account or any part of it, they must have found under the instructions, that this item was for costs recovered by Nathan Stuart in an action brought in the name of the plaintiff as executrix against him, by the direction of the defendant, without cause and without her consent or knowledge; and that after a nonsuit, the plaintiff paid the costs on an execution obtained against her. These facts were a sufficient cause of action in assumpsit under the money counts. An express promise to pay the costs so awarded and paid was not necessary for a recovery. *Ticonic Bank* v. *Smiley*, 27 Maine, 225.

The court was requested to instruct the jury, that the burden of proof was upon the plaintiff to satisfy them, that the defendant and his wife were at the plaintiff's in the capacity of boarders. This instruction was refused; and the jury were instructed, that if they found the defendant and his wife were at the plaintiff's at the time alleged, eating at her table and lodging at her house, the burden of proof was on the defendant to show, that they were not there as boarders.

One of the charges, in the plaintiff's account sued, is for boarding the defendant and his wife. To entitle her to recover for this item, it was necessary that she should satisfy the jury of the fact of their being boarders. It was not the province of the Court to direct what particular facts were sufficient for this purpose. The jury might have been satisfied, that the defendant and his wife were the plaintiff's boarders, because they took their food and lodging at her house, and they might perhaps have inferred from this fact,

and others in the case, that they were the servants of the plaintiff; they were the judges. Again, on the question, whether they were the plaintiff's boarders or not, the issue was upon the plaintiff to maintain throughout. The burden of proof did not change by the establishment of the fact, that they ate and lodged in her house, for this they could have done, if they were at service for her. The instruction should have been given, as requested, and that given was erroneous. For these causes, the exceptions are sustained and a new trial granted.

HERBERT *versus* FORD.

The holder of an unnegotiable promissory note, made payable to him at the request of the party from whom the consideration moved, is, in a suit upon the note, and in the absence of any further proof of ownership, presumed to hold it in trust for the benefit of the party from whom the consideration moved.

Such a suit is open to the defence that there was a failure of consideration, either total or partial, whether the payee, at the time of receiving the note, did or did not know what the character of the consideration was.

It is the duty of the Court to define the meaning of words used in written contracts; but in verbal contracts, the jury are to decide, not only the language and the forms of expression used, but also to interpret their sense and meaning.

ON exceptions from a *Nisi Prius* term of this Court, WELLS, J.

In 1839, Dr. Ford, the defendant, and Dr. Clark were practising physicians. The defendant resided at Damariscotta. Dr. Clark lived at Bristol. Some arrangement was made between them, that Clark should give up his practice to the defendant, and remove from Bristol. In consideration of that contract, the defendant gave the note now in suit. The note is unnegotiable, and made payable to the plaintiff. Dr. Clark accordingly removed to New York, and the defendant removed to Bristol, where he practiced in his profession.

The case states that in 1842, the defendant having in some measure lost his health, for $200, sold out "a part of his practice" to Dr. Palmer, and removed back to Damariscotta, reserving liberty to practice in Bristol and the adjoining towns, when called for; in all of which places, he has since continued to practice.

In 1844, Dr. Palmer made known that he should leave Bristol, and was told that, in such event, the people would prefer to have Dr. Clark return there. Palmer said the citizens had treated him kindly, and if they preferred to have Dr. Clark take the absent place, he would rather *give* the stand to him, than *sell* it to any one else, and he accordingly left the town without selling his stand. Dr. Clark was then written to, and re-established himself at Bristol in January, 1845.

Evidence was presented to the jury upon the controverted fact, whether it was by the consent of the defendant, that Clark returned to Bristol.

The plaintiff's counsel contended that as the note was made payable to the plaintiff, and had a good consideration at its inception, there being no evidence that the note belonged to Clark, a subsequent violation by Clark of his agreement with Ford, would not affect the plaintiff's right to recover.

But the Court instructed the jury that, if Herbert took the note with knowledge of the consideration, the violation by Clark of his agreement, in returning to Bristol in 1845, would be a good defence to this action to the extent of the injury to Ford, by reason of Clark's return.

Plaintiff's counsel contended that the agreement between Clark and Ford, from the nature of the subject of it, must be construed with limitations, and that it could not by law be construed to restrain said Clark from returning to Bristol and resuming practice there, in the event of Ford's indisposition, so as to become incapable of doing the professional business of the place, or in case of his removing from the town, and that his removing and selling out his practice to Palmer, and Palmer's subsequent removal from Bristol, leaving his place vacant, with no intention on the part of Ford to return to Bristol,

it was, on the part of Clark, no violation of his agreement, that he returned and resumed practice at his old stand, thus abandoned by Ford. And he requested that such instruction should be given to the jury.

He also contended that, Ford having sold out to Palmer, and Palmer consenting to Clark's taking his place, Ford having no intention of returning to Bristol, Clark's taking the place of Palmer, and the professional practice which Palmer was entitled to, was not, to that extent, a violation of his agreement with Ford, nor of any of the legal rights of defendant.

The Judge instructed the jury that they must determine for themselves what the contract was between Clark and Ford, and its extent and meaning, and whether it had been broken by Clark, and if broken, they must estimate the injury to defendant from the breach and deduct it from the note; and if it exceeded the amount due on the note, their verdict must be for the defendant.

The plaintiff excepted.

Ruggles & Gould, for the plaintiff.

1. Though the consideration moved from Clark, in absence of all proof, the property in the note must be presumed to be in Herbert.

It must be regarded as having been given to him to pay a debt due from Clark to Herbert, and the burden is upon the defendant to show that the plaintiff does not hold the note for his own benefit, if he would set up in defence subsequent equities between himself and Clark, or a failure of consideration. *Tucker* v. *Smith*, 4 Greenl. 415; *Barret* v. *Barret*, 8 Greenl. 353; *Hatch* v. *Dennis*, 10 Maine, 244; *Lane* v. *Pendleton*, 14 Maine, 94; *Smith* v. *Prescott*, 17 Maine, 277.

2. Knowledge of what the consideration was, cannot be regarded as knowledge of any equitable defence, as none existed at that time, and the plaintiff could have foreseen none. *Goddard* v. *Lyman*, 14 Pick. 268; *Knapp* v. *Lee*, 3 Pick. 453.

3. Whether the contract between Clark and Ford is to be construed with limitations, was a question of law, and should

not have been submitted to the jury, as there was no conflicting testimony about the *terms* of it.

Where the facts are clearly established or are undisputed or admitted, the *construction* which they are to receive, is a question of *law*. *Steward* v. *Riggs*, 10 Maine, 467; *Hill* v. *Hobart*, 16 Maine, 164.

Lowell, for the defendant.

WELLS, J. — This case has been previously presented to the Court for consideration. 29 Maine, 546. The testimony shows that the consideration of this note was the property of Doct. Clark. It does not appear that the plaintiff paid any thing for it, or that he was in any manner a holder for a valuable consideration. If there was no evidence in the case of its origin, a presumption might arise, that the plaintiff was a holder for value paid by him, but that presumption is entirely repelled by the fact, that the consideration belonged to Clark, who paid for the note whatever of value there was in it. It must then be regarded as the property of Clark, and the plaintiff as holding it in trust for his benefit. No instruction based upon the assumption that the note did not belong to Clark could have been properly given. And the instruction in relation to the knowledge of the plaintiff as to the consideration was immaterial. For if he did not own the note, and it was the property of Clark, then the defence could be made in the same manner as if the action were in the name of Clark, whether the plaintiff had knowledge of the nature of the consideration or not.

The jury had the right to determine the existence of the parol contract, its extent and limitations. They are to find not only what language was used, but its purport and meaning. In cases of written contracts, it is the duty of the Court to define the meaning of the language used in them, but in verbal contracts such duty is confined to the jury. They are not barely to ascertain the words and forms of expression, but to interpret their sense and meaning. *Copeland* v. *Hall*, 29 Maine, 93.

There was testimony introduced by both parties in relation to the question of the consent of the defendant for the return of Clark to Bristol. If such consent had been given, it is very apparent, that the defendant could not have objected to his return by way of defence to this action. And the jury were so instructed. But in determining this question, they were directed to take into consideration all the testimony in relation to it, and not to confine their examination to those portions of the testimony which were embraced in the plaintiff's request. The jury must regard the whole evidence upon any controverted point, and the request for instruction embracing but a part of that evidence and requiring a conclusion of the jury upon it, might have been very properly rejected.

There does not appear to be any error in the instructions, nor in the qualification of the requested instruction, and the exceptions must be overruled and judgment rendered on the verdict.

STINSON *versus* GARDINER.

The demurring to a bad plea does not have the effect of admitting as true, the facts therein alleged, to be used in the trial of other issues.

An instrument was made under seal between the owner of a mill-dam and the owner of land flowed thereby, stipulating, on the part of the owner of the dam, that he would reduce its height to a specified point, and forever keep it reduced to that point; and *granting*, on the part of the land owner, a right to flow his land by the dam, while it continued reduced to the stipulated point; reserving however the right to annul the grant, whenever the dam should be raised above that point; —

Held, 1st, That the covenant of the owner of the dam to keep its height reduced, was an *independent* covenant; —

2d, That the contingent reservation by the land owner to annul his grant, gave no election to the owner of the dam to raise it, after having once reduced it to the stipulated point.

3d, Such a reservation furnishes no protection to the dam owner, in a suit upon his covenant to keep the dam reduced.

4th, In such a suit, whatever previously acquired right of maintaining the dam to its original height, may have been vested in the owner, by prescription, or grant lost through time and accident, he is precluded, *by his covenant*, from setting up such previous right as a defence.

On report from *Nisi Prius* term, SHEPLEY, C. J. presiding.

COVENANT BROKEN.

The defendant was maintaining a dam across the Cobbissee river, by which the water was flowed back upon the lands of several riparian proprietors, of whom the plaintiff was one. Between those proprietors and the defendant, an instrument of agreement was entered into, under their respective seals, of the import described in the opinion of the court.

Under the stipulation by the defendant he reduced his dam to the agreed point. Of the back-flow afterwards resulting from the dam in its reduced condition, the plaintiff made no complaint. But the defendant afterwards raised the dam to its original height, thereby creating damage to the land of the plaintiff. To recover for that damage, this suit is brought upon that covenant, by which the defendant had bound himself to keep the dam at the reduced height.

The defendant put in four pleas.

Two of them were traversed and the issues were found for the plaintiff, with damages assessed at $100.

The third plea alleged, *in the defendant* a right to flow, acquired by twenty years uninterrupted user, prior to the making of the covenant.

The fourth alleged a grant, now lost, made about the year 1773, to the defendant's ancestor by the Proprietors of the Kennebec Purchase, who then owned all the lands now flowed by the dam.

To these last two pleas, general demurrers were filed. The defendant requested instruction to the jury, *that* the covenants of the parties to the sealed instrument were *dependent* covenants; *that* the reservation, made by the plaintiff, authorized the defendant to restore his dam to its original height; and *that* the only penalty for his so doing was to authorize the plaintiff to annul his grant, and resort to the remedy for flowing,

given by the statute; and *that*, therefore, this action is not maintainable. These instructions were not given. If they ought to have been given, a new trial is to be granted.

F. Allen, for the defendant.

Under an erroneous construction of the law, though declared by the appropriate tribunal, (see *Tinkham* v. *Arnold*, 3 Greenl. 120,) the defendant stipulated to reduce his dam from a height to which it had been maintained for 60 years. And the plaintiff, in consideration of that stipulation, and assuming that he had a right to prohibit the flowing, granted to the defendant a right to flow by the reduced dam, reserving the privilege of annulling the grant, whenever the dam should be raised.

The defendant has pleaded that, prior to the covenant, he had uninterruptedly occupied the dam to its original height, and thereby flowed the water for twenty years; and also that, about the year 1773, the Proprietors of the Kennebec Purchase, then owning all the land alleged to be flowed, granted to the defendant's ancestor, &c. the right to flow to the height of the dam in its unreduced condition.

By demurring, the plaintiff admits the facts stated in the pleas, if properly pleaded. They were properly pleaded, because they apply directly to the only valuable consideration alleged in the instrument to have been given for the defendant's covenant. They assert, *in the defence*, the very right which the plaintiff assumed to grant, and negative all such right in the plaintiff.

If the consideration, expressed in the instrument, had been *ostensibly* of no value, the raising of the dam could give to the plaintiff no cause of action. Suppose the alleged consideration for the covenant now sued had been that the plaintiff would grant to defendant a right to take a journey, it could support no action. In that case, the want of consideration would appear on the instrument itself; in this case we point it out by a plea, which is of equal efficacy.

Should it be said there was, in raising the dam, a technical breach of the defendant's covenant, we reply, there was virtu

ally a breach of the *plaintiff's* covenant, in assuming to grant to the defendant that which the defendant already possessed.

The grant from the Kennebec Proprietors, admitted by the demurrers, is to have the same effect as if made by the plaintiff himself. Suppose, prior to the indenture, the plaintiff had made such a grant, how illusory would have been the reiteration of it, contained in the indenture.

Even if there *was* a technical breach of the defendant's covenant, yet on the facts presented and admitted by these pleadings, the damage could be but nominal. If it be said, the jury, under the other issues, have found real damage, the answer is that, under those issues, the jury had not the evidence furnished by these pleadings.

Suppose the plaintiff, instead of demurring, had taken issue on any of the material facts, alleged in the pleas, and the issue had been found for the plaintiff, the jury could have assessed but nominal damage, if any. Surely the plaintiff's *admission* of the facts should avail to the defendant quite as much as the *finding of them* by the jury. Where one sued upon the covenants in a deed, and the only incumbrance was a mortgage to himself, he could recover but nominal damage. *Bean* v. *Mayo*, 5 Greenl. 94. So in slander, for loss of character, the defendant may prove the plaintiff had no character to lose. It is to be remembered that this is not an action on a bond with penalty, but is one merely sounding in damages. The plaintiff cannot urge that the pleas, if traversed, would have formed immaterial issues, for the facts stated in them, if found true, would have precisely met and annihilated the plaintiff's claim.

Ruggles, for the plaintiff.

Howard, J. — The defendant was owner of a dam on the Cobbissee river, which caused the water to flow back upon the lands of the riparian proprietors. On June 11, 1829, the parties executed an instrument under seals, which they style an indenture, by which the defendant on the one part, "in

consideration of the individual covenants and agreements hereinafter mentioned to be performed," by Bradstreet and others, riparian proprietors, subscribers individually, on the other part, covenanted and agreed with them individually, that he would, by the first day of October, then next, reduce the perpendicular height of his dam, eighteen inches between the wings; and further covenanted for himself, his heirs, executors and administrators to keep the dam so reduced forever. "And the said Bradstreet and others, subscribers hereto, on their part, for the consideration, and for the further consideration of one dollar paid us by said Gardiner, do hereby give, grant, sell and convey to said Gardiner, his heirs and assigns forever, the right and privilege of flowing so much of our lands as will remain flowed by reason of said dam, after the same shall be reduced to the amount before named, and so long as said dam shall continue to be raised no higher than it will be after said reduction. To have and to hold the said granted privilege to him the said Gardiner, his heirs and assigns forever. The said Bradstreet and others, subscribers hereto, reserving to themselves the right of annulling this grant whenever the said Gardiner shall cease to keep his said dam reduced to the extent before mentioned, and the said Gardiner agreeing thereto."

This instrument appears to have been duly executed by the parties, respectively, the plaintiff being one of the riparian proprietors, and a subscriber, with his seal affixed.

Damages are claimed in this suit for an alleged breach of the defendant's covenants recited. It appeared that he reduced his dam according to his agreement, and afterward raised it to the original height, and thereby again flowing and injuring the lands adjacent to the waters of the river. For such injury to the plaintiff's land, in 1847, this action is brought.

Issues were joined on the first and second pleas, and found for the plaintiff. To the third and fourth pleas, the plaintiff demurred generally, and the first question relates to their sufficiency. In the third, the defendant sets out a prescriptive right to flow as alleged, acquired and enjoyed before entering into his covenants; and in the fourth he pleads a similar right un-

der an alleged grant from the Proprietors of the Kennebec Purchase to his ancestor, which has been lost by time and accident.

The substantial issues were, whether the defendant made and kept the covenants declared on. His right to flow independent of those covenants was not involved, but rather his rights under his covenants, and the grant from the plaintiff. It is no answer to the declaration, for the defendant to allege rights that he once possessed, and might still enjoy but for his own acts and covenants. He had power to part with his supposed privileges on his own terms. There appears to have been a compromise of asserted rights or claims, by the parties, when they executed the "indenture." Then new relations, rights and obligations were created, which are now the subject of controversy. Prior rights waived, surrendered, abandoned or lost, are no longer material to the issues involving present interests and obligations. The third and fourth pleas must be adjudged bad, for immateriality.

It is insisted that the covenants of the defendant are dependent. Whether they can be so regarded must depend upon a construction of the terms of the instrument, and with reference to the nature of the transaction, and the intention of the parties. Upon a fair interpretation of the "indenture," it will be perceived that the defendant agreed to perform, and that the plaintiff performed. The former covenanted, and the latter granted. And when the defendant reduced his dam, the grant took effect, and the performance of his covenants was, in no respect, to depend upon any subsequent act or agreement of the plaintiff. These covenants were unqualified, and unconditional, and must be regarded as independent.

The defendant contends that the true construction of the contract of the parties was, that if the defendant did not keep his covenants, the sole remedy for the proprietors was to annul their grant, and resort to a complaint, under the statute, for flowing. It is true that they reserved, by consent of the defendant, the right to annul their grant whenever he should cease to keep his dam reduced according to agreement; but they did

not stipulate to release his covenants, or abandon their claim for damages for a breach, in any event. Nor can we understand that it was optional with the defendant whether to sustain or rescind the entire contract. The construction contended for, would be inconsistent with the letter and spirit of the instrument, and the obligations of the parties.

The position that the defendant had a right to flow, before executing the contract, is assumed to be in accordance with the fact, because it is admitted by the demurrers. If true, it was irrelevant, as before suggested; yet it cannot be conceded that by demurring to a bad plea, the plaintiff admitted the facts therein stated, as independent facts to be used in the trial of other issues, in this, or any other action. The effect of the demurrers was to admit the facts stated in the pleas for the purpose of testing their sufficiency in law;—but the pleas having been adjudged bad, the admissions do not estop the plaintiff, or affect the determination of his case. Nor do they confirm the defendant's alleged right to flow, acquired before the grant; a right which he is estopped to claim by his acts and covenants. In legal strictness, facts not well pleaded are never admitted by a demurrer.

In the opinion of the Court the verdict cannot be disturbed on the alleged ground of excessive damages.

Judgment on the verdict.

LARRABEE *versus* LARRABEE.

The Rev. Stat. ch. 121, sec. 33, exempts from the operation of a judgment for partition of land, any person who did not *appear* and *answer* to the petition upon which the partition was ordered.

The name of an attorney, placed "*for special purpose*," under the name of a respondent in the docket entry of such a petition, does not constitute either an *answer* or an *appearance*, within the meaning of that section of the statute.

ON REPORT from *Nisi Prius*, WELLS, J.

WRIT OF ENTRY on the demandant's own seizin. General issue pleaded.

The tenant offered to prove *that* he and one Dakin and this demandant were tenants in common of land, which *included* the demanded premises; *that* he and Dakin presented a petition for partition, upon which notice to this demandant was ordered, returnable at the October term; *that*, at that term, Messrs. Sawyer & Gilbert, attorneys of the Court, entered their names on the docket, under the action, in the form as follows: "*Sawyer & Gilbert, for special purpose;*" and *that*, at the same term, this demandant was defaulted, and commissioners to make partition were appointed, by whose report, (accepted at a subsequent term,) the demanded premises were set off to this tenant. The record, the docket, the petition and all the papers connected therewith, were referred to as evidence.

The Judge ruled that, by these proceedings, the demandant was estopped to deny the tenant's title. The case was then taken from the jury, and that queston was reserved for the consideration of the whole Court.

The R. S. chap. 121, sect. 33, provides, that if "any person who has not appeared and answered to the petition for partition, shall claim to hold in severalty the premises described therein, or any part thereof, he shall not be precluded by the judgment for partition."

Gilbert, for the demandant.

Tallman, for the tenant.

TENNEY J. The parties agreed if the Judge erred in the ruling, that the demandant was estopped by the petition for partition, and the proceedings under it, to deny the tenant's title, and that the petition was conclusive and binding upon the demandant, the case is to be submitted to a jury. The decision which we make upon this point, will render a consideration of other questions raised at the trial unimportant.

When the petition was pending in court, the demandant being respondent therein, her counsel placed their name upon

the docket under hers, with the words added "for special purpose." Is it legally proved by this fact, that the demandant "appeared and answered to the petition for partition" within the meaning of the provision of the Revised Statutes, chap. 121, sect. 33?

In common parlance, "appearing" for a defendant in an action or suit is sometimes regarded as nearly synonymous with "answering" thereto. This loose use of the terms may have arisen from the fact, that a general appearance in such a case is entered for the purpose of answering to the claim of the plaintiff in a manner which will entitle the party in all respects to be heard upon the matters involved in the suit; and hence one is treated as the other. But when the terms are tested by their precise meaning, as given by lexicographers, or as used in judicial proceedings, a broader signification was intended by the legislature. The word "appearance" has the signification in Webster's dictionary, of "being present in Court," and in the same dictionary, the term "answer" has given to it the definition, "In law, a counter statement of facts, in a course of pleading; a confutation of what the other party has alleged," and when an "answer" is spoken of in legal proceedings, in civil cases, it generally implies something, which is written. And we cannot suppose that the legislature would make use in the statute of the words "appeared" and "answered," if it were the intention merely to repeat the idea conveyed by one.

In this instance, we may also seek for the meaning of the statute, by comparing it with the principles of evidence generally. It is a well settled rule, that whatever is to operate upon the title to real estate, cannot be proved by parol; something more certain, and less liable to change and to loss is required. When title to land is involved in a suit or petition in court, the record of the process, the issues made up, and the judgment rendered are the only proper evidence of such facts. The record of the defendant's petition for partition, and the proceedings, and the judgment for partition, and the final judgment therein, are made parts of this case; and on an examination, there is noth-

ing which shows that the demandant pleaded to the petition, or that she answered, or in any manner appeared. There is, therefore, no evidence in the case arising from the petition for partition, and the judgment under it, which precludes the demandant from asserting her rights in this suit.

Action to stand for trial.

BROOKINGS *versus* CUNNINGHAM.

The defendant was selected by the principal in a debtor's relief bond to act as a magistrate in an adjudication upon the debtor's disclosure, and, upon such disclosure, united with the other magistrate in giving a discharge-certificate to the debtor, when in fact the defendant had no authority to act as such magistrate; whereby the surety in the relief bond was compelled to pay the same: — *Held*, that for such assumption of authority, the defendant was not liable, *in an action brought by the surety.*

ON facts agreed in the District Court.

Upon an execution against one Walker, the debtor had been arrested, and given a relief bond. The debtor made a disclosure of his property affairs, having selected this defendant as one of the justices of the peace and quorum, to hear and act upon the disclosure. Upon the hearing, the defendant assuming to act as a justice of peace and quorum, united with the other magistrate in giving to the debtor a discharge-certificate.

A suit, however, was brought upon the relief bond. In that suit it appeared, that the defendant had held the office of a justice of the peace and quorum; but that, when he acted upon Walker's disclosure, his commission had expired two or three months; and judgment was recovered against Walker and this plaintiff, who was one of his sureties. That judgment was paid by the plaintiff, and he brings this action against the defendant for wrongfully assuming to act as a justice of the peace and quorum.

Gilbert, for the plaintiff.

If the defendant had possessed the authority, which he as-

sumed to exercise, the action upon the bond must have failed. But, through the want of such authority, the action prevailed, and the surety, this plaintiff, was compelled to pay the judgment. Such assumption was an unlawful act, for which the party practicing it was liable to any one to whom it did an injury. *Spencer* v. *Perry*, 17 Maine, 413; *Briggs* v. *Wardwell*, 10 Mass. 356.

To the maintenance of an action for such an injury, it is not necessary that any malice or wilfulness should be proved. *Osgood* v. *Bradley*, 7 Maine, 411; *Lincoln* v. *Hapgood*, 11 Mass. 350, and cases before cited.

Ingalls, for the defendant.

TENNEY, J. The plaintiff having been surety on a bond given upon an arrest of one Walker, to Davis Hatch, according to the R. S. chap. 148, sect. 20, was afterwards sued upon said bond with the principal and co-surety; and the defence set up, that the principal had disclosed and been admitted to his oath before a breach, failed, for the want of authority in the person who was selected by Walker as a Justice of the peace and quorum, to act in the character which he assumed. A judgment was obtained in the suit upon the bond, and upon the execution taken out upon that judgment, the plaintiff paid the amount, and also paid to them sums of money in defence of the suit on the bond. This action is brought against the defendant for damages alleged to have been sustained by the plaintiff, for acting in the capacity for which he was not commissioned and qualified, though he was not at the time aware of the want of authority. Upon a report of these facts certain questions are submited to this court for discussion, and one is, "can the plaintiff recover for money paid by him on Hatch's execution?"

The answer to this question must be in the negative. The damage alleged and sought to be obtained, is too remote and indirect. The ground of action is, that the defendant failed to do effectually, what he undertook to perform for the principal, and not for the plaintiff. In becoming a surety on the

bond, the principal contracted to indemnify the plaintiff from any loss which should arise to him in consequence of that undertaking. The surety had no power to compel the performance by the principal of any one of the conditions in the bond, and it does not appear that he took any measures to have them performed by the principal himself, or that he relied upon their performance for his indemnity. There was no privity between him and the defendant in any service, which the latter undertook. He held only the relation of surety to the principal on the bond, till after its breach.

If the principal had designed to fulfil the condition of the bond by payment of what might be due thereon, and had entrusted the money to a person who had engaged to carry and pay it to the creditor, and instead of doing it, he had negligently lost, or have embezzled it, or if the principal had employed one to carry him to the prison, that he might surrender himself to the keeper thereof, and prevent a breach of the bond, and he had unnecessarily failed to arrive in season, in neither case, could the surety avail himself of such delinquency, by payment of the debt, and a resort in his own name to a suit to obtain a reimbursement. The counsel for the plaintiff has presented no analagous case, where a claim of the kind has been sustained. There have been numerous instances, where a surety may have relied upon property in the hands of his principal for his indemnity, and that property has failed through the carelessness or fraud of persons to whom it was entrusted, but we know of no instance where those who have wasted it have been held accountable to the surety of the owner, merely by reason of the relation. And when the principal has failed to relieve the liability of his surety, by an act which he had contracted with others to perform, and which has failed of a valid performance, the principle will equally apply. *Lamb* v. *Stone*, 11 Pick. 527.

Plaintiff nonsuit.

Judgment for defendant.

ROGERS *versus* MARCH.

In view of all the parts of an unsealed contract, signed as agent by one having authority so to sign, the agent will not be bound by it, if it be apparent that the intention was to make it the contract of the principal and not of the agent.

To this rule there is an exception, upon the ground of commercial policy, that agents, acting for *merchants* resident abroad, are held personally liable upon contracts made by them for their employers, whether the contracts do or do not show the agency.

This exception does not extend to a contract, made in this State, by one resident here, for personal services to be rendered in a foreign country.

ASSUMPSIT per account annexed to the writ, and upon a written contract.

The account was as follows:—

"Leonard March

To Rufus Rogers, Dr.

1846.			
January.	For 8 days services, planning and giving advice for Boom, $5,00,	$40	00
	" expenses to and from Bangor,	23	00
February.	" making model of piers of Kesway boom, drawing and making plan of same, and calculating dimensions of same,	50	00
March.	" time and expenses of hiring men,	17	50
April.	" 13 days work, a $7,00,	91	00
	" expenses paid,	26	99
		248	49
	Services per agreement	800	00
		$1048	49

The following is a copy of the contract.

"I will give Mr. Rufus Rogers, eight hundred dollars for the route from April 8th to September 1st, and expenses both ways — meaning to leave Topsham 8th April, and Fredericton Sept. 1st. Should we detain him longer than Sept. 1st at boom, we will allow him seven dollars per day for every day after Sept. 1st that he is detained at the boom.

"L. March, Agent of Fred. Boom Co."

"Bangor, Jan'y 15, 1846."

"Should we require you to work on Sundays, to be allowed extra, at the rate of seven dollars per day. Should we get through the work of the boom before Sept. 1st, no discount to be made. L. M."

The parties to this suit are citizens of this State, the plaintiff residing at Topsham, and the defendant at Bangor. The Fredericton Boom Company was incorporated by the Legislature of the Province of New Brunswick, and is legally established and located in a foreign country. The defendant was its authorized agent, with power to employ persons for the company.

Pursuant to the contract, the defendant went to Fredericton, New Brunswick, where he labored upon the company's boom for a few days, till discharged by the defendant.

Each party put into the case depositions and letters.

The defendant also introduced two receipts signed by the plaintiff, which were as follows: —

"Fredericton Boom Co., to Rufus Rogers, Dr.

Expenses from Topsham to Fredericton and returning,	$52 65
17 days time,	34 00
£21 12 3.	$86 45

"18th Feb'y, 1845. — Rec'd pay't of Oliver Frost, agent.

"Rufus Rogers."

"Received of L. March, as agent of F. Boom Co., one pound, about April 6, 1846; also two pound ten shillings about May 12; also twenty-five pound this day, to be accounted for on settlement. "Rufus Rogers."

"£28 10

$114 00 May 14, 1846."

One of the plaintiff's deponents testified that Oliver Frost was agent of the company for 1845.

The following are extracts from letters written by the defendant to the plaintiff, after the contract was made: — "I have hired all the men I shall want from this way:" — "I want

you to be here and go down with me;" "I have ordered the timber." "I want you to write me in season." "Give me your ideas on the subject;" "I do not like to advance on last year's price." "I think we had better go early, should like to have you arrange to be ready."

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

Shepley & Dana for the plaintiff. 1. The evidence sufficiently shows that the contract was entered into by the defendant personally, and that he bound himself, as an individual to pay the plaintiff.

It is Leonard March who promises to pay; his signing as agent has not altered his liability. The statute, chap. 91, sec. 14, treats exclusively of conveyances and contracts relating to land, and does not apply to this case. 1 Greenl. 231, 237, and 339.

"It is not sufficient that a person, in order to discharge himself from a promise in writing, should show, that he was in fact the agent of another, but it should be made to appear that he treated as agent *and actually bound his principal by the contract.*" "Nor is it sufficient that the agent describe himself in the deed or contract as acting *for* and *in behalf* or as *attorney of* the principal, for *if he do not bind his principal* but set his own name and seal, such expressions are but *designatio personæ; it is his own act and deed, and he is bound personally.*"

To discharge himself the agent *must give a right of action against his principal;* here March has done no such thing. The writing is the only evidence of the contract, and plaintiff must have introduced it to maintain an action.

The Boom Company is not within this jurisdiction, a suit against it, then, must have been brought in New Brunswick, where it was located, but no suit could for a moment be maintained there on such a contract, for it is not stamped, and by the laws of that dominion a stamp is indispensable. Giving then no right of action against the company, the inference is irresistible, that he *intended* to bind himself.

It is evident from the contract, that for a portion of the work at least, March promised, in his individual capacity to pay. He does not even sign as agent.

2. The defendant, if acting as an agent, was a resident agent of a foreign principal. In such cases, the credit is presumed to be given to the agent, and he is treated as the principal. 3d ed. Story on Agency, sect. 268, 290 and notes; 2 Kent's Com. 5th ed. 629, 630; *Tainter* v. *Pendergrast*, 3 Hill, 72–3; *Paterson* v. *Gaudesequi*, 15 East, 62; *Thompson* v. *Davenport*, 9 B. & Cr. 78; *DeGaillon* v. *L'Aigle*, 1 B. & P. 368; *Houghton* v. *Matthews*, 3 B. & P. 490; Chitty on Contracts, 230, 6th American edition.

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

WELLS and HOWARD, J. J. having been of counsel, took no part in the decision.

SHEPLEY, C. J. and TENNEY, J. concurred in the following opinion, drawn up by

TENNEY, J. — The evidence in the case shows fully, that "the Fredericton Boom Company" received the benefit of the plaintiff's services so far as they were rendered. This was a company duly incorporated, and organized in the province of New Brunswick. The performance of the services for the company, aside from any express agreement made by the plaintiff, would imply a promise in it, to make compensation therefor.

But the plaintiff relies upon a contract in writing dated at Bangor in this State on January 15, 1846; and contends that it is the agreement of the defendant to make payment for those services, and not that of the company; and that by the request of the defendant therein contained, he performed the services, or was ready to do so. It is further contended in behalf of the plaintiff, that if the agreement should be construed to be that of the company, the defendant is still liable, he being the agent of the company, resident in the State where the plaintiff also resides, and where the contract was made.

By R. S. chap. 91, sect. 14, it is provided, that all deeds and contracts, executed by an authorized agent for an individual or

corporation, either in the name of the principal by such agent, or in the name of such agent, for the principal, shall be considered the deed or contract of such principal." This is substantially a reënactment of the statute, chap. 220, passed in the year 1823. Both are in affirmance of the common law, so far as it is applicable in this respect to unsealed, written contracts. Story's Agency, sections 154, 261, 263. The rule is laid down by Judge Story in these words, "If it can upon the whole instrument be collected, that the object and intent of it are to bind the principal, and not merely the agent, courts of justice will adopt that construction of it, however informally it may be expressed." The case of *Mann* v. *Chandler*, 9 Mass. 335, was a suit upon notes of hand, in the words, "I, the subscriber, treasurer of the Dorchester Turnpike Corporation, for value received, promise Seth Mann, to pay him or bearer," &c. and they were signed "Gardner L. Chandler, treasurer of Dorchester Turnpike Corporation." The Court say in their opinion, "Here it cannot be doubted, the corporation is itself liable. The consideration moved wholly from them. It is very apparent, that the plaintiff did not at the time of receiving the notes, look to the defendant's personal security. The whole transaction was in behalf of the corporation. The property is liable and the defendant is not." A note in the words, "*I* promise," &c. and signed by one person, *pro* another, named, was held to be the note of the latter. *Long* v. *Colburn*, 11 Mass. 97; *Emerson* v. *Prov. Hat Man. Co.* 12 Mass. 237; *Ballou* v. *Talbot*, 16 Mass. 461; *N. E. Ins. Co.* v. *De Wolf*, 8 Pick. 56.

Decisions upon this question have not been entirely uniform. It has been held, that the party signing the instrument, and adding to his name the agency, which he had, was personally liable, and that the addition was only *descriptio personæ*. Some of these cases do not seem very clearly distinguishable from those before cited, where a different construction was adopted. In some of them was involved the question, whether the person who signed, with the addition of agent, had any authority from the principal to contract in his behalf; and in the dis-

cussion of that question, there has been an indistinctness in reference to the other. Judge Story, in a note to sec. 154, in his treatise on Agency, says, "It is not easy to reconcile all the cases in the books upon this subject; though I cannot but think, that the true principle to be deduced from them is that stated in the text."

The case before us finds, that the defendant was the agent of "The Fredericton Boom Company," at the time, when the contract was executed, and that he had authority to contract with the plaintiff for the company and to make them liable. In looking at the agreement, it has the appearance of being drawn in haste; but it is manifest, when taken together, that it was the intention of the defendant to bind the company and not himself individually. In the beginning of the contract, the language is, "*I* will give," &c. but that must be considered in connection with what follows, and with the signature, where his agency is added. In the latter part of the contract, the language is inconsistent with the hypothesis, that the company was not designed to be made responsible. It is, *we* will allow seven dollars per day, &c. for any time, that *we* shall detain you at the boom; and in case *we* should require you to work on Sundays, an extra allowance was to be made. And no discount was to be made, if *we* get through the work before the time, for which the plaintiff was engaged.

In the account annexed, are certain charges for services not falling within the terms of the written contract, and there is no evidence of any promise of the defendant in reference thereto. But there is in the case a bill of the plaintiff rendered under a former agency, made against the company, and receipted. A receipt of the plaintiff also, dated May 14, 1846, in which he acknowledges the payment of £28,10, by the defendant as agent of the company. These show, that for certain services performed, and a part charged in this suit, he looked to the company for payment.

"No rule of law is better ascertained, or stands upon a stronger foundation than this; that when an agent names his principal, the principal is responsible, not the agent." *Hartop*

ex parte, 12 Vesey, 349; Story's Agency, sect. 261 and 263. To this rule there is an exception, upon the ground of general convenience, and the usage of trade, that agents and factors acting for merchants resident in a foreign country, are held personally liable upon all contracts, made by them for their employers, and this without any distinction, whether they describe themselves in the contract as agents or not. In such cases it is presumed the credit is given to the agent or factors. And this exception becomes a general rule, within the scope of its application. Story's Agency, sect. 268. A reason given for this rule is, that there is no other known responsible principal. But Judge Story remarks, that it "is founded on a broader ground, the presumption, that the party dealing with the agent intends to trust one, who is known to him, and resides in the same country, and subject to the same law as himself, rather than one, who if known, cannot from his residence in a foreign country, be made amenable to those laws, and whose liability may be affected by local institutions, and local exemptions, which may put at hazard both his rights and his remedies." *Ibid.* 290. "This doctrine is in conformity to the general usage of trade; and it was in all probability originally derived from it, as affording a just exposition of the intentions of all parties, and as being founded in public policy and convenience and in the safety, if not the necessities of commerce." — *Ibid.* 400.

But we have been directed to no authority, where the rule has been held so broad as to embrace the case of personal services performed in a foreign country, for one residing there, although under a contract made in the country, where the one, who engaged to perform the services, resided. The reason of the rule will not extend to such a case. It is well settled, that where the acts stipulated in a contract are to be done, not in the country where the contract is made, but in another country, the laws of the latter are to govern in the performance. Story's Confl. Laws, sect. 280. And where the rule, to which we have referred, in mercantile transactions, is founded on the principle, that one would be unwilling to look to a resident of

a foreign country, perhaps unknown to him, and expose himself to the inconvenience, the risk, the expense and uncertainties attending the enforcement of a contract, in that country, it cannot apply to a contract, whereby a party agrees to go to a foreign country, to render services for a resident therein, to be under his direction, knowing that in the performance, he is to be governed by the laws of that country. Where too, he is supposed to be entitled to compensation for his labor, immediately on the performance of the contract therefor, it is not to be presumed that he would voluntarily postpone to a distant time the receipt of payment.

But it is insisted, that in order to discharge himself, the defendant must have given to the plaintiff a right of action against the principal; and the written agreement being the only valid proof of the contract, it fails of being sufficient against the company, because it is not stamped, according to the supposed law of New Brunswick.

Courts cannot take official notice of the local laws of foreign countries, without proof of their existence. If important in the trial of actions, they must be shown by evidence like other facts. The case does not find, that the laws of New Brunswick are such as has been stated in argument.

But if it were shown by competent evidence, that such is the law of the country, where the contract in question was to be performed, it is believed that it would have no effect in the decision of this case. This contract was made in this State, and every person is supposed to submit himself to the laws of the place where he makes the contract, and silently assent to its action upon his contract. The law of the place of the contract is to govern. "*Locus contractûs regit actionem.*" Story's Confl. Laws, sections 261, 263, 289. When a contract is made in one country, for the payment of money in another, and by the laws of the latter a stamp is required, and not by those of the former, it has been held, that it is not governed by the *lex solutionis*, upon the ground, that an instrument as to its form and solemnities, is to be governed by the *lex loci contractûs*, and a stamp is not required by the principle. *Ibid.* 318.

The requirement of stamps in other countries is a part of the revenue laws of those countries. In *Holman* v. *Johnson*, Cowper, 343, Lord MANSFIELD, C. J. says, "no country takes notice of the revenue laws of another." *James* v. *Catherwood*, 3 Dowl. & Ry. 190. *Plaintiff nonsuit.*

KING, *in error*, *versus* ROBINSON.

The appointment of a guardian *ad litem* is at the discretion of the Court.

No duty rests upon a plaintiff to ascertain the mental capacity of a defendant and bring it before the Court, in order that a guardian *ad litem* may be appointed.

In a suit in error, a waiver of exceptions, taken to alleged irregularities in the preliminary proceedings, authorizes no inference that the proceedings were correct.

A defendant who becomes *non compos mentis* must, if of full age, appear by attorney and not by guardian.

Therefore, in a suit to recall or reverse a judgment recovered against such a defendant in a civil action, it cannot be alleged as error, that no guardian or guardian *ad litem* had been appointed.

Nothing which contradicts the record can be alleged as error.

WRIT OF ERROR, brought by guardian to recall or reverse a judgment recovered by the defendant in error against the plaintiff in error. The record of that judgment showed that the plaintiff in error appeared by attorneys and pleaded to an issue, upon which a verdict was rendered against him.

The defendant moved that the writ be quashed.

The first two grounds of the motion were founded upon some alleged irregularities in the preliminary proceedings. The third ground was that the record of the original action showed that the then defendant appeared by his attorneys and pleaded to an issue, upon which a verdict was rendered; and that he is now estopped by that record to assert, that he was *non compos mentis.* The motion was overruled, and the defendant excepted. When the case came up for hearing, the now defendant waived the first two grounds of the motion.

The error assigned was, "that said King at the time of the rendition of the said judgment, was *non compos mentis* and incapable to take care of himself; nevertheless no guardian for said King was appointed, and no guardian *ad litem*, and there was no notice of the pendency of said action given to, and there was no appearance by, any such guardian at or prior to the rendition of said judgment."

To this assignment *in nullo est erratum* was pleaded.

Paine, for the plaintiff in error.

1. The fact assigned for error is, that the original defendant was *non compos mentis*, and that a guardian had not been appointed and notified, nor any guardian *ad litem* assigned for him. This is not in any direct contradiction of the record, that attorneys appeared and pleaded for him. 2d Ld. Raymond, 1415; Wilson's Rep. 85.

The argument would be equally applicable, and yet manifestly invalid, if urged in a writ of error by a minor or an idiot, to reverse a suit, in which an attorney had appeared for him. The insanity of the principal is a revocation or suspension of the powers given to an attorney. Story on Agency, sect. 481, p. 501.

2. The error assigned is sufficient in law. Its averments are admitted by the plea to be true. The allegation that the then defendant was *non compos* and incapable to take care of himself, includes the fact that he was incompetent to appoint and to instruct an attorney, or to substitute one attorney for another.

It is now settled that a judgment so recovered is voidable, if not void. There was formerly a proverb in England that no person could be allowed to "stultify" or make a fool of himself. Whether the luminary who originated it, did not, by the very act, contradict his own maxim, is hardly to be doubted. But the expression was a mere jargon, of no definite import, and having no application to legal proceedings, more than to other transactions. And yet the sages of English law, in its semi barbarian state, introduced the phrase as a legal dogma. The oracular form and haziness of the words seem to have

allied it to the ancient bench. For a season, it wrought out many cruelties. No idiocy, no degree of insanity could exculpate from the charge of crime or of trespass, or relieve against alleged acts which took the form of contracts. The revolting effect of it instanced in cases, in which it is supposed some *non compos* persons, under age, suffered the cruelty of its application, led to a revision. In itself the phrase had no exactness of meaning. At that period it was thought best to embody it into some legal form. The quaintness of that day demanded the form of a general proposition. Accordingly a formula was bungled up, that "An idiot, in an action brought against him, shall appear in proper person, and he who pleads best for him shall be admitted. Otherwise it is of him who becomes *non compos*, for he shall appear by guardian, if he is within age, and by attorney, if he is of full age."

That rule was introduced in the time of the 3d Edward. 2 Black. Com. 291. Prior to that, it was by guardian and not by attorney, that the insane had pleaded their inability. The maxim that a man should not stultify himself, was a denial that insanity was a defence. When that was adopted, the insane was put upon the same footing with others. His disability could no longer be pleaded. Pleading by guardian then became unsuitable. It would have been absurd. The sane and the insane, being in this respect upon equal footing, all must adopt the same mode of pleading. To admit one to plead by guardian, would be the allowing of him to set up the disability, or in the language of the times to stultify himself. Hence the doctrine that a man could not stultify himself was simply expressed in the words that he "must plead by attorney." So soon as it was allowed that an insane man should set up the disability, that was in itself an abrogation of the rule that he could plead only by attorney. It was not long before that abrogation took place. As a rule of law, it was found too revolting to retain a place even in a system which hung a starving pauper for stealing food to the value of a sixpence.

But will it be argued that the non-stultification rule is not

identical with the rule, denying an insane person to plead by guardian, and that the latter is only a deduction from the former, and that though the former is rescinded, the latter is in force? I have shown it to be otherwise. But suppose the one is an inferecce from the other, can an inference from a principle stand as law, when the principle itself has been condemned and expelled? The rule itself with all its corollaries, inferences and offshoots, long ago became extinct. It was never adopted in this country, and no hand here, however antiquarian, has attempted to raise it from its foreign grave. Its inhumanities should protect us against its adoption here.

The case of *Beverley*, 4 Coke, 126, though adverted to by Comyns and Saunders, has in fact been set aside for ages; that is, just so long as insanity has been allowed as a defence. Such a defence was allowed as early as 1737. *Yates* v. *Boen*, 2 Strange, 1104, on the authority of cases, there cited, which had previously overruled the case of *Beverley*. This is cited with approbation in Buller's N. P. 172. The same principle was decided in *Webster* v. *Woodford*, 2 Day, 90.

The case of *Mitchell* v. *Kingman*, 5 Pick. 431, (see Rand's ed. and notes,) confirms the same doctrine.

Judge Story groups together madmen, infants, lunatics and idiots, and holds them all bound to act by guardian. If contracts, made by an insane person himself, are not binding, will the counsel show how it is that his contracts are binding, when made by his agent or attorney?

Suppose an attorney were, at the commencement of a suit, rightfully appointed, could no circumstances occur in which it would be necessary to exchange him, or to give further instructions from facts newly discovered?

A recent statute requires guardians to be appointed for defendants becoming insane during the suit. It may become necessary to move in arrest, or for a set-off of judgments, or for a new trial. Can these be done by attorney?

It may be asked who is to ascertain the condition of a defendant's mind; and on whom is the risk? I ask in turn who is to do it, when a minor or an idiot is sued? It is upon the

plaintiff. It may be called a hard rule. But the plaintiff has the power; the other party has not. The objection is fully met and obviated by the case of *Seaver* v. *Phelps*, 11 Pick. 304.

In support of the foregoing positions, I cite *Mitchell* v. *Kingman*, 5 Pick. 431, and notes of Rand; *Seaver* v. *Phelps*, 11 Pick. 304; *Thompson* v. *Searl*, 3 Mod. 310; *De Witt* v. *Port*, 11 Johnson, 460; *Arnold & al.* v. *Sanford*, 14 Johnson, 417; *White, adm'r*, v. *Palmer*, 4 Mass. 147; Story on Agency, sec. 481, p. 501; *Peaslee* v. *Robbins*, 3 Metc. 164; *Allen* v. *Billings*, 6 Metc. 415; *Hix* v. *Whittemore*, 4 Metc. 545; 1 Story on Equity, 223, and cases there cited.

Clifford and *Porter*, for the defendant in error.

The assignment of error is one which the plaintiff is not permitted to make.

The record shows that he appeared by attorney. The assignment contradicts that record. This is never allowed. 1 Roll. Ab. 758, pl. 8; 1 Strange, 648; 2 Tidd's Pr. 1108; 3 Johns. 433; 5 Com. 541; 1 Arch. Pr. 251; Hare & Wallace's Leading Cases, 561; 2 N. H. 435; 18 Maine, 372.

The assignment does not show that there was insanity prior to the rendition of the judgment. Sanity is always to be presumed till the contrary is shown. It is therefore presumed to have continued till the very moment of rendering the judgment. And even then it was not known to the Court or to the then plaintiff. We may simply remark, in passing, that it was, at that late period, quite impossible that a guardian *ad litem* should have been appointed.

Certain persons appeared in the case as attorneys. If there was any duty upon the court to appoint a guardian *ad litem*, it may be inferred that those persons were appointed. It is not requisite that the appointment should be in writing or of record.

The issue was joined and the verdict rendered prior to the alleged incompetency. Nothing then could have been done by a guardian. Not even a motion in arrest, for no civil suit can be so arrested.

But our reliance is mainly upon the ground that no guardian or guardian *ad litem* was necessary. The principle which we maintain is, that it is by attorney and not by guardian, that an insane person, if of adult years, must appear and plead. *Beverley's case*, 4 Coke, 124; *Dennis* v. *Dennis*, 2 Saund. (2d part by Williams, 333, n. 4,); Story's Pl. by Oliv. 375; *Faulkner* v. *M'Clure*, 18 Johns. 134; 4 Com. Dig. Idiot, D, 7; 1 Chit. Pl. 469; 2 T. R. 390; 6 T. R. 133; 4 T. R. 121; 4 Denio, 262; 19 Wend. 649; 13 Ves. 540; 1 Chit. Gen. Pr. 671, 826; Rev. Stat. ch. 110, sec. 33; ch. 115, sec. 87; Story's Eq. Pl. 3d ed. 73, and 64, n. 2; 2 Inst. 390; 3 Bibb, 11; Jacob's L. D. Idiot and Lunatic, IV. 382. The Stat. 1849, ch. 104, has been adverted to. That statute had not been enacted when this judgment was rendered; and it does not require, but merely authorizes, the appointment of a guardian *ad litem.*

It does not appear that any probate guardian had been appointed. Whatever might have been the rights of such a guardian, or the duty of giving notice to him, need not be considered.

On whom rests the duty and the penalty of watching the mental powers of a defendant, and making a representation of them to the court? No pretence that it can be on the plaintiff in a suit. If the friends of Mr. King had made a representation, a guardian *ad litem* would doubtless have been designated. It could however have been but useless. It is not pretended that the judgment was unjust, or unfairly obtained. If injustice has been done, the case is open to a review.

The strongest case against us is probably that of *Mitchell* v. *Kingman*, 5 Pick. 431, cited by counsel. But that was a case of idiocy. And idiots could never appear, except by guardian.

But the case at bar is decided in *Hathaway* v. *Clark*, 5 Pick. 490.

The statute of Westmoreland authorized all persons to appear and answer, except idiots, infants and married women. The rule laid down in *Beverley's case* was found in that statute. No case, found in any book, is at variance from that

rule. Nor has it been changed or invaded by any statute of the State.

The case of *Hix* v. *Whittemore*, 4 Metc. 545, cited and relied on by counsel, is different from this. The insanity there existed at the commencement of the suit, and there was a default. It is therefore inapplicable here. The conclusion therefore, in view of the whole case, which we respectfully submit to the Court is, that lunatics, of adult years, till under guardianship, have all the rights and duties, as to appearance in court, which pertain to other men.

Paine, in reply.

It is urged, on the other side, that we are estopped, because our assignment of error is in conflict with the record. But the thing is not so. We do not contend that there was no appearance by attorney; but that the principal was incapable to appoint and instruct an attorney.

The gentlemen mistake in treating the case of *Mitchell* v. *Kingman*, 5 Pick. as one of idiocy. It was one of lunacy, and the language and the decision of the case, sweep away the mass of incongruities heaped upon the obsolete and barbarian case of Beverley, which in fact, with all its absurdities, has been made the only basis of the defence. The statute of Westmoreland, like wager of battle, faded centuries ago, before the lights of reason and humanity. If it be in force, and the gentlemen's construction of it be correct, how is it that they admit power in the courts ever to appoint a guardian *ad litem.* It denies too the power of a probate guardian to appear or even to institute or prosecute a suit. Our blessing is, that it rests harmlessly among the things that were of old.

Shepley, C. J. — This writ of error *coram nobis* has been commenced by the guardian of the original defendant to procure the recall or reversal of a judgment rendered in this Court.

A motion was made to quash the writ and proceedings for certain alleged irregularities, which motion was overruled, and exceptions were filed and allowed, which have been waived,

as it is said, to have a decision upon the merits. The exceptions are therefore overruled, but this will authorize no inference, that the proceedings are considered to have been correct.

The error assigned is, "that the said King at the time of the rendition of the said judgment was *non compos mentis*, and incapable of taking care of himself, nevertheless no guardian for said King was appointed, and no guardian *ad litem*, and there was no notice of the pendency of said action given to, and there was no appearance by any such guardian at or prior to the rendition of said judgment."

It may be doubtful, whether it was intended to allege the error to have consisted in the rendition of a judgment against one *non compos mentis*, or in the rendition of it without the appointment of a guardian, or a guardian *ad litem*.

It is not probable that it was intended to allege, that a judgment rendered against one *non compos mentis* must of course be erroneous, for by the common law a judgment may be rendered against such a person founded upon contracts or liabilities, by which he is legally bound. If such were the intention, the position could not be sustained. It would be opposed to the general current of authority.

The cases, which determine how such a person shall appear and plead, as well as cases to be hereafter noticed, show, that judgments at law, and decrees in equity may be properly entered against them, when they are properly represented.

It is not alleged in the assignment of errors that a guardian had been appointed by any competent tribunal before the judgment was rendered; or that he was an idiot or an infant.

Whether the judgment was erroneous must therefore depend upon the question, whether the person alleged to be *non compos mentis* was under such a state of facts properly represented before the court.

In many jurisdictions after an inquisition has been taken, and it has been ascertained, that the person is of unsound mind, and his person and estate have been committed to a

committee or guardian, a suit at law for any practical purpose may not be maintainable. The custody of the persons and estates of idiots and lunatics was given to the crown by statutes, 17 Edw. 2, chap. 10 and 19. A person aggrieved by such an inquisition was entitled by statute, 2 Edw. 6, chap. 8, sect. 6, to traverse it, and if not entitled he might obtain permission of the chancellor to do it, and if successful he might obtain a judgment on a contract or liability assumed during the alleged idiocy or lunacy. *Ex parte, Wragg & Feme*, 5 Ves. 449; *Ex parte, Hall*, 7 Ves. 261. In the matter of *Fitzgerald*, 2 Sch. & Lef. 432. In New York, it has been regarded as a contempt of the court, having by statute the custody of the persons and estates of such persons, to commence and prosecute an action at law against them without permission. *L'Amoureux* v. *Crosby*, 2 Paige, 422; Matter of *Hellen*, 3, Paige, 199.

Where, as in this State, no such obstacle exists, the inquiry is presented, whether the original defendant, being of age and not an idiot, but *non compos mentis*, was properly represented before the court. The record shows, that service was regularly made upon him, and that he appeared by attorneys.

"An idiot in an action brought against him shall appear in proper person, and he, who pleads best for him, shall be admitted, as appears in 33 H. 6, 18, b. Otherwise it is of him, who becomes *non compos mentis*, for he shall appear by guardian, if he is within age, and by attorney, if he is of full age," is the rule laid down in *Beverley's Case*, 4 Co. 123. And although one point asserted in that case, that no one shall be permitted to stultify himself, has been denied to be correct, especially in this country, the rule now presented does not appear to have been at any time denied to be a correct one. It has the sanction of the best authorities. 2 Saund. 333, note 4; Com. Dig. Idiot, D. 7.

This court is authorized to appoint a guardian *ad litem*, when a party becomes insane pending the suit. Chap. 115 sect. 86; Act approved on July 19, 1849, chap. 104. And it

may by implication be authorized to do it, when the person was not of sound mind before the suit was commenced. Chap. 110, sect. 33. The Court can have no knowledge of the fact, until it receives it from some proper source; and it is then a matter of discretion to be exercised or not according to its judgment upon the proof presented.

The law does not appear to have imposed it as a duty to be performed by a plaintiff, to ascertain the mental capacity of a defendant and to bring it before the Court for its consideration, that such a guardian may be appointed. It may be prudent in cases of doubt for him to do so, lest his judgment should be liable to be disturbed by a petition for a review, or possibly by a suit in equity.

There being no legal obligation resting upon the Court or upon the plaintiff to ascertain the facts and have such a guardian appointed, its omission cannot be assigned as error.

When one *non compos* has been properly before the Court, "acts done by matter of record, as fines, recoveries, judgments, statutes, recognizances, &c. shall bind as well the idiot as he who becomes *non compos mentis.*" *Beverley's case*, 4 Co. 123; *Mansfield's case*, 12 Co. 124; Fonbl. Eq. B. 1, c. 2, § 2, note k.

Nothing can be assigned for error, which contradicts the record. 2 Saund. 101, 102; Com. Dig. Pleader, 3, B. 16; *Hilbut* v. *Held*, Stra. 684.

When the record of a domestic judgment states, that the defendant appeared by attorney, testimony to prove that the attorney was not duly authorized, cannot be received, for it would contradict the record. If the question be, whether a foreign judgment was rendered by a court having jurisdiction and there be found in the record a statement, that the defendant appeared by attorney, such testimony may be received, for the reason, that there can, properly speaking, be no record made by a court having no jurisdiction. *Anonymous*, Salk. 88; *Stanhope* v. *Firmin*, 3 Bing. N. C. 301; *Hall* v. *Williams*, 6 Pick. 232; *Gleason* v. *Dodd*, 4 Metc. 333; *Aldrich* v. *Kin-*

ney, 4 Conn. 380; *Starbuck* v. *Murray*, 5 Wend. 148; *Reed* v. *Pratt*, 2 Hill, 64.

In the case of *Dennis* v. *Dennis*, 2 Saund. 329, the original defendant appeared by attorney, and by her next friend brought a writ of error to reverse it. The error assigned was, that she was an idiot *a nativitate*, and that she ought to have appeared by her friend, and not by attorney. The defendant in error presented by plea an issue on the fact of her being an idiot *a nativitate*, which was joined and the plaintiff in error was nonsuited, and the judgment was affirmed. This affirmance appears to have been made upon the rule laid down as before stated in Beverley's case.

In the case of *White* v. *Palmer*, 4 Mass. 147, the error assigned was, that the original defendant was *non compos mentis*, and that White and Hall long before the teste of the writ had been legally appointed guardians, and that they had no notice of the suit. The judgment was reversed for that cause, but the case does not decide, that the judgment would not have been legal, if the *non compos* had not been under guardianship.

In the case of *Hathaway* v. *Clark*, 5 Pick. 490, the error assigned was, that the original defendant at the time of the service of the writ and of the rendition of judgment was under guardianship as a person *non compos mentis*. The fact of his being thus under guardianship was traversed, and an issue joined thereon was found for the defendant in error, and the judgment was affirmed. The mere fact, that the defendant was of unsound mind at those times, does not appear to have been considered as constituting any objection to an affirmance of the judgment.

In criminal proceedings, the defence according to the usual course of proceeding is often made by an attorney not assigned by the court, that the accused was insane. The verdict of conviction or acquittal may have been found after a decision upon that ground of defence. It would present an anomaly in judicial proceedings to find it assigned for error, that no guardian *ad litem* or other guardian was appointed to conduct

the defence. In such cases it is true, that the accused must appear in person and answer to the charge. Yet if he be actually insane then, that affords him no advantage for his own protection. His defence is managed by an attorney selected by himself, or by his friends, and it is not known, that this course of proceeding in the administration of criminal law, has occasioned any grievance requiring redress.

In the administration of justice in civil cases there is an intrinsic difficulty in cases of alleged unsoundness of mind, in framing a rule for the protection of such persons before the trial, when they have not by some competent tribunal been adjudged to be of unsound mind. Whether the weakness of mind or decay of intellect is so great as to prevent their being regarded as *compos mentis*, is often a question of great delicacy and difficulty. One, which in many cases, can only be decided properly after a most careful and thorough investigation and examination of testimony. If a court upon affidavits and counter affidavits should decide in such cases not to appoint a guardian *ad litem*, this being a preliminary proceeding would not ordinarily appear of record, and if it were regarded as error for a *non compos* of full age to appear and defend by attorney, he might bring error, assign for error his unsoundness of mind and the omission to appoint a guardian *ad litem* and try before a jury the very question submitted in the first instance to the decision of the court, and have that decision regarded as erroneous and the foundation of a writ of error to reverse the judgment. Not only so, but the same question may have been also submitted to the jury as a ground of defence in the original action and have been decided by them also, and then again be submitted to another jury in a writ of error.

The mere fact, that a party defendant is *non compos mentis* during any of the preliminary proceedings, or when judgment is rendered, constitutes no ground of defence, for both at law and in equity a contract or liability assumed by him while of sound mind, may be enforced against him, when he is of unsound mind. *Yates* v. *Boen*, Stra. 1104; *Kernot* v. *Noo-*

man, 2 T. R. 390; *Nutt* v. *Verney*, 4 T. R. 121; *Ibbotson* v. *Galway*, 6 T. R. 133; *Steel* v. *Allan*, 2 B. & P. 362 and 437; *Pillop* v. *Sexton*, 3 B. & P. 550; *Baxter* v. *Portsmouth*, 2 C. & P. 178; *Hathaway* v. *Clark*, 5 Pick. 490; *Robertson* v. *Lain*, 19 Wend. 649; *Clark* v. *Dunham*, 4 Denio, 262; *Owen* v. *Davis*, 1 Ves. 82; *Niell* v. *Morley*, 9 Ves. 478; Anonymous, 13 Ves. 590.

Cases have been cited to show, and they do show, that a judgment rendered against an infant will be erroneous, if the record shows, that he appeared by attorney and not by guardian. The inference thence appears to have been drawn, that the rule is the same respecting the appearance of one of full age and of unsound mind. The inference is unauthorized. The rule respecting the appearance of an infant, whether of sound or unsound mind is, that he must appear by guardian. 2 Saund. 96, note 2; Com. Dig. Pleader, 2, c. 2; *Beverley's case*. And one of unsound mind of full age, must appear by attorney.

Nor does it appear to be essential, that the law should be otherwise for the protection and preservation of the rights of persons *non compos mentis*. The defence must be, that he was in that condition, when the contract was made or liability incurred; and the only cause of complaint must be, that he was not in a condition to have a fair trial. If it should be made to appear, that he did not on that account have a fair trial and that injustice had been done, the court upon petition might grant a review.

And when a judgment wholly unjust has been obtained against one *non compos mentis*, he may in certain cases obtain relief in equity by a perpetual injunction against the enforcement of that judgment. In the case of *Homer* v. *Marshall*, 5 Mumf. 466, a judgment appears to have been obtained against a monomaniac for slanderous words spoken of one with reference to the subject, concerning which his mind was unsound, and a perpetual injunction was obtained against the enforcement of that judgment. *Judgment affirmed.*

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF KENNEBEC,

1851.

PRESENT:

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

THE STATE *versus* HASKELL.

By R. S. chap. 156, section 7, it is an offence, punishable in this State, if a person, to whom property is entrusted, to be by him carried for hire and delivered in another State, shall, before such delivery, fraudulently convert the same to his own use, whether the *act* of conversion be in this State or in another.

ON EXCEPTIONS from the District Court, RICE, J. presiding.

INDICTMENT, containing three counts. The second count alleges, in substance that, at Waterville in this county, the President, Directors and Company of the Ticonic Bank entrusted and delivered to the defendant sundry bank notes,

checks, drafts and other evidences of debt, the property of said bank, to the amount and of the value of $3418, to be delivered by the defendant to the Cashier of the Suffolk Bank in Boston, in the Commonwealth of Massachusetts, and that the defendant feloniously embezzled and converted the same to his own use, before the same had been so delivered, against the peace and contrary to the form of the statute.

The evidence tended to prove *that*, at the time and place alleged, the Ticonic Bank, delivered to the defendant a sealed package containing bank bills, checks, drafts and other evidences of debt, of the character, and to the amount and for the purposes alleged in the indictment, *that* the defendant immediately proceeded to Boston, and *that* in four or five days after the receiving of said funds he, at Waterville, delivered back to the Cashier of the Ticonic Bank a portion of said checks, drafts and acceptances, saying he had used the rest of the contents of the package, amounting to 2145 dollars and —— cents.

The defendant's counsel requested the Judge to give instruction to the jury, that they should acquit the defendant of the charge of embezzlement, unless satisfied that the act of embezzlement was committed within this State. That instruction was not given, but the jury were instructed, that if the defendant was intrusted at Waterville with the property for the purpose of carrying it to Boston, and if, before delivering the same there, he embezzled or fraudulently converted it to his own use, and refused to account for the same on demand in this county, the offence was made out, and might be prosecuted for in this Court.

The defendant was found guilty upon the second count. He filed a motion in arrest of judgment, 1st, because the value of each description of the property was not set forth, and 2d, because in the second count, it is not averred, that the fraudulent conversion was committed in this county or in this State. The motion was overruled, and to that overruling and to the instruction and to the rufusal to instruct, the defendant excepted.

H. W. Paine and *H. A. Smith*, for the defendant.

1. The judgment should be arrested, because the indictment contains no statement of the place where the offence was committed. The place must be named, and it must appear to have been within the jurisdiction of the Court. Roscoe's Cr. Ev. 259; 26 Maine, 263; Hawkin's P. C., B. 2, ch. 25, § 83.

The case therefore presents the question whether, for a crime, committed in another State, the prisoner can be punished in this. Rev. Stat. ch. 167, sec. 1; Amendments to the Const. U. S. Art. 6; Const. of Maine, Art. 1, sec. 6, giving a right to trial by a jury of the vicinity, — viz. a jury "from the scene of the transaction;" 1 Chit. Cr. Law, 146.

The Constitution of the United States, Art. 4, sec. 2, provides for the surrender of fugitives. So that it is not necessary to enlarge the operation of the statute by construction.

2. The judgment must be arrested, because it is not stated *when* the offence was committed.

It is in general requisite to state, that the defendant committed the offence, for which he is indicted, on a specific day and year. Chitty's C. L. vol. 1, page 217.

Every issuable fact must be stated with time and place. The time should be stated with such certainty, that no doubt can be entertained of the time really intended. Chitty's Cr. L. vol. 1, page 218.

It is laid down in all the books which treat of the matter, as an undoubted principle of law, that no indictment whatever can be good without showing the year and day of the material facts alleged in it. 2 Hawkin's P. C. chap. 25, sect. 77.

3. The instruction refused, should have been given. An act committed beyond the limits of the State, is no offence against the laws of the State.

No more reason for charging a man with embezzlement out of the State, than for charging him with larceny or murder, done out of the State.

4. The instruction given was clearly wrong. By that instruction the crime is made to consist in the refusal to account;

whereas the defendant might have refused to account, and yet have done no wrong within the statute.

5. The State where the offence was committed has jurisdiction. A conviction or acquittal here, would be no bar there. 1 Chitty's Cr. Law, 146.

This rule in regard to embezzlement has never been changed by statute.

The intention must exist at the time of taking. *Hobson's case*, 2 Russell, 189, 190.

No presumption of a felonious intent, in the taking, can arise from a subsequent embezzlement. Starkie's Ev. part 4, 826, 827.

Vose, County Attorney, for the State.

SHEPLEY, C. J. — The accused was found to be guilty only of the offence alleged in the second count. That alleges, that he received at Waterville, in this county, of the Cashier of the Ticonic bank, sundry bank notes, checks, drafts, and other evidences of debt to be by him carried for hire to Boston, and delivered to the Cashier of the Suffolk bank; and that he fraudulently converted the same to his own use, before they were so delivered. There is no allegation that he thus converted them at any place within this State.

The presiding Judge refused to instruct the jury, that they must acquit him, unless satisfied that the act of embezzlement was committed within this State. There is a motion for arrest of judgment.

The question presented by the refusal to instruct and by the motion is, whether by the statute, chap. 156, sect. 7, it is made an offence in this State to receive property within its jurisdiction, to be carried for hire and delivered to a person in another State, and to convert it fraudulently to his own use out of the State, before it has been delivered.

The offence of embezzlement and all other offences are punishable only in the State, within whose jurisdiction they have been committed. But the legislature of a State may make an act done within its jurisdiction, an offence by reason of other

acts subsequently done without its jurisdiction. And it may be just legislation, and necessary for the protection of the rights of its own citizens to do so. It may declare, if a person within the State shall receive property to be carried for hire, and delivered to a person out of the State, and shall fraudulently convert the same to his own use, either within or without the State, that he shall be considered to have received it with a felonious intent, and that he shall be deemed to be guilty of larceny.

Whether the second count is sufficient, will depend upon the construction of the section upon which it was founded. That section does not declare, that a violation of its provisions shall constitute the offence of embezzlement. It does declare, that a person found to be guilty of their violation shall be deemed to have committed larceny.

The act of fraudulent conversion, wherever committed, appears to have been regarded as evidence of an intention existing at the time of its reception to commit the crime, or to do the act declared, to amount to larceny.

The elements required by the statute to constitute the crime are, that the goods should be delivered to a person to be by him carried for hire, and to be delivered to another person, or at a certain place; that the same should be by him embezzled or fraudulently converted to his own use, "before the same shall be delivered at the place or to the person where or to whom they were to be delivered." There is no requirement that the fraudulent conversion should be made within the State; and it is not unreasonable to conclude, that it was the intention of the framers of the statute to make such a breach of trust and fraudulent conversion, wherever committed, an offence in the State, where the property was received and the trust assumed.

Such fraudulent breach of trust and conversion, although it would not by the common law amount to embezzlement or larceny in this State, the legislature might declare should be deemed to be larceny or any other well defined offence respecting property.

An appropriation by a carrier, of money thus received to his own use, might not constitute the crime, for a delivery of other money of equal value would show, that there was no intention to defraud or embezzle.

In this case the testimony does not show, that money only was fraudulently converted to the use of the accused. It is stated in the bill of exceptions, that on his return to Waterville, the accused delivered to the cashier of the bank "a portion of said checks, drafts, and acceptances, saying, that he had used the rest of the contents of said package." The value or amount converted is stated, but that does not show, that the amount stated was not composed in part of checks or other evidences of debt. It appears from this testimony, that he did not account for the property within the State; and the instructions required that the jury should find, that he refused to account for it in this county.

When considering the sufficiency of the count, upon which he was found to be guilty, the facts alleged in it must be regarded as having been established by legal testimony.

Exceptions and motion overruled.

ROLLINS *versus* CLAY *& al. ex'ors*

A corporation is not dissolved by merely ceasing to exercise its powers.

A corporation, having authority to maintain a boom, took a lease of some flats and shore, and there erected a boom, extending into the river, for catching and securing lumber. It was made of piers, logs and chains. — *Held*, that by a sale of "the boom and piers," on execution against the company, nothing passed but the piers, logs and chains, and that the purchaser took no right in the leasehold.

Though it was by wrong that the reversioner regained possession of land, which was under lease, yet, he may maintain trespass against a mere stranger to the lease, who has invaded his possession.

Directors of a corporation, unless specially empowered, have no authority to make sale of any portion of its estate, essentially necessary for the transaction of its customary business.

ON REPORT from *Nisi Prius*, HOWARD, J. presiding.

Trespass *quare clausum fregit*, brought against the testator to recover damages for taking away the plaintiff's boom. The general issue with brief statement was pleaded.

Documentary and oral evidence was introduced by the parties. The case was then submitted to the full Court with authority to draw inferences of fact, and to appoint an assessor of damages, if there should be any occasion for an assessment.

The evidence showed, that in 1832, Mrs. Olive Rollins leased to Usher and Weston, acting in behalf of the Kennebec Boom Corporation, the shore and flats pertaining to her upland farm, for the purpose of catching, and booming logs and other lumber for the term of thirty years, yielding a rent of twenty dollars yearly, but reserving to the corporation a right to surrender the lease after the first year.

In 1835, she conveyed the farm to the plaintiff, "reserving, however, for the time being, the flats and shore which I have leased to the Kennebec Boom Company." She also, on the next day, assigned the lease to the plaintiff.

In 1832, the corporation acting under their lease, erected a boom on the flats and in the tide waters of the river, and occupied it until 1842. In the spring of that year all the right, title and interest of the corporation "*in and to said boom and piers*," was sold on execution to Henry T. Clay, who has since continued to occupy the boom.

In Feb'y, 1847, the plaintiff notified Henry T. Clay and one Lancaster, to discontinue their occupation of the shore and land. In April of that year, the plaintiff erected a boom within the boom occupied by Clay, of nearly the same shape and size of it, and extending the whole width of the plaintiff's land. This inner boom collected and retained nearly all the logs which would have come into the larger boom. In June of the same year the testator, by direction of Henry T. Clay, removed the inner boom. It is to recover damage for that removal, that this suit was brought.

Subsequent to the suit, Usher and Weston, by separate instruments, released to the plaintiff all their respective rights in the premises.

In May 22, 1847, Samuel E. Crocker and Elijah Jackson, acting as directors of the corporation, licensed Henry T. Clay and said Lancaster, for a term till countermanded, to occupy the boom with the shore and privileges, secured to the corporation by Mrs. Rollins's lease.

Crocker and Jackson were members and a majority in number of the last board chosen by the corporation, and their election was made more than five years before the alleged trespass. During all that time, the corporation had ceased to do business, and they never voted to authorize any sale or conveyance of their interest in the shore or flats. Some of the particulars in the evidence are recited and commented upon in the opinion, given by the Court.

Bradbury, *Baker* and *Whitmore*, for the plaintiff.

The title to the *locus in quo* is in the plaintiff. Neither the executor nor Henry T. Clay, under whom he professed to act, had any right to maintain any boom in front of the plaintiff's land.

I. Whatever right the corporation had under the lease was abandoned. The lease reserved the right to abandon after one year. From 1842 to 1847 they had no occupation. Hence a resistless inference, that they had availed themselves of the reservation, and given up the contract.

II. Even if the lease had not been abandoned by the company, Henry T. Clay had no right under it. The officer's sale to him was ineffectual. It was merely of a chattel, the boom sticks and chains. It did not purport to convey the franchise or any thing held by the lease. H. T. Clay in no way connects himself with the lease.

III. Henry T. Clay could take no available interest under the assignments of Usher and Weston.

1. They had no rights; the lease was not to them, but to the corporation.

2. If they had rights, their assignment of them to H. T. Clay and Lancaster was after the trespass.

IV. The attempted license given by Crocker and Jackson was unavailing.

1. It amounted to a transfer of property which was essential to all future and further operations of the company. For such a transfer, no vote of authorization was ever passed, and no ratification was given. The power to make such a transfer is not within the incidental powers pertaining to directors.

2. The corporation, at the time of the giving of that license, had long been dissolved.

3. Crocker and Jackson had long ceased to be directors. Their appointment was but an annual one, and it took place several years before they assumed to make the license.

V. If, without claiming under the lease, Henry T. Clay sets up a tenancy under the plaintiff, that relation was terminated by the notice to quit, given February 1, 1847.

In support of these positions the following authorities were cited. 17 Mass. 1; 1 Pick. 45; 23 Pick. 216; Story on Agency, chap. 6.

Evans, for the defendants.

The plaintiff had no title. 13 Metc. 523.

The corporation had a good title for thirty years under the lease. The deed, under which the plaintiff claims, exhibits that fact. The rights of the corporation all passed by the officer's sale. A term for years is a chattel. *Gay, ex parte*, 5 Mass. 419.

By R. S. chap. 114, sect. 46, not only the franchise but all other corporate property is attachable on *mesne* process.

By R. S. chap. 117, sect. 2, all chattels real and personal, liable at common law to attachment, and not exempted, &c. may be sold on execution. Comyn's Digest, tit. Execution, (chap. 4.) "What things may be taken."

"So he may extend and sell a term of years." 8 Coke, 171, a.

Erections made on another's land by his consent, are personal property to be sold as other personal chattels are.

By the terms of the lease itself, it was contemplated that other persons might hold under the corporation.

The expression "or any person under them" is twice used in it.

If any irregularity or want of form in levying the execution had taken place, which is denied, nobody but the corporation, or some person claiming under them, could take advantage of it.

Objections to the regularity of a sale of property on execution cannot be raised by strangers to the execution. *Smith* v. *McGowan*, 3 Barb. Sup. C. Rep. 404.

The corporation acquiesced in H. T. Clay's title, and surrendered possession.

The plaintiff also acquiesced and received rent for several terms from H. T. Clay. The corporation never abandoned. It had no right to. The right reserved was only a right to surrender. That could be done only upon giving notice. The sale by force of law will not be pretended as an abandonment.

The boom, erected within the boom of Clay, was a private nuisance, which he had a right to abate.

SHEPLEY, C. J. — Olive Rollins, being the owner of a farm adjoining the Kennebec river on March 21, 1832, leased "all the shores and flats of her said land" for the term of thirty years to the Kennebec Boom Corporation for an annual rent agreed to be paid by Ellis B. Usher and Benjamin Weston, jr., who represented the corporation, and with whom the contract was made. On March 20, 1835, she conveyed that farm to the plaintiff, "reserving however for the time being the flats and shore on the Kennebec river, which I have leased to the Kennebec Boom Company, about three years ago, for the term of thirty years." On the following day she assigned that lease to the plaintiff, and on the twenty-fourth day of the same month it was recorded in the registry of deeds. The plaintiff having acquired title to the farm, with a reservation of the title of the lessees, and taken an assignment of that lease can have no right to occupy the flats leased, while the lease is legally subsisting.

It contained a provision, that the lessees should have "the privilege of delivering up said premises and privileges at any time after the expiration of the first year." There is testimony to prove, that the plaintiff stated that one year's rent remained unpaid before this contest arose. There is no testimony to prove, that any entry had been made, or other act done to terminate the lease for that cause. The notices given by the plaintiff to Henry T. Clay, and to Daniel Lancaster could have no such effect. The lease or rent is not alluded to in them.

The Kennebec Boom Corporation having been authorized by special acts of the legislature, placed a boom, called the Brown's island boom, upon the flats and in the waters of the river during the year 1832, and continued to occupy it until the spring of the year 1842.

Parker Sheldon says: — "I understood all the personal property of the corporation was sold about 1842, to pay the debts of the corporation, and from that time I considered the shore contract abandoned, and the company defunct."

A corporation is not dissolved by ceasing to exercise its powers. Nor because its stockholders and directors may consider it to be "defunct." Nor will the lease be terminated, because the witness considered the shore contract abandoned.

There is no proof that the corporation, or any person acting in its behalf ever terminated the lease, by delivering up the premises. On the contrary the flats appear to have been occupied in part by the boom, and it may be inferred from the plaintiff's declaration, that the rent due by the lease had been paid until within a year or two of the time, when this contest arose.

The releases made by Ellis B. Usher and Benjamin Weston, jr., to the plaintiff, can have no effect upon the rights of the parties. They were not executed, until after the supposed trespass had been committed. Those releases do not purport to convey any rights of the corporation. Certain agreements contained in the lease appear to have been made with Usher and Weston, acting in behalf of the corporation, but the flats

are expressly leased to the corporation, and to it is reserved the right to terminate it by delivering up the premises.

There is, therefore, no evidence presented to prove, that the lease was not a valid and existing contract; and the corporation had by virtue of it the exclusive right to occupy those flats, unless it had in some other mode parted with or been deprived of that right.

Henry T. Clay claims to have been the owner or assignee of the term, and to have directed Richard Clay, (deceased,) to cut away or remove the boom placed on those flats by the plaintiff. He introduces in proof of his title, copies of a judgment, and of an execution issued thereon in favor of Charles Lawrence, against the Kennebec Boom Corporation, with a copy of the return made on that execution by Enoch Marshall, a deputy of the sheriff, of a sale by him to Henry T. Clay, of "Brown's island boom and piers." That sale, made on May 5, 1842, appears to have been regular and legal. The officer made out a bill of sale of the boom, and delivered it to the purchaser.

It is contended in defence, that this sale of the boom and piers conveyed the right of the corporation to occupy the flats, on which the boom had been partly placed and maintained. It is said, that by a boom is meant the space enclosed by the piers, chains and logs. That the materials are designated as boom pieces, piers and chains. This signification of the word boom cannot be admitted. As explained by lexicographers, and as used in acts of legislation, the word means the spars or logs, and chains, and other fixtures used to keep them in place, extending wholly or partially across a river or other body of water to obstruct the floating of objects in those waters. The word has not a meaning sufficiently broad to embrace a leasehold estate for years. Nor does there appear to be any sufficient reason to conclude, that it was used by the officer to include it, or with the expectation that it would include it. No allusion is made to it by the officer in his seizure, return of sale or conveyance of the boom and piers. These were visible objects; the term was not; and there is no proof that its exist-

ence was known to the officer. Nothing can pass by such a sale, which is not named, described, or involved in the description of what is sold.

It is said that advantage cannot be taken by a stranger of any irregularity or want of form in making the sale. Such is not the defect here presented. The objection is not that there were irregularities or informalities in making the sale, but that the leasehold term of years was not in fact sold.

The defendants present a conveyance or assignment of it, purporting to have been made on May 22, 1847, by Samuel E. Crocker and Elijah Jackson, as directors of the corporation.

They appear to have been two of the three last directors chosen by the corporation. By the testimony of Sheldon, they appear to have been chosen at least five years before they executed that assignment. The corporation during that time had ceased to do business. The directors of a corporation are authorized, by virtue of their office, to transact its ordinary and customary business, unless the charter or by-laws otherwise determine. But they are not authorized, without some special authority, to make sale of that portion of its estate or property essentially necessary to be retained to enable it to transact its customary business. This term existing by lease appears to have been of that character. The directors do not appear to have had any special authority to make the sale. Considering the time which had elapsed, since their election, and that the corporation had ceased to do business during that time, and that the property conveyed was necessary for the transaction of its customary business, the conclusion must be that no title was acquired by that conveyance.

The result is, that there was an outstanding term held by the Kennebec Boom Corporation, to which neither of these parties has exhibited any legal title. The flats do not appear to have been occupied by that corporation for several years. If the plaintiff received rent from Henry T. Clay, who occupied without title, their relations were terminated by the notices to quit, given on February 1, 1847, before the plaintiff's boom was removed in the following month of June.

The plaintiff was the owner of the flats subject to the lease. He appears to have made a peaceable entry, and to have placed his boom upon them. He was thus in the actual possession of them, when his boom was cut away. He was liable to be treated as a trespasser, and to be ousted by the corporation, but not by a stranger to the title. If he had commenced a real action against the owners of Brown's island boom, as the occupants of the flats, they being strangers to it, could have set up that outstanding term to disprove his actual seizin, but for no other purpose, to prevent a recovery. *Walcot* v. *Knight*, 6 Mass. 418; *Bailey* v. *March*, 3 N. H. 274; *Shapleigh* v. *Pillsbury*, 1 Greenl. 271; *Stanley* v. *Perley*, 5 Greenl. 369; *Green* v. *Watkins*, 7 Wheat. 27.

If a person should lease his house for a term of years, and finding it unoccupied should enter during the term and place his furniture in it, a stranger to the interests of the lessee could not enter and injure that furniture without being a trespasser; and the owner of the house, having the actual though not rightful possession of it, might maintain trespass *quare clausum* against such stranger. So the plaintiff, being the owner of the flats, and having entered into the actual possession, and placed his boom upon them, may maintain such an action against one who, being a stranger to that title, destroyed his boom. But the income and profits of those flats belonged to the lessees and not to the plaintiff; and he is entitled to recover only for the damage done to the boom, which was his own property.

If the parties do not agree upon the amount, an assessor will be appointed to ascertain them.

Defendants defaulted.

LAMBARD *versus* PIKE.

An officer returned that he had attached "as the property of defendants, all the right, title and interest that they have to a grist-mill, standing in the town of M." — *Held;* if it appear that the defendants had an interest in one grist-mill in that town, the attachment was valid to hold that mill, unless it appear, that they had also an interest in some other grist-mill in the same town.

Though a debtor, at the time of his indebtment, held a conditional bond for a conveyance of real estate, yet if he had *bona fide* transferred it prior to the attachment of his interest in the land by the creditor, the attachment is of no effect.

Though, *after such transfer*, the officer having the writ with orders to attach, should neglect to make the attachment, he would not be accountable to the creditor for the neglect even to the amount of nominal damage.

If a creditor in taking judgment for a lien claim include with it, in the judgment, another claim, to which no lien attached, the lien is thereby waived and defeated.

A stove with its funnel cannot be considered as materials for the repair of a building, within the meaning of the statutes of lien.

ON REPORT from *Nisi Prius*, HOWARD, J. presiding.

The case was submitted to the court with power to draw inferences of fact. So far as the matters presented in argument were decided, the character and facts of the case are too fully stated in the decision, to justify the taking of room for the recital of them here.

SHEPLEY, C. J. — The action is case against a former sheriff of the county of Somerset for the default of his deputy, Seth Greenleaf, in omitting to make an attachment of the estate of Elijah D. Johnson and Samuel Soule, on a writ in favor of the plaintiff against them. The name of Samuel Soule was erased and judgment was in that suit recovered against Johnson alone. The execution issued thereon was afterward in the hands of the defendant, and it was by him returned in no part satisfied.

There is no count in the declaration charging the defendant with personal neglect or misconduct in relation to the execution. The action can be maintained only upon proof of default by his deputy in making service of the writ.

The deputy was by written instructions directed to attach

"defendant's real estate, particularly their interest in the grist-mill operated by them." On the same day he made his return of an attachment in the following words: — "I have attached as the property of the within named defendants all the right, title and interest, that Elijah D. Johnson and Samuel Soule has to a grist-mill now standing in Mercer in said county of Somerset".

The argument for the plaintiff assumes, that no valid attachment was made of those defendants' title to or estate in the mill and privilege; and this does not appear to be denied in the argument for the defendant. It should however be noticed, lest an inference should be drawn, that the Court had so decided.

This Court has decided that an attachment "of all the right, title and interest" which a debtor "has to real estate" in a town or county named is valid and sufficient to create a lien upon the debtor's estate therein. *Crosby* v. *Allyn*, 5 Greenl. 458; *Roberts* v. *Bourne*, 23 Maine, 165. Technical accuracy or the most appropriate phraseology is not to be expected in such returns. They will be sufficient if the purpose be clearly made known by the language used. It may be no valid objection to the sufficiency of the return, that their interest in "a grist-mill" was attached. By the conveyance of a mill the land, on which it stood, was held to have been also conveyed. *Blake* v. *Clark*, 6 Greenl. 436. The attachment may not be void for uncertainty, because their interest in "a grist-mill now standing in Mercer" was attached.

This might be too uncertain, in a conveyance, especially if it should appear, that they had an interest in more than one grist-mill in that town; but it would give information, that their interest in any grist-mill situated in that town was attached, and if there did not appear to have been more than one, the estate attached might be rendered certain.

If the words "as the property of the within named defendants" were omitted; the remaining language might be sufficient to make a valid attachment of their interest in the mill and privilege. Those words would not restrict the mean-

ing of the other words used. The word "property" is not applicable to personal estate only. Its use by the officer would not determine the kind of property attached.

Elijah D. Johnson does not appear to have had any attachable estate or interest in the mill or privilege at the time when the writ and attachment were made on August 10, 1846. He conveyed one undivided half of the mill and privilege, being all which he had before owned, to Leonard W. Russell in September, 1844, by a deed, which was recorded on March 28, 1845. On November 4, 1844, Russell by a written contract engaged to convey the same to Johnson upon payment of certain sums of money named. On March 24, 1846, this contract was canceled and surrendered, and another made, by which Russell promised to convey the same to Johnson upon payment within one year of certain sums of money named therein. This contract was assigned by Johnson on July 17, 1846, to Henry True. The interest, which a debtor has in real estate by such a contract, may by the provisions of the statute, chap. 114, sect. 73, be attached. But he can have no interest after the contract has been assigned without fraud. An attachment may be made after an assignment, but it can be available only on the ground, that the debtor's interest in the contract really remains, after it has been apparently assigned. In such case the creditor may have a remedy by the provisions of the act approved on July 31, 1847, chap. 21, sect. 3. No proof is presented in this case, that the assignment made by Johnson to True was fraudulent or invalid; and without it there is nothing to show, that Johnson had any attachable interest in that estate at the time of the service of the writ.

There is another ground upon which the plaintiff rests his claim to recover damages. Samuel Soule was the owner of one undivided half of the mill and privilege. The mill needed repair. In the year 1845 he made a written contract with Johnson to repair his half. The mill was accordingly repaired by Johnson during the years 1845 and 1846. The plaintiff claims a lien upon Soule's half to pay the amount of his ac-

count against Johnson for articles furnished for repair of the mill. Among the items of that account, are found charges for a cylinder stove and funnel, amounting to $21,70.

Without entering upon an inquiry whether the provisions of the statute, chap. 125, sect. 37 and 38, can for any practical purpose be enforced upon the estate of a person against whom no judgment can be recovered or execution issued, it will be sufficient for this case to observe, that a cylinder stove and funnel cannot constitute materials for the repair of a building or mill, in the sense contemplated by the statute. If placed in the mill, it would be but a fixture used for its comfortable occupation. To create a lien, the materials must be used for erecting, altering or repairing the building; must be so applied as to constitute a part of the building. It will not be sufficient that they be placed in it for its more convenient use. The Court being authorized by the report to draw such inferences as a jury might, may properly decide this question.

If a person having an account due for labor or materials furnished, payment of which would be secured by a lien, could combine with it other claims not thus secured and obtain judgment for the whole amount and enforce the collection of that judgment, by taking the estate subjected to the lien, the effect might be, that he would collect a debt due only from one person from the estate of another, not subjected to a lien for part of the debt.

If the attachment in this case had been sufficient, and the execution obtained against Johnson could have been collected from the estate of Soule, he might have been compelled to pay a debt due from Johnson for the stove and funnel, for the payment of which his estate could not have been liable.

If it could be considered, that the deputy did not perform his duty by making a valid attachment of the estate, the plaintiff could not have been injured thereby, for the debtor does not appear to have had any attachable interest therein, and the execution recovered in that suit could not have been collected from the estate of Soule.

If the officer be proved to have been guilty of a neglect of

duty, it is said, that the plaintiff is entitled to recover nominal damages without proof that any have been occasioned by such neglect.

The principle, upon which one person is entitled to maintain an action on the case against another, on account of the commission of some illegal or wrongful act, is, that he has thereby suffered injury.

The action cannot be maintained by proof alone, that the other person has conducted illegally or wrongfully. He must proceed further and show, that he has suffered injury in consequence of such conduct.

The law may indeed infer, that he has suffered damages from proof of certain acts, from which it is perceived, that damages would ordinarily be occasioned. The cases cited and relied upon decide, that the law will infer, that an execution creditor suffers some damage from the neglect of an officer to return his execution in due season. In such cases it can be perceived, that he could not obtain a renewal of his execution, or otherwise collect his debt without some delay or inconvenience.

When the case presented does not exhibit any facts, from which it can be inferred, that any delay, inconvenience, or other injury, has been suffered ; and especially, when the facts, as in the present case, exclude such an inference, and show, that the neglect did not occasion any damage, no judgment for damages could be rendered, without a violation of principle, and the rights of a party.

It will not be necessary to notice the other questions presented by the report.

Plaintiff nonsuit.

J. H. Williams, for the plaintiff.

J. S. Abbott, for the defendant.

THE STATE *versus* BILLINGTON.

When by a statute, the jurisdiction of an offence is given to a justice of the peace or a police court or a municipal court, but is not declared to be exclusive, the District Court has concurrent jurisdiction of the same offence.

ON exceptions from the District Court, RICE, J.

INDICTMENT, under the Revised Statutes, ch. 162, sec. 13, for maliciously breaking the windows and window blinds of a dwellinghouse, whereby it was "greatly injured."

There was testimony that one Robinson owned the house and the land on which it stood. The defendant requested the Judge to instruct the jury, that the statute did not extend to mischiefs committed upon real estate. This was not done, and a verdict was returned that the defendant was guilty. He then moved in arrest of judgment, because, —

1. The indictment does not allege what amount of injury was done to the house; —

2. It does not appear that the Court has jurisdiction, because neither the indictment or the verdict shows that the injury exceeded ten dollars.

The motion was overruled, and to that overruling and to the refusul to give the requested instruction, the defendant excepted.

Lancaster & Baker, for the defendant.

The value of property destroyed, or amount of injury ought to be set out in the indictment.

1. Because it is necessary in order to show *jurisdiction*. R. S. ch. 162, sec. 15; *Thayer* v. *Boyle*, 30 Maine, 479, 480.

2. In order to show the measure of *punishment*. R. S. ch. 162, sec. 15; *Britton* v. *Commonwealth*, 1 Cush. 302; *State* v. *Somerville*, 21 Maine, 22; R. S. ch. 156, sec. 15; *Hope* v. *Commonwealth*, 9 Metc. 136, 137; *State* v. *Gasner*, 8 Porter, 447, Alabama; *State* v. *Peden*, 2 Black. 371, Indiana.

The District Court had no *original* jurisdiction of this case, and the Judge ought so to have decided. R. S. ch. 162, sec. 15, and ch. 166, sec. 2, 3.

There are 14 chapters in R. S. on crimes and offences; —

in seven of them no jurisdiction whatever is given to justices of the peace. In none of the others is the word "*exclusive*" found, but "*concurrent*" is found, wherever the legislature intended it should be so, and it not being so expressed in this chapter, "*exclusive*" is to be inferred.

Vose, County Attorney, for the State.

WELLS, J. — The offence, charged in the indictment, of an injury to a dwellinghouse, is embraced in the thirteenth section of chapter 162, of the Revised Statutes.

It is contended, that the District Court has not jurisdiction of the offence, because the injury to the property is not alleged to exceed the sum of ten dollars. By chapter 166, in the second section, exclusive jurisdiction is given to the District Court of all offences, with the exception of those over which the Supreme Judicial Court has exclusive jurisdiction, and "of those of which justices of the peace, police and municipal courts have by law original jurisdiction, exclusive or concurrent with the District Court."

The inference to be drawn from the statute is, that when jurisdiction is conferred upon justices of the peace, or police or municipal courts in relation to offences, but not exclusive, the District Court has also a concurrent jurisdiction with them over the same cases. The fifteenth section of chapter 162, gives jurisdiction to a justice of the peace, but it is not declared to be exclusive, and must be considered as concurrent.

It is not therefore necessary to state in the indictment the amount of injury to the property to entitle the District Court to jurisdiction. And the indictment is good without such statement. It describes an offence within the statute, and the punishment must be such as the law prescribes.

The exceptions are overruled.

SMITH *& als. in equity, versus* VIRGIN *& als.*

To a bill in equity setting forth the facts upon which the plaintiffs relied, and presenting the legal principle which they applied to the facts, three of the defendants neglected to enter an appearance. Three others appeared, but made no answer. The remaining thirteen filed their answers, and agreed with the plaintiffs to submit the action with its subject-matter to referees. On motion to accept the referees' award, it was *Held;* —

that those who agreed to the submission and were heard before the referees, with knowledge that the others had not concurred in the submission, must be considered to have waived the objection arising from that non-concurrence; and

that it was competent for the referees to attach to the facts which were proved, their legal consequences, although at variance from the legal principle alleged in the bill.

By the articles of agreement, made by the members of an unincorporated association, for the regulation of their business affairs, it was stipulated *that* the capital stock should be divided into shares; *that* the shares should be transferrable; and *that* trustees should be appointed to manage the affairs, in whom all the property should vest in trust. In accordance with those regulations, trustees were appointed, made purchases of real and personal property, and proceeded to the transaction of business. Shares were from time to time transferred, until twenty-nine fortieths of them were held by one person.

It was held, that a sale by him, not of his shares, but of twenty-nine fortieths of all the land and property which had belonged to the company, was a dissolution of the association; — and *that*

The persons, who owned the shares at the time of the dissolution, were entitled, according to the number of their shares, to all the avails and assets of the company, and liable to contribute, in the same proportions, to all the debts of the company.

BILL IN EQUITY.

Certain persons formed an unincorporated association for the manufacturing of scythes.

A code of articles was drawn up for the regulation of the company, prescribing the amount of joint capital stock to be $4000, in shares of $100 each, authorizing transfers of shares, and prescribing the mode of transfer, pointing out the mode of voting, and specifying what officers should be appointed, with their respective rights and duties, and among other things, providing that "the officers of this company should be a president, a secretary and a treasurer, who should constitute a board of trustees, in whom the capital and property of the

company should be vested," and clothing the trustees with power to purchase real and personal estate, and to conduct and carry on the business of manufacturing, and to dispose of the manufactured articles.

One of the articles provides that "the secretary shall record all transfers of shares on the books of the company."

The seventeenth article was that, "no party to these presents shall be discharged from his obligations, as a member of the company, by transfer of his share or shares, until the transfer is certified to the secretary; and no person, becoming a party by purchasing a share or shares, shall be entitled to the privilege of members, until he signs these articles."

The articles were signed by twelve individuals. The capital stock was subscribed, officers were chosen, a factory was erected, and materials for making scythes were purchased, and the work of manufacturing was progressed in.

By transfers of shares, frequent changes were made in the list of proprietors, — or in the proportions of their ownership.

The company became embarrassed in their money affairs. Some of the members respectively and from time to time paid a portion of the debts. No settlement was made.

Three of the members filed this bill in equity, against nineteen persons, charging them as members of the company. Among other things, the bill charged that land and other property, purchased by the company, are now held in trust for payment of the company debts. The prayer of the bill was, that those debts may be ascertained; also the amount of its rights, credits, assets, effects, and property, applicable to the payment of its debts; and also when any member or shareholder in the stock of said company, a party to this bill, became liable to the debts of said company and when he ceased to be liable, and what is the extent or amount of his liability; and that the Court will order that the rights, credits, assets, effects and property of the said company, in whosesoever hands of the members of said company or shareholders in the stock thereof, parties to this bill, the same may be, so far as

liable for the payment of the debts of the company, may be so placed and disposed of, as to satisfy and extinguish the just and equitable demands and claims against said company, so far as the same may be sufficient for that purpose; and in case of the insufficiency of the company's rights, credits, assets, effects and property to pay and discharge all the just and equitable debts against said company, so far as the same is applicable, to ascertain the just and equitable proportion which the several parties to this bill ought to contribute to the payment of the company debts at the time of filing this bill of complaint, and order and decree the payment of the same accordingly, to the end, that there may be a full and final settlement of all the transactions and of all the accounts and demands for and against said company.

Three of the defendants appeared by attorney, but presented no answers in writing. Three others entered no appearance. The remaining thirteen appeared and put in written answers, and entered into an agreement with the plaintiffs that the bill and its subject-matter should be submitted to referees, the answers of the several defendants to have the same effect in the hearing as if tried before the Court. So far as relates to matters brought before the full Court, the award of the referees was as follows: —

The stock was all subscribed for and officers elected pursuant to the articles, in April, 1838: —

A mill site was purchased, and a dam and a factory building were erected; iron, coal and tools were purchased; the manufacturing of scythes was commenced about April, 1839, and was carried on until about the first of August, 1839, at which time the business operations of the company were discontinued: —

In these proceedings of the company large debts were incurred which chiefly constitute the subject-matter of the present suit: —

From the establishment of the company until January, 1841, shares were frequently transferred, and some of them went through several successive ownerships. It is considered,

that each of these transfers, which substituted a new member instead of the former owner, created a new copartnership.

On the first day of September, 1841, one of the stockholders had become the owner of twenty-nine shares, and thereby had the power of controlling the company affairs.

On that day he, by a deed duly executed, sold and conveyed, not his shares, but twenty-nine fortieths of the tools, factory buildings and appurtenances. This act, being in subversion of the purposes, for which the association was formed, is considered to have been a dissolution of the copartnership.

The three plaintiffs and the nineteen defendants, were each of them owners of shares, some at one period, some at another.

The plaintiff Smith had owned fourteen of the shares. He transferred the last of them on the 26th day of April, 1839. Debts were at that time due to him from the company, and he afterwards paid a large amount of debts due from the company, for which he was liable, having been one of the copartners at the time when they were contracted. The other plaintiffs, Fisk and Hubbard, who still remain shareholders, also paid considerable amounts of debts, for which they were respectively liable, for the like reason. It is to recover for these sums that this bill in equity was instituted.

In the early stages of the case a question arose of deep interest to the parties. It was contended on the one hand, that the plaintiffs' remedy is alone for contribution against the persons, who composed the several copartnerships existing when the original debts were, from time to time, contracted. On the other hand it was contended, that (under the articles of association,) the plaintiffs are entitled to recover against the last copartnership, and, that, not merely for a contribution, but for the whole amount.

Upon this question each party claimed the law to be in his favor, and claimed, by the course of the argument, that the decision be made on legal principles. It is the question upon which most of the controversy hinges; and upon it we consider the parties entitled to the opinion of the Court: —

It is therefore submitted for a legal decision.

The referees might properly enough perhaps wait here for

instruction. But the parties are desirous, that further progress be made as early as possible. Such progress can only be made by the presentation of an alternative report, and such a report we have concluded to offer, proceeding for the present merely upon the hypothesis that the plaintiffs' remedy is against the last copartnership, and for the whole amount.

Should this hypothesis be unsustained, the Court will have occasion at once to reject or recommit this award, but if sustained, then, of and concerning all the matters to us submitted, the following is our final award: —

The referees then proceeded to report the persons who composed the last copartnership, together with their respective interests; the amounts due from the copartnership to each of the past and present members; the indebtments due to the copartnership from each of the past and present members, and the resources of the company of every description, and who among the members had become insolvent, together with all other facts and details, needful to the formation of a final decree, upon the hypothesis before named.

The report was offered, and its acceptance was objected to, for the reasons stated in the decision of the Court.

Emmons argued in support of the award.

Bronson, *May* and *Morrill*, contra.

Tenney, J. — The plaintiff and six of the defendants, move the acceptance of this report. Several are silent upon that question. Others make objections for the following reasons. The first is in reference to the jurisdiction of the referees, upon the ground, that all the defendants were not parties to the agreement to refer.

The defendants in the bill are nineteen in number. Thirteen of them appeared before the referees, and put in written answers. Three appeared by attorney, but did not answer in writing. No appearance was entered by the other three. Neither of the six defendants last named executed the agreement to refer the action.

Gilman L. Gale was the only one of those who did not

sign the agreement, that now interposes any objection to the acceptance of the award. Those who did not. appear before the referees have not been prejudiced by the award, upon the hypothesis adopted, in any thing which makes them responsible. The parties who did appear, and who now make objection to the report, cannot be injured by any decree thereon, because their liability is made no greater by the failure of others to become parties to the agreement, or to appear before the referees. One only of those, who did not originally become parties to the reference, has been adjudged liable in any event to contribute towards the sum which is due from the copartnership, beyond the amount of its resources. And he is relieved on account of his admitted insolvency. By his appearance which is not represented to be limited to any particular purpose, he must be considered as having ratified the agreement, and actually submitted to the jurisdiction of the referees. He stands in the same category with those who authorized the reference.

No other whose name is on the agreement interposes any objection, or manifests any dissatisfaction. The parties to that agreement, having a full knowledge of the omission of some of the defendants to submit the subject-matter of the suit to referees, by their appearance, and a hearing before them upon the merits, have waived that objection and cannot be allowed now to revive it.

2. A further objection to the award is, that the referees did not decide upon all matters submitted, and that they passed upon questions not embraced in the bill, and therefore not in the submission; or in other words, that the award does not follow the submission.

The object of the bill was an adjustment of the affairs between the plaintiffs and the company, and those who are liable to contribution, if the resources of the firm were insufficient to discharge the debts due from it. For this purpose the plaintiffs are as specific in their premises and in the statement of the facts as the knowledge possessed by them would probably allow. This was necessary in order that proof could be offered in support of all the allegations substantially made.

The prayer of the bill is, that the debts due and owing from the company at the time of filing the bill may be ascertained; and also its rights, credits and assets, effects and property, applicable to the payment of its debts, the time when any member or stockholder, party to the bill, became liable for its indebtedness, and when that liability ceased; and what are the extent and amount of his liability; and to order and direct that the rights, credits, assets, effects and property of the company in whosesoever hands, of the members or shareholders, they may be found, so far as liable for the payment of its debts, may be so placed and disposed of as to satisfy and extinguish the claims against the company, to the extent that they are sufficient for that purpose; and in the event that they shall be found insufficient, to ascertain the just and equitable proportion which the several parties to the bill ought to contribute to the payment of the company debts, at the time of filing the bill, and order and decree the payment of the same accordingly. And such other and further relief is prayed, in the premises, as is proper and suited to their case according to the principles and rules of equity.

Every part of the report is upon the matter which constitutes the premises of the bill, and falls within the prayer for relief. The debts due and owing from the company are specifically reported, both in reference to the creditors and the amount to each. The referees state the property and its character belonging to the company, which should be applied to the payment of its debts; they also report, subject to the opinion of the Court upon the facts proved, the time during which any member of the company or shareholder, party to the bill, was liable for its debts; also the extent and amount of his liability; and they award that the property of the company as reported by them, is to be appropriated toward the discharge of its liabilities, so far as it is sufficient, and that the deficiency having been ascertained in just and equitable proportions shall be paid accordingly by those who last composed the copartnership and are solvent.

It is true that an interest in the real estate and personal pro-

perty at one time belonging to the company, which were sold and conveyed by one of the stockholders, is claimed in the bill as being held in trust for the payment of the company's debts, and for the benefit of the shareholders, successively, and it is denied that any shareholder can legally claim the same or any part thereof for his exclusive benefit.

This is a statement of no fact but what is regarded by the plaintiffs as a principle in equity, applicable to the facts alleged. The principle contended for in the bill may have been erroneous, or the facts proved variant to some extent, from those alleged. Neither could restrict the referees in their duties, or authorize them to come to a conclusion which the facts shown, and the law, would not justify. They found the sale of the interest of one of the stockholders, and instead of the conclusion, that the interest was held in trust for the company by the purchaser, they regarded the copartnership dissolved.

It is further objected that the award does not follow the bill and subject-matter submitted, because it puts upon a portion of the shareholders the payment of all the debts, whereas the bill prays a contribution among the several parties to the bill, in equitable proportions.

The premises and the prayer of the bill do not furnish a basis for this objection. The language of the latter in this respect, is "to ascertain the just and equitable proportion which the several parties to this bill ought to contribute to the payment of the company debts." If any party to the bill ought not to contribute to the payment of the company debts at all, it is not a prayer that they shall be decreed to contribute.

Under this head it is contended that the referees having found that in some of the transfers of shares the sellers undertook to indemnify the purchasers against the outstanding debts of the company, the referees should have transferred this liability for such debts to the purchasers, as it was proposed they should do, and was improperly refused. The referees do not undertake to adjust the rights between individuals under the special agreements, but only such as arise under the partnership affairs. Neither does the bill in its frame seek an adjustment *inter*

sese among all the partners, but only as between the plaintiffs and defendants. The referees have not in the latter omitted to report upon the subject submitted. If there has been any omission, the first fault was not in the referees, and no advantage on account of any defect in this particular has been attempted in a proper manner.

The two first objections having a relation to the entire award, which would be fatal to its validity, if they were sustainable, are overruled.

3. The referees have made their award in its details, and in full, upon the legal hypothesis that under the association the partnership at the time of its dissolution consisted of those who then held the shares, and no others. At the hearing, that basis was denied to be correct in law, and the question is submitted by the referees to the Court with the facts found connected therewith. In a partnership at common law with no agreement to continue for any specified time, or to qualify in any manner the principles ordinarily applicable, a dissolution takes place on the assignment of the interest of any member. Story on Partnership, sect. 273. In such a case the assignee may be received as a partner in the place of the assignor. But it not only becomes a new firm, but the incoming member has no concern as a partner with the firm before the assignment, and is in no manner liable as such for its obligations. When an association consisting of many members is formed with the power of each, to some extent at least, to increase the number by the transfer of shares without the consent of the other members, it is obvious that unless the rules of ordinary common law partnerships are modified and in some respects restricted, their affairs will be expcsed to become complex, involved and ruinous. It would be strange indeed if they could be prosperous for a long time, if each had the power to bind the company in every thing falling within its legitimate scope.

By the rules of the association, the whole business of the company was to be done by trustees, having duties in most respects similar to those of directors in certain private corporations. This was suited to render more simple the opera-

tions of the company, and prevent the want of concert which might otherwise be attended with great derangement in the prosecution of its common affairs. The members of the company had no other duties to perform than to elect its officers. The officers were the trustees, who were to hold all the property belonging to the company, and to dispose of the manufactured articles. They were required to render in at every annual and semi-annual meeting an account exhibiting in detail the precise situation of the property affairs, and business of the company, and of their doings for the current year. Under these regulations, if the association in other respects were like partnerships at common law, the settlements of the company with its individual members would be attended with great embarrassment. The transfer of interests in the smallest amount allowable, might be made daily, and if the changes of the firm were to be followed by the adjustment of the affairs of each copartnership, as it came into existence and afterwards expired, it would fail to be successful, and be attended with great perplexity, and occasion endless disputes.

The accounts of the trustees, which they were required to exhibit, would well inform the shareholders whether the company was prosperous or otherwise, and thereby the value of the shares could be ascertained with great accuracy. If it was the intention of the company that the transfer of a share should carry with it all the privileges and all the liabilities of the holder as incidental thereto, it would render the settlements required by the company with its individual members easy and simple, and the business would be carried on upon the same principles which ordinarily prevail in an incorporated stock company. The income as it should accumulate would follow the share whenever a dividend should be made, and the share would be subject to the debts of the company, and the holder himself personally liable after the company property should be exhausted, without reference to the time when the income should be received, or when the debt should be contracted. This would be so in harmony with the wants of

the association, that it would be surprising if no such provision should be found in some form in the articles adopted.

By the 17th article no party to these presents shall be discharged from his obligations as a member of the company, by the transfer of his share or shares until the transfer is certified, and no person becoming a party by the purchase of a share or shares shall be entitled to the privilege of members till he signs these articles.

It was intended that the evidence of membership, and the time when it commenced, and when it ended, should be proved by the party's own signature upon the books of the company. The outgoing member was to escape none of his liabilities while the company existed, till this evidence of the change was afforded.

When the transfer was thus certified to the secretary, it is clearly implied that the seller was relieved from all liability. And if so, it is implied that they were transferred to the purchaser as an incident of the share, consequently the privileges and benefits attached to the share before the transfer, vested in the purchaser on his signing the articles, and ceased in the seller. The last copartnership was that composed of those who were members and shareholders at the time of its dissolution, and they were liable for the debts of the company beyond the amount belonging thereto.

The objection that no decree can be entered against the last copartnership, because the award is in the alternative, and does not determine on the two hypotheses, has no legal foundation. On one hypothesis the whole matter submitted is examined, and an award made. If that hypothesis is correct the award was intended by the referees to be complete, and a decree in favor of the plaintiffs will follow. If it had been otherwise, the rule would have been discharged, or the report recommitted under the decision of the court upon the question of law raised. The hypothesis on which parts of the award are based, being found correct, the other alternative would be erroneous, and all further proceedings thereunder would be useless.

The other objections all look to the award as intended by the referees to be final, both in law and fact. One question only was submitted to the Court for their decision. So far as other matters reported depend upon the correctness of this principle assumed by the referees, no objection is sustainable. On all other questions the award is conclusive. It is not improper to remark however, that if the referees had reported the facts upon all the points raised, and submitted the law applicable thereto, it is not perceived that the result would be different.

The plaintiffs are entitled to a decree in pursuance of the award.

JOHN P. HUNTER *versus* LYMAN PERRY.

Where articles of property are liable to a corporation to pay tolls, (such for instance as boomage upon logs,) and the corporation is by law authorized to sell the articles for the tolls at public auction; *it seems*, that on grounds of public policy, such a sale will pass a valid title to the purchaser; although the proceedings of the officers of the corporation, in relation to the custody of the articles and to the sale itself, are irregular and defective.

Thus a boom corporation, having such powers, collected logs, and after those belonging to certain owners had been redeemed and taken away, proceeded to sell at auction all the residue, comprising logs of many different marks, values and ownerships: —

Held, that a valid title passed to the purchaser, although the proceedings of the officers of the corporation, pertaining to the taking and keeping of the logs and to the sale, were irregular and defective; *and* although they sold more of the logs of each owner than were necessary to pay the tolls and expenses due upon the logs of such owner, *and* although the sale was made collectively of all the logs in the boom, without any regard to ownerships, or to the respective amounts due upon them; *and* although the sale was had, not on the day prescribed in the charter, but on a subsequent day, by an adjournment not provided for in the charter.

ON REPORT from *Nisi Prius*, HOWARD, J. presiding.

ASSUMPSIT upon a promissory note.

There is a corporation called the Kennebec Log Driving Company. It has authority, in the fall of the year, to collect

from other booms, and lodge in certain deposit booms of its own, all logs, (with an excepted class not necessary to be here described.) Upon the logs thus lodged in the deposit booms, a toll accrues to the company. If after certain prescribed notifications, the tolls be not paid, the treasurer is authorized, upon specified preliminary measures, to sell the logs at auction.

In July, 1845, the company employed the plaintiff to collect the logs into the deposit booms, and to do whatever, in such a case, pertained to the company to perform, and stipulated to allow him for his expenses and services, whatever boomage-money he might collect.

In the fall of 1845, he got together and deposited a large quantity of logs of many various marks, values and ownerships. The treasurer then advertised in certain newspapers, the time and place for selling, at auction, such of the logs as should not have been previously redeemed by the owners. At that sale, the treasurer sold all the unredeemed logs. A portion of them was struck off to one Coburn, who, with the plaintiff's consent, transferred the bargain to the defendant, who then entered into the following contract with the plaintiff: —

"Whereas there is now deposited in two certain booms near the shore of Thomas N. Atkins, a quantity of logs called scrabble logs, supposed to be about 600 in number, and which logs I have purchased of *J. P. Hunter, an agent of the Ken. Log Driving Company* at $7\frac{3}{8}$ per M, for the merchantable in the lower boom, and $7 in the upper boom, at a straight and sound scale, and 25 cents per log, for those which are not equal to 100 feet. And as owing to the weather said logs cannot now be surveyed, I hereby agree to pay the aforesaid prices for all the scrabble logs in said boom, except those of the description excluded from the sale at auction by said company. I further agree that said logs shall be at my risk till they can be surveyed. Payment to be made by a note or notes on six months, with interest. And I, J. P. Hunter, hereby agree to the above.

"Dec. 1, 1845. "Lincoln Perry.

"J. P. Hunter."

On the back of the instrument is the following indorsement. "Dec. 1, 1845. — Rec'd of Lincoln Perry his note for three hundred dollars, payable at the Franklin Bank in Gardiner, in six months, with interest, which note I am to account for to him on final settlement, for the within named logs.

"J. P. Hunter."

This $300 note is the one now in suit.

After the introduction of testimony by the parties, and a reference to the charter, a default was submitted to, which is to be taken off, if in view of the evidence, the action is maintainable.

It appeared, as the Court viewed the testimony, that after the sale to the defendant he took possession of the logs, but they were allowed to lie in the boom through the winter. In the following spring they were nearly all swept away by a freshet; and some of the testimony tended to show that, of the residue, the original owners took their own wherever they could find them.

The testimony of several of the witnesses tended to establish the facts, stated and relied upon in the argument for the defence. It was testified that, after the purchase by the defendant, a person was directed by the plaintiff to take care of the logs in the deposit booms, and to deliver any of them that the owners might call for upon the payment of the boomage and some additional expenses, and that the plaintiff was then employed in securing the logs at said booms.

Other facts are stated in the opinion of the Court.

Whitmore, for the defendant.

By the charter and its additional Acts, the company is required to "raft the logs of the individual owners, (whose marks may be furnished by such owners to the clerk or master raftsman,) by themselves;" this was not done. Also, that the logs of the several owners shall be "counted and deposited" in the booms of the company before the sale; but they were never counted.

The company did not sell merely so many of the logs of

each owner as would pay for the boomage and expenses upon the logs of such owner. They sold all the logs in the deposit booms, regardless of ownerships. The logs were of various values, and owned in different proportions by the several proprietors. Thus by the sale of all of one man's logs, he was made to pay the debts of other men. More logs were sold than were necessary to pay all boomage and expenses. Some of them, then, were unlawfully sold, and to them the defendant could take no right. If so, the contract was invalid for the whole.

The Act is imperative, that the sales should be made on the first Tuesday of November, annually. The sale in question, though advertised for the proper day, was adjourned to a subsequent day. This was wrongful. It evaded competition. If in opposition to the statute, the sale could be had on any other day, it must be from some urgent necessity. No such necessity is pretended.

The company had no right to sell, except for cash. 26 Maine, 309.

The defendant got no title to any of the logs. The original owners took all of them which were to be found after the freshet. They had a right to do so, for no title to any portion ever vested in the defendant, and he in fact never had the benefit of so much as a single log.

It was inserted in the contract, that the logs were to be at the defendant's risk. This stipulation was only upon the ground that the defendant should obtain a title. It was a mere adjective to the ownership, and no part of the consideration of the note.

The case also shows that the sale was rescinded; for the plaintiff afterwards had the possession of the logs, and employed the witness to deliver them to the original owners, when called for.

The note was therefore without consideration.

The counsel pointed out several other particulars, in which he contended that there were fatal delinquencies in the pro-

ceedings of the corporation, but which the Court seem to have classed with the irregularities already mentioned.

He then contended that, by the contract, upon which this note was given, the plaintiff set aside the auction sale by the company, and sold the logs himself to the defendant. The price for which they were sold and the manner of the sale are entirely different from any auction sale. The plaintiff was to have $7\frac{3}{8}$ per M. for a part, and $7 per M. for a part, and a portion of the logs, although all are equally taxed, (viz. 25 cents per log,) is sold by the stick at 25 cents per stick. Nothing can be more absurd than such a sale for such a purpose; no title passed by it, not even a lien for boomage.

The Kennebec Log Driving Company was incorporated for the public good as well as the interest of the members of the company.

They could have no authority to delegate their powers, and convey the benefit of their franchise to J. P. Hunter. It may be supposed that peculiar confidence was reposed in the company by the Legislature, that they would manage the rafting operations in the most prudent manner; and that they would regard the interest of the log owners. But, by the contract copied, John P. Hunter is invested with all the authority of the company. The franchise of the company is conferred on him as a matter of favoritism and personal emolument.

Evans, for the plaintiff.

TENNEY, J. — The suit is defended on the ground, that no consideration passed from the plaintiff to the defendants, for the note, which is the alleged cause of action. The directors of the Kennebec Log Driving Company, on July 2, 1845, made a contract with the plaintiff, by which he agreed seasonably to raft up, agreeably to the statute of 1845, chap. 242, all the logs to be found between Augusta bridge, and Trott's cove; and taking said act for his guide, to do every thing required by the same, of the company, including the boomage therein prescribed, the whole to be done to the approval of the directors, or their successors. And in considera-

tion of the plaintiff's agreement, the directors authorized and empowered him, to demand and receive all the sums of money, perquisites and advantages, which the directors or the company were entitled to, which moneys so received were to be in full consideration of the services contracted by him to be performed.

The note was given for certain logs, which the plaintiff under the authority of that agreement had collected upon the river, and placed in the deposit booms, called the "scrabble logs," and were among those which were there deposited, consisting of a great number and variety of marks, and belonging to many different persons, few being of any one mark. Notice was given by the company to all persons owning logs, to pay the expenses thereon, and take them away, and many owners received their logs. Those remaining, and not having been called for, were sold at auction to pay expenses thereon, by the treasurer of the company, under a warrant from the directors, and upon a notice of the time, place and object of the sale. Portions of the logs in the deposit booms were purchased by one Bradstreet, and another portion by Hanson and Palmer. After that five hundred sticks were bid off by Abner Coburn; and all remaining afterwards of those which were sold, were bid off in a lot by said Coburn, estimated at six hundred logs. The lot of five hundred sticks were surveyed, and all the logs sold were entered upon the books of the company, excepting the lot last sold. After the auction, Coburn transferred his right to the defendant Perry, upon condition that the transfer should be satisfactory to the plaintiff, to whom he referred him to adjust the business. It was stipulated at the auction, that the purchasers should take the logs at the booms. On Dec. 1, 1845, Perry and the plaintiff entered into a written agreement, in which the former admits, that he had purchased of the latter, agent of the Kennebec Log Driving Company, a quantity of logs, estimated at six hundred in number, called "scrabble logs," for prices in some respects higher than the offer of Coburn, to whom they were sold at the auction, and as the weather at the time prevented a survey of the logs, it

was therein agreed by Perry, that he should pay the prices specified for the logs, and the logs so purchased were to be at his risk, till the survey, and payment to be made by note or notes payable in six months with interest.

The logs purchased by Bradstreet, and Palmer and Hanson, were taken away, and it was in proof that all might have been removed and secured during the fall and winter, after the sale. Perry was at the boom several times, subsequent to his becoming interested in the logs, and rafted out some of them, bought rigging and put on them, and left it there till after the river was frozen. He was on the logs several times. They were carried away in the freshet the spring following, excepting those removed by Perry.

The counsel for the defendant has pointed out irregularities in the course pursued by the officers of the company, in taking possession of the logs, and in their sale, which he relies upon, as fatal to the validity of the title attempted to be conferred upon him. If the right of a purchaser of personal property at such a sale is to be defeated by any defect in the proceedings touching the same, it is not impossible that the title of Perry to the logs would be pronounced imperfect, at least.

The logs having been taken into the possession of the company, and the treasurer having undertaken to sell them, according to the provisions of the statute, the sale accompanied by the possession of the purchasers, may be regarded as analogous in some respects to sales of chattels by a sheriff, and the legal effects thereof, also similar. And it has been held generally, the purchaser of a chattel at a sheriff's sale, having received the goods and paid for them, will have the property, notwithstanding any irregularity in the proceedings against the former owner, from whom they were taken as his property. Purchases would not be made, and the interest of both debtor and creditor would suffer, if sales made by one having lawful authority, and appearing to have exercised it lawfully, should be avoided on account of some irregularity, *Ladd* v. *Blunt*, 4 Mass. 402; *Titcomb* v. *Union Marine and Fire Ins. Co.*, 8 Mass. 326; *Howe* v. *Starkweather*, 17 Mass. 240. These author-

ities are cited with approbation by the Court in the case of *Clark* v. *Foxcroft*, 6 Greenl. 296, where it is said, that the doctrine deducible from these authorities, and from the common law, is, that the title of a purchaser of goods under a sheriff's sale, upon *fieri facias*, may be good, although the officer making it, may have been guilty of important omissions of duty, in the proceedings required.

It is certainly unreasonable for a person, who has purchased property at a sale authorized under the law, by the one making it, to object to the payment of the consideration, upon the ground that the sale is irregular, when he has taken possession of the goods, and has the enjoyment of that which he has attempted to obtain. It is believed to be a well settled principle, that by such a purchase and possession, the title of the debtor passes to the purchaser; and notwithstanding irregularities in the proceedings connected with the sale, it is not in the power of the latter, when he may have lost the property by his own carelessness, to invoke the pretended claim of a stranger, as an excuse for withholding payment of the consideration, especially when the stranger is totally unknown, whose interests are at best vague and uncertain, and when no suggestion is made, that any attempt to interfere with his title is intended.

The condition of the supposed claimants of the logs, may be compared with the assignee of a bankrupt, when the latter brings a suit against his debtor. It is not competent for the party liable, originally, to the bankrupt, to defend the suit on the ground that all the interest in the claim has vested in the assignee; no one having a right to deprive the bankrupt of that which was his, excepting those who claim regularly under the commission. *Fowler* v. *Daun*, 1 Bos. and Pul. 44, in which HEATH, J. says —"an uncertificated bankrupt has a defeasible property, which none but the assignee can defeat." *Clark* v. *Calvert*, 8 Taunton, 742.

The company had possession of the logs; and for the expenses incurred by causing them to be deposited in the booms under the law, for the purpose of making them secure, they had a lien upon them. The sale was made by the officer of the

company, who had the power to make it. It was attempted to be made according to the provisions of the statute. At the sale the logs were bid off, and the right acquired by the one who bid them off obtained by Perry, by the assent and agreement of the plaintiff, who was duly authorized by the company to make the agreement. Perry obtained all that he sought, and gave his note therefor, when he had a full opportunity, by ordinary care, to acquire a knowledge of all the facts. It is not suggested that he was in any manner misinformed in reference to the proceedings, or did not know fully every step, which had been taken before and at the sale. He had what must be treated as perfect possession of the property, and when in his possession had contracted that it should be at his own risk.

A modification of the terms of the sale at auction to Coburn, made in a contract, in which Perry was a party, to his satisfaction, if not by his procurement, could not be injurious to any party, and was without effect upon the sale, which had then been made and completed. The case of *Cushing* v. *Longfellow*, 26 Maine, 306, relied upon by the defendant is unlike the one before us. That was a sale of real estate, which is governed by very different principles from those applicable to chattels. And the credit which was given by the county treasurer in that case, was in the conditions of the sale. In this case no *such* credit was given, and the credit in the note was in pursuance of an agreement after the sale, between the company's agent and the defendant Perry. In this respect, it is precisely similar to the case of *Longfellow* v. *Quimby & al.* 29 Maine, 196, where a note was taken by the county treasurer on time, after the sale, but not in pursuance of the stipulations made previously. A sale and delivery of goods which are tangible, and can be removed, may be sufficient to pass the title, though the officer after the sale may take a note for the purchase money, at a price greater that that, at which they were struck off at the auction.

It is contended, that the agreement of December 1, 1845, is proof of an abandonment of the sale at auction, was unauthorized, and passed no title to the property. It is not ap-

parent, that the purchase at auction, under the offer of Coburn, was intended to be surrendered, but it does appear from the evidence, that the purchase was claimed by Perry, with some change in the amount and terms of payment, which were probably made for his benefit and at his request. If the purchase was abandoned, the consideration of the note has not failed. The plaintiff was the authorized agent of the company, who had a claim upon the logs for the payment of the expenses incurred thereon. An abortive attempt to make a public sale did not discharge that lien. The right of possession was in the company, which could not be divested, excepting by the discharge of the lien by payment or otherwise. No one appeared to claim the logs after notice. That such a claim from one, having had at any time an interest in them, would be made, after the note was given, is certainly improbable. The note was given on account of the logs, with as full a knowledge of all the facts, as he has acquired since the purchase, for aught which appears in the case. He treated the company as the owner before the sale, and claimed the benefit of it afterwards. The logs were in his possession and at his risk, and a part actually taken away. The sale without any qualification implies a warranty of title. No one has attempted to interfere with the rights acquired by Perry, under the purchase, by a claim upon the logs or their value; and the note must be regarded as unimpeached.

Judgment on the default.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF OXFORD,

1851.

PRESENT:

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

METHUEN COMPANY *versus* HAYES.

The agency of a witness may be proved by his own oath.

This rule applies to the agent of a corporation, as well as to the agent of an individual.

If an agency be proved, without showing its extent, the presumption is that it is a general agency.

ASSUMPSIT, tried before SHEPLEY, C. J. The plaintiffs were an incorporated company.

The authority to institute the suit was in question. One Davis, a witness for the plaintiffs, testified, that he was their agent.

The Judge instructed the jury, that if Davis was the agent of the plaintiffs and had directed the suit, it could not be defeated for want of authority to commence and to prosecute it.

The defendant excepted.

Perry, for the defendant.

1. It is only by a vote, that a corporation can confer authority. Such vote must appear of record in their books. 24 Maine, 171. It was not competent for the agency of Davis to be established by his own oath, or by any other parol testimony. 17 Maine, 440.

2. If the *agency* of Davis was sufficiently shown, it does not follow, that he had authority to involve the company in a lawsuit. Of that authority, the presiding Judge should have required *record evidence*. 17 Mass. 479; 14 Mass. 58.

Andrews, contra.

HOWARD, J., orally. — The agency of Davis was lawfully proved. There was no evidence that it was a limited agency. In the absence of such evidence, the agency is to be considered a general one. Such an agency *includes* the authority to commence and prosecute suits.

Exceptions overruled.

ESTES *versus* SCHOOL DIST. NO. 19, IN BETHEL AND MILTON.

A school district has no authority to raise money for fuel, or to make itself liable for it.

ON EXCEPTIONS from the District Court, COLE, J.

ASSUMPSIT for fuel furnished to the district.

The plaintiff's testimony tended to prove that he furnished the fuel, which was used in the district school, and that he was employed by the lawful agent of the district to furnish it at the expense of the district. A nonsuit was moved for, and was ordered, upon the ground that a school district has no authority to create a debt against itself for the fuel used in the schools.

The plaintiff excepted.

Codman, for the plaintiff.

Rawson, for the defendant.

WELLS, J. — School districts are corporations of limited powers, and if they exceed those powers their acts are invalid. 3 Fairf. 254. No authority is conferred on them by statute to raise money for the purpose of providing fuel, or to contract for the purchase of it. By the Revised Statutes, chap. 17, sect. 42, school agents are empowered to provide fuel from the money assigned to them by the assessors of their towns. A similar provision is contained in the Act of March 15, 1821, chap. 117, sect. 3, and also in that of March 11, 1834, chap. 651, sect. 3.

As the district could not create any liability upon itself for fuel, the nonsuit was properly ordered.

Nonsuit confirmed.

BACON *versus* DENNING.

An attachment of land creates no lien, as against a subsequent purchaser, unless the attaching officer certify to the register of deeds, *all* the sums sued for, and included in the creditor's judgment.

WRIT OF ENTRY.

One Hilbourne owned the land in 1848. It was then attached, as his property, by the plaintiff, upon a writ which embraced two separate demands; one upon a note for $33,81, and the other upon an account for $39,00. The precept of the writ was to attach property to the value of $100. The attaching officer, in his return to the register of deeds, certified that "the sum sued for was a note, dated, &c., for $33,81. *Ad damnum*, $100."

Hilbourne conveyed the land in 1849, to a person who conveyed it to the demandant in 1850. The plaintiff obtained judgment for $118,31 in said suit, on *both* his demands, Dec. 5, 1849, and levied the land within thirty days afterwards. The defendant makes title under that levy. The case was submitted to the Court for a legal decision.

Black, for the plaintiff.

Perry, for the defendant.

SHEPLEY, C. J., orally. — The statute, chap. 114, sect. 32, provides that, in order to create a lien by attachment of real estate, the attaching officer shall file with the register of deeds a certificate, expressing, (among other things,) "the sums sued for." No lien could therefore be created for any claim beyond that specified in the officer's certificate. But in this case, the judgment was taken and the land was set off not only for the claim so specified, but also for another demand. More land was, therefore, taken than was covered by the attachment lien. That excess was unlawfully taken from the demandant's grantor. As there is no mode of separating that part from the residue of the land, the whole levy was void, as against the demandant's grantor, whose conveyance to the demandant, therefore, passed the title, free from any incumbrance by the attachment.

Judgment for the demandant.

DWINAL, *petitioner, versus* HOLMES.

In order to the transfer of land by a deed, it is essential that the deed be expressly or impliedly accepted by the grantee.

The tender of a deed, and continued readiness to deliver it, by one who had given bond to convey, will transfer no title.

Neither will the payment for the land, and an occupation of it for nineteen years by the obligee, under the agreement to buy, together with such tender and readiness to deliver the deed, have the effect to vest title in the obligee.

ON REPORT from *Nisi Prius*, SHEPLEY, C. J. presiding.

PETITION for partition of land.

HOWARD, J. — The petitioner seeks partition of a farm in the town of Oxford, embracing lots numbered 3 and 4. The respondent denies the seizin of the petitioner and alleges and claims title to one quarter of lot numbered 3, and to three

quarters of lot numbered 4. Both claim to have acquired the title, which was once in the heirs of Andrew Cragie, to the lot numbered 4, and to this lot only, the present controversy applies.

Samuel Brown, (deceased,) conveyed to the grantors of the petitioner, and the question arises whether Brown acquired title either by deed, or by disseizin, to the lot in controversy.

In August 1826, he took a bond for a deed, from Whitney, as agent of the heirs of Cragie, to convey lot numbered 4, and other lands not embraced in the petition, on payment of five hundred dollars, and at the same time took possession of the land from the agent, and occupied it till his death in 1845. On April 9, 1832, the heirs made a deed of the land, and placed it in the hands of Whitney, the agent, to be delivered to Brown, when he should pay the amount due upon the note.

This deed is still in the possession of the agent. Brown subsequently paid the amount, and it appears that the agent afterwards repeatedly offered him the deed, and requested the bond. The agent testified that "Brown promised frequently to deliver me the bond and take his deed, but never did deliver the bond and take his deed." There was other testimony tending to show that Brown had repeatedly said that he refused to take the deed, alleging that "it did not cover so much land as he bargained for, or expected to have;" — that there was a dispute between him and Whitney about the land; — that he had a bond for it which Whitney had demanded, and he would not give it up; — that the deed was made out by the heirs, and Whitney had it; that he would not take it, and that he claimed the farm as his own. The declarations appear to have been made a short time before the death of Brown, which occurred in 1845, as well as during years preceding.

This deed has been within the control of the supposed grantors, solely, and though there was a conditional execution, it was never delivered to, claimed or accepted by Brown, but seems to have been expressly repudiated by him. There must have been an acceptance, express or implied, or there

could have been no delivery. "Albeit it be never so well sealed and written, yet is the deed of no force," until delivered. *Shep. Touchstone*, 57; *Carr* v. *Hoxie*, 5 Mason, 60; *Church* v. *Gilman*, 15 Wend. 656. Brown acquired no estate or interest in the land by this deed, which never took effect.

The evidence does not show adverse possession by Brown, or those claiming under him, and consequently, neither could acquire title by disseizin.

The respondent has established his title to a portion of the lot in controversy, derived from the heirs of Cragie, but his claim to one quarter deduced from Brown, is subject to the infirmity of Brown's title.

The petitioner not being seized in fee simple, or for life, and not being possessed, or having a right of entry for any term of years, or otherwise, "as tenant in common, joint tenant, or coparcener," with the respondent, in lot numbered 4, cannot have partition of that portion of the land embraced in his petition. (R. S. c. 121, § 1 and 2.) But to lot numbered 3, his title and the tenancy having been admitted as alleged, he will have judgment for partition according to his prayer.

The case was submitted for the petitioner without argument.

May, for the respondent.

BRIDGHAM *versus* PRINCE, *administrator.*

At the common law, an action for real estate was abated by the death of the tenant.

By our Statute it may be continued in existence by notice given to the legal representatives of the tenant, and to all others interested as heirs, &c.

Upon the death of the tenant in a real action, no further proceedings can be had in the suit until the appearance of the heirs or notice to them.

An award by referees in favor of the demandant, in a real action, upon a submission by rule of court, entered into by the administrator after the death of the tenant, and before the heirs appeared or were notified, cannot be accepted. It is merely void.

On exceptions from the District Court, Cole, J.

Writ of entry. — After the death of the tenant, his administrator appeared voluntarily to the suit, and agreed that the action should be submitted to referees, which was accordingly done by a rule of court. The heirs had neither appeared nor been notified to appear. The award of the referees was, that the demandant recover possession of the land, with costs of reference and of Court.

The award was accepted, though objected to, and, on demandant's motion, he was allowed to recover costs against the administrator, from the commencement of the action.

Exceptions were taken by "the defendant." The case was submitted without argument for the demandant.

S. C. Andrews, for the defendant.

Wells, J. — The defendant, as administrator of Jonathan Buck, voluntarily appeared and took upon himself the defence of the suit. It was submitted to referees, by a rule of court, and they have decided that Buck did disseize the plaintiff, as he has alleged in his writ, and that the plaintiff recover possession of the demanded premises and costs. Upon the death of Buck, the Court had no authority to proceed any further in relation to the writ of entry, which he had commenced, without notice to his legal representatives, and all others interested in his estate, as heirs. Ch. 145, § 19, R. S. A judgment against the administrator would not affect the heirs, who alone appear to be interested in the land demanded. A decision without notice to them could have no legal effect upon the title to the property in controversy. The action was abated according to the common law by the death of Buck, but by the statute its existence might be continued, provided proper notice should be given to those who are interested. As no further action could take place in relation to the suit without their appearance or notice to them, the reference must be considered void. The administrator did not make himself a tenant of the freehold in his own right, nor was there any award against him as such by the referees. The course adopted was not in conformity

to law. This Court has power, by the Act of April 7, 1845, c. 168, to reject the report of the referees, and it must be rejected and the exceptions sustained.

BRADFORD *versus* FULLER.

The proof, mentioned in the statute of 1846, chap. 192, which entitles a defendant to cost, in cases of usury, may be that of his own affidavit alone, when not controlled by the oath of the creditor.

EXCEPTIONS from the District Court, COLE, J.

ASSUMPSIT by the payee upon a promissory note.

The defendant by brief statement, verified on his oath, pleaded, that in the note certain specified sums of usurious interest were included, and consented to be defaulted for the residue, which was accordingly done. The Judge ruled, that costs should be allowed the defendant, and that no costs should be allowed to the plaintiff, who thereupon filed exceptions.

Clifford and *G. F. Shepley*, for the plaintiff.

1. The defendant having been defaulted, the plaintiff is the prevailing party, and, as such, is entitled to cost. R. S. chap. 115, sect. 56.

2. The seventh section of chap. 69, allowed the defendant to recover cost, when *by means of his own oath*, the damages were reduced. That section was expressly repealed by the Act of 1846, chap. 192. *Wing* v. *Dunn*, 24 Maine, 128; *Cummings* v. *Blake*, 29 Maine, 105.

The term, "proof," in this statute means such testimony only as is admissible in ordinary suits at law, and does not include the party's own oath. In this case no such testimony was presented. The damages may indeed be reduced by the oath of the party. When they are reduced by *such an oath* merely, and not by *disinterested testimony*, the plaintiff's right to cost, as the prevailing party, is not taken away.

Our statutes do not, in such cases, make either party a

witness. They merely require the defendant to verify his plea, in order to entitle it to be considered. Neither party is sworn as a witness. The credibility of neither could be impeached by testimony as to character. Thus our law differs from that of Massachusetts, where both parties were made witnesses. *Little* v. *Rogers*, 1 Metc. 110.

Ludden, for the defendant.

WELLS, J. — The Act of July 22, 1846, ch. 192, provides "that in any suit brought, where more than legal interest shall be reserved or taken, the party so reserving and taking shall recover no costs, but shall pay costs to the defendant, provided the damage shall be reduced by proof of such usurious interest, and the provision for costs contained in the seventh section of the sixty-ninth chapter of the Revised Statutes is hereby repealed."

It is contended on the part of the plaintiff, that the damages having been reduced by the oath of the defendant, the plaintiff should recover his costs. But by the Revised Statutes, ch. 69, § 3, the defendant is permitted to be a witness in his own case, so far as to testify to the unlawful interest. When by his testimony, the fact of usury is established, then the proof of it exists, as much so as if it were shown by the testimony of a disinterested witness in the ordinary course of a judicial trial.

The order of the Judge of the District Court, that the plaintiff should not recover costs, but should pay them to the defendant, was correct, and the exceptions must be overruled.

Exceptions overruled.

ANDREWS, *administrator*, *versus* ANDREWS.

An agreement by the principal, made after having paid his note, that it should rest, for his benefit, in the hands of a third person, in order that the principal might thereby coerce the surety to relinquish some right in another matter, was without consideration, and therefore void.

A promise made to the principal by the surety, after such payment of the note, that for the sake of having it canceled, he would relinquish his right in the other matter, and that the note might lie in the hands of such third person, for the benefit of the principal, until such relinquishment could be legally made, was without consideration, and could impart no validity to the note.

ON REPORT from *Nisi Prius*, SHEPLEY, C. J.

The case was submitted without argument.

SHEPLEY, C. J. — This suit is upon a promissory note made on September 4, 1847, by Nathaniel Getchell as principal, and by the defendant as his surety, payable to Abiezer Andrews the testator. The following stipulation is found in the body of the note.

"And whereas the undersigned, Nathaniel Getchel, has given to said Abiezer four other notes, and this note is to be signed by Hiram Andrews as surety for said Getchell, it is hereby agreed by the parties, that the first money, paid by said Getchell, shall be allowed and indorsed on this note until it is paid, so as to relieve said Hiram of his liability."

At the same time, Getchell mortgaged a farm to the payee to secure the payment of all the five notes; and also mortgaged the same farm to the defendant to secure a maintenance for life of Shuah Bicknell.

After the decease of the testator, all the notes became the property of his widow, who became the wife of Thomas Clark.

On March 13, 1849, the notes remaining unpaid, Getchell, by an agreement made with Clark and wife, conveyed by a deed containing covenants of warranty, the same farm to Mrs. Clark, in payment of the notes, which were to be delivered up.

Clark declined to deliver up this note, and assigned as reasons therefor, "that he wished to keep it for Getchell's benefit, and to compel the defendant to discharge the mortgage made by

Getchell to the defendant, to secure the maintenance of Mrs. Bicknell."

According to the agreement made by the principal with the holders of the notes, they were all paid by a conveyance of the farm. The note was no longer a valid contract, whether surrendered to the principal or retained by the holder.

With the consent of the principal maker, it was put into the hands of E. W. Clark, a son of Thomas Clark, to be retained by him until the defendant discharged the mortgage made by Getchell to him. In effect to be retained for the benefit of the principal, and enforced against the person, who had become his surety, unless he would yield some of his rights to the principal.

The case further states, that the defendant subsequently agreed that E. W. Clark should retain it, until he canceled the mortgage made by Getchell to him.

This can have no effect to enable the plaintiff to collect the note. If this agreement were valid it would not revive the note. But there does not appear to have been the least consideration to support it.

The defendant after having taken legal advice respecting the effect, which a discharge of the mortgage would have upon his rights, refused to discharge it.

It does not appear that he was under any legal or moral obligation to do so, when he made the promise.

Plaintiff nonsuit.

Codman, for plaintiff.

INHABITANTS OF OXFORD *versus* INHABITANTS OF PARIS.

The R. S. chap. 32, sect. 30, provides, that in a suit by one town against another for the support of a pauper, a "recovery" shall bar the town, against which it was had, from disputing the settlement of the same pauper with the prevailing town in any future action brought for his support.

Held — 1st, That the obtaining of judgment by the defendant town against the plaintiff town in such an action, is a recovery against the plaintiff town.

2. That the plaintiff town, as well as the defendant town, is bound by such recovery against it, from further contesting with the other party the pauper's settlement.

3. That such a recovery by the defendant town estops the plaintiffs as well in a second suit, brought *before* the decision of the *first* suit, as in any subsequent suit.

On Report from *Nisi Prius*, Shepley, C. J.

This and an earlier action, were brought by the plaintiffs against the defendants, founded upon R. S. chap. 32, sect. 29, for the support of the same pauper. They were pending at the same time. The earlier one was referred. The award, which was against the plaintiffs, was accepted and the defendants recovered their cost. This action then came up for trial. It was for supplies furnished *prior* to the commencement of the first suit. A nonsuit was directed, which is to be set aside, if erroneously ordered.

Perry, for the plaintiffs.

1. A recovery, in order to operate as a bar in a subsequent suit for supporting paupers, is one had not against the plaintiff party, but against the defendant party. A judgment against the plaintiffs in such a suit, is no estoppel to a future action by them. The failure to recover may have occurred without any trial of the merits.

2. The "future actions," estopped by the statute, do not embrace an action commenced *before* the decision of the first suit.

3. To make a judgment a bar, it must appear from the record, that the question of the *pauper's settlement* was adjudicated upon.

In the previous case between these parties, the plaintiffs' action may have failed merely from want of notice to the defendants, without touching the pauper's settlement. *Arnold* v. *Arnold*, 17 Pick. 14; *Knox* v. *Waldoborough*, 5 Greenl. 185; 1 Greenl. Ev. 566.

Andrews, for the defendants.

Shepley, C. J. — The former action between these parties

was founded upon the statute ch. 32, § 29, and the declaration must have alleged, that the same pauper had a legal settlement in the town of Paris. The settlement of the pauper was therefore involved in the trial upon the merits.

The plaintiffs insist, that the judgment against them in the former action is not a bar to their recovery in this action. That the town against which an action is commenced is alone estopped by a judgment against it.

To recover in legal proceedings is to be successful in a suit. It is to obtain a favorable judgment. The word recovery, as used in the statute, means the obtaining of a final judgment in such a suit. When a defendant has obtained a judgment against a plaintiff in a suit, he in legal language is said to have recovered in that suit.

If the former judgment had been specially pleaded in bar of this action, an appropriate averment would have been, that the defendants recovered judgment.

The language of the statute makes no distinction between parties plaintiff and defendant respecting the effect of a recovery in such an action. The town against which the recovery is had, is to be barred by it.

There can be no just reason to conclude from the language of the 30th section, or from the general provisions of the statute, that it was the intention, that one of the towns only should be barred by such a recovery. The intention appears to have been, that the settlements of paupers should be finally determined between the parties in one action, and not to have repeated and continued litigation between them respecting it. It was not intended to permit a town, which had commenced an action and been defeated in it, to continue to litigate the same settlement with the same town as often as it pleased, while it failed to obtain a judgment in its favor. This would be permitted by the construction contended for.

By the words "in any future action brought for the support of the same pauper," must be intended any action brought or to be tried subsequently to the one, in which the recovery was had. If not, a town might commence several actions be-

fore a trial was had in one, and thus have several decisions upon the same settlement between the same towns, while it was evidently the intention to have the settlement between them finally determined in one action.

Nonsuit confirmed.

ODELL *versus* DANA.

The statute of limitations provides that, if there be two or more joint contractors, no one of them shall be chargeable by reason only of any acknowledgment or promise made by any other of them.

Though an action upon a note against the principal would be barred by the statute limitation; yet that limitation would be no bar to a suit against the principal for reimbursement, brought by the surety, who had paid the note before the limitation attached to it.

A surety, by making a partial payment on the note, had extended its vitality as against himself. After the limitation *upon the note* had attached as to the principal, but within six years from the time of the partial payment, a suit was brought upon the note against the surety for the balance. *Held*, the principal was inadmissible as a witness for the surety, because of his accountability over to the surety, notwithstanding the statute of limitation.

ON REPORT from *Nisi Prius*, SHEPLEY. C. J. presiding.

ASSUMPSIT on a promissory note for one hundred and twenty-five dollars, given in 1837, by Abigail O. Ripley as principal, and the defendant as surety.

In 1842, the defendant paid upon the note $48,74.

The defendant offered the deposition of Mrs. Ripley, the principal in the note. The deposition having been objected to on the ground of interest in the deponent, was excluded.

The defendant then consented to a default, which is to be taken off, if the deposition was admissible.

Shepley and *Dana*, for the defendant.

The witness could only be interested, by being liable to defendant, in case plaintiff should prevail.

At the time of giving the deposition, the deponent might have pleaded the statute of limitations to an action brought against her upon the note.

The question then is, was she liable to defendant, and if so, how was that liability occasioned?

A surety, by paying a debt to which the statute limitation had attached, could not entitle himself to recover of the principal. He could not stand in a better relation towards his principal than that sustained by the creditor.

Can then a surety *voluntarily* so change that relation as to call upon his principal when that principal is relieved from the creditor, and thus deprive him of a defence, which would otherwise have been available to him?

The case (*Crosby* v. *Wyatt*, 23 Maine, 156,) is widely different from this. There both parties were sureties, and the case turned upon the construction of the *lex loci.*

The two cases differ in principle, as well as in the law applicable thereto. In the case cited, a surety, sued before the statute of limitations would have afforded any defence, and forced to satisfy a judgment, obtained after the statute could have been pleaded, was held entitled to contribution from a co-surety, though the co-surety had made no new promise.

If a surety can, by making a voluntary promise or payment, deprive his principal of a defence otherwise open to him, the intention of our statute is manifestly over-borne, and the surety, having acted *without* necessity or compulsion, is claimed to have acquired all the equitable rights acknowledged in *Crosby* and *Wyatt*, where payment was *coerced.*

By the statute no one of two or more joint contractors shall "be *chargeable*, by reason only of any payment made by any other, or others of them." It is attempted in this suit to make the deponent *chargeable* by reason of the payment by the defendant. If deponent is liable to defendant, she is clearly *chargeable* by reason of his payment in 1842, before the statute had become pleadable; (for a surety could not maintain an action against his principal for money paid on a demand against that principal after the six years had expired.)

In this way the object of the statute is defeated. By allowing such an attempt to succeed, the statute is not only avoided, but the very object of a *caution* is lost, and the principal

subjected to positive hardship; for a case *might* happen, (whether this is one or not,) in which the surety or cautioner becomes such without the knowledge of the principal. Even then the principal would be bound to repay the surety on discharge of the debt by him. (1 Poth. on Obl. part 2, chap. 6, art. 4, sect. 1.) And thus a party having a perfect defence by statute, to an action by the only person he contracted with, is held *liable* to another party who was wholly unknown to him, and with whom he had made no contract whatever. This would seem inequitable, but it is what is contended for by plaintiff.

As long as the deponent is *chargeable* by reason of the promise of another than herself, whether her liability be to the creditor or to the surety, so long she is debarred from all benefit of the statute.

The plaintiff's counsel will contend, that inasmuch as, when the defendant made the new promise in 1842, neither he nor deponent could set up the statute of limitations, the deponent would be holden to repay defendant if within six years from that new promise he should pay the note now in suit; and, that, as the deposition was given within six years from the date of that new promise, she was then liable to defendant.

It is only necessary to follow out this reasoning to see its absurdity, for if at any time within the six years from 1842, the defendant, instead of payment had made a new promise, it would just as effectually, according to the plaintiff's reasoning, have kept alive both the defendant's and the deponent's liability, as payment within that time would have done; and if, just before the expiration of six years from this second promise by surety, he should make a third, thereby keeping alive both his and his principal's liability, (as it must do, according to plaintiff's argument,) it is easy to see that the principal would be forever deprived, by these continued acts of another, of all benefit of the statute of limitations whatsoever and be *ever* chargeable by reason of the promise of another than herself.

The great distinction between this case and *Crosby* v.

Wyatt, (and others of the same character) seems to be this. There the surety had done nothing to prevent his availing himself of the statute defence, and payment having been *coerced* from him, it was held that he could oblige a co-promissor to contribute towards repaying that which the surety had been forced to advance by virtue of the original contract alone. Here if the surety is held entitled to contribution or repayment, it will not be by reason of the original contract between himself and the witness, but from the added life given to it by the *voluntary* act of the surety himself, *which act alone deprived him of a perfect defence to this suit.*

A. R. Bradley, for the plaintiff.

WELLS, J. — The note in suit was signed by Abigail O. Ripley, as principal, and by the defendant as surety. It was given in August, 1837, and in October, 1842, a payment of a part of it was made by the defendant and indorsed upon it. The defendant offered in evidence the deposition of the principal upon the note. If that was inadmissible the default is to stand. The note would be barred by the statute of limitations, if the payment had not been made by the defendant. And the principal by that payment is not deprived of the benefit of the limitation provided by statute, by the terms of which one joint contractor shall not lose the benefits of its provisions by a promise or payment made by another. The liability of the principal then to the plaintiff, is not continued by this act of the defendant, and it does not appear that the plaintiff can maintain any action against her, more than six years having elapsed since she signed the note. But if the defendant can recover against her when he shall have paid the note, she is interested in his favor to defeat the action, and her deposition was properly excluded.

The object of the statute, chap. 146, sect. 20 and 24, was to change the rule of law, so that one of two or more joint contractors could make no payment, promise or acknowledgment, that would have the effect to deprive either of the others of the benefit of the statute, in an action by their creditor. If

the defendant had made the payment after the limitation had attached, or a written promise before or after, thereby charging himself when he would otherwise be discharged, he could have no right to reimbursement for a claim thus voluntarily created. But at that time, he might have been compelled to pay the whole debt, and if the whole, so also a part, and thus he was discharging, not an assumed obligation, but one imposed on him by law. If in so doing, his liability is prolonged, it is the result of the law applicable to the contract, and furnishes no just ground on the part of the principal to object to a repayment. His claim against the principal, when he shall have paid the debt, will arise from paying what he was bound to pay by an obligation founded in the contract, the duration of which was extended by an act, that he could have been coerced to perform.

A different construction of the statute would throw the whole debt upon a joint contractor, who had conducted with the utmost good faith, in making a partial payment, and had done nothing more than his legal duty. And if by successive payments, the liability may be indefinitely extended, one, who has not paid his just proportion of the debt, has no legal or equitable cause of complaint.

In N. H. a payment by one joint debtor does not take a case out of the statute as to another. *Exeter Bank* v. *Sullivan & al.* 6 N. H. 124. Yet in *Peaslee* v. *Breed*, 10 N. H. 489, it was decided, that "where the liability of one joint maker of a promissory note is continued by partial payments within six years, but the remedy of the holder against the other is barred by the statute of limitations; the debtor, who continues liable, may, notwithstanding, recover a contribution from the other, when he has paid the debt." And it is said by PARKER, C. J., "On the facts in this case, the liability of Peaslee was at all times continued, and the case, as to him, taken out of the operation of the statute of limitations; not by any new agreement, or assent to any new agreement, not contemplated by the original contract; but by a part performance of what was stipulated in the original contract itself. The

defendant, therefore, cannot object that Peaslee paid wrongfully, or that the payment does not come within the implied promise to contribute."

The principal is bound by an implied promise, to indemnify the defendant for whatever he may be holden to pay in this action, and is therefore directly interested.

According to the agreement of the parties, the default is to remain, and the defendant to be heard in damages.

NOTE. — HOWARD, J., having been of counsel, did not act in the decision of this case.

MCKEEN *versus* GAMMON.

By intendment of the R. S. chap. 1, sect. 3, rule 22, relationship, within the sixth degree, is an *interest*, which disqualifies a person for deciding upon rights, wherein he is so related to one of the parties.

In the levy of an execution upon land, the officer's return that the appraisers were disinterested is, in legal effect, an affirmation that they were not within the sixth degree of relationship to either of the parties.

As between the parties to the levy, such an affirmation must be taken as true, and cannot be controverted.

The remarks of counsel, in the progress of a trial, are not to be regarded as an admission, by which the rights of his client should be determined.

A debtor's life estate in land belonging to his wife passes to the creditor, by a levy of the fee.

In an action of trespass against the debtor for entering and cutting trees upon such land, the damage which the creditor is entitled to recover, will not extend to trees belonging to the inheritance, the cutting of which by the creditor would be waste.

ON REPORT from *Nisi Prius* term, SHEPLEY, C. J. presiding.

TRESPASS for entering and cutting trees upon the plaintiff's land.

The land had been conveyed to the defendant's wife. The plaintiff's counsel asserted that the defendant had paid a part of the consideration money. The plaintiff levied and set off the land to himself, *in fee*, upon an execution against the defendant. The defendant refused to appoint an appraiser.

The officer's return stated that the appraisers were disinterested men; but it is to be considered as proved, that one of them was uncle to the defendant's wife, if proof of such fact would be admissible against the plaintiff's objection. A part of the land was cultivated; the residue was in its natural state, covered by a growth of trees. The defendant, by authority of his wife, entered upon the land and cut trees; but it did not appear that he entered upon the cultivated part.

The case was submitted to the Court for decision. If the plaintiff can sustain the suit, and is entitled to recover any thing more than nominal damages, the amount is to be ascertained by a jury.

Hammons, for the plaintiff.

Gerry, for the defendant.

I. The levy was void, one of the appraisers having been related by affinity, within the sixth degree, to the defendant. R. S. chap. 1, sect. 3, rule 22.

This relationship is proveable by parol. The officer's return, that the appraisers were "disinterested," does not preclude the defendant from introducing such proof. The return is conclusive only of such facts as it alleges. Its affirmation that the appraiser was disinterested, is not, in effect, an affirmation that the relationship did not exist. Such relationship is an independent fact, not controlled by the officer's return. 14 Pick. 123; 11 Maine, 491; 6 Maine, 350.

It has been urged, on the other side, that interest is inferrable from relationship, and that, therefore, the officer's denial of the appraiser's interestedness, is equivalent to a denial of the relationship. But we hold that such an inference cannot be drawn from the position, even if admitted, that interest is inferrable from relationship.

Because interest may be inferred from relationship, is it true that therefore there can be no relationship, where there is no interest? Relationship is a disqualification, as much as interestedness is, and is no more merged in the term interestedness, than the latter term merges the "discretion" which is also required by the statute.

Three qualifications are requisite, disinterestedness, discretion, and the absence of relationship. How can the officer's return, that a man possesses two of these qualifications, be held as an allegation that he also possessed the third? The declaration of the statute is not, that a person related shall be regarded as interested, or that the fact of relationship shall even be evidence of interest. On the other hand, the relationship alone is an absolute disqualification. 11 Maine, 491; 30 Maine, 155.

The proof of relationship, therefore, is not in conflict with the officer's return.

Even if the return creates a presumption of all want of relationship, it is but a presumption, and, like other presumptions, may be repelled and overcome by proofs.

II. There is a further reason why, in this suit, the officer's return is not conclusive. The wife of Gammon owns the land. She is the real defendant. A recovery by the plaintiff would be a bar to an action, for the same trespass, brought against her, or against her jointly with her husband. Chit. on Plead. 8th Amer. ed. 88.

The parties to this suit, then, are different from the parties to the levy. In such a case the officer's return may be disproved. 11 Mass. 163 and 463; 17 Mass. 433; 7 Pick. 551; 30 Maine, 155.

III. The plaintiff's counsel declared that, when the land was conveyed to the wife, the defendant paid a part of the consideration money. This admission is to be regarded as a fact in the case. The husband and wife, then, were joint purchasers, the wife holding a part in trust for the husband. The whole would belong to the survivor. A levy made by metes and bounds, as this was, upon the fee of a part only of land held in joint tenancy, is merely void. 2 Paige, 132; 14 Mass. 407; 5 Mass. 521.

IV. The land belonged to the wife, and the defendant entered and cut the trees by her direction. He did not enter upon the cultivated part of the land. He did nothing which could impair or lessen the plaintiff's pretended right to the

rents and profits under the levy against the husband, who had, on the plaintiff's own hypothesis, but a life estate. The plaintiff had no right to cut the trees, no interest in them. They belonged, not to the life estate, but to the inheritance. There was then no invasion of the plaintiff's rights. By implication of law, there was reserved to her the right to save her own property; and for that purpose to enter and take the trees, which pertained to the inheritance. The plaintiff's possession, (if any he had,) of the uncultivated part of the land, was a qualified one, limited to the mere purposes of taking wood for fires and for repairs. It was not such a possession as to exclude the reversioner from using that part of the trees which belonged to the reversion. 1 Greenl. 6; 10 Mass. 261; 14 Mass. 409; 17 Pick. 248; 19 Maine, 252; 2 Kent's Com. 130.

WELLS, J. — It is contended by the defendant that the levy is void, because one of the appraisers was an uncle to the defendant's wife. The statute requires that the appraisers should be discreet and disinterested men, and the officer in his return declares them to be such. His return cannot be controverted by the parties to the levy, but must be taken to be true. *Bamford* v. *Melvin*, 7 Greenl. 14. Appraisers are required to be disinterested, and by statute, c. 1, § 3, rule 22, "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."

In accurate language relationship does not imply an interest, but the degree of relationship mentioned in the statute is regarded as an interest. And the officer by declaring that the appraisers were disinterested, does thereby affirm, that they were not within that degree of relationship, which precluded

them from acting. If his return is not true, the remedy is by an action against him for a false return.

It appears that the defendant was not the owner of the estate, upon which the levy was made, in fee, but was seized of it in right of his wife. He had a life estate which could be taken for his debts. It would continue at least so long as both he and his wife might live, and after her death, if he became tenant by the curtesy. It is, in the language of the statute, "the real estate of a debtor in possession," an estate of freehold, although it may not continue any longer than the life of the wife. The levy was made upon the estate as if the defendant were the owner of the fee simple, and the value must have been estimated accordingly. No detriment could accrue to the defendant by allowing him the value of a greater interest in the estate than he possessed. And by statute, chap. 94, § 10, "all the debtor's interest in the premises shall pass by the levy, unless it be larger than the estate, mentioned in the appraisers' description." The declarations of the plaintiff's counsel, upon which reliance is placed, to show that the defendant had a different interest in the premises from what is manifested by the deed to his wife, cannot be regarded as evidence. The remarks of counsel in the progress of a cause are not to be viewed as an admission or agreed statement, by which the rights of his client should be determined. Nor do we mean to be understood as saying, that the statement of the counsel, if received as testimony, would alter the case.

By the levy of the execution the plaintiff was clothed with the seizin of the premises, and he had the possession when the trespass was committed. The entry upon them was a violation of his possession, and the defendant by such unlawful act became a trespasser, and he is bound in law to pay all the damages, which the plaintiff has sustained. The premises were not in a wild and uncultivated state, but were partly cultivated, and partly covered by a growth of trees. The plaintiff, succeeding to all the rights of the defendant, is entitled to those, which are incident to a life estate. He cannot commit waste, but he is entitled to firewood, fencing, and building

materials. But whatever appertains to the inheritance, excepting what the tenant for life may take, belongs to the wife of the defendant, under whose authority he entered. The plaintiff can recover no more damages than he has sustained, nor for the taking and carrying away the property of the defendant's wife. As in the case of a lease, if the lessor fells the trees, the lessee may maintain an action of trespass against him and will be entitled to recover damages adequate to the loss of his particular interest, and also for the entry into his land. But the interest of the body of the trees remains in the lessor, as parcel of his inheritance, who may punish the lessee in an action of waste, if he fells or damages any of them. 1 Cruise, Dig. T. 3, § 16 ; *Lyford's case*, 11 Coke's R. 48, a. It also has been held, that if the creditor injure the inheritance of the wife, where an execution against the husband has been levied upon her land, by cutting down and selling the trees, an action on the case lies against him, in which the husband must join. *Babb & wife* v. *Perley*, 1 Greenl. 6. If then the plaintiff should recover damages for the timber and wood, he would obtain what belongs to the wife of the defendant. But he can recover only the special damages, which he has sustained, for the breaking and entering his close, and for whatever has been carried away, which was necessary for the enjoyment of his life estate. If wood enough for firewood, fencing and building materials, was left in a situation as convenient and easy of access as it was before the trespass, the injury would appear to be confined to the breaking and entering upon the plaintiff's close. Unless the parties agree upon the damages, which are to be assessed upon these principles, they can be settled by a jury.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF FRANKLIN,

1851.

PRESENT:

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

INHABT'S OF NEW VINEYARD *versus* INHABT'S OF HARPSWELL.

Under the statute for the relief of paupers, an insane person may gain a settlement in any town, in his own right, though carried to such town while insane, and without the concurrence of a guardian.

No admissions of the overseers of the poor of a town can change the legal settlement of a pauper.

ON REPORT from *Nisi Prius*, WELLS, J., presiding.

ASSUMPSIT, for the support of Mercy Allen, a pauper. She was born in Harpswell and resided there about fifty-four years, till 1833. In 1827, she became, and has since continued to be, insane. She had no guardian. In 1833, her brother took her with him to New Vineyard. He maintained her there at

his expense till 1843. Relief from the town being then needed, the overseers of the poor of Harpswell, on being notified by the overseers of New Vineyard, contracted with the brother for her subsequent support. He supported her under that contract till 1849, for which he was paid by Harpswell.

In 1849, the plaintiff town furnished needful supplies to a large amount. Harpswell, on being duly notified, denied that the pauper's settlement was in that town.

The case was submitted to the Court.

J. L. Cutler, for the plaintiffs.

1. A person insane cannot, without the assent of his guardian, change his settlement. A change of one's settlement requires and pre-supposes the voluntary choice of a mind, capable of intelligent action: — 3 Greenl. 388; 13 Mass. 547; 15 Mass. 237; 3 Pick. 173 and cases there cited.

2. Defendants acquiesced in the notice given them in 1843, that the pauper's residence was in their town, and extended for several years the needed relief. By this proceeding they are now estopped to deny the settlement.

3. More than five years elapsed, while defendants were supporting the pauper, prior to the plaintiffs' furnishing the supplies for which this suit is brought.

H. & H. Belcher, for the defendants.

1. Insanity does not preclude a person from gaining a settlement in his own right. 24 Maine, 112; 3 Greenl. 220; 5 Greenl. 123.

2. The admissions of overseers of the poor cannot change a settlement. 1 Fairf. 185.

Howard, J. — The pauper was born in Harpswell, about 1779, and "remained and had her home, residing" there until 1827, when she became insane, and has continued in that state. It is stated that she "remained in said defendant town till, in January, 1833, she was brought by her brother, John Allen, to the town of New Vineyard, where she has since remained, and resided in her brother's family." She first became a pauper in November, 1843.

It has been held that *idiots*, and persons *insane* and *non compos*, may gain legal settlements in their own right, under the provisions of the statutes of this State, for the settlement and support of paupers. Stat. 1821, c. 122, § 2; R. S. c. 32, § 1, and c. 1, § 3, rule 8. *Lubec* v. *Eastport*, 3 Maine, 220; *Sidney* v. *Winthrop*, 5 Maine, 123; *Augusta* v. *Turner*, 24 Maine, 112.

It would seem that the pauper, Mercy Allen, gained a settlement in the town of New Vineyard, by a residence there, in the family of her brother, in the manner stated, for more than the term of *five years* together, without receiving, during that term, supplies or support as a pauper, directly or indirectly, from any town, in accordance with the provisions of the statutes, and the decisions cited.

But it is contended that the defendants are estopped to deny her settlement to be in Harpswell, by reason of supplies having been furnished for the support of the pauper, from 1843 to 1849, by her brother, under a contract in writing with their overseers.

It is not within the official authority or duty of overseers of the poor, to create or change the settlement of paupers, and neither their acts, nor their admissions to that extent, can bind or estop towns. Nor will a town be estopped to contest the settlement, by the mere fact that it has furnished supplies and support for the pauper. *Peru* v. *Turner*, 10 Maine, 185; *Harpswell* v. *Phipsburg*, 29 Maine, 313.

Plaintiffs nonsuit.

Ballard *& wife versus* Russell.

The statutes enlarging the rights of married women, as to property, do not extend to rights of action for tort.

To recover for an injury sustained by a married woman through the mal-practice of a surgeon, the husband *must* be a party to the suit.

The previous desertion of the wife by the husband does not remove the necessity that, in such a suit, he should join as co-plaintiff.

A discharge of the cause of action, given by such husband to the defendant, is a bar to such a suit, when brought in the joint names of the husband and wife.

On Report, from *Nisi Prius*, Wells, J. presiding.

Case for an injury to the female plaintiff, by mal-practice of the defendant, in attempting to reduce a fracture of the fore-arm and dislocation of the wrist. The husband prior to the injury had deserted the wife, and for eight years had made no provision for her support. He resided in the same town, and in co-habitation with another woman.

The defendant introduced an unsealed discharge, signed by the husband, and given prior to the suit, stating that he had received of the defendant, fifty dollars, in full for the injury. The counsel for the female plaintiff, then offered a document, (of one day's date later than the discharge,) by which the husband assigned to the wife the cause of action, and empowered her to collect the same for her use, and to make all needful use of his name. The case was taken from the jury and submitted to the Court. If the Court should conclude that the discharge given by the husband to the defendant would defeat the action, the counsel moved to amend, by striking the husband's name from the writ, and that thereupon the action should stand for trial.

Wells, J., orally. —

It is suggested that the discharge by the husband to the defendant was obtained through fraud. The Court cannot yield to that suggestion. If the plaintiffs would have availed themselves of it, the question should have been submitted to the jury.

By the common law, both husband and wife must join to

maintain an action like the present. This case does not come within any exception to the principles stated. The husband has not abjured the realm; and the facts stated in the report of the case, do not deprive him of the power to control the action nor to discharge the cause of it.

The statutes giving additional rights and remedies to married women, relate to property, and do not apply to this case. Hence the proposed amendment, by striking out the name of the husband, would be of no advantage to the wife.

It appears that the husband, the day after he had discharged the cause of action, gave his wife a written power of attorney to prosecute the claim for her own benefit. But the cause of action having been previously discharged, could not be revived by such an instrument.

It results that the action cannot be maintained, and the plaintiffs must be called.

LYFORD *versus* ROSS *& al.*

One who holds a mortgage of land made to a third person, together with the notes secured by it, can maintain no action at law upon the mortgage, unless the same had been assigned in writing.

ON FACTS AGREED at *Nisi Prius.*

WRIT OF ENTRY, with plea of *nul* disseizin.

The tenants have no title.

The land was formerly mortgaged by Dodge & Dodge to one Rangeley. The notes secured by the mortgage were duly indorsed to the demandant, and are unpaid. The mortgage was also, at the same time, delivered to the demandant. The notes and the mortgage are his property, but the mortgage was not assigned by any writing.

May and *Linscott*, for the demandant.

The question is whether the demandant, with an *equitable right*, can recover against the tenants, who have *no kind of*

right; in other words, whether an *equitable right* is better than *no right.*

We respectfully submit that, *between parties so situated,* the action is with the demandant. *Martin* v. *Mowlin,* 2 Burr. 978; *Green* v. *Hart,* 1 Johns. 580; *Jackson* v. *Blodgett,* 5 Cow. 202; *Jackson* v. *Willard,* 4 Johns. 43; *Clearwater* v. *Rose,* 1 Blackf. 137; Powell on Mortgages, 187; *Southerin* v. *Mendum,* 5 N. H. 420.

Sherburne, for the tenants, cited *Prescott* v. *Ellingwood,* 23 Maine, 345; *Vose* v. *Handy,* 2 Maine, 322; *Warden* v. *Adams,* 15 Mass. 233.

SHEPLEY, C. J. — It is well known, that there is a difference of opinion, whether a mortgage of real estate is to be regarded as a security merely and not as a conveyance within the statute of frauds, and therefore assignable without any instrument in writing by delivery only.

The decisions in this State have followed those of Massachusetts, and the question might be considered at rest here without reference to any statute provisions. *Vose* v. *Handy,* 2 Greenl. 322; *Prescott* v. *Ellingwood,* 23 Maine, 345.

Mortgages in this State may be foreclosed without any judicial proceedings by acts *in pais;* and if they were not regarded as within the statute of frauds, titles to real estate could be transferred without operation of law or any deed of conveyance. The registry with the records of the courts would no longer afford information, in which confidence could be placed, respecting titles. Nor would mortgagers or their grantees be able to ascertain with certainty to whom performance should be made or tendered to redeem their estates.

The tenant has no title to the land demanded, but the demandant must recover upon the strength of his own title.

It is provided by statute, c. 91, sect. 30, that "no estate or interest in lands shall be granted, assigned or surrendered, unless by some writing signed as aforesaid, or by operation of law;" and it is difficult to perceive, how the Court could decide, that the demandant has a legal title to, or interest in,

the land demanded, without disregarding this provision of the statute. *Demandant nonsuited.*

USHER *versus* TAFT.

A sale of land by a collector for the payment of taxes, under the Act of 1821, chap. 116, is void, if made more than two years from the date of his tax warrant, although the land was duly seized and advertised within the two years.

WRIT OF ENTRY, submitted on facts agreed as follow: —

The demanded premises were originally the property of the demandant, and he is entitled to possession unless he has been divested of his title by a sale for the payment of taxes.

On the twenty-fifth day of July, A. D. 1838, the selectmen of Weld, in which town the land was situated, made and delivered to their collector of taxes a warrant in due form, for the collection of the taxes assessed for that year.

The tax against the demanded premises remaining unpaid, the collector by virtue of said warrant, on the sixth day of June, A. D. 1840, gave notice, as required by law, that he would sell said premises for the payment of said taxes, on the tenth day of October, 1840. All the notices necessary were given, as required by law, prior to the 25th day of July of the same year.

On the 10th of October, the collector, agreeably to said notifications, set up the land at auction, and sold it to the tenant's grantor.

Sherburne, for the demandant.

Tripp, for the tenant.

The Act of 1821, chap. 116, sect. 31, limits the time, within which a sale can be made, to two years from the date of the collector's warrant. The only question raised by the facts is, whether the sale was too late to be valid.

A tax-sale is made up of the seizure of the property, the publication of the notices and the striking off the land to the

highest bidder. If the seizure be made within the two years, the analogies of the law authorize the sale to be completed afterwards. *Prescott* v. *Wright*, 6 Mass. 20.

The sale has relation back to the seizure.

The demandant has made no offer to pay the tax.

TENNEY, J., orally. — The warrant to the collector must have been dated as early as the 25th July, 1838, and the sale was made more than two years after that date. The Act of 1821, chap. 116, under which this sale was attempted to be made, required in sect. 31, that the sale be made within two years from that date. Not having been so made, the sale was void. *Tenant defaulted.*

STATE *versus* LUCY WORMELL.

Of the jurisdiction of justices of the peace, in taking recognizances.

SCIRE FACIAS.

The defendant, at the age of fifteen years, recognized to the State, before a justice of the peace, in the penal sum of $50.

The condition of the recognizance was, that she should "appear at the Supreme J. Court," to be held, &c., "and give evidence on behalf of the State upon the complaint on oath of S. N. against J. W. for the crime of a felonious assault." She neglected to appear, and this suit is brought to recover the penalty of the recognizance.

Tripp, County Attorney, for the State.

J. L. Cutler, for the defendant.

SHEPLEY, C. J., orally. — In two respects the recognizance is fatally defective: —

1. It does not show jurisdiction in the justice to take any recognizance.

2. The statute limits to $20, the penal sum in which a justice is authorized to take a recognizance in a case like this.

Judgment for defendant, for costs.

CUTLER *versus* EVERETT.

To support an action upon a written agreement to pay the debt of another, a consideration for the contract must be proved.

From an agreement on a separate paper, to be responsible for the payment of a note, though of the same date, described as having been given by a third person, no inference of a consideration is to be drawn.

ON EXCEPTIONS from the District Court, COLE, J.

ASSUMPSIT.

The plaintiff was indorsee of a note against a third person. The defendant gave to the plaintiff a memorandum, under his signature, and of the same date with the note, as follows; —

"I will be responsible to N. Cutler to pay a note;" [describing the note aforesaid,] "my responsibility the same as if I signed the note, and will not require notice of its non-payment."

This action is brought upon that memorandum.

The plaintiff having introduced the memorandum together with the note, which was unpaid, rested his case. The defendant requested a nonsuit, on the ground that there was no consideration for the memorandum.

The Judge directed a verdict for the plaintiff.

Webster, for the defendant.

The memorandum recognizes the note as one then in existence. It was then but a collateral agreement to pay the debt of a third person. The plaintiff is therefore bound to prove a consideration. *Tenney* v. *Prince*, 4 Pick. 385; *Ware* v. *Adams*, 24 Maine, 177.

J. L. Cutler, for the plaintiff.

1. The writing is an agreement to pay a definite sum in a definite time without contingency, and is a promissory note.

Bailey on Bills, 33, 2d Amer. ed.; *Townsend, executrix*, v. *Derby*, 3 Metc. 363; D. 8 Mod. 364; *Manrow* v. *Durham*, 3 Hill, 584.

2. If not a note of itself it is a guaranty of a note, and so need not express value. *Manrow* v. *Durham*, before cited.

3. The writing is of the same date with the note. The law presumes it to be a part of the same transaction.

4. No reason is perceived why the consideration should not be presumed in any and every agreement, as in promissory notes.

The reasoning, by which the Court came to the conclusion that consideration need not be expressed in writing, also sustains the position that it need not be proved. *Packard* v. *Richardson*, 17 Mass. 122.

5. A consideration appears from the instrument. The cause, moving to a consideration, need not be mentioned as the consideration. It is enough, if from the whole instrument, it appears, that there is a consideration. *Allen* v. *Jaquish*, 21 Wend. 628.

Shepley, C. J., orally. — The promise declared upon is to pay the debt of another person, and no consideration can be inferred from the papers in the case; and none was proved. The exceptions are therefore sustained, and a new trial is granted.

Ditson *versus* Randall.

Fraud practised by the vendee of a chattel, whereby he obtained the sale and delivery of it to himself, will not authorize the vendor to retake it from one, who had subsequently purchased it, for value, and without knowledge of the fraud.

Where a case is submitted upon a statement of facts, and the statement shows that an act was done either "feloniously or fraudulently," the Court are not at liberty to infer that the act was felonious, but will consider it as merely fraudulent.

On Facts agreed at *Nisi Prius*.

REPLEVIN for a mare.

One Rose hired a horse in Portland to go to Lewiston. He "feloniously or fraudulently" carried the horse through Lewiston to Readfield, and there exchanged him with Furbush, for another horse. He then exchanged the Furbush horse with the plaintiff for the mare now replevied. He afterwards exchanged that mare with the defendant, for another horse. In these exchanges, Furbush and the plaintiff and the defendant were, each one, ignorant of any felony or fraud on the part of Rose.

The owner of the Portland horse retook it from Furbush, who then took from the plaintiff the horse which he, Furbush, had delivered to Rose. The plaintiff thereupon demanded of the defendant the mare now replevied.

Abbott, for the plaintiff.

Rose had no title to the horse he hired in Portland. He fraudulently exchanged it with Furbush. Furbush thereby acquired no title to the horse, and it was rightfully reclaimed by the owner in Portland. Rose, by the fraudulent transactions with Furbush, acquired no title to Furbush's horse. He exchanged the Furbush horse with the plaintiff Ditson. But as Rose had no title to the horse, he could give none to Ditson. He practised a fraud upon Ditson, by which he neither gave any title to the Furbush horse to Ditson, nor acquired any title himself to the Ditson horse. Furbush rightfully reclaimed his horse from Ditson. Rose, in the meantime, had fraudulently, and without any right, transferred the Ditson horse to the defendant Randall. Rose, having no title, could not give any. Ditson, having made demand on Randall for his horse, and it being refused, brought his action of replevin. He may well maintain it. He had never parted with the title. Randall's ignorance of the fraud of Rose furnishes him no protection. "*Caveat emptor*" will apply.

Whoever purchases must at his peril see that the vendor has a right to sell.

S. Belcher and *Marshall*, for the defendant.

The case shows, there was no fraud in any of the transac-

tions, subsequent to the exchange of horses by Furbush and Rose. The plaintiff purchased in good faith, without notice of the fraud, and the sale of the mare by him to Rose was absolute and perfect. The mare, being in the open and undisturbed possession of Rose, was purchased of him by the defendant, *bona fide*, for a valuable consideration, and without notice of any fraud.

The title to the mare in the defendant, is not invalidated by fraudulent acts of other parties. *Hussey* v. *Thornton*, 4 Mass. 405; *Buffington* v. *Gerrish*, 15 Mass. 156; *Carleton* v. *Sumner*, 4 Pick. 516; *Smith* v. *Dennie*, 6 Pick. 262; 6 Wend. 83; 1 I. R. 471; 12 I. R. 548; 16 Cow. 44; *Mowry* v. *Walsh*, 8 Cow. 238; *Rowley* v. *Bigelow*, 12 Pick. 307; *Williams* v. *Given*, 6 Gratton's Va. Rep., vide Law Mag. Jan. No. '51, p. 76; *Gilbert* v. *Hudson*, 4 Maine, 345; *Neal* v. *Williams*, 18 Maine, 391.

TENNEY, J., orally. —

We cannot assume that the horse was put away feloniously. We are at liberty only, to conclude from the statement of facts, that it was done fraudulently. And the doctrine is, that the vendor of a chattel, though the sale was procured by the fraudulent conduct of the vendee, cannot reclaim the property from a subsequent innocent purchaser.

Judgment for the defendant.

ABBOTT *versus* PIKE.

No effect can be given to the following words, (inserted at the close of the covenants, in a warranty deed of land:) "*Provided that the grantor shall pay to*" [*a third person,*] "*a note,*" [*described,*] "*signed by the grantee.*"

A true and certain description in a grant of land is not invalidated by the insertion of a falsity in the description, when, by rejecting the erroneous part, the conveyance can be supported, according to the intention of the parties.

A deed, by its description, conveyed lot No. three, "being the same farm that P. W. now lives on." In fact, the farm occupied by P. W. was on lot No.

one. *Held*, that the description by the *number of the lot*, was less certain than that by the word *farm*; and that the farm, (and not No. three,) passed by the deed.

On Report from *Nisi Prius*, Wells, J. presiding.

Writ of entry, for a "lot of land numbered three, being the farm on which Peter Wyman formerly lived."

The demandant made title under a deed of warranty from Peter Wyman to Benjamin Hilton. This deed described the land to be lot numbered *three*, "being the same farm that Peter Wyman now lives on." At the close of the covenants, were the following words, "Provided, nevertheless, that the said Wyman shall pay or cause to be paid unto John Black two notes of hand signed by Benjamin Hilton, William Wyman and Charles Dolbier, for seven hundred and eighty dollars each, and interest from the 15th of October, 1828."

A witness testified, though objected to by the demandant, that the farm occupied by Peter Wyman, was on lot No. one, and did not extend to any part of No. three.

The demandant then proposed to amend his declaration, so as to call for the Wyman farm only.

The tenant then proposed to prove that the notes mentioned in the deed from Wyman to Hilton, had been paid by Wyman. This evidence was objected to by the demandant. The tenant exhibited no title to the farm.

The case was withdrawn from the jury, and submitted to the Court.

J. S. Abbott, pro se.

The proposed amendment is allowable, especially upon terms. But if not, there is no evidence that the Wyman farm was not formerly called No. three. An amendment is, therefore, unnecessary.

The deed from Wyman to Hilton, was a warranty, and an absolute deed. The words inserted at the close of the covenants have no legal effect. They do not make the deed a conditional one. They do not transform it into a mortgage. *Freeman's Bank* v. *Vose*, 29 Maine, 98.

Webster, for the tenant.

1. The demandant alleges the tenant to be in possession. That possession is good against the demandant, and all other persons, but the rightful owner. 23 Maine, 417; 16 Maine, 84; 20 Maine, 281.

2. The deed from Wyman to Hilton conveyed, if any thing, only the lot No. three. Com. Dig. E. 4; Coke Litt. 6, a; 4 Cruise, 298, chap. 19, sect. 29; 4 Mass. 196; 15 Pick. 428; 18 Pick. 553; 13 Maine, 111 and 430; 23 Maine, 217.

3. The deed was but a mortgage. 22 Pick. 376; 7 Pick. 111; 7 Mass. 381; 20 Pick. 514; 14 Maine, 233; 11 Maine, 318; 13 Maine, 111; 27 Maine, 156; Co. Litt. 303, a and b; Sheph. Touchst. 121. The tenant offered to prove that the mortgage was discharged by the mortgager.

Howard, J. — The deed from Peter Wyman to Hilton is absolute. The clause supposed to render it conditional is incomplete, unmeaning and inoperative. We are not at liberty to surmise the object of inserting that particular portion of the deed, nor are we called upon to reform the instrument, in any respect. *Freeman's Bank* v. *Vose*, 23 Maine, 98.

Whether Wyman did, or did not pay the notes described in the clause referred to, is immaterial, and the evidence on that point, is of no importance to this case.

Treating the deed as absolute, the next inquiry is, what was conveyed by it. The language of the grant is, "a certain tract or parcel of land situated in said Kingfield, *numbered* 3, *in the third range, and being the same farm that Peter Wyman now lives on.*" *Habendum* to Hilton, his heirs and assigns forever, with general covenants of warranty.

The farm was on *lot numbered one, range three*, but did not embrace any part of lot numbered *three;* and it did not appear that Wyman ever occupied or claimed any portion of the lot last named.

It is evident that the parties intended that the deed should convey the *farm* which Wyman then occupied. It was then located, and in the actual occupation of the grantor, and its

boundaries and extent readily ascertainable. The number of the lot was more uncertain, less likely to be known or regarded by the parties, and appears to have been used as descriptive of the farm. The general description of the premises was intelligible and correct, and the mistake occurred in the details, but it is not sufficient to defeat the manifest intentions of the parties, or to render the deed unintelligible, or inoperative.

Particular recitals, when used merely as descriptive of the grant, do not limit or restrict it, when the general language of the conveyance is intelligible and effective, without the recitals. So, a true and certain description of the grant is never invalidated by the addition of a falsity, when the intention of the parties can be subserved, and the conveyance upheld, by sustaining the true, and rejecting the false description. *Swift* v. *Eyres*, Cro. Car. 548; *Stukeley* v. *Butler*, Hob. 168; Shep. Touchst. 86–89; *Worthington* v. *Hylyer*, 4 Mass. 205; *Bott* v. *Burnell*, 11 Mass. 167; *Drinkwater* v. *Sawyer*, 7 Maine, 366; *Field* v. *Huston*, 21 Maine, 69; *Moore* v. *Griffin*, 22 Maine, 350.

Upon a fair construction of the deed, it appears that the *farm* was conveyed to Hilton; and the demandant, claiming under that conveyance, may amend the description of the premises demanded, so as to restrict his claim to the *farm* only, and may have judgment accordingly. The amount of rents and profits to be determined as stated in the report.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF SOMERSET,

1851.

PRESENT:

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

SAWYER *versus* KNOWLES.

The appointment of an administrator to be guardian of minor children, interested in the estate, is merely void.

Nor would his appointment as guardian furnish any legal inference that he had been previously discharged from the administratorship.

Proof that a person has been legally appointed to an office or place, furnishes a presumption that he continues to hold it during the term prescribed by law, or until he has been legally discharged.

EXCEPTIONS from the District Court, RICE, J.

ASSUMPSIT upon a note.

Hiram Hill, at his decease, left property to his minor children.

The plaintiff was administrator of his estate. A guardian was appointed for the children; but, after serving some time, he resigned the trust. The plaintiff was then appointed by the Judge of Probate, to be guardian.

There was an indebtedness to the minors, upon an obligation against the defendant. The plaintiff surrendered the obligation, and received therefor, the note now in suit, made payable to himself. Prior to the suit, one of the heirs had become of age.

The Judge ruled that the action is not maintainable, unless the taking of the note, upon the surrender of the obligation, was ratified by some one authorized to act in behalf of the minors. The plaintiff excepted.

Abbott, for the plaintiff.

If, in a proper process, it *might* be held that, under the R. S. chap. 110, sect. 6, the administrator could not lawfully be appointed as guardian, yet the plaintiff's appointment as such must stand good, until set aside on *certiorari*. Whether he was lawfully constituted a guardian is not, *in this suit*, an open question.

The plaintiff was the *acting* guardian. None of the heirs, though one of them has become of age, has objected to his authority or his acts. From these facts, and from the further fact that the defendant has never in any other form been called upon to discharge the original obligation, the Judge ought to have left to the jury the question of ratification, in a less restricted form, than that which he adopted.

The note was given to the plaintiff, for property belonging to the children. If the defendant would rescind the contract, he should have returned the property.

Webster, for the defendant.

Shepley, C. J. — The plaintiff was appointed administrator of the estate of Hiram Hill, on April 20, 1836. After a former guardian of the minor children of Hill had resigned, the plaintiff appears to have been appointed, during the year 1844, their

guardian by the Judge of Probate. Acting in that capacity, he settled, as the jury have found, an obligation made by the defendant to those children, and received therefor the note, upon which this action has been commenced.

It is provided by statute, chap. 110, sect. 6, that "no executor or administrator on an estate shall be appointed guardian to any minor, interested therein." The appointment of the plaintiff as guardian, was therefore void, and his acts as such were void, unless he had before that time ceased to be administrator of their father's estate. *Conkey* v. *Kingman*, 24 Pick. 115.

The obligation surrendered to the defendant, would be still binding upon him, and he might be compelled to pay it to any person lawfully authorized to enforce it.

The note having been made payable to one having no lawful authority to adjust and deliver up that obligation, was without consideration. To this it is objected, that the defendant must by law be presumed to have been discharged from his trust as administrator, before he was appointed guardian.

If such were the presumption of law, the production by an administrator, of his letter of administration, or of a copy of the record of his appointment would, after the lapse of a few years, be insufficient proof that he sustained that character; and one does not readily perceive, how he could produce proof, that he had not been discharged.

When there is proof, that a person has been legally appointed to an office or place of trust, the presumption of law is, that he continues to hold it during the term prescribed by law, or until he has been legally discharged.

It is not perceived, that the instructions respecting a ratification were too restricted; or that the defendant was estopped to make this defence, because he had not returned the obligation. *Exceptions overruled.*

WITHEE, *in error*, *versus* PRESTON.

The provision in the Revised Statutes, chap. 115, sect. 96, which prohibits the allowance of cost in any action founded upon a judgment, *if commenced within the time when an execution might have been issued thereon*, was prospective only.

In *such* an action, commenced within *such* time but *prior to the Revised Statutes*, it was not erroneous to allow cost, although such action did not come to judgment till after the passage of the Revised Statutes.

ERROR.

Preston recovered a judgment against Withee in the Court of Common Pleas in 1836, and took out an execution thereon. Within a year from the rendition of that judgment, and at a time when he might have renewed the execution, he sued an action upon that judgment. Judgment was recovered upon default in the District Court in 1847, for both debt and cost; and thereupon an execution was issued in 1847.

The Revised Statutes, passed in 1841, ch. 115, § 96, provided, that no cost should be allowed in an action founded upon a judgment, if commenced within the time, when an execution might have been issued thereon.

This writ is brought to reverse or correct the said last named judgment, on the ground that the costs therein were unlawfully allowed. *In nullo est erratum* was pleaded.

Abbott, for the plaintiff in error.

Hutchinson, *contra*.

HOWARD, J. — The defendant in error recovered judgment against the plaintiff in error in the Court of Common Pleas, in November, 1836; and, within a year from that time instituted a suit on that judgment, not being a trustee process, returnable to the same court, in November, 1837, and obtained another judgment thereon, in January, 1847, in the District Court, on default, for damages and costs. The error alleged is, that the last mentioned judgment was rendered for *costs*, contrary to the provisions of the Act of 1841, R. S. chap. 115, sect. 96. The plea, *in nullo est erratum*, is in effect a demurrer; and the single question presented is, whether the restrictions

of that section applied to suits pending at the time of the enactment of the statute.

By the statute of 1821, chap. 60, sect. 3, in force when the second suit was commenced, a party obtaining judgment "might have his execution thereon, at any time after the expiration of twenty-four hours after judgment rendered, and within one year after the entering up of such judgment." But if he neglected to take out execution within one year next after obtaining judgment, or to take an *alias* or *pluries* within one year next after a prior execution was returned not satisfied, he might sue out a writ of *scire facias*, or bring an action of debt on the judgment, without being restricted in the recovery of legal costs. Nor was any such restriction imposed, if he brought debt upon the judgment within the time in which he might have execution. But while the Revised Statutes contain a prohibition against the issuing of a *first* execution after the expiration of one year from the time judgment was entered, (chap. 115, sect. 104,) they provide, in section 105, that "an *alias* or *pluries* execution may be issued, within three years next after the day on which the last preceding execution was returnable, and not afterward." In section 96, it is provided, that "no costs shall be allowed the plaintiff, in an action upon a judgment of any court, or justice of the peace, on which an execution might, at the time of commencing such action, have been issued and duly served on the judgment debtor; provided this section shall not apply to any trustee process, founded on such judgment." The provisions of this section were intended for the new relations, to which it has reference, created by, or arising under that act, and were evidently prospective. The rights of parties in suits pending could not be affected by its passage, unless by a retrospective operation. This is not admissible, when an intention to give it a retroactive effect is not clearly expressed in the enactment. *Dash* v. *VanKleek*, 7 Johns. 503; *Hastings* v. *Lane*, 15 Maine, 134; *Torry* v. *Corliss*, 33 Maine, post.

The statute referred to, as restricting the original plaintiff

in the recovery of costs, being prospective in its operation, did not apply to actions pending, and, therefore, the error assigned is not supported.

Judgment of the District Court affirmed.

BAKER *versus* PIKE.

Parole testimony is inadmissible to prove the contents of the declaration in a writ, which had been sued out by another party, unconnected with the action on trial, and had been settled without being entered in Court, and yet remains in the hands of the attorney, by whom it was drawn.

Notice given to the opposing counsel, to produce a written paper, is ineffectual if the paper be held by him merely as the counsel of some person unconnected with the action on trial.

EXCEPTIONS from the Dictrict Court, RICE, J.

TRESPASS for a horse.

It appeared in evidence, that R. M. Baker, in the fall of 1846, sold the horse to the plaintiff, and in the spring of 1847, also sold him a lot of store-goods.

The defendant contended that the sales were fraudulent, and proved that the creditors of the vendor brought a suit against the vendor and the vendee, on account of the transactions between them, and that the suit was settled without being entered in court.

The writ in that suit not being on file in the court, the defendant in order to show that the sale of the *goods* was fraudulent, offered the officer who served the writ, as a witness, to prove that the declaration alleged a fraudulent sale and purchase of the goods, and that the plaintiff settled it. This testimony was objected to, and excluded.

It appeared that the writ in that action had been made by Mr. Abbott, as attorney of said creditors, and was yet in his hands, and he had been notified on the trial to produce it in this action.

The defendant excepted.

Hutchinson, for the defendant.

Abbott, for the plaintiff.

SHEPLEY, C. J. — The only question presented is, whether the testimony of a witness offered to prove the contents of a declaration inserted in a writ of attachment, which had been settled and continued to be in possession of the attorney, who commenced the suit, without having been filed in court, was properly excluded.

The attorney for the plaintiff appears to have been the attorney for another person, who caused that suit to be commenced against the plaintiff and another.

The notice given to the attorney during the trial to produce that writ was ineffectual and unimportant; and any notice more seasonably and regularly given would have been equally so, because that writ does not appear to have been in the possession of the plaintiff, or subject to his control. Proof of this was indispensable. 1 Greenl. Ev. sect. 560, note 2. Although the writ was in the possession of the plaintiff's attorney, it was not held by him as the attorney or agent of the plaintiff or subject to his control.

The defendant might have obtained the writ by a *subpoena duses tecum*; but neglecting to pursue that course, he could not have been legally permitted to prove the contents of the declaration by the testimony of a witness.

The case of *Frost* v. *Shapleigh*, 7 Greenl. 236, is not similar in principle. The officer in that case had not made upon the writs of attachment any returns, because the suits had been settled. The writs were produced, and the doings of the officer not existing in writing, were permitted to be proved by the testimony of witnesses. *Exceptions overruled.*

SEARLE *versus* PRESTON.

The lien, created by an attachment of real estate, is not limited to the amount, which the officer, in the writ, was commanded to attach.

Such a lien is commensurate with the judgment and the costs of levy, though the judgment exceeds the amount which the officer, by the precept of the writ, was commanded to attach.

On Report.

Writ of entry for a twenty-eight acre lot of land. One Withee owned it in 1837, and then conveyed it by a deed under which the demandant holds. Two days, however, before that conveyance the tenant attached all Withee's land lying within the county, by virtue of a writ, in which the *ad damnum* was set at $150, and the officer was commanded to attach property to the same amount. That action was pending nearly ten years. Judgment was recovered in 1847 against Withee for $125,43, debt, and $25,49, costs, making 92 cents more than the officer was commanded to attach. Upon the execution issued on that judgment, the tenant set off, at the appraised value of $164,29, the twenty-eight acre lot, excepting therefrom half an acre particularly described.

The case was submitted for a legal decision.

J. S. Abbott, for the demandant.

E. Hutchinson, for the tenant.

Howard, J. — Withee was owner of the premises, and the parties claim title from him; the tenant by attachment and levy, and the demandant by deed subsequent to the attachment. The officer, serving the writ, was commanded to attach goods and estate to the value of one hundred and fifty dollars only. Judgment was rendered for the plaintiff in that suit, about ten years after its commencement, for $125,43, debt, and $25,49, costs. The levy was for $164,29, including the costs of the extent.

It is contended by the demandant, that the judgment was rendered for an amount greater than the *ad damnum* in the writ; and that the levy, being for a sum greater than that required to be attached, was invalid. A plaintiff is restricted by the *ad damnum* in the recovery of damages, but not of costs. His judgment may be valid, although it exceed, in damages and costs collectively, the amount declared for, and laid in his declaration, if the damages alone do not exceed that amount. *Pilford's case*, 5 Coke's R. part 10, p. 115; 1 Chitty's Pl. 399. Attachments on mesne process are for the

security of the final judgments which may be recovered, and legal costs, incident to their enforcement and collection. That on which the tenant relies was upon all the real estate of the debtor, in the county, and created a lien upon the whole property, for the amount for which it could be legally held by the attachment, "as security to satisfy the judgment for damages and costs, which the plaintiff may recover," R. S. ch. 114, sec. 29, 30; or for which it could be taken on execution to satisfy the final judgment. Stat. 1821, ch. 60, sec. 1. In *Chickering* v. *Lovejoy*, 13 Mass. 56, this point was not material to the decision, and was not in fact decided. That case, therefore, does not sustain the positions taken by the demandant.

The levy under which the tenant claims, described a tract of land by metes and bounds, "containing twenty-eight acres, excluding the buildings, and one half acre of land on which they stand, laid out eight rods wide, and ten rods long, from the south-easterly line of the above 28 acres, and so as to include the buildings, — the north-easterly line running one rod north-east of the house."

To that portion of the demanded premises thus excluded, the demandant, having proved his title, can have judgment. R. S. chap. 145, sect. 13.

BOYNTON *versus* FRYE.

An award of arbitrators is of no effect, unless it be responsive to the submission.

An award, so far as it gives to either of the parties, any compensation for matters not submitted, is inoperative.

An award, which allows any compensation for matters not submitted, is wholly void, unless the unauthorized amount be distinguishable from the residue; and unless it appear, that the consideration of the unsubmitted part was so disconnected with the residue as to have had no influence upon it.

An offer to be defaulted for a specified amount authorizes the plaintiff to take judgment for that amount, although he may fail to establish any claim.

ON REPORT from *Nisi Prius*, HOWARD, J.

DEBT. — The plaintiff and two other persons were entitled to the use of three quarters of a shingle mill. They made a claim upon the defendant for erecting obstructions in the stream, whereby the water was diverted from their shingle mill to his tannery. The plaintiff, owning the mill privilege, also made a claim for the "permanent injury done to it by reason of the obstructions aforesaid." These claims were submitted to arbitrators. The parties gave bonds respectively to abide the award, and in the bonds was a stipulation, that the sum of five hundred dollars, as liquidated damage, should be paid for neglecting to keep the award in each of its particular requirements. The arbitrators awarded, that the defendant should pay $24,95, to each of the three claimants, and that this should be in full compensation for all past and all future damage by the appropriation of the water for the tannery.

This is an action of debt upon the bond given by the defendant. There were four counts. They were framed to recover the $500; and also the $24,95.

Non est factum was pleaded, and the issue was joined. Three special pleas were pleaded, but no issue was taken upon them. The defendant attempted to prove that he tendered $25, and he brought into court $37, for the plaintiff, but it was not taken. The defendant also offered to be defaulted for $27,10.

The case was submitted for a legal decision.

Waterhouse, for the plaintiff, presented a written argument. It was however addressed to points, which received no adjudication by the Court.

Abbott, for the defendant, among other points, argued, that the *submission* was of claims for *past* obstructions only, and that the *award* allowed damage for *future* obstructions; and, that by this deviation from the submission, the award was merely void. *Clements* v. *Durgin*, 1 Maine, 300; *Bean* v. *Farnham*, 6 Pick. 269; *Culver* v. *Ashley*, 17 Pick. 98; *Pierce* v. *Woodward*, 6 Pick. 206.

Waterhouse, in reply. — Beside the general issue, the pleas were of performance, of tender and of payment of money

into Court. Under none of these pleas could the objection be taken, that the award transcended the submission. They constitute an implied waiver of such an objection. *Bean* v. *Farnham*, 6 Pick. 269.

But further, the objection is not in accordance with the facts. The *future* damage to this plaintiff was submitted to the arbitrators. The "permanent injury to his mill privilege" was one of the specifications. The award follows the submission, and is therefore valid.

SHEPLEY, C. J. — By a contract under seal, these parties with two other persons agreed to submit to the decision of arbitrators, the claims set forth in a written instrument annexed to the submission. The matters therein submitted, are damages "for the loss, destruction, deterioration, and loss of rents and profits of three fourths of a shingle mill, which they own in common with another." And they allege "that it has been valuable and productive property, but has for the last five and a half years been made of no value," by back water rendering the mill useless.

The plaintiff also "claims damages in his individual right, for the permanent injury done to the said mill privilege, of which he claims to be the sole owner, in consequence of the obstructions aforesaid."

Although the latter claim made is for damages for a permanent injury to the privilege yet both the claims are for damages for injuries already suffered.

The matters submitted were damages occasioned by the past misconduct of the defendant. The submission does not embrace a claim for damages for his future misconduct. Nor is the regulation of the water rights of the parties or the future use of the water embraced in it.

The award is of certain sums to the plaintiff and to the two other persons respectively "in full satisfaction of all claims set forth in the claims annexed to said bond, and that said Frye shall be entitled to draw more or less water through the canal now cut from the Sebasticook river to his said tan-

nery, than he has heretofore drawn. The said arbitrators meaning and intending to decide, that said sums shall be in full satisfaction of all past and future damages, that the drawing of water from the Sebasticook river, and emptying the same into the brook below said shingle mill, by the said canal, as now cut, might occasion the said claimants or either of them."

The arbitrators have exceeded their authority, by assuming to regulate the future use of the water, and by awarding damages to be occasioned by such future use.

An award may be good in part, and bad in part, when the facts are not so connected as to render the whole void. In this case the award is made expressly "in full satisfaction of all past and future damages, and there are no means afforded by which the amount awarded for the past and for the future damages can be ascertained and separated.

The award is therefore wholly void.

This conclusion is resisted by the counsel for the plaintiff, because, as he correctly states, no such issue is presented by the pleadings.

There having been no joinder of any of the pleas, except the general issue, the others cannot be noticed, unless they be considered as in the nature of brief statements. It is not essential to notice them, or to inquire if they can have any effect, for they would not present any issue on the validity of the award.

The plaintiff's right to recover is founded upon the award. One count in his declaration is upon it. In the other counts a forfeiture is claimed as liquidated damages for a neglect or refusal to perform the award. The submission and award are in one count set forth. To support his action upon any count the plaintiff must prove an award made in conformity to the submission; and that the defendant after notice had neglected or refused to perform it.

This he does not and cannot do, by the production of an award not made in accordance with the submission, but void for excess of authority.

By the provisions of our statutes a payment of money into Court, or an offer to be defaulted for a certain sum, does not operate as an admission of the plaintiff's claim, while such an offer to be defaulted does authorize the plaintiff to take judgment for that sum, although he may fail to establish his claim.

The plaintiff will be entitled to judgment, for the sum of $27,10, with costs to the time of such offer to be defaulted, and the defendant will be entitled to costs since that time.

WARREN *versus* MILLER.

By the statute of 1846, non tenure can be pleaded in abatement only. Such a plea must, (except by leave of Court,) be filed at the return term of the writ.

Though the action be continued, the necessity of filing such plea at the first term is not removed by an order of the Court, obtained on motion, that the demandant should file an abstract of his title by the middle of vacation.

ON EXCEPTIONS, from *Nisi Prius*, HOWARD, J. presiding.

WRIT OF ENTRY. At the return term, the tenant moved, and the Court ordered, under R. S. chap. 145, sect. 5, that the demandant, by the middle of vacation, should file a statement of the title upon which he relied, and the origin of it. Leave was, at the same time, given to the tenant to plead non tenure. The action was then continued.

At the next term, the tenant pleaded the general issue, with a brief statement "that he is in possession of the demanded premises, under and by authority of Stephen Hilton, who is the owner thereof."

The demandant moved that the brief statement be rejected, because it is in substance a special plea of non tenure, which, by the Act of 1846, chap. 221, can be pleaded in abatement only, and should therefore be filed at the first term. The motion was disallowed; whereupon the demandant became nonsuit, reserving leave to file exceptions, which he accordingly did.

Warren, pro sese.

D. D. Stewart, for the tenant.

WELLS, J. — By the Act of August 10, 1846, chap. 221, it is provided, that "in all writs of entry, the defendant may plead that he is not tenant of the freehold, in abatement, but not in bar. And if any defendant would avail himself of the provisions of the ninth section of the one hundred and forty-fifth chapter of the Revised Statutes, his pleadings and brief statement shall be filed within the time required for filing pleas of abatement, and not after, except by special leave of the Court, and on such terms as the Court shall direct."

The substance of the tenant's brief statement is, that he was not tenant of the freehold, but held the possession of the premises as tenant, under Stephen Hilton. This was not filed at the first term of the Court, and if such ground of defence could be presented by a brief statement, it was not done in season, and the tenant was precluded at that time from making such defence.

An omission of the demandant to comply with the order of Court, to file an informal statement of his title, according to chap. 145, sect. 5, would not authorize matter in abatement, to be pleaded in bar.

It is not apparent that an exhibition of title would have been of any service to the tenant, if his defence was placed altogether upon the ground, that he was not tenant of the freehold. If the action had proceeded to trial, no evidence could have been received of the character of that, contemplated by the brief statement. The nonsuit is taken off, and the action is to stand for trial.

DAVIS, *in equity, versus* ROGERS *& al.*

In a bill in equity to reform a conveyance of real estate, on the ground of an accident or mistake, the persons, under whom the defendant claims by deeds of warranty, made since the mistake or accident is alleged to have occurred, must be made parties.

The bill is defective, unless it contain an allegation that the grantees in such deeds purchased with notice of the mistake or accident.

Of the want of such an allegation, and of the want of requisite parties, advantage may be taken on general demurrer.

BILL IN EQUITY.

The allegations of the bill are in substance as follow : —

In April, 1832, Ephraim Watson was owner of the west half of lot No. 20. He then gave one Hamilton a bond to convey the same to him on the payment of a stipulated sum.

Subsequently, but at what time the plaintiff is ignorant, Watson, by the consent of Hamilton, agreed by bond to convey to James McNally, five acres off of the south end of said west half of the lot, but the plaintiff does not know that the writings between Watson and Hamilton were altered.

Thereupon McNally went into the occupation of the five acre lot ; cleared it up, fenced it, and erected valuable buildings upon it ; and Hamilton went into the occupation of the remainder of the said west half of the lot.

Hamilton, not being able to pay for the remainder of said west half without assistance, induced Calvin Copeland to pay Watson, in whole or in part ; and it was agreed between the three, that Watson should convey the same to Copeland, who should hold it in trust for Hamilton, and convey it to him on receiving the sum by him advanced and interest. Thereupon Watson, on the 29th of July, 1840, gave Copeland a deed of the whole of the west half of No. 20, including, by mistake, the five acre lot. Copeland held the deed in trust for Hamilton, who continued to occupy the same, except the five acres, and he did not occupy or pretend to have any right to the five acres, but the same was before and after in the occupation of McNally, under the bond given him by Watson.

Copeland afterwards conveyed the west half of No. 20 to Hamilton, but Hamilton did not claim nor occupy the five acre lot, well knowing of the mistake, and not intending to take any advantage of it.

On or about the 14th June, 1847, Hamilton, for a stipulated sum, agreed to convey to the defendant Rogers that part of the west half of lot No. 20, which he really owned, not including the five acres. The boundaries were pointed out to Rogers, and were well understood by him. Rogers neither bargained for, nor paid for, nor understood that he was to have any part of the five acre lot. But the deed from Hamilton to Rogers, dated 14th June, 1847, and recorded, embraces the five acre lot, by accident and mistake.

McNally, not being able to perform the condition of his bond, abandoned the land, and Watson gave a bond of the same to one Hiram Watson, and afterwards died. Said Watson's administratrix, being duly licensed by the Judge of Probate, conveyed the five acres to Hiram Watson, he having performed the condition of his bond.

Hiram Watson then conveyed the five acre lot to the plaintiff by deed.

Rogers conveyed the whole of the west half of lot No. 20 to the other defendants in mortgage or as security for money borrowed. The other defendants seek to derive no advantage from the mistake, and have been defaulted. Rogers fraudulently intends to hold and convey away the five acre lot.

The deeds were all duly recorded.

Plaintiff asks for discovery and relief, the correction of the mistake, and a perpetual injunction upon the defendants, to restrain them from conveying the five acre lot, and from exercising any acts of ownership over it.

Defendant Rogers demurs generally to the bill, and plaintiff joins.

Hutchinson, in support of the demurrer.

The bill alleges that Watson agreed by bonds to convey the lot to Hamilton, and also to convey five acres to McNally. There is no allegation, that when Watson, some years after-

wards, conveyed the land to Copeland, those bonds were in force. The inference is, that they had been forfeited by non-performance of their conditions.

The plaintiff claims no title under Hamilton or McNally. He is therefore a stranger to their transactions, nor does the bill allege that Copeland, under whom the defendant holds, had any notice of any bonds given to Hamilton or McNally. He could therefore convey a valid title even to Hamilton. *Whitman* v. *Weston*, 30 Maine, 285.

Rogers, the defendant, was a purchaser without notice of the pretended mistake or accident, and therefore cannot be affected thereby.

Ephraim Watson conveyed to Copeland, under whom the defendant claims.

The plaintiff claims under Hiram Watson. But Hiram's claim, which was under the representative of Ephraim, must be estopped by Ephraim's prior conveyance to Copeland.

The requisite parties are not before the Court. Hamilton and Copeland ought to be made parties.

If there be any rights in the plaintiff, there is for him a clear and adequate remedy at law.

The plaintiff is a purchaser, with notice of the prior conveyances, as they had been a long time recorded.

Abbott, for the plaintiff.

Shepley, C. J. — The plaintiff seeks discovery and relief, by the correction of alleged mistakes, made in conveyances of the west half of a lot of land numbered twenty, in the third range, in the town of Cambridge.

A demurrer to the bill has been filed by the defendant Rogers.

It appears, that Ephraim Watson conveyed the land to Calvin Copeland, who conveyed the same to Foss Hamilton, who conveyed the same to the defendant Rogers. It is alleged, that mistakes were made in these conveyances, by including five acres to be taken from the south end of the lot, which

James McNally had contracted to purchase, and upon which he had entered, and erected buildings.

Ephraim Watson, it is alleged, has deceased. Calvin Copeland and Foss Hamilton are not made parties. No correction of the alleged mistakes can be made, without proof of their knowledge of them; nor can a correction of their conveyances be made, or their rights be affected, unless they have an opportunity to be heard, by being made parties to the bill.

Demurrer allowed.

Leave to amend was thereupon granted, and the action was continued.

ADAMS *versus* HODSDON *& al.*

A dilatory plea is not favored in law.

In such a plea, the highest degree of certainty is required.

It is bad, if it do not exclude all supposable matter, which, if alleged, would defeat it.

The defects of such a plea, whether they be of form or substance, are reached by a general demurrer.

ON EXCEPTIONS. —

The officer returned upon the writ, that he had attached a chip. The defendant pleaded in abatement the want of due service of the writ. To that plea the plaintiff demurred generally.

D. D. Stewart, in support of the plea.

No service other than that prescribed by statute will be sufficient. *Peck* v. *Warren,* 8 Pick. 163—4.

Where goods or estate are attached, a separate summons must be delivered to the defendant, or left at his last and usual place of abode. R. S. chap. 115, sect. 24.

Where such separate summons is not so left, the defendant may plead such defect of service in abatement. *Ames* v. *Winsor,* 19 Pick. 247. *Nelson* v. *Swett,* 4 N. H. 256. Story on Pleading, 118.

J. S. Abbott, in support of the demurrer.

HOWARD, J. — When his goods or estate are attached on a writ, "a separate summons, in form, by law prescribed, shall be delivered to the defendant, or left at his dwellinghouse, or place of last and usual abode, &c. if he be an inhabitant of the State. R. S. chap. 114, §§ 24, 27, 29.

The plea states that, although the estate of the defendants had been attached, "yet no summons to appear and answer to this action of the plaintiff, has ever been given to them, or either of them, or left at the last and usual place of abode, of them and each or either of them, as the law requires." But it does not allege that no summons was *left at the dwellinghouse* of the defendants, or either of them, or that they were inhabitants of the State, when the attachment was made.

The last and usual place of abode of a person may be, and often is, different from his present dwellinghouse. And when the defendant is not an inhabitant of the State, the attachment of his property upon a writ may be made, and the service and return complete and sufficient, without a summons being left or delivered, in either mode stated in the plea, or in the section of the statute on which the plea appears to have been framed. (§ 24.)

This is a *dilatory plea,* not favored in law, and in which the highest degree of certainty is required, and as it does not exclude all supposable matters which, if alleged, would defeat it, it must be adjudged bad for uncertainty. Every allegation in the plea may be true, and yet the service and return be good. Lawes' Pl. 54; Gould's Pl. chap. 3, § 57 and 58.

The defects of *dilatory pleas,* whether in form or substance, are reached by general demurrer.

Exceptions sustained, plea adjudged bad,
and respondeas ouster awarded.

MOORE *versus* DUNLAP.

In actions of trespass *quare clausum*, originating before a justice of the peace, no appeal lies from the District Court, except in cases where title to land was pleaded before the justice.

TRESPASS, *quare clausum.*

The action was commenced before a justice of the peace, and was appealed to the District Court. The general issue alone was pleaded. A verdict was rendered for the plaintiff, and the defendant appealed to this Court. It was here dismissed for the reason that the last appeal was unauthorized. That ruling was excepted to by defendant.

Abbott, in support of the exceptions.

By R. S. chap. 97, § 13, an appeal from the District Court, is expressly given in any "action of trespass on lands." In *Barker* v. *Whittemore*, 22 Maine, 556, such an appeal was sustained. True, an *inference*, unfavorable to these exceptions is deducible from that case; but that inference was drawn from the position, that where the defendant pleads title, the action *cannot* be tried before the justice, but *must* be sent up. It is submitted that position is unsound. The law, R. S. chap. 116, sect. 1, 2, and 3, is *not* that the action *must* go up without trial, but that it *may* go up, *if* either party request it. The position itself, then, being erroneous, the inference drawn from it has no strength.

Foster, *contra.*

SHEPLEY, C. J. — An appeal may be made from a judgment of the District Court, to this Court, in a class of actions enumerated in the statute, chap. 97, § 13. The settled construction of that section is, that it has reference to actions originally commenced in the District Court, and that it was not intended to include those originally commenced before a justice of the peace and triable there.

The decision in the case of *Barker* v. *Whittemore*, 22 Maine, 556, that such an appeal might be made in an action

of trespass *qua. cla.*, commenced before a justice of the peace, and removed to the District Court on a plea of title to the land by virtue of the provisions of the statute, chap. 116, sect. 3, is not regarded as inconsistent with the construction established by the cases cited by the counsel.

The ground of the decision in the case of *Barker* v. *Whittemore* was, that it was, as presented, an "action of trespass on lands," and it was regarded for all practical purposes, as commenced and introduced by an indirect course of proceeding in the District Court, because no trial could take place before it had been thus removed. It was not denied, that trespass *qua. cla.* of any other description could be brought into this Court by appeal, when commenced before a justice of the peace.

In this case the general issue was pleaded and joined, and the title to the land could not be tried. The case is not within the principle established in the case of *Barker* v. *Whittemore*, while it is within the principle established by the cases deciding the construction of that section of the statute.

Exceptions overruled.

ADAMS, *administrator*, *versus* WARE.

A debt due to the defendant from the plaintiff jointly with others, cannot be set off in a suit at law.

Rights to a set-off in a suit, wherein an executor or administrator is a party, are the same that would have existed, if all the parties interested had continued in life.

ON EXCEPTIONS from the District Court, RICE, J.

DEBT upon a judgment recovered by the plaintiff's intestate. The defendant filed in set-off a judgment in his favor against the deceased and three other persons now living, one of whom resides in this State. The Judge ruled that the set-off should be allowed. To that ruling the plaintiff excepted.

J. S. Abbott, for the plaintiff.

The judgment of the defendant against plaintiff's intestate

and others, cannot be legally filed in set-off. Rev. Stat. chap. 115, sect. 33, 37.

This statute is not to be enlarged by construction. *Call* v. *Chapman*, 25 Maine, 128; *Smith, in equity*, v. *Ellis & als.* 29 Maine, 422.

Hutchinson, for the defendant.

The death of the plaintiff's intestate operated as a severance, and gave the defendant the right to claim the whole balance of his unsatisfied judgment, of the administrator of the intestate, when no decree of the Probate Court had declared the intestate insolvent, and thus subjected the defendant to a different mode of proceeding. In the case of insolvent estates, the Rev. Stat. chap. 115, sect. 39, provide for the set-off, but not for recovery of judgment for the balance. Sect. 37 and 38 of the same chapter provide for the set-off in actions by executors and administrators, of demands against their testators and intestates, existing at the time of their death. This judgment existed at the time of the death of the intestate, and might have been enforced against him alone. An action upon this judgment at the present moment might be maintained against the present plaintiff in his representative capacity, and could he not file the judgment sued in set-off? If so, the rights must be mutual, that circuity of action may be avoided. Section 27 of the same chapter is in these words, — "No demand shall be set off, unless it is founded upon a judgment or contract; but the contract may be either express or implied." The demand filed in set-off in the case at bar is a judgment, and therefore within the express provisions of the section last cited. Section 33 provides, "*If there are several plaintiffs, the demand set off shall be due from them all jointly; if there are several defendants, the demand set off shall be due to them all jointly, except as is provided in the following section.*" The following section does not affect this case. In the margin of sect. 33, are cited 11 Mass. 139; 15 Maine, 268; 1 Metc. 80. The first, is an action of one party against two, and the set-off filed by one of the defendants was not allowed. The case in 15 Maine, is precisely like that in the

11th Mass., is decided upon its authority — that in the 1st Metc. is the same in principle as the last — neither is opposed to the views of the defendant in the present case. Sections 37 and 38 of the same chapter, before cited, contain the specific provisions, upon which we rely, and probably so does the plaintiff. Sect. 37 is as follows, "*In actions by executors and administrators, demands against their testators and intestates, which belonged to the defendant at the time of their death, may be set off in the same manner, as if the action had been brought by the deceased.*" Now if there had been no other defendant in the judgment filed in set-off than James Adams, no argument could be raised. Is the case now different? The death of Mr. Adams rendered the judgment filed in set-off a several judgment against him with all the rights and remedies incident thereto, among which is the important right of set-off against the claim of the intestate, prosecuted by his legal representative, otherwise the anomalous case would be presented, of single co-existing claims between the living and the representative of the dead, wherein the living must pay the dead man's representative, and lose his own debt. Such is not supposed to be the law; nor can that be justice, which in like case gives a right to one, and denies it to another. This Court, in the case of *Call* v. *Chapman*, 25 Maine, 128, say, that set-off in this State is regulated wholly by statute. That case relates to indorsed promissory notes, and has no similarity to the case at bar. Statutes are to be construed sensibly and with a view to the object aimed at by the Legislature, which may well be supposed to have been to protect creditors from the unjust effects of compulsory payments to those who are justly indebted to them.

TENNEY, J. — Can the set-off be allowed?

Revised Statutes, chap. 115, sect. 37, provides, that "in actions by executors and administrators, demands against the testators and intestates, which belonged to the defendant at the time of their death, may be set off in the same manner, as if the action had been brought by the deceased." We are

then to see, what would have been the rights of the deceased and the defendant upon the question of set-off, upon the claims now presented. "When there are mutual demands between the plaintiff and the defendant in any action, one demand may be set off against the other." Sect. 24.

By the statute of 1821, chap. 59, sect. 19, when an action is brought on a debt of the kind therein specified, the defendant may file any account, he has in set-off, and he may recover a balance, if one is found in his favor. This provision, which is substantially the same, as that contained in R. S. chap. 115, sect. 24, has had the consideration of this Court in *Banks* v. *Pike & al.* 15 Maine, 268, where an account in favor of one of the two defendants was filed in set-off. And the Court say, "The provisions of the law in respect to accounts in off-set, cannot be carried out unless the parties having cross-demands are identical. The party defendant is to recover a balance if the demand proves to be greater than that of the plaintiff, in the same manner as if he had brought an action therefor." It cannot be said, with any propriety, that the debts and demands between parties to a suit, are mutual, when that in favor of one party is against the other party, jointly with those, who are strangers to the suit, and not severally. This construction is aided by the provision in the 33d section of the same chapter, which provides, "if there are several plaintiffs, the demand set off, shall be due from them all jointly; if there are several defendants, the demand set off, shall be due to them all jointly." If, in an action upon the judgment in the name of the deceased, the defendant's judgment against him and others could be allowed in set-off, there is no good reason why an action on a demand in favor of two persons, a claim in favor of the defendant, against the plaintiffs and another, should not be allowed in set-off; and if there were two defendants, why a demand in favor of those and another against the plaintiff, should not be so allowed. An action upon the defendant's judgment against the plaintiff's intestate alone, if such had been brought during his life, would have failed without an amendment ac-

cording to the statute, chap. 115, sect. 12, the judgment being joint against all the debtors therein.

In case of *Warren & al.* v. *Wells*, 1 Metc. 80, where the action was against the principal and surety, and an attempt to have an allowance in set-off of a demand in favor of the principal alone, against the plaintiff, the Court held the set-off inadmissible. They say, "the rule is founded on this consideration, that the plaintiff may have a several demand against such principal, which he could not include in his suit against both defendants, and which he reserves to meet the several defendant's demand, whenever he shall offer it." This reasoning will equally apply to a case, where a joint demand against the plaintiff and others in favor of the defendant is filed by the latter.

The defendant's counsel does not rely upon such a construction of the statute, as would allow his judgment to be set off in an action in favor of the deceased, in his lifetime; but insists, that his death has caused a severance of the claim, which was before joint; and that an action could be maintained thereon against the plaintiff as administrator, and therefore the same claim may be legally set off. The question is to be settled, by the statute as it is, upon a reasonable construction, and not as it may be thought it should be. It was manifestly the intention of the legislature to limit the operation of the statute to the demands between the parties themselves, during the lifetime of both; and that no change should be effected by the death of either, in this respect, excepting by the substitution of the executor or administrator for the deceased. It was clearly the design of the statute in relation to set-off, that there should not be a separation of demands, which were joint against the original debtors, by the death of one of them, although a severance might be the consequence of the death; and the same rule was intended to apply under the statute to a suit by or against an executor or administrator, and the one, whom he represents, excepting so far as that rule is modified by other provisions, which are foreign to the

present inquiry. The question, whether a set-off can be made or not, in an action, where an administrator is a party, is to be determined alone by the rights of those interested in the demands, before the decease of any of them.

Exceptions sustained.

HOBBS, *petitioner for review, versus* BURNS.

Of the evidence and of the conditions upon which reviews may be granted.

SHEPLEY, C. J. — The petitioner and Henry L. Wiggin, since deceased, made a written contract on December 6, 1833, with the respondent, that he should cut and haul logs from a township of land numbered four, in the sixth range.

Hobbs and Wiggin do not appear to have been owners of that township, but to have been interested with other persons, in contracts for the purchase of it. They were to make payment for the labor performed by two installments.

The respondent appears to have recovered judgment against them in the month of July, 1839, for the first installment, and the execution issued on that judgment, appears to have been satisfied in part by a levy made on the estate of Hobbs, on February 24, 1840. In the month of October, following, he commenced another suit against them, to recover the second installment, and recovered judgment therein, in the month of June, 1847, against Hobbs, Wiggin having deceased. An execution issued on this judgment was satisfied in part, by a levy made on the estate of Hobbs, on July 8, 1847.

At the term of this Court, holden in the month of November following, the petitioner presented this petition to obtain a review of the action last named, which was heard at the last term of the court of law in this county.

The petition in substance, alleges, that Hobbs and Wiggin, in making that contract, were in fact acting for those then interested, and who subsequently became owners of the township. That Burns, by power of attorney, duly executed, on

December 21, 1843, authorized William Weston, to compound, settle, receive pay, and discharge them from that contract. That on February 15, 1844, a settlement of the contract was made between the petitioner and Weston, by which it was agreed that the respondent should discharge his claims upon the petitioner, and take his remedy in the name of the petitioner against the owners of the township. That in violation of the agreement and settlement, the respondent recovered judgment in the last named action against the petitioner.

It does not appear that the agreement made between Hobbs and Weston, was reduced to writing. It is stated in the testimony of Josiah Dearborn, a counsellor at law in the State of New Hampshire, that it was agreed, that Burns should take his remedy against said company or proprietors of said township No. 4, in the name of said David L. Hobbs, for his claim by virtue of said agreement; said Hobbs to do all necessary acts to enable said Burns to bring and sustain an action, in the name of said David L. Hobbs, against said company." His testimony also states, that the first judgment recovered was then satisfied by a negotiable note, made by Hobbs, and payable to Burns for the amount of it, with interest and costs of levy, to enable Burns to commence an action in the name of Hobbs against the owners of the land. Such an action appears to have been commenced in the State of New Hampshire. Mr. Dearborn further states, that "said Hobbs was not to be required to do any thing to interfere with the right of said owners to defend the action then pending in the name of said Burns, against said D. L. Hobbs, and said Henry L. Wiggin, on the second payment named in said agreement."

William Weston was examined as a witness, but he does not give any satisfactory account of the precise terms of that agreement. This is the only testimony presented to prove that agreement; and the inquiry arises, whether it does prove, that Burns was not to prosecute the action then pending, and obtain a judgment therein againt Hobbs for the recovery of the second installment due by the contract. Hobbs does not appear to have paid to Burns any thing on account of it, or to have

afforded him any means, by which he could in his name have maintained a suit against the owners of the land. There does not appear to have been any agreement, that the suit then pending should be no further prosecuted. On the contrary, there appears by implication, an intention to permit it to be prosecuted, for Hobbs was not to interfere with the rights of the owners to defend it; and if it was understood between them, that the owners of the land were to be at liberty to defend it, the right of the party plaintiff to prosecute it was involved therein. To carry into effect the agreement made between Hobbs and Weston, there must have been in some mode a valid claim first established by Burns, against Hobbs, to enable Burns to maintain, in the name of Hobbs, a suit against the owners of the land, for the recovery of the last installment. If it had been the intention, that the second suit should be no further prosecuted, and that the entire claim of Burns, by virtue of the contract, should be adjusted without another judgment, the note, made by Hobbs to Burns, should have included what might be due upon both installments.

The fair and just conclusion is, that Burns was to be at liberty to prosecute the second suit, leaving the owners of the land at liberty to defend it, that the sum justly due to Burns might be ascertained by a judgment, and that by a course similar to that pursued respecting the first judgment, Burns should be placed in a position to enable him in the name of Hobbs to obtain satisfaction from the owners of the land. The testimony therefore fails to prove, that Burns recovered that judgment in violation of any contract made between Hobbs and Weston.

The claim to have a review granted is presented under another aspect.

It is alleged, that Weston settled the suit, which had been commenced in the State of New Hampshire, and also settled with three of the owners of the land, Messrs. Upham, Haven, and Treadwell, and received from them, satisfaction of their

shares of what might be due to Burns on the entire contract, and that they were released from all further liability.

The depositions of Messrs. Upham and Haven are offered to prove these allegations.

It appears, that they as part owners of the land would be liable with others to pay to Hobbs and Wiggin, whatever they might be obliged to pay and should pay by virtue of that contract. They would therefore be directly interested to prevent a recovery against Hobbs; would thereby be relieved from a burden already resting upon them. It appearing from their own testimony, that they were thus situated, their depositions must be excluded.

The depositions of Josiah H. Hobbs and Elizabeth Wiggin, if read, would not vary the result.

In the testimony of Mr. Dearborn, copies of the discharges made by Weston to Messrs. Upham, Haven and Treadwell are presented, but they are not admissible. Proof of the execution of the originals cannot be properly made without their production.

It appears from the testimony of Weston, and from the admission of the respondent's counsel, that certain payments were made by those three part owners of the land upon the entire contract. It is admitted, that the respondent received money and a conveyance of an undivided portion of the land on account of that contract. These payments appear to have been made and received in part satisfaction of the whole contract and not in part satisfaction of the first installment only. These payments were not allowed in the settlement of the first judgment.

Hobbs, according to the agreement, was not to have been expected to defend the second suit, and if the judgment is to be enforced against him, Burns ought not to have taken judgment for the amount of the second installment without deducting the proper portion of the amount of those payments from it.

It is insisted by the counsel for the petitioner, that Burns was not legally entitled to recover a judgment against Hobbs for

any amount, because he had released Messrs. Upham, Haven and Treadwell, who were joint contractors with him, and that a release of one joint contractor operates as a release of all. This position cannot be sustained by the proof in this case for several reasons. It will be sufficient to notice one or two.

There is no proof, that they were joint contractors with Hobbs. They did not sign the contract with him. If Hobbs and Wiggin, who did sign it, were to be regarded as agents of the owners of the land, and the owners as joint contractors, there would then be no proof, that Hobbs was one of the owners and as such a joint contractor with them. Although he appears to have been interested in the contract to purchase, he does not appear to have become a part owner of the land.

Nor does it appear, that those persons were discharged by a release or instrument under seal, which would operate as a discharge of all the joint contractors.

If the respondent will remit so much of the judgment as he ought to have credited in payment of the last installment, or indorse that amount as paid upon the execution, there will be no occasion to grant a review, that entire justice may be done. If he is willing to do so, and the parties do not agree upon the amount, the Court will appoint a master to ascertain it.

Hutchinson, for the petitioner.

J. S. Abbott, for the respondent.

INHABITANTS OF CORNVILLE, *petitioners*, v. COUNTY COMMISSIONERS OF THE COUNTY OF SOMERSET.

Applications for the writ of *certiorari* are to the discretion of the Court.

The law prescribes that the return by County Commissioners, of their doings in locating a highway, shall be recorded at the *first* ensuing term of their court.

When such a return has not been recorded until the *third* ensuing term, a writ of *certiorari* will be granted, with a view to quash the whole proceedings.

PETITION for a writ of *certiorari*.

An application for the establishment of a highway, was presented to the County Commissioners, at the term of their court, in March, 1846. They examined the route in August; located the way in September; and returned their report of the same to their court, at its October term, 1846. The report was then continued *unrecorded*, till, in Dec. 1847, at an adjournment of the October term, of 1847, it was ordered to be accepted, and the proceedings to be closed.

The fourth cause alleged for granting the writ, was that the Commissioners' return of their location, though made at the October term, 1846, was not recorded until the second regular term of their court, after the one to which it was returned.

J. S. Abbott, in behalf of the petitioners for the writ.

Coburn, County Attorney, *contra.*

WELLS, J. — It appears, that the report of the commissioners in relation to the view and location of the highway, was made at the October term of their court in 1846, but was not recorded until at an adjournment of the October term in 1847. The statute, chap. 25, sect. 3, requires, that the return of their doings shall be recorded at the next term after their proceedings shall have been finished. The record should have been made at the October term in 1846, but it was not made until the second term next following.

So wide a departure from the requirements of the law cannot be considered merely formal and technical. It is essential that the acts of public functionaries and legal tribunals should be recorded at the time specified by law. By omitting to do so, they may be lost, to the detriment of public and private rights. And if not lost, those, whose interests may require them to make an examination, may not have an opportunity to inspect the proceedings, by an inability to ascertain where they are lodged. This Court has a discretion in relation to petitions of this nature, but it should be exercised in such manner as will best subserve the public welfare, and prevent too great laxity and irregularity in the time of recording judicial acts.

It is our conclusion that a *certiorari* must be granted. *Inhabtants of Cushing* v. *Gay & al.* 23 Maine, 9. *Inhabitants of Parsonsfield* v. *Lord, & al.* Ibid. 511.

LANDER *versus* SCHOOL DISTRICT, IN SMITHFIELD.

A vote to hire money, passed by a school district, at a meeting of which no previous notice had been given, creates no liability upon the district to repay money borrowed in pursuance of the vote.

A vote, subsequently passed, though at a meeting legally called, "to pay the debts due from the district," is no admission of indebtedness for money hired under the vote passed at the previous and unauthorized meeting.

ON EXCEPTIONS, from the District Court, RICE, J.

ASSUMPSIT.

The district, 7th June, 1847, voted to build a school-house; to raise two hundred dollars; and to hire money. On the 12th of June, 1847, voted to raise eighty dollars more, and that Isaiah Taylor build the house, and be agent to hire the money. The plaintiff in December, 1847, lent seventy-nine dollars, and took the note of that amount, now in suit, signed by Taylor, in behalf of the district. There was no evidence that the inhabitants had notice of either of the meetings, at which the votes were passed.

The plaintiff relied upon a ratification by the district.

Another record of the district showed, that more than a year after the note had been given, the district chose a "committee to pay and settle for the building of the school-house in said district, and settle any debts which the district may owe."

A further, and still subsequent meeting, in October 1849, called "to see what sum of money the district will vote to pay for the school-house, built by Isaiah Taylor," voted to raise one hundred and twenty dollars, in part pay for the same.

Oliver Parsons, Jr., was a witness for the plaintiff. In order to prove that the records were fraudulently kept, the defendants in cross examination, drew from him the following testi-

mony, viz: The sum of eighty dollars only, was voted at the meeting of 7th of June; the two hundred dollars was voted at a previous meeting; the vote for hiring money authorized the agent to hire one hundred dollars by 20th July.

A nonsuit was ordered, and the plaintiff excepted.

Noyes, for the plaintiff.

The nonsuit was erroneously ordered. There was sufficient evidence from which the jury could have found a ratification by the district. 17 Maine, 34; 18 Maine, 380; 17 Mass. 249.

It was shown that the money lent by the plaintiff was appropriated to building the school-house. The record shows that more than a year after the giving of the note, the district voted to settle and pay for the building of the school-house, and *settle any debts* which the district might owe. This was clearly shown to be one of those debts. The vote imports that nothing had been paid toward building the house. There was proof from which the jury might infer that every voter of the district knew that Taylor had borrowed the money on the credit of the district, for building the house. There was a vote authorizing the committee to pay district debts, which included every debt, and of course this debt; and consequently there was a ratification of the agent's act in hiring the money.

Contracts made in behalf of another person, though without authority, may be affirmed by such person, and made valid against him, as well those which are detrimental, as those which are for his benefit. 4 Term R. 211; 10 East, 378; Paley on Agency, 143. Receiving notice of the acts of an agent, without objection, is, by legal intendment, a ratification, unless the notice came too late to prevent the effect of such act. 14 S. & R. 27; *Lunt* v. *Padelford*, 10 Mass. 236; 15 Mass. 39; 13 Mass. 178; 9 Metc. 91; 20 Maine, 84; 5 Hill, 139; Story on Agency, sects. 239 and 244.

The vote of October, 1849, recognized that the house was built by Taylor, and that the district was indebted for the building.

If the want of proof, that the meetings of June, 1847, were

duly notified, should exclude the records from being testimony, there is evidence drawn out by the defendants on cross examination, to which *they* cannot now object, and which, with the other evidence, ought to have been submitted to the jury.

J. S. Abbott, for the defendants.

WELLS, J.—By the Act of August 8, 1846, chap. 208, sec. 1, it is provided, that "any school district, by a vote of two thirds of the legal voters present, and voting, at a legal meeting called for that purpose, shall have power to borrow money for the purpose of erecting a school-house, and of purchasing land on which the same may stand."

The note in suit was given by virtue of votes, passed at a meeting of the district, held on the 7th of June, 1847, to build a school house, raise and hire money, and appoint an agent to hire it. But there does not appear to have been any notice of the meeting given to the inhabitants of the district. The meeting not having been legally called, the district could not be bound by its action, it was altogether inoperative and void. It is contended that there might be, and was, a subsequent ratification. But we do not perceive from the copies of the votes exhibited to us, that there was any reference whatever, to the debt of the plaintiff at the subsequent meetings. The votes, at subsequent meetings, to raise money "in part pay for school-house built by Isaiah Taylor," "and to choose a committee to pay and settle for building the school-house, &c, and to settle any debts which the district might owe," would not imply that it was to be raised to pay the plaintiff nor that his demand was a debt against the district. What would be the effect of a vote, by which it appeared, that money was raised for the purpose of paying the plaintiff; whether such vote would make the district liable for money, which had been delivered upon a supposed loan to an unauthorized agent, but had been appropriated by him to the payment of its lawful debts, it is unnecessary to determine, for there is no evidence to raise such inquiry.

If the money had of the plantiff was delivered to the per-

son, who built the school-house, that would not be a payment made by the district, which had not authorized the money to be borrowed. And if the district might, at a subsequent meeting legally called, raise money, and appoint an agent to hire it, who should receive that amount of money thus delivered, as the plaintiff's, and the district would thereby incur a debt to the plaintiff, no proceedings appear to have taken place, by which such obligation on the part of the district was created. The plaintiff must seek his remedy in some other manner than against the defendants.

That part of the testimony of Oliver Parsons, Jr., a witness for the plaintiff, elicited on cross examination, in relation to the record of the meeting of the 7th of June, and of a prior meeting, even if taken as legal evidence of the acts done at those meetings, as the plaintiff now claims should be, would be of no service to the plaintiff, for it does not appear from it, that there was any notice of either of those meetings. But it was not admitted as competent evidence to prove the proceedings of the meetings, but to show some fraud in making the record. And in testifying in reference to the alleged fraud, he spoke of those meetings. Neither the admission, or rejection of this testimony could change the plaintiff's case. He was not entitled to recover upon the testimony presented, and the nonsuit was properly ordered.

Exceptions overruled.

PERCIVAL *& al. versus* MAINE M. M. INS. CO.

An insurance, against fire, upon a mill for the manufacture of starch, was effected, upon a representation by the insured, that the business had been completed for the season. In fact, a quantity of starch was then lodged in the drying room. For the purpose of expelling moisture from it, after the policy had been effected, a fire was made in the mill by the insured. *Held*, it was not for the Court but for the jury to decide whether such drying of the article was or was not a part of the manufacturing process; and, therefore, whether the representation was or was not true, that the business of manufacturing was completed when the insurance was effected.

Where an insurance upon a building is effected upon a warranty that a

"suitable watch" would be kept, it is not for the Court but for the jury to decide what, under the circumstances, would be a suitable watch.

On Exceptions from *Nisi Prius*, Howard, J., presiding.

The plaintiffs owned a mill for the manufacture of starch. They quit working it, December 8, 1847. On the 10th of the same month, they applied to the defendants for insurance against fire. In the application were the following statements; — "We have got through manufacturing of starch for this season." "We keep a watch the whole time we are manufacturing starch." The defendants issued a policy December 14, 1847, containing among other things the following words; "conditional that a suitable watch be kept while manufacturing starch." The mill was destroyed by fire, December 31, 1847. This action is assumpsit, brought upon the policy, to recover for the loss.

It was proved that, on the 8th December, a small quantity of starch was left on the racks for want of a cask to put it in. There was no direct proof that the drying of that starch had then been completed. On the 31st Dec. in the forenoon, in order to expel from it the moisture which was remaining in it, when first left upon the racks, or which had been subsequently imbibed, a clerk of the plaintiffs, a lad of about 18 years of age, by their direction, built a fire in the furnace. He then left the mill for some time; afterwards returned and replenished the fire and went away, about half an hour before the fire, which consumed the mill, was discovered. The clerk, though frequently at the mill, was not proved to have had any experience in manufacturing. A witness, experienced in the business, testified that, in order to the keeping of a suitable watch, the mill is to be in charge of the workmen during the daytime, and some one is to sleep in it by night, and that "a person unacquainted with starch is not so suitable for a watch, as one acquainted with the operation of manufacturing."

There was other evidence upon the same point.

For the purposes of this trial, the Judge instructed the jury: —

1st, *that* the drying out of the moisture, imbibed or remain-

ing, as testified to, should be considered as a manufacturing of starch ; —

2d, *that*, if starch was put into the mill to dry, requiring the same fires as starch in the original process of drying in the manufacture, it might be considered as part of the process of manufacturing ; —

3d, *that* the term suitable watch, as used in the policy, means the presence of a suitable person at the mill, at all times during the manufacture of starch, in readiness to extinguish the fire by suitable means."

The verdict was for the defendants, and the plaintiffs excepted.

J. S. Abbott, for the plaintiffs.

1. It was for the jury, not for the Court, to determine whether drying out the moisture, imbibed by the starch was a part of the process of manufacturing.

2. But if it were for the Court to determine, there was error in the ruling, that drying out moisture imbibed by the starch, was a part of the process of manufacturing starch. Paper, leather and boards are articles manufactured. But the drying out of the moisture from them is no part of the manufacturing process.

3. There was error in the Judge's definition of the term "suitable watch." The jury, from the evidence in the case, should have been permitted to determine what would have been a suitable watch, and whether such a watch was in fact kept. They should, in determining it, have regard to the price paid for the insurance, to the condition and situation of the mill, and the opinion of experienced men. *Chase* v. *Eagle Insurance Company*, 5 Pick. 51; *Smith* v. *Dennie*, 6 Pick. 262.

Hutchinson, for the defendants.

The first instruction was correct.

The manufacture of starch is not completed, until the same is dried sufficiently to be put into casks for exportation. Drying is the most dangerous part of the manufacturing process. There was the same risk in drying on the 31st of December, as

would have been on the 8th. Cases cited, 1 Esp. N. P. 66 and 67. The suppositions of counsel as to the drying of other manufactures are inappropriate.

The second instruction was correct.

The condition that there should be a suitable watch, was a part of the written contract, and to be construed by the Court according to the situation of the parties, and the subject matter. *Sumner, admr.* v. *Williams*, 8 Mass. 214; *Fowle*, v. *Bigelow*, 10 Mass. 379; *Hopkins* v. *Young*, 11 Mass. 302.

Oral testimony is not admissible, to contradict, vary or materially affect, by way of explanation, any written contract, whether under seal or not, if the contract be perfect in itself, and be capable of a clear and intelligible exposition from the terms of which it is composed. *Stackpole* v. *Arnold*, 11 Mass. 27; *Baker* v. *Prentiss*, 6 Mass. 430; *Richards* v. *Kilham*, 10 Mass. 239; *Hunt, adm'r*, v. *Adams*, 7 Mass. 518; *Higginson* v. *Dall*, 13 Mass. The case of *Murray* v. *Hatch*, 6 Mass. 465, upon a policy of insurance, sustains the principle contended for.

Was the instruction that "*the term, suitable watch, as used in the policy, means the presence of a suitable person at the mill at all times during the manufacture of starch, in readiness to extinguish fire by suitable means*," such as should have been given? The subject of the contract, and the obvious design and purpose of introducing these words, is an essential element in the construction.

Insurance in this case, was upon a mill constructed purposely for the manufacture of starch, the last operation of which, was drying the starch filled with water, in the previous processes of the manufacture, requiring a high temperature, and long continued, increasing danger of conflagration. If a *suitable watch* were kept, that danger would be very much diminished. And what would this suitable watch be expected to do? If the building caught fire during the time of danger, was he to look on and see the building consumed? If that was the duty, we admit that, in this case it was fully performed, and that too, with no inconvenience and at a safe distance.

But the instruction to the jury conveyed the exact import of the words, "suitable watch." The watch was to be maintained in the time of danger. A watch without "suitable means" of extinguishing fire, would have been of no use.

But if it were for the jury to decide, their conclusion was correct, and in accordance with the opinion of the witness, given by him as an expert. In fact, however, no watch of any kind was kept.

TENNEY, J. — In the written application for insurance, dated December 10, 1847, it is stated by the plaintiffs, "we have got through the manufacture of starch for this season, and we keep a watch the whole time we are manufacturing starch." In the policy, which is dated Dec. 14, 1847, the risk being assumed therein from noon of that day for one year is the following, "conditioned that a suitable watch be kept while manufacturing starch."

On Dec. 8, 1847, a small quantity of starch was left on the racks, which had imbibed moisture, or in which moisture remained, there being no positive proof, that the original drying had been completed, and was there till the destruction of the mill. On Dec. 31, 1847, a clerk of one of the plaintiffs, not being proved to have any experience in the manufacture of starch, was sent to build a fire in the furnace of the mill for the purpose of drying the starch so left; he built the fire as directed and left the mill for some time; then returned and replenished the fire, and left the mill about half an hour before the fire, which consumed the mill, was discovered.

The questions presented to the jury at the trial were, whether the statement, "we have got through the manufacture of starch for this season," was a material misrepresentation, and whether the fire took in the manufacture of starch at a time when there was not a suitable watch.

The jury were instructed, that if the starch was put into the mill to dry, requiring the same fires, as starch in the original process of drying in the manufacture, it might be

considered as a part of the "process of manufacturing." This merely permitted the jury, upon satisfactory evidence, to treat the expulsion of moisture from starch put into the mill for that purpose, as a part of the original manufacture, if the same fires were necessary; and that the terms of the policy did not forbid such a conclusion. This proposition cannot be regarded as erroneous. The policy must have a reasonable construction, and such as will affect the intention of the parties. It was in contemplation by them, that while the manufacturing operation was in progress generally, the property insured was peculiarly exposed to destruction by fire; hence, that there should be a watch, which should be suitable at such times. It can hardly be supposed, that the term "manufacture of starch" was designed to have so restricted a signification in the policy, that the use of such fires as were made to drive out the inherent moisture in the materials used, or the water with which they were mixed in the early stages of the manufacture, during which a suitable watch was deemed indispensable, was to be allowed without any watch, merely because the purpose was to dry up the moisture, which might have been imbibed after the original drying was complete.

If the exposure to danger from fire was the same in both cases, and the latter operation was not in the "manufacture of starch," according to the true meaning of the policy, and therefore that a watch was not demanded on this account, is it certain that the policy is not equally invalid, by such a voluntary subjection of the building to a risk arising from fires, used by the plaintiffs in the mill, for a purpose not intended by the parties as disclosed by their contract? The insurance is upon a starch mill, and the gear thereof; and measures were taken by the defendants, that they should be specially guarded at the plaintiff's expense, while the danger was imminent, in the prosecution of the business for which it was designed. To use it without a watch for purposes foreign to the "manufacture of starch," when such use would subject it to the same risk, as when a watch was required, would be a manifest attempt to misappropriate the building to hazardous operations, and to

omit the precautions contracted for, and make the wrongful appropriation, which was the cause of its destruction, an excuse for the neglect of the party, who was guilty of it.

But the jury must have understood the instruction, "that the drying out of the moisture imbibed or remaining, should be considered as manufacturing starch," as a rule of law, which with them was inflexible. It was given to them as a legal proposition, which they could not disregard.

In the manufacture of different articles, very different and various results are sought, depending upon the nature and the intended use of the same. In the conversion of logs into boards, it is probably never expected that the boards should be seasoned or planed, to make the manufacture complete. But it would not be contended that a valuable article of cabinet furniture would be manufactured in the proper sense of the term, unless it was composed of seasoned materials, and the part at least, which is ordinarily exposed to view, in its use, made smooth. Writing paper would not be considered as perfectly manufactured, unless it was dry when delivered, without any distinction being made between the moisture of the pulp, and that contracted after it was once dried; and in such paper as is supposed, it would be regarded as a necessary part of the manufacture, that it should be sized in a manner appropriate for the use of the article, whereas paper destined for newspapers, would probably not require the same degree of sizing.

One but little skilled in the arts, perhaps, would know that starch coming from the racks in a starch mill, having moisture in it, which was imbibed or which remained of that originally existing, was not in a perfect manufactured condition, so that it could be properly packed away as an article of commerce to be used at any indefinite future time. But this cannot be assumed as a doctrine of the law, but must depend entirely upon the facts applicable to the question. It is for the jury to determine from the evidence at what stage of the process the manufacture of starch is ended and perfect. It is the same in principle, as the question, whether the requisite degree

of surgical skill has been employed in the performance of an operation, coming within the range of the professional labors of one who has undertaken it. It is to be settled as a fact, whether the party has taken every necessary step in the process, and whether in each, a sufficient degree of dexterity has been used and directed by competent scientific knowledge.

In the instruction which we are now examining, the jury were not left to full consideration of all the facts before them, but were bound to find *that* to be a part of the manufacture of starch, which they should have been allowed to pass upon exclusively and find from the evidence whether it were so or not.

The same may be said also touching the definition given to the jury of the term "suitable watch."

What would be a suitable watch must depend much upon the character of the different processes used in the manufacture of starch, and the danger attending each. The operation of washing the materials, and reducing them to a pulp; and also the separation of the starch from the grosser parts, may not require the aid of fire to the same extent demanded in the process of drying the starch. And a watchman would not be regarded so remiss in his duty, at a time when water rather than fire was used, as when a very high degree of temperature was raised, if he was not at his post. The watch may be entirely "suitable" at some times, while the manufacture is going on, in parts of its stages, if the person employed is absent from the mill. It is not difficult to perceive, in order to constitute a suitable watch, for the purpose intended, during certain processes, that there should not only be some person in a situation to discover a fire in its earliest stages, but that he, or others, who could be notified immediately, should have the means at hand to extinguish the fire.

Of these matters the jury were the judges, under all the facts in evidence. They were restricted in their inquiries upon this branch of the case, and the instruction, that the term "suitable watch" means the presence of a suitable person at the mill at all times, during the manufacture of starch, in

readiness to extinguish the fire by suitable means." was a limitation of the exercise of the duty of the jury, which is not fully sustained by legal principles. *Morton* v. *Fairbanks*, 11 Pick. 368. *Exceptions sustained* —

New trial granted.

NOTE. — SHEPLEY, C. J., did not attend at the argument, and took no part in the decision.

JEWELL, *in error*, *versus* BROWN.

The rule that a party, who had the right to appeal, cannot bring error, is subject to qualifications.

By suffering judgment upon default, a defendant does not admit the jurisdiction of the Court, nor the correctness of the proceedings in the suit.

A judgment rendered by a court, having no jurisdiction of the person, is reversible on error.

Thus a judgment may be reversed, when rendered by a justice of the peace, of one county, the defendant's residence being in another county of the state.

A judgment in an action of *indebitatus assumpsit* upon an account annexed to the writ is erroneous, if the account annexed to the writ is against a third person, and not against the defendant.

BROWN, in 1850, brought an action against Jewell, before a justice of the peace, of the county of Somerset.

The action was *indebitatus assumpsit*, upon an account annexed to the writ. The only account annexed to the writ, was one against Maria Luce, for a balance due, $10,98.

Jewell did not appear before the justice, but was defaulted, and judgment was rendered against him for ten dollars ninety-eight cents, damage, and cost two dollars thirty-two cents.

This is a writ of ERROR, brought to reverse that judgment. The errors assigned, were, 1st. that Jewell resided in the county of Aroostook, and that, therefore, the justice by whom the judgment was rendered, had no jurisdiction; 2d. that the judgment was recovered, not for a debt alleged to be due from Jewell, but upon a debt alleged to be due from Maria Luce.

In the assignment of errors, it was alleged, that the judgment

recovered was for ten dollars and ninety-eight cents, damage, and *one dollar ninety-nine cents*, cost.

Brown moved that the writ of error be dismissed, because:—

1. It does not allege the error to have existed at the time when the writ was issued.

2. The error, if any, should have been pointed out by plea in abatement, in the original suit.

3. Error will not lie upon a judgment recovered on a default. 7 Mass. 475.

The motion was overruled, and Brown pleaded *in nullo est erratum.*

Currier, for the plaintiff in error.

As to the first assigned error, he cited R. S. chap. 114, sect. 15; Act of amendment, passed 16th April, 1841; Statute of 1842, sect. 3 and 4.

As to the second point, he cited *Smith* v. *Keen*, 26 Maine, 411.

Foster, for the defendant in error.

The error if any, should have been taken advantage of in abatement. 4 Mass. 591.

If personal service be made, the action may be maintained in the county where the service was made, unless a plea to the jurisdiction was seasonably filed.

The mistake, by which Luce's name, instead of Jewell's, was inserted in the account annexed to the writ, was amendable, and therefore not subject to revision on error.

Error will not lie for a defect which was amendable; neither will it lie upon a judgment on default; 7 Mass. 475; or on one from which the party might have appealed, as the original defendant in this case might have done.

HOWARD, J. — The plaintiff in error did not appear in the original suit, in which he was defendant, but judgment was rendered against him on default.

By suffering judgment by default, a party may admit the justice of the claim, but he does not thereby admit the jurisdiction of the court, or the correctness of the proceedings to

establish and enforce the claim. He may safely rest upon the assumption that, unless the process be legal, and the service sufficient, and the jurisdiction certain, no judgment will be rendered against him; or if from fraud, accident, or mistake, a judgment should be erroneously entered, that the whole may be revised on error. It would be a hard, and an unsafe rule to be established, that an erroneous judgment shall stand, unless objected to by an aggrieved party, *in limine*; or that a defendant who did not appear, but suffered default, had waived all right of objection to the proceedings against him, although they might involve errors of law, and of fact.

The rule, therefore, that a party who had the right of appeal, cannot bring error, is subject to qualifications. If he was not duly served with legal process, or was prevented from defending by fraud, or inevitable accident, or did not appear, when duly summoned, and an erroneous judgment has been rendered against him, on default, he may have remedy by a writ of error. *Howard* v. *Hill*, 31 Maine, 420; *Thayer* v. *The Commonwealth*, 12 Metc. 9; *Monk* v. *Guild*, 3 Metc. 373.

The first error assigned is, that the defendant, at the time when the action was commenced, and ever since, resided in the county of Aroostook; that the suit was brought to be tried before a justice of the peace, in the county of Somerset, and that the judgment sought to be reversed, was rendered by him in the county last mentioned. These facts were not controverted, but were in effect admitted by the plea.

By the statute of 1842, chap. 10, sect. 3, the action triable by a justice of the peace, could not have been commenced legally, only in the county where the defendant resided.

The judgment was rendered on the first count in the declaration, "being on the account annexed to the writ." But it appears that the account annexed to the writ was not against the defendant in that suit, but against *Maria Luce*. So that judgment was rendered on a count in *indebitatus assumpsit*, against the party, for the indebtedness of another person having no apparent connection with the suit. This constitutes the substance of the second error alleged.

There is a mis-recital in the assignment of errors, of the amount of costs, which may be corrected by the record.

Both errors are well assigned, and the judgment against the plaintiff in error must be reversed.

MERRICK, *in review, versus* FARWELL.

A recognizance, entered into upon the filing of exceptions in the District Court, and reciting the filing of the exceptions, is not rendered void by further reciting that the excepting party "*appealed*," and by being conditioned that he should prosecute the "*appeal*."

At the common law, no tender was effectual, if made after a breach.

That principle is still in force as to moneys due on a recognizance to prosecute an appeal.

Costs, due on such a recognizance, are payable as soon as a taxation of them is made.

A tender of such costs, made subsequently to such taxation, is without legal effect.

Whether such a tender, though made at the time of the taxation, would be available, *non dicitur*.

REVIEW.

In an action, brought by one Moore against Farwell, the District Court had ordered a nonsuit. Moore filed exceptions, and recognized with Merrick as surety, in the sum of $200, to prosecute, &c.

The exceptions were overruled, and Farwell's costs were taxed, $27,36, at the term of this Court held in June, 1847. Of these costs, $3,30 accrued after the filing of the exceptions.

Upon that judgment, execution was issued June 22, 1847, and before its expiration, payment was demanded of the defendant Moore. Merrick, the surety, on or about the 1st of November, 1847, tendered to Farwell's attorney $4,00 to discharge the recognizance. The attorney refused to take the money, and brought suit against Merrick.

The money was lodged in Court at the first day of the return term of that suit, and judgment was then obtained in

the District Court by Farwell for damages, to the whole amount of the penalty, $200, that Court having no power to chancer in such cases.

For reasons shown to the Court, Merrick was permitted to institute an action of review, and it is this action of review which now comes up for the decision of the whole Court.

The condition of the recognizance recites the filing of the exceptions, and then proceeds to state that, from the judgment of the District Court, the said Moore "*appealed;*" and concludes as follows: — "if said Moore shall prosecute his "*appeal*" with effect, and pay all intervening damages, and the costs arising after the appeal" the recognizance to be void.

Merrick pleaded a tender, and also denied that there was a record of such a recognizance.

Abbott, for Merrick, the plaintiff in review.

The supposed recognizance recites an "*appeal,*" and binds to the prosecution of an "*appeal.*" But there was no "appeal."

The law did not authorize any appeal. R. S. chap. 97, sect. 13 and 14.

The recognizance, being founded on a supposed appeal, is merely void.

The declaration alleges a record of the recognizance. And the plea denies it. The mere filing the paper is not a recording. But there was no need of a record. A recognizance is not to be sued as a *record*, but as a *specialty.*

The tender was *sufficient.* The condition of the recognizance was, to pay intervening damages and costs. There were no damages, and the costs were but $3,30. The tender was $4,00.

It was seasonable; before action brought; and before any demand on Merrick, the surety. Even the demand on Moore, was ineffectual, because it was a demand, not of the $3,30, which accrued after exceptions filed, but for the whole amount of the judgment, $27,36.

Again, nothing is due upon the recognizance. The $4,00,

lodged in court for the use of Farwell, is a full payment of the $3,30.

At any rate we claim costs. *This* court has power to chancer the penalty. The original plaintiff, then, can recover but the $3,30 as *damage*. Having thus reduced the *damage* on review, we are entitled to costs. R. S. chap. 124, sect. 12.

E. E. Brown, for Farwell, the defendant in review.

WELLS, J., orally. — The plaintiff in review contends that the recognizance is void, because taken, not as on exceptions filed, but as on a supposed appeal. This position is not tenable. Exceptions operate, like an appeal, to transfer the action; and the statute requires the recognizance to be taken "as in case of appeals."

A tender is also relied upon. Was it seasonable? By the common law, no valid tender could be made after a breach. And in that respect, our statute has made no change, applicable to cases on recognizance to prosecute an appeal. It was duty to pay the costs so soon as taxed. In this particular, there was neglect; and the tender was too late, even if a tender, *made at the time of the taxation*, could have availed, of which we give no opinion.

This Court having power to chancer, in cases of recognizance, a judgment for the defendant in review is to be entered for the penalty, $200, and for damages, $3,30; with full costs.

Dinsmore *versus* Weston.

By filing a motion in the District Court for a new trial after verdict, a party waives the right of excepting to the rulings of the Judge at the trial.

After verdict for the plaintiff, the defendant moved for a new trial. The plaintiff then remitted a part of the damage assessed for him by the jury, whereupon the defendant asked leave to withdraw his motion. *Held*, the refusal to grant such leave was rightful.

Warren *versus* Homestead.

Sales of a bankrupt's estate, by his assignee in bankruptcy, under the late law of the United States, were valid, only when authorized by the Court of Bankruptcy.

The conveyances *of land*, in which, by the 15th section of that law, the assignee was bound to recite a copy of the decree of bankruptcy and of the appointment of the assignee, included transfers of mortgages of land.

The sale of a note does not, of itself, operate a legal transfer of the mortgage, by which it is secured.

On Exceptions from *Nisi Prius*, Howard, J. presiding.

Writ of Entry.

One Lancey gave several notes to Preston, and for security, mortgaged to him the land now in question.

Preston was decreed a bankrupt. In his schedule of assets, he inserted among other things, the following item; "sundry notes, about one hundred and forty-six, in number, mostly outlawed." No mention was made of the mortgage.

His assignee in bankruptcy, having obtained leave to sell the bankrupt's estate, "*as it was set forth in the schedule*," made sale by deed to this demandant of all Preston's right in said mortgage, and in the notes therein described. The deed recited no copy of the decree of bankruptcy, or of the appointment of the assignee.

The tenant moved for a nonsuit. The demandant moved for a continuance. The continuance was refused, the nonsuit was ordered, and the demandant excepted.

Warren, for the demandant.

The bankrupt's estate vested in the assignee. As owner he had right to convey it. One of the elements of property, is its alienability. The asking of leave to sell, was unnecessary. The omission by the assignee, in his application for such leave to specify the mortgage rights, was therefore immaterial. *Jewett* v. *Preston*, 27 Maine, 400.

But it is objected that the 15th section of the bankrupt law requires the assignee's deed of land to recite a copy of the decree of bankruptcy, and of the appointment of the assignee.

This provision clearly is not applicable to the mere transfer of a mortgage. In most of the States, mortgages are but chattel interests. 4 Kent's Com. 154, 186; 1 Blackf. 137; 11 Pick. 485, 488; 2 Halstead, 411. It could not therefore be the intention of Congress to treat mortgages as lands.

The notes from Lancey to Preston were transferred, by the deed to the demandant.

By the same deed, the mortgage was assigned, not as growing out of the transfer of the notes, but by its distinct and independent conveyance of the right of redemption.

O. D. Merrick and *D. D. Steward*, for the defendant.

Howard, J., orally. — The demandant, in order to recover, must prove title in himself. The authority to sell, granted to the assignee in bankruptcy, was limited to the property set forth in the schedule of assets. That schedule exhibited no rights in the Lancey mortgage. The sale to the demandant of such rights was invalid.

Again, the 15th section of the bankrupt law requires, that in every deed of land made by the assignee, there shall be inserted a copy of the decree of bankruptcy and of the appointment of the assignee. The deed under which the demandant claims, so far as relates to rights under the mortgage, was ineffectual.

There was in the schedule, an item of 146 notes. Whether the Lancey notes were among them, does not appear. The assignee, however, in his deed to the demandant undertook to

convey them. But, even if title to them was thereby communicated, it cannot support an *action at law* for the *land.* The mere selling of a note does not assign the mortgage, which secures it. Without such an assignment, the purchaser takes, in the land, no rights enforceable *at law.* It is *at equity* only, that land-rights, acquired by such a purchase, can be vindicated.

Exceptions overruled.

CATES *versus* NOBLE *& al.*

In an affidavit to justify the arrest of joint debtors on *mesne* process, it is not necessary to allege the belief that *each one* of them is about to take property away. An allegation that *they* are about to do it, is sufficient.

A surety on a bond, given by one of the debtors to procure his release from such an arrest, is not competent as a witness for the defendants on the trial.

EXCEPTIONS from the District Court, RICE, J.

ASSUMPSIT against two persons upon a note, on which was due $130. The plaintiff made affidavit of his belief that they were about to depart and reside beyond the State, and to take with them property, &c. One of them was arrested and gave bond for his enlargement, as provided by R. S. chap. 148, sect. 17.

The bond was in the penal sum of $200. One Fowler was a surety. At the trial, Fowler being called as a witness for the defendant, was objected to and excluded, and the defendants excepted.

Hutchinson, for the defendants.

Fowler had no interest in the event of the suit. He was under no liability on the bond.

1. The arrest was unlawful; it was not justified by the plaintiff's affidavit. That did not allege any belief that the defendant, *who was arrested*, was about to take any property away. It only alleged a belief that *they*, the two defendants, were about to do so. The other defendant might have been

rich ; and the belief, expressed in the affidavit, therefore just, though *this* defendant was a pauper.

2. The bond was invalid, because not taken in double the sum for which he was arrested. R. S. chap. 148, sect. 17.

Lyon, for the plaintiff.

PER CURIAM. — It is objected that the plaintiff's affidavit may refer to property owned wholly by one of the defendants. But such is not its obvious meaning, and we think the affidavit sufficient.

The witness was called to defeat the suit. If he could do so, this bond would be harmless. He was, therefore, interested in the event of the suit. This is the reason which has often excluded bail, when offered as witnesses for their principals.

It is further urged that the bond was inoperative, because not taken in double the sum for which the defendant was arrested. But, if not as a *statute*, yet as a *common law* bond, it has validity.

Exceptions overruled.

THE STATE *versus* JACKSON.

In *scire facias* upon a recognizance for the appearance of a person charged with crime, no appeal lies, for the State, from the judgment of the District Court, sustaining a demurrer to the *scire facias*.

Such an appeal will be dismissed upon motion.

When such an appeal is dismissed, the defendant is entitled to costs against the State.

SCIRE FACIAS in the District Court, brought upon a recognizance for the appearance of a person charged with crime. The defendant demurred to the *scire facias*, and judgment was rendered, sustaining the demurrer. The County Attorney appealed to this Court, but no recognizance to prosecute the appeal was entered into.

Now, in this Court, Webster, for the defendant, moved that the action be dismissed, because there had been no recognizance upon the appeal, and cited R. S. chap. 97, sect. 13.

The motion was resisted by Coburn, County Attorney.

Per Curiam. — No recognizance could be entered into. Neither the Attorney General nor the County Attorney, nor any other person had authority to recognize the State. And, if it could be done, the proceeding would be merely nugatory. No action could be sustained against the State upon it.

By a fair construction of the statute, we think it was not intended that appeals should be allowed to the State, in cases of this kind, and the action must, therefore, be dismissed.

On motion, costs against the State were allowed.

Dyer, *in certorari, versus* Lowell and Hamblet.

The granting of a writ of *certiorari* is at the discretion of the Court.

When it is allowed and issued, the proceedings under it are strictly of law, and if in the record brought under revision, material errors are found, it must be quashed.

If, on presenting the petition, errors were assigned, there need be no new assignment of them on the issuing of the writ.

The action of the Court may be as effectually had upon an authenticated transcript of a record, as upon the original.

Grantees of land, who purchase, pending the petition for a writ of *certiorari* though not notified, are bound by the final adjudication in the process.

Certiorari.

Dyer, Lowell, Hamblet and others, were owners of a township of wild land, as tenants in common, in different proportions. Lowell and Hamblet had caused their proportion to be set off in severalty. Dyer had obtained leave to issue a writ of *certiorari*, for the purpose of quashing the partition. 30 Maine, 217.

The writ was accordingly issued, and entered at the June term of this Court, 1850. No new assignment of errors was made.

The respondents appeared by their counsel, and the action was continued to this June term, 1851.

And now Hamblet moves that the writ be quashed, for the following causes; the existence of which, according to his belief, he verified by affidavit.

1. It appears by the return of the Judge of the District Court, that he has sent up, not the record itself, but only "a true copy." Howe's Practice, 490; Colby's Practice, 477.

2. No *scire facias* or notice was ordered by the Court, for the respondents' appearance. 3 Mass. 229; 6 Mass. 72; 19 Maine, 46.

3. No service of this process has been made, personally, on Lowell, and he has not appeared. He is entitled to be heard. He left the State before this writ was issued. As against him, the action ought to have been continued, *defendant ex republica*, and a bond given.

4. The writ assigns no errors in the record.

5. The land, since the service of the original petition upon the respondents, has been conveyed by them, and their grantees have had no official notice of this process.

Some other objections were assigned, but they were not noticed by the Court; probably because, if available in any form, they ought to have been taken at the first term.

Abbott, in support of the writ.

Coburn and *Wyman*, *contra*.

TENNEY, J., orally. — The writ of *certiorari* is grantable at the discretion of the Court. If granted, it is with a view to have the record quashed.

When once the record has been permitted to be brought under examination, the Court no longer has any discretionary power over it. If erroneous it must be quashed.

Upon the *petition* for the writ, certain errors were assigned, examined and adjudicated upon.

The writ was allowed, and having been served by the officer, is now before us, and several objections to the process, are now taken by the respondents.

1. That it was a copy, and not the original of the record, which was sent up by the Judge of the District Court; whereas it is the record itself, and not a transcript of it, which is sought to be quashed.

This objection is without weight. The record may be adjudged of, and acted upon by the examination of a copy, as well as of the original.

2 and 3. One of the respondents has appeared, and is now being heard upon those objections. It appears by the officer's return, that he was duly notified. But if not, that omission is waived by his appearance.

It is said that Lowell had left the State, before the issuing of the writ. But a general appearance was entered for him at the first term. Notice appears to have been left with his family. He appeared to the original process, and was heard upon it, and knew its result, and must have expected the issuing of the writ. There was, therefore, no want of sufficient notice.

4. It was not necessary, to insert *in the writ* an assignment of the errors. An assignment *in the petition* is sufficient. *Commonwealth* v. *Sheldon*, 13 Mass. 188.

5. Purchasers are bound by proceedings, instituted prior to their ownership. Such proceeding cannot be made ineffectual by a mere conveyance of the property. This process is but a continuation of the former one.

The motion to quash the writ is overruled.

Note. — The Court, having denied the motion to set aside the writ, proceeded to examine the errors alleged in the petition, as published, 30 Maine, 217; and thereupon quashed the record of the partition.

Farnsworth *versus* Rowe *& al.*

A subscribing witness to a note need not write thereon for what purpose he affixes his signature.

If one write his name on the note, at the place commonly used for attestations, the presumption is, that he writes it, not as a maker of the note, but as a subscribing witness.

An attestation to a note by one, who writes his name upon it, at the time of its inception, and in the presence of the maker, though unrequested to do so, gives it the legal qualities of a witnessed note.

On Exceptions.

Assumpsit by the indorsee against the makers of a promissory note, dated in 1837. It had, in the place where attestations are commonly written, the name of Wm. Farnsworth, but without any word or expression indicating for what purpose it was placed there. Limitation was pleaded.

The plaintiff called Wm. Farnsworth as a witness. He was objected to from interest and being placed on the *voir dire* testified, that he took the note as the agent of the payee, but had no interest in it. He was then admitted and testified that at the time the note was made, he signed his name thereon as a witness, in the presence of the makers, but that he was not requested by either of them to do so.

The defendant requested instruction to the jury, that the words "Wm. Farnsworth" so written, did not give to the note the character of a note, "signed in the presence of an attesting witness." The instruction given was, that if Farnsworth saw the execution of the note by the makers, and at the time and in their presence, signed as a witness to that transaction, the note was not barred by limitation. The defendant excepted.

Hutchinson, for the defendants.

Is this a note, signed in the presence of an attesting witness," within the meaning of the Revised Statutes? What is meant by an attesting witness? Usage has settled it. It is one who writes his name, with some word, (such as witness, attest or test,) to indicate the purpose of the signing. The

mere locality of the signature is of no importance. Farnsworth is to be considered one of the joint makers, and, if sued jointly with the others, he could not have been a witness. But by his own statement, he wrote his name upon the note, without the request of either of the defendants. Such a signing upon a note, without the knowledge or assent of the makers, does not give it the character of a note, "signed in the presence of an attesting witness." Starkie on Ev. (Ed. 1828,) Part 2d, p. 340; 4 Taunt. 220; 3 Camp. 232; 29 Maine, 298.

In all the cases in the books, (with one exception) the subscribing witness is represented as signing in that character. And it is respectfully contended, that the mere signing of the name upon the paper with or without a designation of the character in which he signs, without the consent and request of the parties, does not give the paper the character of a witnessed instrument. It must require the consenting will of the parties, to be inferred, perhaps, in the absence of all proof. but not in the teeth of contrary proof. *Houghton* v. *Mann*, 13 Metc. 128; *Kinsman* v. *Wright*, 4 Metc. 219; *Drury* v. *Vannevar*, 1 Cush. 276; *Smith* v. *Dunham*, 8 Pick. 246; *Gray* v. *Bowdoin*, 23 Pick. 282.

Abbott, for the plaintiff.

Howard, J., orally, — *Prima facie*, the name of W. Farnsworth is to be considered that of an attesting witness. His signature is at the place on the note, known to every business man as the place for the attestation. Long usage has confirmed this rule. It is of universal notoriety. Its legality is not to be questioned.

But it is objected, that he wrote his name there *without request*. This was not an unusual course. He was, however, the agent of the payee in receiving the note, and might properly witness it, at his own suggestion.

Exceptions overruled.

DUNLAP, *in error*, *versus* ATKINSON.

When, from the usual course of proceeding in Court, the law allows a departure under a prescribed condition, an assignment of errors, based upon the departure, must negative the performance of the condition.

Proof that the condition was not performed, will not aid the defective assignment.

ERROR to reverse a judgment recovered in this Court by *Atkinson* v. *Dunlap*, in a writ of review, in which the *ad damnum* was set at $80,00, instituted in the District Court, and brought here upon exceptions.

The errors assigned were; first, that the writ of review was not sued out and entered at the term of the District Court, next after the review was granted, but was entered at the second term thereafter; and second, that the action of review was brought in the District Court, and was not appealable, and no exceptions were ever "*filed and allowed*" in the case; wherefore this Court had no jurisdiction to render the judgment, now sought to be reversed.

It appeared by the record that leave to sue out the writ of review was granted by the District Court, at its May term, 1847, and that the writ was not entered at the then next term of that Court, held in October, 1847; but was entered at its January term, 1848.

The record also shows, that when the verdict against Dunlap was rendered in that Court, he "*excepted*, and entered into recognizance to prosecute his exceptions with effect," and that in this Court the exceptions were overruled by his consent.

Webster, for the plaintiff in error.

1. The statute required the writ of review to be entered at the term next after it was granted, unless for special reasons, leave was obtained to enter it at the second term; chap. 124, sect. 5.

In this case no such leave was obtained, or asked. The record shows none; yet the entry was not made until the second term.

For this error, the judgment is reversible. 5 Mass. 489 and 525; 7 Metc. 590; Co. Lit. 228, b.

Omission to enter till the second term was a discontinuance.

2. The action in the District Court was not appealable, its *ad damnum* being set at only eighty dollars. No appeal was attempted, neither were exceptions *filed and allowed.* The records show none. Exceptions are merely statutory remedies, and the statute must be strictly followed. Consent cannot give jurisdiction. A party may have error for want of jurisdiction in the Court, although it be taking advantage of his own wrong. *Jordan* v. *Dennis*, 7 Metc. 590; 6 Wend. 465; 2 Cranch, 126.

Abbott and *Foster*, for the defendant in error.

WELLS, J., orally. — The writ of review was not entered, until the second term after it was granted. But the statute authorizes that course under special conditions. The assignment of errors does not negative the existence of those conditions. The action may have been rightfully entered, and yet every allegation of the assignment may be true. Upon such an assignment, no reversal can be based. Proof, whether by the record or otherwise, cannot aid an assignment so defective.

The second assignment assumes that exceptions must be "*filed*" and allowed in the District Court. But it is not requisite to "*file*" exceptions. They are to be "*alleged*," and when allowed are effectual to stay proceedings in that Court. The record shows that the plaintiff took exceptions, that they were allowed, and entered, and by his consent overruled in this Court. This was sufficient.

The plaintiff in error, takes nothing by the writ.

STATE *versus* INHABITANTS OF MADISON.

A request, by a defendant in a criminal prosecution, that the Court would instruct the jury upon a legal point, which was relied on in the defence, precludes him from objecting to the *right* of the Court to instruct the jury, though unfavorably to him, upon that point.

Whether in criminal suits the jury are the judges of the law, *non dicitur.*

In the defence of a criminal prosecution, for a defect in a highway, established by the County Commissioners, it is not competent to prove, even by the Commissioners' record, that there were irregularities in their preliminary proceedings.

EXCEPTIONS from the District Court, RICE, J.

INDICTMENT for a defect in the county road.

The record of the County Commissioners shows that they did not record their location at the next term of their court.

The defendant requested the Judge to instruct the jury that the record did not prove a legal establishment of the highway, and that, on this branch of the case, the defendants were entitled to the verdict.

The Judge instructed the jury, that, as to this branch of the case, the issue was made out by the State, and that their verdict should be for the State. The defendants excepted.

Abbott, in support of the exceptions.

This is a criminal prosecution. In it, the same strictness of procedure is requisite, as in any criminal case against an individual, even for the highest offence.

The ruling of the Judge was peremptory; it left nothing for the jury. It decided the point of law, which it was in the province of the jury, not of the Court, to decide. 18 Maine, 246.

SHEPLEY, C. J. — Do you suppose, because the jury are to judge of the law, that, therefore, the Judge is not to decide it? Is he released from that duty?

Abbott. I cannot reconcile that the Judge and the jury should each have the power to make a binding decision. If the jury are to participate in any degree, in deciding the law, there ought to have been some modification in the instruction, in order to let in the jury to their *modicum* of the right.

But apart from this question, we contend the doctrine of the

instruction was erroneous. [The counsel then pointed out the delinquencies in the record of the County Commissioners.]

Hutchinson, County Attorney, *contra*.

HOWARD, J., orally.—The defendants raised a question of law, growing out of the records, and requested the Judge to decide it, and to decide it in their favor. He decided it, but decided it in favor of the State. Having made this request, that the Judge would adjudicate upon the law, they cannot now object that he did so. If the request was not a recognition of his *right*, it was at least an assent, on their part, that he should exercise the power of deciding. They, however, are not precluded from objecting to the soundness of the instruction. Such an objection they have accordingly urged. But we think it is not well founded. Whatever of irregularity might be pointed out as to the preliminary proceedings by the County Commissioners, their final adjudication, like other judgments of courts, are to be held valid, until reversed upon legal process.

Exceptions overruled, and case remanded.

CLARK *versus* MANN.

Under a plea of *nil debet* to an action upon a judgment, recovered in another State, payment may be proved.

Upon such an issue, a receipt, signed by the plaintiff, acknowledging the payment, may be introduced, as at least *prima facie* evidence, though it be not under seal.

REPORT from the District Court.

The plaintiff had brought an action against the defendant, before a Court in Massachusetts, and the officer had returned upon the writ in that suit, as follows: —

"By virtue of this writ, I attached the property in the rooms occupied by the within named Mann, consisting of office furniture, vials, &c., and placed the same in custody of a keeper, but subsequently was directed by plaintiff and plaintiff's at-

torney to discharge the keeper and leave the property in rooms where I found it on the day of attachment; and on the 17th day of June, 1847, I left a summons in the rooms occupied by said Mann, it being his only, last and usual place of abode in Boston, that I know of."

Judgment was recovered against the defendant on default, and this is an action of debt upon that judgment. *Nil debet* is pleaded. Whether upon such showing, the plaintiff is entitled to recover is submitted, as a "legal question." The defendant then proved, (against the objection of the plaintiff,) that he has had no family, and at the time of the supposed service of the writ in Massachusetts, he resided in this State, and was at home here, and nothing in the case, (except said supposed service,) shows that he had, between that time and the rendition of said judgment, been within that Commonwealth, or had any knowledge of the suit. This point is also submitted as a legal question.

The defendants then offered to prove that, after the rendition of said judgment, he paid to the plaintiff the claim upon which the judgment was founded, and for that purpose offered a receipt, though not under seal, signed by the plaintiff. This was objected to; and this point is also submitted as "a legal question."

Foster, for the plaintiff.

1. Under the plea of *nil debet*, the defendant cannot deny jurisdiction of the Court in Massachusetts.

2. The return on the writ shows that the Court had jurisdiction, and that judgment was properly rendered.

3. The evidence to show residence of the defendant, in Maine, and the evidence to show payment, were not admissible.

Abbott, for the defendant.

Shepley, C. J., orally.

1. *Nil debet* is pleaded. There are diversities of rulings among the States, in the matter of foreign judgments, and as to the forms of pleading in suits on judgments recovered in

another State. Upon this point, it is, in this case, unnecessary to offer an opinion.

2. It is not sufficiently shown that the Court in Massachusetts had any jurisdiction of the defendant's person or property.

3. Payment may be proved under a plea of *nil debet.*

A receipt, though not under seal, is at least *prima facie* evidence of payment. *Judgment for the defendant.*

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF PISCATAQUIS,

1851.

PRESENT:

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

WEEKS *versus* INHABITANTS OF THE TOWN OF SHIRLEY.

By "damage in one's property," through a defect in a highway, within the meaning of the R. S. chap. 25, sect. 89, is intended some injury to an article, by which its value is destroyed or diminished.

A mere loss of one's time, or an addition to his expenses, is not within the statute.

ON EXCEPTIONS from the District Court, HATHAWAY, J.

CASE, for injury alleged to have been sustained through a defect in the highway.

The proof was, that the plaintiff attempted to haul hay through the town, with eight oxen and two hired men. The

road was much blocked with snow, which the defendants had neglected to remove.

The teams were unable, on that account, to proceed, and the plaintiff was obliged to leave his hay on the road, and to return with his teams, he and they having been detained one night at a public house, and having lost a couple of days' time.

The Judge directed a nonsuit, and the plaintiff excepted.

Sanborn, for the plaintiff.

The statute, chap. 25, sect. 89, gives a right of recovery to any person who may have suffered "any damage in his property," &c.

The plaintiff has suffered damage in his property. Damage means "actual loss." This is Webster's first definition of the word.

He has borne expenses, lost his own time, with that of his hired men and teams. For these expenses and losses, the statute gives him a remedy.

Blake, for the defendants, cited 9 Mass. 248; 20 Maine, 246; 19 Pick. 147; 13 Metc. 297.

Per Curiam. — Upon the legal question presented, it is the opinion of the Court, that the action is not maintainable, and that the nonsuit was rightfully ordered.

Exceptions overruled.

Note. — See *State* v. *Hewett*, 31 Maine, 396, and particularly the last part of page 400.

WHITNEY, *complainant*, *versus* GILMAN.

The flowing of land by a reservoir dam, at distance from the mill, will not support a complaint which alleges that the flowing was occasioned by the dam at the mill, though the reservoir dam is maintained, merely to supply water for the mill.

Such a complaint may be amended, on terms, so as to charge that the flowing is occasioned by the reservoir dam.

WELLS, J., orally. — This is a complaint for flowage. The complainant represents that he is the owner of a tract of land set forth in the complaint, that the respondent has erected a flour-mill and dam, on the stream flowing out of North West Pond, by which the land described in the complaint, has been flowed, and for which flowage he seeks to recover damages.

It appears, that at the outlet of the pond, a reservoir dam is erected for the benefit of the respondent's flour-mill, by which the complainant's lands are flowed — that the flour-mill and dam of the respondent, is situated three quarters of a mile below the reservoir dam, — and that there is intermediate between these dams, a third dam, upon which a shingle-machine is erected.

It is obvious that no flowing is caused by the dam immediately connected with the flour-mill, — and that whatever injury the complainant may have suffered, is caused by the reservoir dam.

The counsel for the complainant, claims that the reservoir dam may be considered as well described in the complaint. The complaint definitely and clearly describes the land flowed, and that it is flowed "by reason of a certain flour-mill and dam, erected on, and across a stream or brook, running out of the aforesaid pond and stream, and below said premises," — "said dam erected, being necessary to raise a sufficient head of water for the working of said mill," &c. Now, what dam is meant by the language here used? The description clearly refers to the dam connected with the flour-mill and no other. The language used is to be taken in its ordinary and natural

sense. To construe the language used as having reference to the reservoir dam, which is remotely connected with the flour-mill and not the dam by which the flour-mill is carried on, would be forced and unnatural. The complaint then, cannot be sustained without an amendment.

The complainant seeks to amend by describing the flowage as caused by the reservoir dam. A cause of action imperfectly set forth may be amended, but the Court have no power to allow an amendment by which a new cause of action is set forth. Would the amendment prayed for be a new cause of action? The land flowed, and the injury alleged to be done, remain the same. Another dam upon the same stream, but which is necessary, and used for the same flour-mill is not entirely a new cause of action. The allegation that the damage is caused by the respondent's dam remains unchanged. An inaccurate specification and description of the position of the dam causing the injury, may be modified so as to conform to a true description of the cause of the injury.

This complaint was brought in the District Court, and comes here by appeal. If the complainant had correctly described the cause of the injury complained of, the respondent might have submitted. The litigation so far, has been without fault on the part of the respondent, who could not with safety to himself, have allowed the complainant judgment. The amendment prayed for, may be allowed upon terms — the complainant to recover no costs to this term, and to pay the respondent his costs up to this time.

Sanborn, for the complainant.

J. Appleton, for the respondent.

NOTE. — For the report of this and of the following case, the Reporter acknowledges his indebtment to the kindness of a legal gentleman of Bangor by whose labors two of the earlier volumes of the Reports were so much enriched.

EVELETH *& al. versus* HARMON.

Of the causes, for which a new trial will be granted.

TENNEY, J., orally. — This is a WRIT OF ENTRY to obtain possession of a farm in the occupation of the tenant. Both parties claim title under H. G. O. Harmon; the tenant by deed dated April 3, 1847, which was duly acknowledged and recorded; the demandants by virtue of an attachment made on the 17th April, 1847, in a suit against the tenant's grantor, upon which subsequently a judgment was obtained, and levy seasonably made in due form of law. It is obvious therefore, that were the case to rest here, the tenant's title must prevail.

To avoid the operation of the tenant's deed, the demandants insist that it was fraudulent, and made with the deliberate intention of hindering, delaying or defrauding creditors, and that they, being prior creditors, have a right to impeach it. The demandants for this purpose introduced evidence to show that the judgment debtor was in embarrassed circumstances, that the tenant, his son, was of feeble health, without property or means to purchase; that the conveyance was made on or about the day he became twenty-one years old; that no money was paid at the time of the sale, and that there was no prospect he ever would be able to pay for the place; and that the father and his family remained in possession, occupying and working on the place as before the sale.

The only evidence introduced on the part of the tenant, was the fact, that by arrangement between the father and son, as stated in the exceptions, a certain amount had been indorsed on the first note, before it became due; and the additional fact that nearly a year after the sale, the mortgage and notes given by the tenant to his father, had been by him transferred to Thomas S. Pullen. This testimony was offered to show the original conveyance to the tenant to have been honest.

The counsel for the demandants have excepted to the introduction of this evidence, as being upon legal principles in-

admissible. It is urged that this evidence is in fact simply proof of the declarations or acts of the fraudulent grantor, long after the conveyance; and that it is not competent for him to make declarations, or to perform acts equivalent to declarations, which shall have a retroactive effect, so as to give validity to a transaction, fraudulent in its inception. The assignment of the mortgage had no connexion whatever with the original transaction. The payment subsequently made, may perhaps, be considered as connected with it. Both might have been merely colorable and designed to give a specious aspect of integrity to the cause. But the Court do not mean to rest their decision on the admissibility of this evidence, nor yet to determine, that it is altogether inadmissible.

The counsel for the demandant relies on a motion for a new trial. It is urged that the verdict is so manifestly erroneous, that it should be set aside, that as there is no dispute as to facts, there having been no counter evidence as to the essential facts, that the Court are to apply the law as upon an agreed statement. This view of the law cannot be admitted as correct. If it were so, then it would have been competent for the Court to have peremptorily directed a verdict for the demandant, on the ground that as matter of law he was entitled to it. But such a direction would have been erroneous, and if given, would have been sufficient cause for setting the verdict aside.

We are therefore, to look at the evidence only, to see if the jury have so palpably erred, that the case should for that cause be sent back for a new trial. The demandants to entitle them to recover were bound to show, that the conveyance on the part of the father was fraudulent, and that the son was aware of such intention on his part and aided him in carrying it into effect. The father was a competent witness to explain the purpose and intention of the parties in this transaction, but was not called. The father was a competent witness undoubtedly for either party, but in reference to calling him, the parties do not stand upon an equal footing. The conveyance was one from which the father must have expected to derive some

benefit. If fraudulent, it is hardly reasonable to expect, that the party claiming it to be fraudulent should call the chief actor in that fraud as the witness by whom to establish it. The son was living in the family of his father, and may reasonably be presumed to have known his objects and intentions. The demandant personally must have been ignorant except so far as he must know from what appears in evidence. It appeared in evidence that the father continued in possession of the premises, after the conveyance; that the son had just arrived at years of manhood. It does not appear that he was entitled to his earnings previously, or that he had any means with which to make the purchase. It further appeared that the son was a person of indolent habits and inferior health; that much of his time was spent in visiting. The evidence in relation to all these facts was uncontradicted; and these facts, if true, leave no reasonable doubt of what was the object of the parties in making the conveyance.

Indeed it is not easy to perceive how the jury could have arrived at the result which is shown by their verdict. The conclusion to which the Court have arrived, is that the jury, as to this evidence, must have mistaken their duty. The verdict is set aside upon the motion for a new trial, and the cause will stand for trial.

J. Appleton and *Flint*, for the plaintiffs.

Sanborn, for the defendant.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF PENOBSCOT,

1851.

PRESENT:

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

INHABITANTS OF OLDTOWN *versus* INHABITANTS OF SHAPLIEGH.

Of the extent of the departure from the strict rules of evidence, in the use of unconnected papers and private memoranda of third persons, of an ancient date, to prove the existence of coeval facts.

In order to prove in what town was the residence of a pauper on a particular day, twenty-two years before the trial, a writ drawn and dated on that day, in which he was the plaintiff and his residence was named, was allowed to be read in evidence, although it was never served, and although the attorney who drew it had no knowledge of the residence, except as stated to him by the pauper when it was drawn.

ON EXCEPTIONS from *Nisi Prius*, TENNEY, J. presiding.

The case was tried before the jury in 1850.

ASSUMPSIT to recover for supplies furnished to one Thad-

deus Trafton a pauper, who once had a settlement in Shapleigh.

The defendants contended, that on the 23d of Feb'y, 1828, (the day on which the town of Wellington was incorporated,) the pauper gained a new settlement by residing in that town. The plaintiffs attempted to prove, that the pauper, on that day was not residing in Wellington, but in Brighton.

They called Cleopas Boyd, Esq. an attorney at law, who testified, *that* he made a writ for Trafton on that day, (which was the day of its date;) *that* Trafton indorsed the writ; *that* except what Trafton told him at the time, he had no knowledge where Trafton resided; and *that* the writ was never served. The plaintiffs offered to read the writ, stating that it named the plaintiff therein as of Brighton. To this the defendants objected; but the writ was admitted and read. The Judge submitted the question of settlement to the jury upon all the evidence. The verdict being for the plaintiffs the defendants excepted to the admission of the writ as evidence.

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

The writ was not admissible. The attorney's testimony gave it no corroboration. He knew nothing of Trafton's residence. It was never served, and therefore had no characteristics even of a *quasi* record.

It could not have been evidence between the parties; how then *inter alios?* Trafton's declaration of his residence was of no more force than his declaration upon any other subject. If he had made it in writing, it could not be evidence. He was competent as a witness in this trial. How could his mere declarations be proof of any thing? The writ was not sworn to; it testifies nothing; it cannot be cross-examined. What potency is there in an old unserved writ, more than in an old dunning letter. Upon the established rules of evidence, the rights of the people are too vitally involved, to be frittered away by the appearance of an old writ which was never served, and perhaps never served for the fear that its falsities would defeat it.

Cutting and *J. H. Hilliard*, for the plaintiffs.

TENNEY, J. — In attempting to ascertain the truth of facts, as they existed a long time ago, courts have varied from the strict rules of evidence, because of the difficulty or impossibility by lapse of time, of proving those facts by living witnesses. They have on this account received the declarations of deceased members of the family, in questions touching pedigree; also monumental inscriptions and entries made in family bibles. "The like evidence has been admitted, in other cases, where the Court were satisfied, that the person, whose written entry or hearsay, was offered in evidence, had no interest in falsifying the fact." *Hingham* v. *Rigdway*, 10 East. 109.

"A minute in writing made at the time when the fact it records took place, by a person since deceased, in the ordinary course of his business, corroborated by other circumstances, which render it probable that the fact occurred, is admissible in evidence." And such a minute is competent, "where it is one of a chain or combination of facts, and the proof of one raises a presumption, that another has taken place." These rules were laid down in *Patteshall* v. *Turford*, 3 Barn. and Adol. 890, and adopted in this State, in *Augusta* v. *Windsor*, 19 Maine, 317.

Certain things stated in deeds, wills and other solemn instruments in writing have been received as competent evidence, although the same facts in verbal declarations are inadmissible. In the case of *Bridgewater* v. *West Bridgewater*, 7 Pick. 191, which was an action to recover for supplies for the relief of a pauper, it became important to prove in what part of the town of old Bridgewater, one James Keith, the ancestor of the pauper, resided; and on this question, an extract from the records of the old town, purporting to contain a grant of certain lands, described by monuments, and a dwellinghouse thereon, from the town to James Keith, in consideration of his settling among them as a minister of the gospel, was offered. Other votes and acts of the town were offered, showing that he was recognized as their minister. Also his last will, duly approved, by which he devised to his five sons "his homestead," and the deed of the five sons, conveying the lands devised to them, de-

scribing them by monuments mentioned in the original grant of the town. And the plaintiffs offered to prove by deeds and words of the *mesne* conveyances, from that time to the present, and by witnesses, who knew the monuments, that the lands granted to the ancestor of the pauper, were in the territory of West Bridgewater. The Court say, "it (the evidence referred to,) is not objectionable as parol evidence, for it consists in records and deeds, except so much of it as goes to prove the actual situation of the lands as described in those documents."

In a question of the settlement of a pauper, between the towns of Ward and Oxford, 8 Pick. 496, the registry copy of a deed of land executed by the grandfather of the pauper, in which he was described as being in Oxford; and a copy of his last will, in which he was described "as now resident in Oxford," was admitted as evidence. The Court held such as a very different species of proof, from the mere verbal declarations of a pauper as to his residence; and that the designation of his residence in a solemn instrument, such as a deed or will, is in the nature of a fact, rather than a declaration, being made when there was no controversy, and when no possible interest could exist, to give a false designation.

In *West Boylston* v. *Stirling*, 17 Pick. 126, the plaintiffs offered evidence tending to show that the pauper for a time resided and had his home in Holden, and introduced written notifications signed by Jervis Abbott, an inhabitant of Holden, addressed to the pauper, warning him to attend district school meetings in Holden, which notifications Abbott testified he delivered to the pauper. The Court say, "the question of domicil is often a difficult one, depending upon many circumstances, some of which of themselves are very slight. We believe, that the fact, that one's name has been placed on the list of voters, has been admitted for this purpose, although it is the act of other persons. The evidence in question is similar; it is an act of the officers of the town, recognizing the individual as an inhabitant, and acting towards him and with him as such."

In the three cases cited from Massachusetts the evidence was held competent, on the ground that the statements in the instruments were facts existing at the time, and made, when the party making them could have been under no inducement, that can be perceived, to represent them differently from what truth would require. The death of those who made the statements is not treated as giving to the instruments a character, which could alone render them competent. Neither were the documents held admissible, on account of their being records in the strict sense of the term. Deeds and wills, by being recorded, for such purposes as they were allowed to be introduced in the cases referred to, had no higher character as evidence, than the same would have, unrecorded. The fact of a residence of the grantor or testator, as disclosed by such instruments, is not conclusive upon that point, as is a record of a court of justice of the proceedings, which occurred therein.

The writ in favor of the pauper in this case was made under his own direction, by a practising attorney, and indorsed by the plaintiff therein at the time. The writ bore a true date, according to the evidence, and it was made on Feb. 23, 1828, the day on which the town of Wellington was incorporated. The attorney had no other knowledge of the residence of the pauper at that time, than such as he then derived from him. It was proper, that the places of the residence of the parties to the writ should be inserted. The writ would not be perfect without them according to the forms prescribed by the statute. The writ being made at the request of and for the pauper, while he was present with the attorney, every thing therein is supposed to have been done by his direction or his subsequent approval; and the writ is a document of as great solemnity as would be a deed made at the same time, or a notice to citizens to attend school district meetings. It was made in the ordinary course of business of the attorney, and the facts introduced from the testimony of the attorney and the docket, in which he had entered the memorandum of the suit, without objection, certainly raises a strong presumption that the writ itself would contain a state-

ment of the residence of the one, who caused it to be made, and that such statement would be true. The satisfaction to the mind, to be expected from an inspection of the writ, under such a chain of facts might be very full and clear; much more so, than the recollection simply of the pauper himself. It is a species of evidence, upon the point of residence of the pauper, which would not probably mislead, and exhibits a fact which could not be shown in any other mode with any greater degree of certainty. The reasons for its introduction, are certainly as strong as those given for the admission of minutes and entries made by deceased persons in the cases cited, and may be regarded as somewhat analogous. The writ as evidence, in connection with other facts in the case, falls within the principle applicable to wills, deeds and other solemn instruments, and we think it was equally admissible on the question of domicil. *Exceptions overruled.*

SPOFFORD *& als. versus* TRUE.

A grant of land, conditioned for a subsequent payment to be made therefor, though it reserves, toward such payment a lien upon the lumber which the grantee may take therefrom, is a grant upon a condition subsequent.

Till an entry for condition broken, the land continues vested in the grantee.

A lien, reserved in a grant of land, upon the lumber which the grantee may take therefrom, is postponed to the lien given by the statute of 1848, to laborers who may aid him in getting the lumber.

That statute is not in conflict with any provision of the constitution.

When a grant of land upon a condition subsequent, authorizes the grantee to take lumber therefrom, subject to a lien for the purchase money, and several distinct quantities or lots of lumber are cut and driven to the boom by the grantee, (the persons employed by him to work in getting one of the lots having no connection with those who labor in getting another of the lots,) the lien of each laborer, is upon the lot, upon which he worked.

But, if by the negligence or carelessness of the *grantee* in such a deed, such several lots of lumber become intermixed, so that the respective lots upon which the several laborers worked, cannot be distinguished, their respective liens are upon the whole mass.

Spofford *v.* True.

In actions by the laborers, to establish their lien claims, such an intermixture, if it occurred without their fault, is evidence of negligence or carelessness in the *grantee*, unless it was produced by some fraud or some accident.

So far as relates to the lien claims of the laborers, the *grantee* in the deed is to be treated as the *agent of the grantors*, and they are responsible for the consequences of his negligence or carelessness.

ON FACTS AGREED.

TROVER. The statement presents, in substance, the following facts: —

The plaintiffs were proprietors of a township of timbered land. They conveyed it to Wm. McCrillis, his heirs and assigns, to be paid for at several successive periods, and upon a condition, that the conveyance should be void, if such payments should not be made. The grant reserved, toward payment of the purchase money, a lien of five dollars upon each thousand feet of the lumber which he should take from the tract, and authorized timber to be cut subject to such lien. McCrillis made a contract with Haynes & Co., by which they were to cut, haul, and drive to the boom, a large quantity of logs from the land at stipulated prices to be paid by him. They employed many laborers to cut and haul. These laborers were divided into four gangs, each of which worked upon distinct parts of the township, and hauled the logs which they cut to separate landings. There was no connection between any of these gangs in their operations.

All the logs at the four landings were marked alike.

The logs were driven down the river by Haynes & Co. When arrived at the boom, they had become intermixed, so that it was not possible to tell which of them had been drawn to either of the four landings.

With a view to enforce the lien, given in such cases by the statute of 1848, the said laborers seasonably instituted their several suits for their services against Haynes & Co. Upon the writs in those suits, the logs were attached, and were sold upon the writs according to law by a deputy sheriff. The suits are yet pending.

In one of those suits, William McMaster is the plaintiff. In his account, annexed to the writ, is a charge for his labor

and also a charge of "$6,37, for cash expended in getting into the woods."

For the aforesaid doings of the deputy sheriff, this action of trover is brought against the sheriff by the *grantors of McCrillis*, who claim the logs, the condition in their deed to him having never been performed.

McCrillis and *Crosby*, for the plaintiffs.

The word "lien," as used in the plaintiff's grant to McCrillis, has received a judicial construction. It imports that the grantor, by reserving such a lien, is the legal and entire owner, till the lien is discharged by payment. *Bradeen* v. *Brooks*, 22 Maine, 463; *Oakes* v. *Moore*, 24 Maine, 214.

All our lumbering operations are conducted with reference to this principle. When the plaintiffs stipulated for a *lien*, they used the word in the sense in which it was understood by the community, and with reference to the construction which had been given it by the Courts. The first point which we make, is this—that the license given by the plaintiff to McCrillis, was not assignable; that Haynes, who operated upon the town by virtue of a contract with McCrillis, was a trespasser, and that the rights of the plaintiffs are not to be affected by any of his acts. The plaintiffs were the owners of the town and conveyed it to McCrillis conditionally. The condition was never performed.

If no license to cut timber had been given to McCrillis, what would have been the rights of the parties before the Court, supposing all the other facts to be as they are now presented. McCrillis would have had no right to cut timber, and of course no person under his authority, or by his direction. Haynes would have been a trespasser, and so would the laborers whom he had employed. It is idle to pretend that in such a case the laborers could have a lien upon the logs, on account of their personal services.

McCrillis had authority to cut timber, but the question is, what right had *Haynes?* He claims to have had authority through McCrillis, but McCrillis had no power to grant him authority. It is well known that the success of a lumbering

operation depends in an especial degree upon the skill and prudence with which it is conducted.

When the plaintiffs gave to McCrillis a license to cut timber, they believed that he would manage the operation with skill and fidelity, and that whatever lumber was cut would be faithfully accounted for.

Now, the plaintiffs say, and this is their argument, *that* Haynes did not manage the operation with skill or fidelity; *that* he hired many more men than were needed; *that* the men did not do half the labor which they ought to have done; *that* a large portion of the logs have been secreted, and *that* the wages of the men amount to more than the value of the logs.

Was, then, the business given by the plaintiffs to McCrillis assignable? If not, then Haynes acquired by his contract with McCrillis, no rights as against these plaintiffs, and he, and all the men who worked under him must be considered trespassers. In *Emerson* v. *Fiske*, 6 Maine, 200, it was held that a license to cut timber on the land of the grantor is not assignable.

The defendant may contend that, in legal effect, the timber was cut by McCrillis, Haynes acting only as his agent. We deny that Haynes can in any manner be considered the agent of McCrillis. He entered upon the trust by virtue of a contract with McCrillis, agreeing to cut and remove timber at a certain price per thousand; McCrillis surrenders to him the sole control and management of the operation. The arrangement is liable to all the objections which have been mentioned. If the license given by McCrillis to Haynes be good, then the plaintiffs' property is to be holden for the acts of Haynes, though he may have conducted imprudently, or dishonestly.

When the plaintiffs gave authority to cut timber, they were well acquainted with the law which gives to laborers upon logs a lien on them, and they did not contemplate that any person but McCrillis, was to have the right to create claims upon their property. By giving him authority to cut timber, they of course gave him authority to hire men, and in that way, perhaps to create liens upon their property, but they

did not intend to give that authority to *any one else.* It was a *personal trust* not to *be transferred.*

When McCrillis attempted to give such a license, he exceeded his authority.

The plaintiffs regard Haynes and all who worked under him as trespassers.

By looking at the account of William McMaster, one of the men who sued, we find he claims to recover, not only for his labor on the logs, but also for "expenses, getting into the woods, $6,67." It is a rule of law that, where one unites a claim that is privileged with one that is not, he places them both on the same footing, and waives or abandons all pretensions as a privileged creditor. Now when McMaster claims to recover by one judgment, for labor upon logs, and for expenses of getting into the woods, he joins a demand that is privileged with one that is not.

At all events, then, the defendant is liable for the logs sold on McMaster's writ.

There were various other writs against Haynes, but in all of them, except that of McMaster, the plaintiffs claim only for labor.

Admitting that Haynes was rightfully upon the land, the plaintiffs contend that at the time the attachments were made, the logs were not in such a situation that the liens of the laborers could be secured. The logs were at one time the property of these plaintiffs, and it is incumbent upon the defendant to show by what authority they were taken from them. He alleges that the plaintiffs in the several suits referred to, had a lien upon them by reason of their labor, but he fails to prove that the identical logs sold, were the logs upon which any of said plaintiffs performed labor. There were four teams at work, all upon separate and distinct portions of the tract. Each team had a distinct crew of men attached to it, and they hauled to separate and different landings. If we go to the common law to ascertain the meaning of the word lien, we find it laid down that it is used to signify the right of detention which artisans and others, who have bestowed labor upon

an article, or done some act in reference to it, have, until reimbursed for their expenditures and labor bestowed upon it. *Oakes* v. *Moore*, 24 Maine, 219. In 2 Kent's Com. 634, it is said that a general lien is the right to retain the property of another for a general balance of accounts, but a particular lien is a right to retain it only for a charge on account of labor employed, or expenditures bestowed upon the *identical* property detained.

Now it was perceived by the Legislature that it would be impossible for laborers upon logs to retain possession of them until paid for their services, and it was therefore provided that the lien might be secured and perfected by attachment. It is fair to presume that in every respect, except the retaining of possession, the Legislature intended to give the word the same meaning which it had at common law; to wit, a claim upon an article on account of labor or expenditures bestowed upon it.

The language of the statute is, that any person who shall labor at cutting, hauling or driving masts, spars or other lumber, shall have a lien on all logs and lumber which he may aid in cutting, hauling and driving as aforesaid for the amount stipulated to be paid for his personal services. It will be borne in mind, that the claims of the laborers in this case are all for cutting and hauling. None claim for driving. Can a laborer, who worked in one team only be said to have aided in cutting and hauling all the lumber which was cut and hauled by the other teams? The laborers are undertaking to deprive the plaintiffs of their lien, not by virtue of any contract, but by a statute of the State, a statute which takes the property of one man to pay the debt of another. For these reasons the statute should be construed strictly. No laborers had a lien on any logs, other than those cut and hauled by the team in which he worked.

If it was practicable for the laborers to secure their claims by attaching the logs, *upon which they actually worked*, they cannot be permitted to resort to other logs.

In order to show to what difficulties and absurdities we

should be brought by allowing the construction which the defendant contends for, we will suppose that Haynes had received a permit to cut logs upon a township adjoining the one owned by the plaintiffs; that he had hired men for that purpose, and that all the logs cut had been marked with the same mark, although hauled to different landings. The townships being owned by different persons, it cannot be pretended for a moment that the logs cut on one town could be holden to pay the expenses of labor in cutting logs on the other town. Suppose both towns had been owned by the same persons, and Haynes had been authorized to cut spruce logs upon one, and pine logs upon the other, and that the expenses of labor in cutting the spruce logs exceeded in amount the value of the logs. Will it be pretended that the men who worked upon the spruce logs, would have a right to satisfy their claims out of the pine logs on which they did not work?

It may be said, that the logs were all marked with the same mark, and that it is impossible for each man to identify the logs on which he worked. But that is not the fault of the plaintiffs, they remain the owners of the logs until their stumpage or lien is paid and discharged, they had nothing to do with the operation, with the cutting or marking. If the laborers had taken proper precautions, there would have been no difficulty in identifying the logs and securing their claims, they could have put a private mark upon the logs, or they could have attached before the logs were driven to the boom, and while they remained at their landings. The doctrine of confusion of goods has no application to such a case as this. The lien attaches only to the property on which the work was done, and cannot be transferred to any other property.

But there is a broader view which may be taken of the whole question, one which goes to the very gist of the whole matter, and which we think fatal to the defendant's case. How far does the laborer's lien extend, and whose rights shall be affected by it? There is a construction to be given to the statute which will in some way limit it. It is not to be taken in the extended sense in which it reads. It cannot be

pretended, that if the laborers are trespassers or the person under whom they work is a trespasser, the statute would give them a lien. Some limitation then is to be made to the general words of the statute, and what shall that limitation be? The sale by the plaintiffs was conditional. It was to be a sale, *provided* McCrillis paid his notes at maturity, which was not done.

Our construction of the law is, that the laborer's lien extends only to *such* interest in the logs, as the operator acquires by the conditional sale to him.

The laborers claim to hold the logs because they have bestowed labor upon them, and increased their value. So far as the plaintiffs are concerned, their value is not increased; they sold the logs for what they were worth standing and growing. For any increased value in cutting and transporting the timber to market, the laborers are justly entitled to it. The price at which the timber was sold should first be paid, and whatever the balance may be, should be holden to the laborers. The law was intended for the protection of the laborers against all claims created by the operator in cutting and removing the timber, but it was not intended to take the property of one man to pay the debt of another. It was not intended to secure the laborers their pay, by doing injustice to other individuals.

A. W. Paine, for the defendant.

TENNEY, J.—The condition in the conveyance from the plaintiffs to McCrillis, is subsequent; the fee in the land, therefore vested in the grantee on the delivery of the deeds. There has been no re-entry for the forfeiture, on account of the breach of the condition; and so far as our consideration is demanded in this case, we must regard the forfeiture as waived for the present, and the title to remain as it was at the time of the conveyance. 1 Shep. Touchst. 118, and seq.; 4 Kent's Com. Lecture 56.

The deeds convey the land to the grantee, his heirs and *assigns*. They give the right to cut timber, with no limita-

tion as to the person who may do it, subject to a lien thereon, for the payment of five dollars for every thousand feet cut, board measure. The right to dispose of the timber by the grantee subject to this lien, to be taken off by himself, or by others whom he may employ under a contract, such as that made by him, and James and Alvin Haynes, must be conferred, when the grantee has the power to convey the entire estate by the terms of the deed, subject to the same lien. The case is unlike that of *Emerson* v. *Fiske & al.* 6 Greenl. 200, where the title of the land was not intended to be conveyed, and the entire ownership of the timber continued in Emerson, who had given those, under whom the defendants claimed it, the right to cut it exclusively for him.

The timber may be considered as having been lawfully removed from the land, and driven to the boom, by virtue of a contract, which the plaintiffs had fully authorised. At the time of the conveyance, the statute of 1848, chap. 72, was in force. That secured a lien upon all logs, masts, spars, and other lumber, in favor of those who aided in cutting, hauling or driving them for their personal services.

This lien is analogous to liens upon vessels and upon buildings, in favor of laborers, who have been employed in their construction. It takes away none of the rights of the owner, nor the one interested therein, by a lien or otherwise, any further than is necessary for the security of those who are presumed to have added something to its value, equal to the expense, at least, incurred. It is in the power of the owner, who wishes to dispose of such property, to guard against any loss from the lien which may exist afterwards upon it by the authority of the statute, by taking other security for his purchase money, besides retaining an interest in the property itself. The statute in its prospective operation, and in this case it can have no other, is no abridgment of the rights of the citizen, secured to him, by the constitution of the State, in Art 1, sec. 1, of "acquiring, possessing and protecting property." It subjects the property to the payment of debts, which the owner has directly or indirectly caused or authorized, in its

improvement, under a knowledge, that the property is so charged. In principle it in no respect differs from the lien at common law, in favor of mechanics, who have bestowed labor upon the article which it attaches. The statute provides for its existence in cases where the possession is not supposed to be in the one, to be benefitted by the lien.

It was evidently intended by the legislature, that the lien of laborers was not to be postponed to that of other individuals. Their claim commences immediately upon the performance of services in converting standing trees into logs, masts, spars, and other lumber, where it may be enforced in a manner, which shall be speedy, simple and effectual. The statute protects the laborer in his earnings, without obliging him to follow the property which he has aided in making more valuable, after it has been taken into possession of those persons, who may have attempted to sustain a prior lien; and frees him from exposure to loss, arising from the tardy and uncertain process, of attempting to secure any interest, remaining after such liens have been discharged, when it may have passed from the scene of his labors, and so changed that its identity can no longer be traced. The exception in favor of the Commonwealth of Massachusetts, and the State of Maine, in the statute, confirms this view. The lien, which is preferred to that of the laborers, is what was expected to be proper in the sales of land, for the security of the purchase money. And the statute will not admit of the construction, that there is to be a still farther exception in favor of other grantors, who may attempt to provide the same kind of lien, when the plain language itself, expressly forbids it.

But it is insisted, that the lien under the statute, cannot extend to lumber, to which the one claiming the lien contributed nothing, in cutting, hauling or driving the same. The mischievous results of a more liberal application of the provision, pointed out by counsel in certain cases, are very apparent, and we cannot suppose for a moment that the lumber, which was taken and sold in satisfaction of the debts, in favor of the laborers represented by the defendant, was in each case exclu-

sively that which the creditor aided in cutting and hauling. The case finds, that the logs cut and hauled by the several companies of men, could not be distinguished by the defendant. But in the passage of the logs from the forest to the boom, they were so intermingled that the labors of the distinct companies were not distinguishable. There were no artificial badges upon the several parcels of logs, so that those cut by one company could be separated from those cut by another; and although the logs cut by some of the companies were of different sizes and qualities from those cut by others, it was manifestly a case of the confusion of goods, which may take place in reference to lumber. *Hazletine* v. *Stackwell*, 30 Maine 237.

Assuming that the counsel for the plaintiffs are correct in their proposition that the lien of each laborer is confined to the lumber, which he aided in removing from the land, it may be proper to ascertain who are to be regarded in this action as responsible for the intermixture; and what was the character of the acts, which caused it.

The plaintiffs, their grantee, and those, whom the latter employed to cut, haul and drive the logs, knew constructively at least, that those who should bestow labor upon them in these operations would have a lien thereon for the value of their personal services. They were all affected by that knowledge after the logs were cut and hauled. The men who were employed merely as operatives, had no authority to put thereon their own distinguishing marks, or to interfere in directing the mode in which they should be removed from the landings and driven to the boom. And their claim ought not to be taken away by any of the parties, including the plaintiffs, who were interested in the lumber, by an intermixture, which the laborers had no power to prevent. The plaintiffs conveyed the land, and gave authority for the removal of the timber. Every process in cutting, hauling and driving the logs was in the prosecution of their original intention, when they made the conveyance.

They were in their hands, or in the hands of those who

had been employed by virtue of their contract, through all the different stages of their progress from standing trees, till they were indiscriminately turned into the streams, and the river, and driven to the boom. Every thing done to the timber from the first to the last of these operations, was just what the plaintiffs expected would be done, and in doing which there was no violation of any contract, which had been made with them touching the ultimate object, or the mode by which it was brought about. The logs were constructively in their possession for the purpose of preserving their own lien thereon, subject to the statute lien of the laborers, if the latter existed at the time of the attachments by the defendant's deputy, and had so been from the time they were cut. *Bradeen* v. *Brooks*, 22 Maine, 463.

Is it then for the plaintiffs to claim to hold the logs free from the laborers' lien? Before they can do this successfully, would not justice demand, that they should show, that they had done all in their power to preserve it; that it should be proved, that they had stipulated that nothing should take place, which should impair it, instead of claiming a discharge of it, a forfeiture of the rights, under the statute, by at least their own want of care? If the lien was lost, it is manifest, that it was done by the omission to perform some duty in some of the agents employed in driving the logs, which the plaintiffs should have required to be done.

We cannot doubt, that the plaintiffs must be treated as having so far caused the mixture of the logs, that had the confusion been done wrongfully, the lien of the laborers is not extinguished. This brings us to the other inquiry, what was the character of the acts, which caused the confusion? Was the intermixture brought about by fraud, by accident, or by carelessness or inadvertence?

In view of all the facts in the case, it would be too much to say, the confusion originated in fraud. There is a manifest want of all the material elements of fraud in the plaintiffs and in all those, who had any agency in driving the logs and causing the mixture. On the other hand, it cannot be said,

that the intermingling was the fruit of accident. The plaintiffs, their grantee, and those who contracted to cut, haul and drive the logs under him, must have known fully their situation. The parties to the deeds, knew or were bound to know all the claims existing upon them, and the propriety of such a course as would continue them in their full vigor. There may have been a want of knowledge of the nature of the laborer's claim, and its extent, but this ignorance of the law cannot excuse the plaintiffs, so that they can invoke it for their own benefit at the expense of those, who rendered the services. No care was taken to keep separate the logs hauled by the different companies of laborers respectively, by the agents employed, after they were placed upon the landings, and no marks were put upon them for the purpose of enabling them to make the proper division. It has the character of an intermixture produced by negligence or inadvertence.

What is the rule applicable to a confusion, caused by negligence or inadvertence, when the separation cannot be made, and the whole mass is different in quality from those parcels, which produced it? Judge Story, in his Treatise on Bailments, sect. 40, deduces the rule, from the authorities, in these words: — "If the mixture is undistinguishable, and a new ingredient is formed, not capable of a just appreciation and division, according to the original rights of each, then the party, who occasions the wrongful mixture, must bear the whole loss." In the case of *Lipton* v. *White*, 15 Vesey, 432, Lord Chancellor Eldon says, "The defendant White, as far as he is concerned is involved in it simply in consequence of his own undertaking. No misconduct or fraud is imputed to him. He is culpable, not morally, but only for having applied too little attention to his own interest." The condition of the plaintiffs in some respects, is not essentially unlike that of White in the case referred to. White had undertaken, that articles belonging to the plaintiff and the other party should be kept separate. His agent and lessees omitted to do it. A mixture took place of articles of different qualities; and no account was kept of those which came from the plaintiff, and not

being distinguishable, the plaintiff was held entitled to the whole. In the case at bar, no moral wrong was imputable to the plaintiffs; but such an inattention to the lien of the laborers is shown, that they are so far responsible for the negligence, which was the cause of the confusion, that they cannot claim to hold the logs discharged of the statute lien for their own benefit, and turn over to persons, who may be irresponsible, those individuals, who performed the services and for whose protection the provision of the law was made.

In this case, the several parcels of logs, cut by the different companies of workmen, all belonged to the plaintiffs, so far as the lien in their favor extended, subject to the statute lien of those workmen. Was it then a mixture of property of different values, belonging to different individuals? Each parcel of logs was the property of each laborer, who had rendered personal service in their removal from the land, so long as his claim was in full force, and nothing but the lien excepted from the operation of the provision of the statute, could supersede it. As between such laborer and the plaintiffs, all the other parcels, according to the facts of the case, were the property of the latter. If the confusion had been caused by carelessness, for which they are responsible, and each laborer failed in consequence to distinguish the logs to which the lien originally attached; and the logs were of different qualities, so that he could not obtain those of similar value to his own, he would be entitled to sufficient to satisfy his claim, from the whole mass produced by the confusion. From the facts agreed, the defendant as the representative of the workmen who caused the attachments to be made, is not responsible in this action to the plaintiffs.

In the case of *William McMaster* v. *James and Alvin Haynes*, he appears by the documents in the case to claim for services rendered for them, in cutting and hauling logs; he also claims the sum of six dollars and thirty-seven cents, for the payment of expenses in getting into the woods. Without the statute, the laborers would have no right by attachment upon the lumber, in satisfaction of their services against those

who did not own it. The lien is restricted to the "personal services" of the one, who claims the benefit of it, and cannot extend to the charge last referred to.

It does not appear, that any distinction was made in the sale of logs to satisfy that part of the claim which was for personal services, and the other portion of it. But it appears from the statement of facts, that the suit is still pending, and upon leave granted, the writ may be amended by striking out the charge to which the lien does not attach, and no objection will exist to the application of so much of the proceeds of the sale, as will satisfy the residue, if he should obtain judgment therefor. *Gilbert* v. *Hudson*, 4 Greenl. 345.

Plaintiffs nonsuit.

BICKNELL *versus* HILL.

In a suit by an officer upon a receipt given for property attached, the officer's return upon the execution, that he seasonably made a demand upon the receipter, is not an act required in his official duty, and therefore is not evidence.

When the promise contained in such a receipt is, that the property shall be delivered "on demand," the demand is a condition precedent.

Inability of the receipter to redeliver the property does not waive the necessity for a demand, in order to fix his liability.

ON EXCEPTIONS from the District Court, HATHAWAY, J.

ASSUMPSIT. — The plaintiff was a deputy sheriff. He attached a schooner upon a writ, and took therefor a receipt signed by the defendant and acknowledging that he had received her from the plaintiff, as property attached on a writ specified, and promising to redeliver the same *on demand.* This suit was brought upon that receipt.

Judgment was recovered against the defendant, in the original suit, and within thirty days from the judgment, the plaintiff, still being a deputy sheriff, returned upon the execution, that he had made demand, June 28, 1849, upon the receipter for the schooner, which he refused and neglected to deliver. *There was no other proof of a demand.*

It was admitted that "after the attachment the schooner was restored to the owner and went to sea on a voyage to Ponce Porto Rico, and did not return in the year 1849."

A nonsuit was ordered, to which the plaintiff excepted.

Blake, for the plaintiff.

I. A demand was unnecessary.

1. The attachment was made in May, and judgment was recovered in June. At the time of the judgment, and for more than thirty days afterwards, the schooner was at sea. A demand therefore must have been unavailing.

2. The restoration of the schooner by the defendant to the owner defeated the plaintiff's lien upon her. 13 Pick. 139; 16 Pick. 144. This was a violation of the defendant's contract, by which he became absolutely liable, it appearing by the case that the officer was liable to the attaching creditor.

II. The officer's return of a demand was sufficient. It was an official act, and therefore, at least *prima facie* evidence. 13 Maine, 245; 4 Burrow, 2129; 11 East, 297; 20 Maine, 372; 21 Pick. 187; 7 Cow. 313.

A. W. Paine, for the defendant.

TENNEY, J. — The restoration to the owner, of the property attached by the plaintiff, on the original writ, in favor of Elisha Parker against George F. Granger, which went to Ponce Porto Rico, was a dissolution of the attachment. The receipt was for the indemnity of the plaintiff for surrendering the property to the owner, and was a matter, in which the creditor is not shown to have had any interest whatever. The execution having been placed for service in the hands of the plaintiff as a deputy sheriff, within thirty days after the judgment was rendered, fixed his liability, for not retaining the property, which he had returned as attached upon the writ.

A demand made by the plaintiff upon the defendant had no connection whatever with his official duty in the execution of the precept. The failure of the defendant to deliver the property upon a demand, was no excuse to the officer for his omission to retain it, and had no effect whatever to modi-

fy his liability or to qualify the relations between the plaintiff and the creditor, before existing. And the certificate made upon the execution cannot be regarded a part of the regular discharge of his official duty. If instead of the receipt for the property attached, the defendant in consideration of the surrender thereof, had negotiated a promissory note against a third person, payable on demand after a certain specified time, for his indemnity, it could not be contended with propriety, that the certificate of the plaintiff, as deputy sheriff, upon the execution, would be evidence, that the demand had been made according to the tenor of the note, more than if it had been made upon any other paper. The case before us, and the one supposed, are not essentially unlike in principle.

The cases cited for the plaintiff are not applicable to the case at bar. In them, the facts certified in the return were official acts, were *prima facie* evidence of their truth, and constituted a part of the return. The case of *Rex* v. *Elkins*, 4 Burrow, 2129, was where a rescue was returned by the officer. In the case of *Gifford* v. *Woodgate & al.* 11 East, 297, the facts stated in the return of the officer had relation to his duty as an officer, and if true, were an excuse for the unusual course pursued by him. In *Kendall* v. *White & al. Exr's*, 13 Maine, 245, an attachment had been made by an officer on the original writ, and the execution recovered was put into the hands of another officer, within thirty days after the judgment was rendered, and it became necessary in order to make the attachment available, or to make the officer liable absolutely, that a demand should be made upon him for the property returned. It was clearly, as decided, an official act to make the demand by the second officer, and the return thereof was *prima facie* evidence.

Was a demand of the vessel necessary before the commencement of this suit? So far as it would be the means of obtaining the vessel, it must be regarded as unavailing. She had been gone for more than six months, and there is no evidence that she could be surrendered in season to meet the wants of the creditor, or the officer upon the execution. But

by the terms of the receipt, in the case of a failure to deliver the property, *when demanded*, the defendant was to indemnify and save harmless the plaintiff, from all damage, loss, trouble and expense, that might in any way accrue to him on account of such failure to deliver. The demand was made a condition precedent. It was to be made to entitle the plaintiff to the indemnity. And it was not a void ceremony. The defendant would not be liable, unless the execution was put into the hands of an officer within thirty days; and the plaintiff would of course know that fact, if it was delivered to him, as it was; and if put into the hands of another officer, the plaintiff and the defendant would be no longer liable, unless the demand was made upon the officer, within the thirty days. The defendant was not expected to know, at what time the judgment would be rendered or the execution committed to an officer for service, nor the amount of the judgment, or the sum necessary for the officer's indemnity. He was entitled to the demand that he might make payment of the sum necessary to indemnify the plaintiff. There being no legal proof of this, before the commencement of the action, it could not be sustained under the evidence presented at the trial.

Exceptions overruled.
Nonsuit confirmed.

HAMMOND *& al. versus* MORRELL.

When a grant of land, made jointly by Maine and Massachusetts, contains a reservation for the support of schools and of public worship within the tract, the right and duty of protecting the reserved part against trespassers belong exclusively to this State, until the beneficiaries shall come into being.

The fee of one-half of such reserved land is held by this State in trust.

The State has the right of causing the reserved part of the tract to be severed from the residue by a course of prescribed proceedings, and to be set off into lots, for the purposes specified in the grant.

By the prescribed notice given to the grantees of the residue, and by the

opportunity given them to be heard in the proceedings for the separation, they are bound by the proceedings in the process.

It is not competent for such grantees, after the separation of the lots, to object that Massachusetts was not a party to the process.

The lots, when thus set off, are deemed to be in the legal possession of the State, until vested in those for whose benefit they were reserved.

In an action brought by the State, for trespass upon such lots, the whole damage may be recovered, and it is no defence, in whole or in part, that Massachusetts has not joined in the suit, or interposed any claim.

ON FACTS AGREED.

ASSUMPSIT to recover the sum of $644,65 paid to the defendant for stumpage of logs cut upon a township of wild land.

The township was granted in 1832, by Massachusetts and Maine to Jabez Bradbury by joint deed, in which was the usual reservation for public uses. The plaintiffs showed a regular deraignment of the same title to themselves.

The County Commissioners petitioned the District Court to have the reserved lands set off, in pursuance of the statute of this State; and thereupon the proceedings prescribed by the statute were had, and location of the same was made into lots for the purposes prescribed in the grant. The location was duly confirmed.

The plaintiffs, disregarding that location, and claiming that it was void, granted a permit to Wm. Jameson to cut logs upon the whole township during the logging season of 1849 and 1850, and A. S. Patten, Esq., Agent, having the care and custody of the public lands in the county, also gave Jameson a permit to cut logs during the same season upon the said public lots.

The amount of stumpage for logs cut by Jameson on such lots, was $669,65, of which sum $25 was paid in advance to Patten, leaving due the sum of $644,65.

The plaintiffs and the defendant, as Land Agent of the State, both claiming that stumpage, the parties agreed, that the same should be paid by Jameson to the defendant, who should hold the same to await the decision of the title to it. If said location is valid, so as to entitle the State to the same, the plain-

tiffs are to become nonsuit, otherwise a default is to be entered.

A. W. Paine, for the plaintiffs.

1. The question is whether the legislature of Maine, have a right to interfere, without the consent of Massachusetts, to locate the public lots.

It will not be denied, that in case of private grants between individuals, such an interference is not warranted by any legal principle.

The reservation is a keeping back of so much of the title as is not conveyed, and the estate reserved is of course still in the grantor. Like all other property it is constitutionally protected against invasion, and can only be taken away for public purposes and upon payment of reasonable compensation. In matters of contract and rights to property, the rights of sovereign states are in no respect different from those of individuals. The same law must give construction to both.

The rights of Massachusetts, as a landholder in Maine, are to be governed by the law regulating the rights of private citizens. This is, not only the well established principle of law, but it is a provision guarantied to Massachusetts by the articles of separation in the "first" article, as also in the "eighth."

2. The articles of separation prohibit the exercise of such authority as is here claimed and exercised by the State of Maine. These provide that "the rights of Massachusetts to their lands * * * and the remedies for the recovery thereof shall continue the same as they now are in the Commonwealth," and "for the maintenance of its rights and recovery of its lands, the Commonwealth shall be entitled to all proper and legal remedies," &c. and "all rights of action for or entry into lands * * * shall remain in the Commonwealth, to be enforced or disposed of as the Commonwealth may determine."

The reservations, then, are by these provisions to remain sacredly the property of Massachusetts, without interference on the part of Maine. All right on the part of Maine is

taken away from them, so far as the Massachusetts grant goes. The sole right to regulate the location is then in Massachusetts.

And this is the test question. If Massachusetts has a right to legislate on the subject, Maine has not. That she has such a right the whole tenor of the article goes to prove.

3. The clause provides that the rights of the Commonwealth and the *remedies* shall remain the same as then existed. The mode of enforcing the reservations or locating them is provided by Stat. of Feb. 26, 1811; Mass. Laws, vol. 4, page 209.

To the conclusion drawn from this course of reasoning, we are met by the authority of this Court in *State* v. *Cutler*, 16 Maine, 349.

Of this case it is to be remarked, that the Court do not pretend to base their decision on legal principles, unless it be one of the rights of sovereignty to seize and hold all it can grasp.

The lots were *there* legally located according to the Massachusetts statute, and no question of location arose. The title being admitted, *and in abeyance*, the State was authorized to protect the property for the benefit of the future *cestuis que trust* not yet *in esse*.

The defendant *there* was but a mere trespasser, a wrongdoer at best, and having no claim of right: *here* the party claiming has the right, and a perfect right, until the Commonweath, by legal means, sees fit to exercise the power which she has reserved.

The difference is the same with that, between protecting a minor's property from thieves and stealing it yourself.

The language of the Court in *Dillingham* v. *Smith*, 30 Maine, 380, supports our position. They speak of "*reserving* the title," "*retaining* the right" to locate, &c., making itself trustee. Such they contend is the import of *State* v. *Cutler*. Here, however, the State never had the title. Of course there were no *rights* to *retain* or reserve.

Bradbury, for the defendant.

TENNEY, J.—The plaintiffs hold under Jabez Bradbury, who took a joint deed from the Commonwealth of Massachusetts, and the State of Maine, dated Oct. 24, 1832, of a township of land, situated in the County of Piscataquis, in which was reserved one thousand acres of land for public uses averaging in situation and quality, with the other land in said township." It is admitted by the plaintiffs, that by a statute of this State, and the proceedings under it, the reserved lands, on which the timber was cut, that is the foundation of the present controversy, was located and set apart from the residue of the township. But they deny that the statute and proceedings are valid so far as they purport to affect the part of the township and the reservation therein, which belonged to Massachusetts.

It has been decided that this State is entitled to the custody and possession of the lots reserved for the support of education and public worship, in a township granted by the Commonwealth of Massachusetts, before the separation of this State, until those come into being, for whose benefit the reservation was made. *State* v. *Cutler*, 16 Maine, 349. And by the statute of this State of March 28, 1831, chap. 510, sect. 9, which was in force at the time this township was granted, the Land Agent was authorized and directed, to take care of the public lots which had been, and which should thereafter be reserved for public uses, in the several townships, until the fee should vest in the town or otherwise, according to the force of the grant, and preserve the same from pillage and trespass. And this provision is incorporated into the R. S. c. 3, sect. 45.

The title to these reserved lands did not pass to the grantees of the other portions of the townships. *Dillingham* v. *Smith*, 30 Maine, 370. The custody and possession of these lands being in this State exclusively, and for the purposes of securing them from depredations, there is involved the right of the State to do whatever is necessary to secure this object. This may be done in no other mode, than by a severance of the part reserved from the residue; or by a prohibition to take from the township any timber or other property, which may

be thereon. The statute of 1842, chap. 33, sect. 21, has provided that these reservations may be run out and located by a committee to be appointed by the District Court in the county where the land lies, and the proceedings are to be according to the mode prescribed in the Revised Statutes, chap. 122. The location is to be preceded by a notice in some newspaper in the State, and by posting up notifications, thirty days at least prior to the making of such location.

This notice being constructively at least to all who are the owners of townships, having lands so reserved in them, they become parties to the proceedings. The land which has been granted to them is subject to the jurisdiction of this State, and a partition of the township, when portions are held in common by them and others, according to the laws thereof, to which they cannot object, must be held as binding upon their rights according to their provisions. They have the opportunity of appearing, and being heard, in the location of the reserved lands. As tenants in common, they can demand that their rights should be respected and preserved. And they are presumed to have sustained no injury.

The grantees of townships, having in them a reservation of lands for public uses, have no interest in the part reserved, and they cannot invoke the rights of those in whom the fee legally rests, to dispute the power of this State over such lands. *Shapleigh* v. *Pillsbury*, 1 Greenl. 271.

Massachusetts is not represented in the dispute now before us, and the plaintiffs cannot take the objection that her rights are abridged in the location, unless it in some way interferes with their own, in which they can now be heard. The grant to the one under whom the plaintiffs claim, was while the statute gave to the Land Agent of this State, the care of the reserved lands; there was the reservation therein of one thousand acres, in very nearly the terms of the statute of this State, passed in 1828, chap. 393, sect. 4.

The Commonwealth of Massachusetts have indicated no intention to interfere with the location of lands, reserved in the joint deeds given by it and this State, and as the lands are to

be under the care of this State, until those to be benefited by them come into existence, it is a very remote contingency, that there will ever arise any objection on the part of Massachusetts, especially if the object intended to be secured by the law of this State, providing for the location of such lands, shall be effectual.

The plaintiffs directed the timber to be taken from the entire township, thereby depriving the Commonwealth of Massachusetts, of the power to make a location of the reserved lands, so that they can be in the condition in which they were, previous to removal of the timber.

The acts of the plaintiffs in removing the timber from every part of the township, if no division had been made, without taking the steps provided by the Revised Statutes, chap. 129, sect. 7, were unlawful, and they are not entitled to that part of the timber, which is in proportion to the whole, as the reserved lands are to the entire township. They have no title to the value of this timber, by showing, that another party, to whom they are strangers, is not concluded by the location of the reserved lands. *Chambers* v. *Donaldson & al.* 11 East, 65, wherein it is said by the Court, "if he, (one sued for trespass upon lands,) plead soil and freehold in another, he must also show, that he had authority of that other." *Merrill* v. *Burbank*, 23 Maine, 538.

The fee of one-half of the reserved lands being in this State as trustee, and having the possession and custody of the other half, for the purpose of preserving it from pillage and trespasses, and the lands being located in proceedings, in which the plaintiffs are parties, it is not for them to treat those proceedings as a nullity.

Plaintiffs nonsuit.

SKEELE, *in equity, versus* WILLIAM T. STANWOOD, AND HENRY J. L. STANWOOD.

The statute authority to insert a bill in equity in a writ of attachment does not enlarge the equity jurisdiction of this Court in matters of fraud.

A bill in equity against several persons, alleging that one of them was indebted to the plaintiff, and that such debtor had, by a confederacy with the other defendants fraudulently transferred property to them, for the purpose of hindering the collection of the debt, cannot be sustained, unless the indebtment had previously been established by a judgment at law.

BILL IN EQUITY, inserted in a writ of attachment.

Its allegations are, in substance as follows: —

William was a dealer in books, and was largely indebted. Henry was his clerk, and knew of the indebtedness.

One of the debts was due to the plaintiff on notes and accounts.

Under a confederacy between them to defeat the creditors, William fraudulently conveyed his stock in trade to Henry; for the benefit of William, who, notwithstanding the pretended sale, has since sold large quantities of the goods at auction, intending to convert them into money and to depart with the avails to California, out of the reach of his creditors.

The bill prays that the defendants may set forth a copy of the conveyance from William to Henry, and all other agreements, verbal or written, relating to the premises, and for relief, &c.

The defendants demurred.

C. L. Crosby, in support of the demurrer.

1. This is but an action at law, in the disguise of a proceeding in equity. It is in violation of the constitution, which ensures jury trial. 17 Maine, 404. Though the alleged debt be due to the plaintiff, this process cannot lie until a judgment for it has been obtained. If there can be no relief, there can be no discovery.

2. The discovery sought for could not be awarded, since it would expose to the penalties of the R. S. chap. 161, sect. 2, and 148, sect. 49.

3. For all the plaintiff's rights, he has adequate remedy at

law. 25 Maine, 313 and 326; 28 Maine, 232; 1 Story's Eq. Juris. sect. 72.

4. There is no allegation that the facts, of which the discovery is sought, rest in the knowledge of the defendants alone; and that they are not susceptible of proof from other sources. Story's Eq. Pl. sect. 319; 25 Maine, 531 and 545.

Fessenden, for the plaintiff.

I. The bill is inserted in a writ of attachment agreeably to R. S. chap. 96, sect. 10, and Rule 2, Eq. Pr.; 18 Maine, 444.

The case shows the usefulness of the statute provision in a strong light.

1. It is a case of *fraud*, which in terms is within the *Equity* Jurisdiction of this Court. R. S. chap. 96, sect. 10, Art. 5. It is a mere fraudulent conveyance by one of the defendants to the other, to prevent an attachment of goods.

2. By virtue of this statute, the goods are taken into the custody of law, and the parties can have their rights adjusted without prejudice.

To decline taking jurisdiction would be to disregard the statute.

II. Courts of Equity have, from the earliest period, had *concurrent* jurisdiction with courts of law in all cases of fraud.

III. The specific remedy of an action on the case for a fraudulent conveyance, given by R. S. chap. 148, sect. 49, is merely a cumulative remedy.

It should not be construed to repeal the statute chap. 96, sect. 10, giving equity powers to this Court.

Besides, the remedy by an action on the case would be against one only of the parties to the fraud.

Such a remedy would be *inadequate* in many cases. 1st. because it deprives the plaintiff of *discovery*. 2d. because all parties in interest are not before the Court.

IV. The statute, chap. 161, sect. 2, referred to by the counsel, does not oust this Court of its jurisdiction. It only goes to the substance of the defendants' answers.

The defendants object that discovery would tend to criminate themselves. The demurrer then should have been special,

to that part of the bill. When a defendant cannot answer as to particular facts charged in a bill, without subjecting himself to a penalty or forfeiture, he may demur as to the discovery and answer as to the relief. *Livingston* v. *Harris*, 3 Paige, 528; *Bumpee* v. *Smith*, Wash. Ch. Rep. 327.

The demurrer is then bad in part and must be overruled. *Higinbothem v. Burnett*, 5 Johns. Ch. Rep. 407; 6 Paige, 570; 1 Johns. Ch. R. 57; 11 Paige, 414; 1 Com. 222; Har. Ch. R. 247; Walk. Ch. R. 28; 3 Iredell's Eq. 338.

TENNEY, J., orally. — The object of the bill is to obtain payment of a debt, said to be due from one of the defendants. Whether he was indebted, was a question upon which he has the right to a jury trial. If by a judgment at law, the indebtment had been fixed, equity might interpose a relief against the alleged fraud. Here has been no judgment. The debt may or may not be due. It may be that no judgment can be obtained; and if a judgment be obtained, it may be enforced in the common mode, from property in possession of the debtor. Although property is alleged to have been fraudulently transferred, it is not stated that the debtor has not other property sufficient to pay his indebtment to the plaintiff. It may be voluntarily paid.

The statute authority to insert a bill in equity, into a writ of attachment, gives no jurisdiction in equity, before the obtainment of a judgment. The attachment may be intended to respond the decree. *Demurrer allowed.*

Bill dismissed.

BANGOR HOUSE PROPRIETARY *versus* BROWN.

Land conveyed, as bounded on a *highway*, extends to the *centre* of such highway.

Land conveyed, as bounded on a *street*, existing only by designation on a plan, or as marked upon the earth, does not extend to the *centre*, but the *fee* is limited to the *side line* of such street.

With a lot, thus conveyed as bounded on *such* a street, there is also granted for the convenient use of the lot, a *right of way* in the street, in the condition in which it may be found or made by the grantee.

A dedication, by the proprietor of land, for a *highway*, can be shown only by clear indications that he *intended* to surrender it, not for the benefit of *certain persons only*, but for the use of the *public*.

Before land, thus dedicated, can be treated as a highway, the public must have adopted it as a highway.

Such an adoption may be inferred from a common use of the land as a highway.

On Exceptions from *Nisi Prius*, Tenney, J.

Trespass for tapping the plaintiff's aqueduct and drawing water therefrom.

In 1829, the proprietors of a tract of land, in the city of Bangor, caused one Bradley to draw a plan of it and to designate streets and building-lots thereon.. They then recorded the plan in the registry of deeds.

Soon after the plan was made, one of said streets, now called Centre street, was built by said proprietors, but it has not been kept in repair, and only one part of it is used as a street.

The lot No. 17, bounded southerly on Centre street, "as laid down on said plan," was conveyed in 1832, by the proprietors to Elliott Valentine. A part of No. 17, and bounded on the street, is now owned by the defendant under that conveyance, and his dwellinghouse stands upon it. A portion of Centre street, remote from the defendant's house, and that portion only, has been laid out and accepted by the city, as a public street.

In 1834, the plaintiffs laid an aqueduct, running along in Centre street, at the depth of six feet below the surface, to the cellar of their hotel.

The evidence proved that the defendant cut the aqueduct pipe, lying within the northern half of the street, and in front of his own house.

The defendant contended, that as his premises were bounded upon the street, his title extended to the centre of it, and gave him a right to tap, and even to remove the aqueduct. The

Judge ruled that the defence was not made out, and the defendant excepted.

McCrillis and *Crosby*, for the defendant.

It has been settled for centuries, that a grant of land, bounded on a highway, carries the fee to the centre of the highway. The principle was decided in *Tyler* v. *Hammond*, 11 Pick. 213, but that case was referred to in *Johnson* v. *Anderson*, 18 Maine, 76, and not regarded by the Court as sound law. In 3d Kent's Com. 433, (6th ed.) *Johnson* v. *Anderson* is cited, among other authorities, in support of the doctrine that a grant of land, bounded upon a highway or river, carries the fee to the centre of the highway or river, and the single case of *Tyler* v. *Hammond*, is cited in opposition. A distinction has been suggested between *public* ways and *private* ways. Though the law is established, that the conveyance of land bounded on a *public* way carries the fee to the centre of the way; doubts have been expressed whether a similar result would follow in case of a conveyance of land bounded on a *private* way. We deny that Centre street is a private way, or was, at the time the proprietors conveyed to Valentine the lot now owned by the defendant. The authorities abundantly establish the position that highways may be created by dedication. The principle was denied for the first time in *Hinckley* v. *Hastings*, 2 Pick. 162, where the Court say "it is not known that, in this Commonwealth, a way has ever been made by dedication." This decision overruled the common law as, from time immemorial, it had been understood and acted upon in England. The subject subsequently received a full and elaborate discussion in *Hobbs* v. *Lowell*, 19 Pick. 405, and the case of *Hinckley* v. *Hastings* was overruled. Although the Court were not unanimous in their opinion, the eminent character of the Chief Justice, and of the members of the Court, who concurred with him, and the great attention they gave to the subject, entitle the case to be respected as a decisive authority. The current of decisions is now uniform, and the principle that highways may be established by dedication, is as well settled as is any principle of the law.

The great question has been, what facts are necessary to create the presumption of a valid dedication. In the earlier cases, lapse of time was considered an essential ingredient. As to the length of time necessary to create the presumption, the different cases exhibit almost as many different opinions. In some a use of six years was considered sufficient, and in others a use of twenty years was required. It will be perceived that the point to be arrived at is, the intention of the owner of the land. This can be ascertained by positive acts, as well as by acquiescence in the use of land as a road. Positive acts, if they are unequivocal and decisive in their character, afford a better indication of the owner's intention than mere silence and acquiescence, and accordingly the earlier cases have been overruled, and it is now settled that a dedication may be presumed from such circumstances as indicate assent of the owner of the soil. *Woodyer* v. *Haddon*, 5 Taunt. 137; *Cincinnati* v. *White*, 6 Peters, 431; *Livingston* v. *Mayor of New York*, 8 Wend. 85; *Wyman* v. *Mayor of New York*, 11 Wend. 486, opinion by Senator Sherman; *Hunter* v. *Trustees of Sandy Hill*, 6 Hill, 407; *Hobbs* v. *Lowell*, 19 Pick. 405; *State* v. *Marble*, 4 Iredell, 405; 3 Kent's Com. 431 and 451, (6th ed.); *Trustees of Watertown* v. *Cowen*, 4 Paige, C. R. 410. We have seen that the proprietors, in the year 1829, laid out certain land in the city of Bangor into lots and streets; that they caused a plan to be made of the survey and recorded in the Registry of Deeds; that in 1829 they built the streets designated upon the plan, and opened them to public use; and in 1832 conveyed the lot now owned by the defendant, bounding it on Centre street. Can a case be imagined where dedication is more fully and satisfactorily proved?

C. J. Parker, in the case of *Hobbs* v. *Lowell*, says, "the fitness and utility of the doctrine of dedication are recognized as peculiarly applicable to this country, where, in most of the cities, thickly settled towns, and villages so rapidly springing up, the right of the public to the streets and highways, rests almost invariably upon this foundation."

In the case now on trial, the proprietors built the street, and when selling, bounded the lots upon it. The street was held out as an inducement for people to purchase the lots. The inference is clear that the proprietors intended to dedicate the street to the public use.

But even if Centre street were a private way, the effect of the conveyance is precisely the same as though it were a public way. Why is it that the conveyance of land bounded on a public highway is held to carry with it, as parcel of the grant, the fee to the centre of the road? Because the law presumes, that the grantor does not intend to retain his interest in the road after parting with all his title to the adjoining land. The ownership of the fee can be of no advantage to him, and is of vast benefit to his grantee. Apply this reasoning to the case before the Court. Can it be presumed that the proprietors, after laying out and building streets, intended to reserve to themselves the fee of the streets, when they parted with all their interest in the adjoining land. The streets could never be shut up by them and they could have at most but a nominal interest. The inference of law is as strong and absolute in the one case as in the other. 4 Cowen, 543; 8 Wend. 85.

The defendant then owning the fee where the aqueduct was laid in front of his house, and the plaintiffs having shown no rights or easements there, he had the right to remove or cut the pipe at his pleasure.

Rowe and *Bartlett*, for the plaintiffs.

SHEPLEY, C. J. — An aqueduct, owned by the plaintiffs appears to have passed through a street, formerly called Centre street, in front of the defendant's dwellinghouse, nearer to it than the centre of the street, and about six feet below the surface of the earth.

A lot of land numbered seventeen, a part of which constitutes the defendant's house lot, was conveyed by the owners to Elliott Valentine, on September 28, 1832, bounded "southerly on Centre street, there measuring 120 feet," "as the same

is laid down on a plan drawn by Zebulon Bradley, in December, 1829." The title of the defendant is derived from Valentine.

The owners of land, including this lot, caused Bradley to draw a plan thereof in December, 1829, and to designate upon it building lots and streets. They soon afterwards caused Centre street to be prepared for use as a street or way.

As the law has been established in this State, when land conveyed is bounded on a highway, it extends to the centre of the highway; where it is bounded on a street or way existing only by designation on a plan, or as marked upon the earth, it does not extend to the centre of such way.

The occasion of such difference in effect may be ascertained. The owner of land, who has caused it to be surveyed and designated as containing lots and streets, may not be able to dispose of the lots as he anticipated, and he may appropriate the land to other uses; or he may change the arrangement of his lots and streets to promote his own interest, or the public convenience in case the streets should become highways. He does not by the conveyance of a lot bounded on such a way hold out any intimation to the purchaser, that he is entitled to the use of a highway to be kept in repair, not at his own, but at the public expense, for the common use of all. While he does by an implied covenant assure to him the use of such designated way in the condition in which it may be found, or made at his own expense. By a repurchase of that title, the former owner would be entitled to close up such way, as he would also by obtaining a release of the right of way.

There is no indication in such cases of an intention on the part of the grantor to dispose of any more of his estate than is included by the description, with a right of way for its convenient use.

When a lot conveyed is bounded on a highway expected to be permanent, the intention to have it extend to the centre of it is inferred, (among other reasons noticed by this Court in former cases,) from the consideration that the vendor does not

convey or assure to the vendee a right of way, the law affording him in common with others a more permanent and safe public way, to be kept in repair at the public expense. The vendor not being burdened by an implied covenant, that the vendee shall have a right of way, has no occasion to retain the fee of the highway for that purpose. Hence arises one motive inducing him to convey all the rights, which he can convey to land covered by the highway.

In argument for the defendant it is insisted, that Centre street at the time of the conveyance had become a highway by dedication of the owners of the land.

It might be sufficient to observe, that such a position does not appear to have been presented at the trial, for decision by the jury or for instruction by the Court.

Without insisting upon this, the testimony presented in the bill of exceptions does not sustain the position.

If an owner of land should cause it to be surveyed into lots and streets, and a plan thereof to be made, and should also cause the streets to be made convenient for use, and continue to keep the land enclosed as his own property, it would not be contended, that a dedication of it to the public could be inferred from these acts. There must be some act of the owner, from which it can be clearly inferred, that he intended to surrender it for public use, and not for the use of certain persons only. The simple facts, that a person pursued such a course respecting his land, and that he opened a way for the use of a purchaser of a lot, would not, alone considered, authorize an inference that it was dedicated to the public for common use. There should be some evidence, that it was generally used with his knowledge, as public convenience might require, to authorize such a conclusion. Nor could the owner compel the public to accept and adopt such streets as highways. There should be evidence that they had been commonly used to authorize an inference, that they had been accepted as public ways.

In this case, there is not only no evidence that Centre street at the time of the conveyance of the defendant's lot to Valen-

tine had been used as a public way, but there is evidence, that it was not kept in repair, and that part of it only is used as a street. *Exceptions overruled,*

and judgment on the verdict.

BANCHER *versus* FISK.

A discharge, obtained under the insolvency laws of Massachusetts by a debtor, resident in that State, is not a bar to the recovery of a debt due from him to a person who was never a resident of that State, or to a person who, at the time of becoming a creditor, was not, and has not since been a resident there.

ON REPORT from *Nisi Prius*, TENNEY, J. presiding.

ASSUMPSIT by the indorsee against the maker of a promissory note.

WELLS, J. — The note in suit had its origin in Boston, and was given by the maker to John Bancher for merchandize. It is not stated in the case, that he was then a citizen of Boston, but it is assumed to be so in the argument. He transferred the note to the plaintiff before its maturity, and before the commencement of the defendant's proceedings in insolvency, and while the plaintiff was a citizen either of New York or New Hampshire. It was payable to the defendant's own order, and having been indorsed by him, the title to it would pass afterwards as well by delivery as by indorsement.

The Supreme Court of the United States have decided, that a discharge under the insolvent laws of the State, where the contract was made, will not operate as a discharge of any contracts, except such as are made between citizens of the same State. This conclusion was drawn from the construction given by that court to the constitution of the United States. The discharge, therefore, can have no effect upon a contract made with a citizen of another State. *Ogden* v. *Saunders*, 12 Wheat. 213. Story's Confl. of Laws, sect. 341; *Towne*

& al. v. *Smith*, 1 Wood. & Minot, 115. The Supreme Court of Massachusetts have followed the decisions of the Supreme Court of the United States, regarding them as paramount authority on all questions, that involve the construction of the constitution of the United States. *Betts* v. *Bagley*, 12 Pick. 572; *Woodbridge* v. *Allen*, 12 Metc. 470; *Brigham* v. *Henderson*, 1 Cush. 430. It has also been decided by that Court, that the maker of a note, by giving it a negotiable character, does contract with whomsoever may be the legal indorsee at the time it becomes payable, to pay the same to him, and that such indorsee, not being a citizen of the State where the discharge is granted, and having obtained a title to the note before an application for the benefit of the insolvent law, is not affected by the discharge. *Baker* v. *Wheaton*, 5 Mass. 509; *Braynard* v. *Marshall*, 8 Pick. 194; *Savoye* v. *Marsh*, 10 Metc. 594. This doctrine, in relation to the immunity of the indorsee from the operation of the insolvent laws in such cases, has been questioned by Judge Story in his Commentaries on the Conflict of Laws, sect. 343, *& seq.*, and also in his Treatise on Bills of Exchange, sect. 158. But it appears to have been adopted, in reference to the ground of the decisions of the Supreme Court of the United States, that insolvent laws can act only upon citizens of the State where the contract is made. And as by the indorsement, in conformity to the nature of the agreement, the maker becomes the debtor of the indorsee, a contract exists between them, and when the indorsee is a citizen of another State at the time of the indorsement, it seems to follow legitimately, that he is not affected by the discharge. But however this may be, courts of other States ought not to allow a greater effect to the insolvent laws of Massachusetts, than what is given to them by its own tribunals. According to its decisions, the plaintiff not being a citizen of that State when the debt accrued to him, the discharge subsequently obtained cannot prevent his recovery.

The discharge in bankruptcy, upon which the decision in the case of *Very* v. *McHenry*, cited in argument, was found-

ed, was obtained in the Province of New Brunswick. The question in that case was one of international law.

According to the agreement of the parties, a default must be entered.

Defendant defaulted.

Blake, for plaintiff.

G. P. Sewall, for defendant.

WHITNEY *versus* LOWELL.

Parol evidence, offered to show that a written *mortgage* of a chattel was intended to constitute a mere *pledge*, is inadmissible.

Though a mortgager of a chattel, by contract with the mortgagee, should be entitled to hold possession till the pay-day of the debt, yet an unconditional sale of it by the mortgager will authorize the mortgagee to take immediate possession.

EXCEPTIONS from the District Court, HATHAWAY, J.

TROVER for a mare.

The plaintiff claims under a mortgage made to him by one Garland to secure a note payable Dec. 1, 1847, which is yet unpaid. The mare was left in possession of Garland, and there was evidence, tending to show that by agreement Garland was to keep the possession until the pay-day of the note should arrive.

Prior to the pay-day, Garland sold the mare unconditionally to the defendant, and in November or December, 1847, the defendant offered to sell her to Bennett, who then took her and kept her for several months on trial. The plaintiff demanded her of the defendant in May, 1848, while she was in the possession of Bennett. The defendant's reply was, that he had sold her, but would get her back and restore her to the plaintiff, and afterwards on the same day he took her to the plaintiff's place and offered her to him.

The defendant offered to prove by parol testimony, that the intention of Garland was, not to convey to the plaintiff a

title to the mare, but only to make her a pledge for the security of the note. This evidence was objected to, and was excluded.

The Judge instructed the jury, *that*, (the note being unpaid,) the plaintiff had sufficient title to maintain the suit; *that*, if Garland had authority from the plaintiff to keep and use the mare till pay-day of the note, yet his sale of her gave to the plaintiff the right to resume the immediate possession; and *that* the defendant's offer to sell her to Bennett was evidence of a conversion by him. The defendant filed exceptions.

Waterhouse, for the defendant.

1. We offered to prove, that it was not a mortgage, but a mere pledge which Garland intended to give. A pledge does not pass the general property. Though good against the pledgor, yet, if the property remain in his hands, it is invalid against purchasers. 2 Kent's Com. 581; 26 Maine, 531.

2. The plaintiff by the contract, was not entitled to the possession, until after a breach of the condition. Till that time and for 60 days afterwards, Garland could lawfully sell the right of redeeming, and so could the defendant. A sale by either would be no conversion. *Vincent* v. *Cornell*, 13 Pick. 294.

3. The defendant's possession being rightful, there was no conversion. A mere offer to sell is not a conversion. "A mere purchase, in good faith, from one who has no right to sell, is not a conversion against the rightful owner, until his title is made known and resisted." 2 Greenl. Ev. sect. 642 and 644; 1 Fairf. 310; 18 Maine, 382.

C. P. Brown, for the plaintiff.

WELLS, J., orally.

The instrument was a mortgage in the regular and usual form. Parol evidence was offered, to show that it was designed to be merely a pledge, and thereby control the written contract. Such evidence was clearly inadmissible.

The unconditional sale by Garland, though prior to the pay-day of the note, was a violation of the trust reposed in him

by the plaintiff; and gave to the plaintiff an instant right to reclaim the possession.

The instruction was that the sale or offer to sell by the defendant was evidence of a conversion. That fact when taken in connection with the proof of the demand and the non-delivery, constituted sufficient evidence of a conversion.

Exceptions overruled.

WHITE *& ux. versus* DWINEL.

An heir, claiming real estate under a deed to his ancestor, cannot prove the *genuineness* of such deed by the mere production of an office copy, although the persons, purporting, by the copy, to have been the parties and the subscribing witnesses and the register, are all dead.

ON REPORT from *Nisi Prius*, TENNEY, J.

WRIT OF ENTRY.

Mrs. White, one of these plaintiffs, is the sole heir-at-law of James Webster, under whom she claims, by inheritance, the land in controversy. The demandants allege that it was conveyed by Daniel Webster to said James, by a deed, executed and recorded in 1809. They produced an office copy of such a deed, and it purported to have been witnessed by three persons, and to have been recorded by B. Hall, register. The original deed is not in the registry.

The demandants filed their own affidavits, to the effect that the original deed is not to be found.

The parties and the subscribing witnesses to the supposed deed, and the said register, are all dead.

The demandants offered the office copy in evidence, but it was excluded. A nonsuit was then ordered, which, by agreement, is to be taken off, if the copy was admissible.

Fessenden, for the demandants.

The original deed with proof of its execution would doubtless have been the highest evidence. But, in this case, the best attainable evidence was the very copy which the Judge excluded.

This Court, under statute authority to establish rules, not repugnant to the laws of the State, have ordained that office copies may be used, except by grantees and their heirs. This proves that the reception of office copies is not repugnant to the laws of the State. It shows that by law such copies are evidence. For that Court could not, by one of its rules, make that evidence which the law had prohibited. And, in principle, there is no difference whether such evidence be offered by a grantee or any purchaser under him.

But we submit that an office copy, as an effect of the public registry, should be competent as evidence of a genuine original. Such a record places it above the presumption of forgery.

Rowe and *Bartlett*, for the tenant.

The demandants' case rests upon the fact, set up by them, that a genuine deed once existed.

They fail to prove it.

A *sworn* copy of a paper proves, at most, the existence of the original, and not its genuineness.

An *office* copy stops one step short of this. It purports to be but a copy of a copy. *Kimball* v. *Morrill*, 4 Greenl. 368.

The case of *Hewes* v. *Wiswall*, 8 Maine, 94, has gone the farthest in the admission of an office copy; and in that case, proof of the existence of the original, by persons who had seen it, was required before the copy was admitted.

WELLS, J., orally. —

An office copy is not evidence that a paper, of which it is a transcript, was a genuine paper.

The demandants claim by inheritance from the grantee in the supposed deed. The rule of the Court, allowing office copies, touching the realty, does not authorize the use of a copy by the heirs of a grantee.

There is then no competent evidence that a deed from Daniel Webster to James Webster ever had an existence.

Nonsuit confirmed.

WHITE *versus* SAYWARD *& al.*

In an action against the editor of a newspaper for a libelous publication, it is admissible for the plaintiff to show articles, in subsequent numbers of the same paper, for the purpose of proving that the plaintiff was the person intended to be defamed.

Testimony of witnesses is not receivable to show that, on reading the libelous article, they considered the plaintiff as the person intended to be defamed.

ON EXCEPTIONS from *Nisi Prius*, TENNEY, J. presiding.

CASE, for libel.

The plaintiff is one of the firm of Thomas A. White & Co., consisting of himself and James White, traders in Bangor. The plaintiff proved, *that* on May 7th, the firm inserted in a newspaper, published in Bangor, the following advertisement: —

"BOY WANTED. — An honest and industrious young man, who is willing to give his whole attention to business, can have a good situation, on application to the subscribers. None need apply, except those who can bring the best of recommendations. Thomas A. White & Co.;" —

that, on the next day the following article, which is the libel complained of, appeared in the Daily Whig and Courier, edited by the defendants, and published in the same city, viz.: —

"WARNING TO BOYS. — 'An honest and industrious young man, who is willing to give his whole attention to business,' had better think twice before going into that store, where the clerks are treated as much worse than the truck horses in the streets, as it is possible for the imagination to conceive.

"There are some stores, where, if the clerks leave by reason of such treatment as would disgrace a Mississippi slave driver, the keeper does not hesitate to break down the character of the young man, by cowardly insinuating something against his honesty, and basely misrepresenting his business qualifications." —

that on the 14th of May, there was published in the defend-

ants' paper an article adverting to this suit, (which was commenced on May 12,) and stating that the author of the article was able to respond to the defendants, and that the plaintiff 's damage would not exceed a single mill, federal money ; —

and *that* on the 15th May there was published in the defendants' paper an article, adverting to some rumor respecting a lawsuit for a libel in Canada.

To the admission of the two last named articles in evidence, the defendants objected, but they were received.

The plaintiff offered several witnesses to prove that, on reading the article, alleged to be libelous, they understood it to apply to the firm of Thomas A. White & Co. This testimony, though objected to, was received, and they testified accordingly.

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

J. A. Peters, for the plaintiff.

Sanborn, for the defendants.

TENNEY, J. — In the argument, the counsel for the defendants attempt to sustain their exceptions on two grounds only.

1. Were the articles published by the defendants in the Whig and Courier, on May 14 and 15, 1849, admissible in evidence? Decisions are relied upon as sustaining each side of this question. In some cases, when such evidence has been pronounced inadmissible, the exclusion was upon the ground, that the subsequent charge was entirely a distinct matter from that which was the cause of action in the suit, and might be the foundation of an action itself. *Bodwell* v. *Swan*, 3 Pick. 376; *Watson & ux.* v. *Moore*, 2 Cush. 133. In other cases the evidence was held to be competent, to show the intention of the party, if it were at all equivocal in the publication, charged as libelous, but was not allowed merely for the purpose of enhancing damages. *Stuart* v. *Lovell*, 2 Stark. 93. The case of *Chubb* v. *Westley*, 6 Car. and P. 436, was similar. The plaintiff was permitted to read certain remarks in the same journal, in which the alleged libel was published,

made from month to month on the subject of the libel and the parties who were supposed to be concerned in the actions for it. The Court considered them admissible as showing the motive of the defendant, *quo animo* the former libels were published, and also as showing that the defendants themselves considered those libels as applying to the plaintiff. Similar evidence was admitted in *Bodwell* v. *Swan*, before referred to, for the purpose of showing malice, but the Court confined the evidence to such as were a repetition of the words on account of which the action was brought, or words of similar import, but would not allow a distinct calumny to be admitted. The case of *Watson & ux.* v. *Moore*, confirms the principle of *Bodwell* v. *Swan*, in adhering rigidly to the restriction therein declared, and further than that, the facts of the case did not require an examination of the principles therein announced. The doctrine of allowing subsequent publications repeating the matter of the former, or words of similar import, was affirmed in the case of *Smith & ux.* v. *Wyman*, 16 Maine, 13.

In order to recover in a suit for a libel, the plaintiff therein must satisfy the jury, that he was intended in the publication, and any subsequent article admitting that fact or tending to show it to be true is admissible. And if the defendant can introduce evidence suited to rebut the presumption of malice arising from the terms used in the publication, it is certainly competent for the plaintiff to counteract the effect of such evidence, by facts, having a contrary tendency.

If subsequent publications were to be entirely excluded great injustice might take place. It would be in the power of a party to so frame an article published, in reference to the person intended to be affected, that although it might be perfectly understood in the neighborhood of the one supposed to be accused, that he was referred to, and still be attended with great difficulty, if an attempt should be made to satisfy a jury upon that point. And the article may have been published under such circumstances, and in such terms, that it may be supposed that he was influenced by none but pure motives

and a sincere desire to prevent an imposition upon the public and individuals. Subsequent publications, made at a time when the author was less cautious, not libelous in themselves so much, as containing a reference to a former article, complained of, explanatory of the meaning, and exhibiting the motives and designs of the publisher, would be pertinent.

The article in the paper published the 14th of May, refers to the suit, which the plaintiff had instituted against the defendants. There is no assertion that he had fallen into an error in assuming that he was intended, but the jury would be authorized to infer, that the defendants intended to admit it. And instead of asserting a justifiable motive in the publication, they rely upon the author for their indemnity, and the opinion that the plaintiff will not be injured beyond the tenth part of a cent. The article of the 15th of May, has no direct reference to the publication on the 8th of May, but being the next day succeeding the second, wherein the former was referred to, and on a subject kindred to it, it might be regarded by the jury as having an important bearing upon the questions before them. It was headed "In luck," which would seem without meaning, if it was intended to be nothing more than a piece of newspaper information. It does not purport to be an extract from, or the substance of any article published in another paper, but merely a rumor, that an editor in Canada had found himself in a situation somewhat similar to the one which the defendants had announced the day before they were in. This was followed by a statement, that the editors were satisfied of their security from injury, by the supposed difficulty in *proving* that the one who had commenced his suit was intended; and by the assumption that he was intended, there was proof that he was guilty of the charge. Those publications of the 14th and 15th of May, we think might tend to show the two propositions; that the plaintiff was referred to in the one of the 8th of May; and that the motives of the defendants were not such as to relieve them from the charge of malice, and the existence of it, implied in the arti-

cle itself; and the evidence was properly submitted to the jury.

2. The plaintiff introduced witnesses, though objected to, who testified, that they understood, that he was referred to in the article published on May 8, 1849. According to 2 Stark. 861, this evidence was competent. It is there stated in the text, "the colloquium and other averments, which connect the words or libel with the plaintiff or subject-matter before stated must be proved. This is usually done by the testimony of one or more witnesses, who knew the parties and circumstances, and who state their opinion and judgment as to the intention of the defendant, to apply his words or libel to the parties or circumstances as alleged." Mr. Greenleaf's treatise, 2d vol. sect. 417, contains the statement of a similar doctrine.

It is very clear, that the rule laid down by the two learned authors referred to, is an exception to the great principle, which is generally applicable to evidence. Witnesses are confined to the statement of facts and circumstances, leaving the inferences and conclusions to be drawn by the jury. It is an elementary doctrine in the law of evidence, that the understanding and opinions of witnesses are not to be received, except in matters of science and a few other special cases resting upon peculiar circumstances.

In *Van Vechten* v. *Hopkins*, 5 Johns. 211, it is said by the Court, "The intention of the defendant is not the subject of proof by witnesses, in the way here attempted. It is the mere opinion of the witness, which cannot and ought not to have any influence upon the verdict. I consider the evidence as inadmissible, because it goes to prove the correctness of an *inuendo*. This kind of evidence, I know has frequently, though I think erroneously, been admitted at *nisi prius*. SOUTHERLAND, J. in giving the opinon of the Court, in the case of *Gibson* v. *Williams*, 4 Wend. 320, referring to the doctrine of Mr. Starkie, contained in the citation made, says, "Mr. Starkie cites no case as authority in support of these positions, and it is believed that none can be found;

nor is the doctrine asserted, so far as I have been able to discover, by any other writer upon the law of libel or the rules of evidence."

In looking into the authorities referred to, Mr. Greenleaf 's treatise, which was published long after the decision of the case last cited, they certainly have but a very remote bearing upon the question, and are very far from supporting the doctrine of the text. *Maynard* v. *Beardsley*, 7 Wend. 560. In the case of *Snell* v. *Snow*, 13 Metc. 278; the Court of Massachusetts treat the evidence as entirely inadmissible.

We cannot regard such testimony of witnesses, an exception to the general rule of evidence, and it was erroneously allowed to go to the jury. Upon this point

Exceptions sustained and new trial granted.

KITTRIDGE *versus* MCLAUGHLIN.

The sale of a bankrupt's right in real estate, made by his assignee in bankruptcy, conveys only the right in law and equity which the *bankrupt* had in the land, at the *time* of the filing of his *petition* to be decreed a bankrupt.

A right which, after the filing of a petition to be decreed a bankrupt, may be yielded to the bankrupt by the waiver of a previous forfeiture, does not pass by the sale in bankruptcy.

If a bankrupt, since his application in bankruptcy, have purchased an equity of redeeming mortgaged land, the mortgagee, (though he have also bought the bankrupt's right to the land by a sale in bankruptcy,) cannot bar the bankrupt's right to redeem, by merely showing that, at the time of such application, the bankrupt had a conditional bond for a conveyance to him of the equity, *unless* the *mortgagee* shall have performed the condition of the bond.

Before such purchaser from the assignee in bankruptcy can be treated as the owner of the right of redemption, he must have established the right by a suit in equity, in which all opposing interests had opportunity to be examined.

BILL IN EQUITY, to redeem mortgaged land.

Kittridge, the plaintiff, in 1835, mortgaged the land to one

Benjamin, whose right, by a regular train of conveyances, became vested in the defendant.

An entry to foreclose was made July 20, 1846.

Kittridge, July 14, 1849, requested of the defendant an account of the sum due, and of the rents and profits. That account was rendered, July 18, 1849, accompained by a written statement, that the defendant recognized no right in the plaintiff to redeem, but claimed that the right of redeeming belonged to himself alone.

Kittridge, on the same 18th July, 1849, tendered to the defendant $425, and now brings this bill to redeem against the mortgage. The defendant, to show that the right of redeeming was not in Kittridge, but in himself, proved that Kittridge was decreed to be a bankrupt, on his own petition filed March 10, 1842, and that Kittridge's assignee, in 1846, conveyed the bankrupt's right to this defendant, wherefore the defendant denies that the plaintiff has any right to redeem.

The plaintiff contends, that notwithstanding his bankruptcy and the said sale made by his assignee, he is still entitled to redeem; upon the ground that, at the date of his petition in bankruptcy, all his right of redeeming had been taken from him and sold on execution, and that he afterwards, by purchase, became the owner of that right.

To establish this position he proved, *that* his said equity was sold and conveyed on execution against him to George Wheelwright, and that the year allowed to redeem against that sale had expired before the petition in bankruptcy; *that*, in 1844, Wheelwright conveyed the same to Tasker, and *that* Tasker conveyed the same to the plaintiff, one half of it in 1845, and the other on July 8, 1846.

Of these facts, thus exhibiting an apparent right in the plaintiff to redeem, the defendant undertook to dislodge the effect, by showing that at the time of the petition in bankruptcy, the right of redeeming was held merely in trust for the plaintiff, and that the conveyances of 1845 and 1846, were the mere execution of that trust.

For this purpose, the defendant introduced evidence, the character and effect of which are presented in the opinion given by the Court.

Rowe, for the plaintiff.

Peters, for the defendant.

SHEPLEY, C. J. — The plaintiff seeks a decree for the redemption of an estate mortgaged by him to David Benjamin on April 17, 1835. The defendant is the assignee of that mortgage. An entry for condition broken was made on July 20, 1846. The plaintiff, on July 14, 1849, requested an account of rents, profits and expenditures, which was presented by the defendant, on July 18, 1849, with a denial of the plaintiff's right to redeem, and a claim to be the absolute owner of the whole estate. On the day last named the bill alleges, that a tender was made of a certain sum to redeem the estate, which does not appear to be contested.

The plaintiff's equity of redemption was seized on an execution in favor of George Wheelwright, and was sold and conveyed to him on December 28, 1839; and on December 29, 1840, he executed a bond obliging himself to convey to Parsons and Tasker all his title to the estate upon payment within one year, of a certain sum named. The bond contained a stipulation, that if any part of that sum was paid within the year, the time for payment of the residue should be so extended as to give an average of one year's time for the payment of the whole sum; but this is unimportant, for the testimony does not show, that any part was paid within the year.

Wheelwright conveyed his title to Tasker, on July 25, 1844, and Tasker conveyed the same to the plaintiff, part on May 7, 1845, and the remainder on July 8, 1846.

The answer alleges, that Parsons and Tasker took the bond of Wheelwright, in trust for the plaintiff, who was the real party entitled to purchase, and whose right passed to his assignee in bankruptcy; and that it was by his assignee sold and conveyed to the defendant on November 8, 1846.

The question is therefore presented, whether the plaintiff or the defendant is the owner of the equity of redemption.

The right to have a conveyance from Wheelwright on payment of the amount named in the bond, would cease on December 29, 1841. Joseph S. Wheelwright testifies, that he heard several conversations between his father and the plaintiff, and between his father and Tasker, respecting the bond and land, but he does not with any degree of certainty determine, that any one of those conversations took place earlier than during the winter of 1843–4. He thinks that some of them did, but he does not fix upon any time, nor does he state what the conversations were, if any such did take place. During that winter, he says, "there was a reference made to the bond having been forfeited, and that having remained so a long time my father wished the matter closed up." He says, that his father at another time stated to him, that he had told the plaintiff, that he should never take advantage of him. If this were received as testimony, it would not prove, that he had so stated to him before he had filed his petition to be declared a bankrupt; but between these parties it is not legal testimony, and it must be excluded.

There is testimony to prove that the plaintiff exercised acts of ownership on the land, and that he spoke of it as his own. The proof, however, fails to show, that he had any legal or equitable title or interest in it, which could have been enforced at law or in equity, when his petition in bankruptcy was filed on March 10, 1842, or that Parsons and Tasker had.

The legal and equitable interests, which the bankrupt had at that time, passed to his assignee. Such as he might afterward acquire by the favor of another, by the waiver of a forfeiture, would not pass to the assignee. Whatever claims the creditors of the bankrupt might have to such property or rights by a subsequent waiver of the forfeiture operating to reestablish the original right, none could pass to the assignee before any such waiver had been made. The defendant, not appearing to be a creditor of the plaintiff, cannot assume that character to resist his title. *Baker* v. *Vining*, 30 Maine, 121.

This is not the only difficulty which the defendant must overcome to establish his title to the equity of redemption. If the plaintiff was the owner of the right to purchase from Wheelwright, and if that right passed to his assignee, and was sold and conveyed to the defendant, he would thereby acquire only the right to have a conveyance upon performance of the condition of the bond. Before he could become the owner of the land subject to the mortgage, he must by a suit in equity, in which all opposing interests could be examined, obtain a conveyance of it. Now at best, he has but a right to have a conveyance upon proof of performance. If Wheelwright had conveyed the title to others, all interested must be made parties to such a suit, to have a decision upon their rights. If he could have in this manner acquired a title from the plaintiff he has not done it, and cannot now, without a cross bill filed for that purpose, interpose a mere contested right to a conveyance, to have the effect of a title virtually acquired, and superior to that of the plaintiff.

A decree may be entered, that the plaintiff is entitled to redeem, that ——— is appointed master, to take an account of the amount due upon the mortgage, and that the case is reserved for further proceedings, until the master's report is presented.

McGurn *versus* Brackett.

Of what may constitute probable cause for a criminal prosecution.

On Exceptions from *Nisi Prius*, Shepley, C. J. presiding.

The defendant had instituted a prosecution against the plaintiff, for a crime, which in fact had not been committed by any one. Defendant insisted that he had probable cause for the prosecution. Witnesses were examined on both sides. The verdict was for the defendant; and the plaintiff filed exceptions.

Sanborn, for the plaintiff.

A. Waterhouse, for the defendant.

HOWARD, J. — Exceptions were taken to the "refusals of the Court to rule as requested," but not to the instructions given to the jury. The instructions, therefore, will be regarded as correct.

The first request was granted, but the second was refused in the terms in which it was made, and given with qualifications. The request was, that the Court would instruct the jury "that *probable cause* is a reasonable ground of suspicion, supported by circumstances and facts, sufficiently strong in themselves, to warrant an impartial, cautious, and reasonable mind in the belief that the person accused is guilty of the offence with which he is charged." But the instructions were, that the elements of probable cause, embraced in the request, should be such as to warrant an impartial and reasonable mind, *in the exercise of ordinary care and caution,* in the belief of the guilt of the accused. The qualification would seem to be appropriate, so long as minds of the description mentioned may be uncertain and variable in their conclusions. It is not what might be, but what ordinarily would be the conclusion of such minds, in the exercise of ordinary care and caution, under like circumstances, which furnishes the rule in such cases.

The third requested instruction was, "that if one person rashly and hastily causes the arrest and prosecution of another for a crime, which has not been committed, and which, by the use of proper deliberation, care and inquiry, he could have ascertained had not been committed, the assurance of the former, however strong, that the latter was guilty, is not sufficient evidence of the probable cause."

One may "rashly and hastily cause the arrest and prosecution of another, for a crime which has not been committed, and which by the use of proper deliberation, care and inquiry, he could have ascertained had not been committed," and yet have probable cause for the prosecution. He may have been induced to prosecute by the wilful misconduct, or the procure-

ment of the supposed offender; and if he proceeded with ordinary care and prudence, and without malice, he is not responsible, as for the want of probable cause, if he did not use proper or sufficient deliberation. If deliberation, inquiry, and care were required, it would be only such as persons of ordinary care and prudence would use under like circumstances. This request was properly refused.

The fourth requested instruction was, "that malice is not necessarily a grudge against an individual, but that a want of due care and a reckless design to accomplish an object, regardless of the rights of others, may constitute malice."

"The want of due care and a reckless design to accomplish an object, regardless of the rights of others," do not necessarily constitute malice. They may be consistent with an honest purpose, and the kindest and purest intentions. Besides, the presiding Judge might well decline to instruct the jury on general propositions stated by counsel, which assume a state of facts that may have been contested, or which may not have constituted a part of the case. It does not appear that this request should have been granted, or that the cause required other instructions than those given.

The exceptions are overruled.

TORREY *versus* CORLISS.

A contract, legally made in another State, may be enforced in this State, although a similar contract, if made in this State, would have been illegal.

A statute is not to have a retroactive effect, unless it clearly express that intention.

The Act of 1851, chap. 211, "to suppress drinking houses and tippling shops," does not contain any such clearly expressed intention, and its operation can be *prospective* only.

ASSUMPSIT, upon two promissory notes and upon two accounts.

The plaintiff resided in Boston, and was a dealer in spirit-

uous liquors and groceries, and used to furnish such goods to the defendant, who resided in Bangor, and who there sold such liquors, without any license. The plaintiff, when occasionally at Bangor, several times told the defendant that, on receiving orders for goods, he would supply and forward them. Accordingly the defendant several times sent orders, and the goods were forwarded. In August and also in November, 1847, they settled the accounts, and the defendant, at each of those settlements, gave his note for a balance. The settlements were made and the notes given in Boston. A part of the consideration of each note was spirituous liquor. These are the notes now in suit.

In November, 1847, the plaintiff delivered some other goods, of the same sort, on account, to the defendant in person at Boston, and in February, 1848, a further account of the same kind had accrued.

These are the two accounts now in suit. They each contained some items of credit.

The case was submitted to the Court for such disposition as the law should require, with power to draw inferences of fact.

Blake, for the plaintiff.

Sanborn, for the defendant.

1. The sale was injurious to the people and to the interest of the State. Such contracts are not to be enforced. Story's Confl. of Laws, sect. 244, 252, 348—351; *Greenwood* v. *Curtis*, 6 Mass. 376; *Blanchard* v. *Russell*, 13 Mass. 1, 6; *Prentiss* v. *Sawyer*, 13 Mass. 22, 24.

2. The sale was against good morals. *Ex turpi causa non oritur actio.* Story's Confl. of Laws, sect. 244, 245; *Armstrong* v. *Toler*, 21 Wheat. 358, 360. Plaintiff knew the defendant bought the liquor to be sold to citizens of Maine.

3. Plaintiff knew the defendant had no license, and thus, purposely furnished him the means of transgressing the laws of this State. Story on Confl. of Laws, sect. 253, p. 379; *Lightfoot* v. *Tenant*, 1 Bos. & Pul. 351, 356; *Langton* v.

Hughes, 1 Maule & Selw. 593; *Canaan* v. *Brice*, 3 Barn. & Adolph. 179, 181; *Catlin* v. *Bell*, 4 Campb. 183; *Terrill* v. *Bartlett*, 21 Verm. 184; *Case* v. *Ricker*, 10 Verm. 282.

4. The action is barred by the statute of 1851, for the suppression of drinking houses and tippling shops. Chap. 211, sect. 16. This statute was clearly intended to act retrospectively, and to affect actions pending, as well as future actions. Sect. 16 and 18. *Hastings* v. *Lane*, 15 Maine, 134; *Thayer & al.* v. *Seavey*, 11 Maine, 284; *Whitman* v. *Hapgood*, 17 Mass. 464; *Oriental Bank* v. *Freeze*, 18 Maine, 109; *Satterlee* v. *Matthewson*, 1 Peters, 413; *Watson* v. *Mercer*, 8 Peters, 110; *Bennett* v. *Boggs*, 1 Bald. 74; *Charles River Bridge* v. *Warren Bridge*, 11 Peters, 420.

The gentleman speaks of the Act of 1851, as unconstitutional. But it is not so. It disturbs no vested rights of the plaintiff. He never had a right to recover for the liquors in this State. It impairs no obligation of a contract. It only changes the remedy from the Courts of this State to those of Massachusetts, or of the United States.

5. No recovery can be had by the plaintiff, because the liquors were sold to the defendant, not in Boston, but in Bangor. They were ordered by the defendant at and from Bangor, without any direction by whom they should be sent, and the plaintiff shipped them upon that order. The sale then was not completed, till they were delivered to the defendant at Bangor. 2 Kent's Com. sect. 39, p. 500; *Terrill* v. *Bartlett*, 21 Verm. 184; *Case* v. *Ricker*, 10 Verm. 282; Story on Confl. of Laws, sect. 252.

For these liquors sold by plaintiff, and delivered to defendant at Bangor he cannot recover, nor can he maintain this action on the accounts in which the liquors are charged, though they contain other articles of merchandize. See Laws of Maine, 1846, chap. 205, sect. 10.

Large payments have been made by defendant to plaintiff, and these should be appropriated towards payment for the other articles of merchandize, which the plaintiff had a lawful right to furnish.

SHEPLEY, C. J. — It appears from the agreed statement and the documents referred to, that the notes were made in part payment for bills of goods containing more or less of spirituous liquors, and the accounts contain goods of a like character.

The testimony does not prove, that any of the goods were sold in this State. It only shows, that the plaintiff offered to sell, whenever application was made to him by the defendant.

When a purchaser orders goods to be sent to him, a delivery to a person named or to a common carrier authorized to receive them for his use is a delivery to him, and the sale and purchase is completed. *Barry* v. *Palmer*, 19 Maine, 303; *Wing* v. *Clark*, 24 Maine, 366.

These goods were sold in Massachusetts, and there is no proof, that the sale was not legal by the laws of that State.

There is proof, that the defendant was a dealer in spirituous liquors and other goods in Bangor without license. There is no proof, that the plaintiff knew, that he had no license, or that the liquors were purchased to be sold in violation of the laws of this State, although he knew, that the defendant was a dealer in spirituous liquors.

The contracts having been legally made in the State of Massachusetts may be enforced in this State, where by its laws it would have been illegal. *Holman* v. *Johnson*, Cowp. 341; *Hodgson* v. *Temple*, 5 Taun. 181; *McIntire* v. *Parks*, 3 Metc. 207.

The Act of June 2, 1851, passed while this action was pending, contains the following provision. — "And no action of any kind shall be maintained in any Court in this State, either in whole or in part for intoxicating or spirituous liquors sold in any other State or country whatever, nor shall any action of any kind be had or maintained in any Court in this State for the recovery or possession of intoxicating or spirituous liquors or the value thereof."

Statutes are not to be construed to have a retrospective effect, unless the intention to have them so operate is clearly expressed. *Hastings* v. *Lane*, 15 Maine, 134.

There can be no doubt, that most of the provisions of that Act were not intended to act retrospectively. When words which, if disconnected from the context, might be suited to operate retrospectively, are found in a section, the general provisions of which are clearly prospective, such words should be considered as partaking of the general character of the enactment, unless a different purpose be disclosed. There is nothing in the Act indicating, that all its provisions were not intended to operate prospectively.

Before its passage the sale of intoxicating liquors in this State by license was legal; and if the provisions alluded to were construed to have a retrospective operation, it would prevent the maintenance of any action for such liquors or their value, when they had by our laws been legally sold and delivered. An intention to punish a person for having acted legally at the time is not to be imputed to a legislative body, unless it be very clearly expressed.

Defendant defaulted.

Carle *versus* Bearce.

Upon a depositary, with whom money has been lodged, to be paid to a third person, *when the depositor shall have satisfied himself* of a fact connected with the deposit, there rests no duty to inquire whether the fact has occurred.

In a suit against a depositary, to recover a fund lodged with him, to be paid to the plaintiff, when the depositor should have satisfied himself of a fact connected with the deposit, evidence to show that the depositor had declared himself satisfied of the fact, is inadmissible, unless such declaration had been made known to the defendant before the suit.

On Exceptions from *Nisi Prius*, Tenney, J. presiding.

Assumpsit, founded upon the following memorandum, signed by the defendant. "There is deposited in my hands this day $150,00, by R. D. Hill to be paid to John Carle, when said Hill shall have satisfied himself that the fourth part of the schooner Bahama, which said Hill has this day purchased of said Carle, is free from incumbrances."

The plaintiff offered to show by the declarations of Hill, that he was satisfied as to the title. The Judge excluded the evidence.

Prior to the suit, (which was brought ninety-four days after the date of the memorandum,) the plaintiff had demanded the money of the defendant. Evidence was introduced by the plaintiff upon which a nonsuit was ordered. To that order, exceptions were filed. The other facts will sufficiently appear in the decision.

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

The nonsuit was wrongfully ordered.

1. It was not shown or pretended that there was any incumbrance on the plaintiff's quarter of the schooner. Hill was bound to make his inquiries within a reasonable time. If he was allowed to delay *ad libitum*, he might virtually annul the contract. Not to have made his inquiries in a reasonable time, was a waiver of the reservation he had made in the deposit. The law would presume he was satisfied. Such reasonable time had elapsed. 14 Pick. 424; 5 Pick. 425.

If, then, Hill had signed the contract, an action upon it would be maintainable.

2. This suit is equally sustainable. If the title was good, Bearce was bound to pay, after a reasonable time for Hill's inquiries. Otherwise the plaintiff has lost his vessel, and the defendant gains the money. 5 Pick. 425.

Bearce represents Hill, and has no other defence than Hill would have had, if he had signed the contract.

3. There was evidence to satisfy the jury that Hill had found the vessel free from incumbrance.

4. The ascertainment of title by Hill was a matter which Bearce might waive. This he did, when saying "call, and if I find there is no claim on the vessel, I will pay you."

5. The declarations of Hill should have been received as evidence that he had become satisfied. They were to be viewed as admissions, either of the party in interest or of the party referred to in the contract. Hill is the real defendant, or is identified in interest with the defendant. 1 Greenl.

sect. 230, 285; 26 Maine, 117; 8 E. L. C. 240; 8 N. H. 356; 2 Stark. Ev. 42.

McCrillis and *Crosby*, for the defendant.

TENNEY, J. — This action is upon a written agreement signed by the defendant. It does not appear, that he had any other interest in the transaction therein referred to, than to pay a sum of money deposited with him by R. D. Hill, "when said Hill shall have satisfied himself, that the fourth part of the schooner Bahama, which said Hill has this day purchased of said Carle, is free and clear from all incumbrances." He undertook no other duty, than to make payment of the money in such an event; he was under no obligation to ascertain, whether there was an incumbrance or not, or if any claim was set up, to the part of the vessel, which Hill had agreed to take, to determine whether the same was valid in law, or otherwise. It appears, that he was desirous, that the plaintiff should take back the vessel, and that the papers should be exchanged, and thereby free him from all trouble. But this the plaintiff declined to do, insisting that he should hold the defendant responsible. The liability was never admitted by the defendant to be fixed, and this negotiation was ineffectual. An attachment was made upon the plaintiff's supposed interest in the vessel, but whether that superseded the claim of Hill or not, the defendant had not undertaken to decide. There was no evidence introduced in the case, tending to show that the defendant had been informed by Hill or by others, that Hill was satisfied, that the vessel was free and clear from all incumbrances. The event, which was to entitle the plaintiff to the money deposited, not having taken place, the defendant is not liable under the written memorandum.

There is no evidence showing that the right to have the condition fulfilled was waived by the defendant, as is contended in behalf of the plaintiff. The defendant told the plaintiff, when he called for the money in company with Lunt, "call on me on Thursday next, and if I find there is

no claim on the vessel, I will pay you then." Whether the attachment had then been made does not distinctly appear, and it is unimportant. The plaintiff did not call on Thursday; and there is no evidence, that the defendant had found that there was no claim upon the vessel, and this cannot be considered a waiver.

But it is contended, that the evidence offered and not received, was admissible, and was sufficient to authorize the jury to have returned a verdict for the plaintiff. In deciding this question, the evidence is to be supposed to exist precisely as it was represented to be; nothing can be added to it or taken from it. The evidence tendered was, "the admissions of R. D. Hill, that he was satisfied, the vessel was free and clear from all incumbrances." The time when the admissions were made was not stated in the offer. If made after the suit was commenced, on no principle could they affect the defendant. But on the hypothesis that they were made before the action, could they legitimately affect him? He might have been liable to one party or the other under his agreement. Payment to the plaintiff before the condition had happened, would expose the defendant to a claim from Hill, if there was an incumbrance upon the vessel. And a refusal afterwards, would render him liable to the other party. He could not be bound by a state of facts, which he did not know, and which by ordinary attention, he could not know. Hill might say many times, and to various persons, that he was satisfied, that no incumbrance existed upon the property, and still that admission be entirely unknown to the defendant. Such a fact alone could not make the defendant's liability absolute. The admission offered was unaccompanied by the further offer, that the fact was known to the defendant, or that he might have known by ordinary attention to his duty.

Exceptions overruled.

Nonsuit confirmed.

CLEAVES *versus* STOCKWELL AND HAYWARD.

When a party has contracted with another to do a particular work, either at its cost or at a fixed price, a sub-contractor cannot resort to the principal for his compensation, but must look to his immediate employer.

An interrogatory which suggests the answer desired, and is in its form a leading question, propounded to a deponent in his direct examination, and objected to at the time, must, together with its answer, be stricken out.

ASSUMPSIT, on facts agreed, there being no pleadings in the case.

Washburn, for the plaintiff.

A. W. Paine, contra.

HOWARD, J. — The defendants and several others, all separate owners of logs then in the Mattawamkeag waters, agreed in writing, in June, 1849, to appoint a committee, as agents to carry out the views of the meeting, and mutually to sustain them, and pay their expenses, and the money expended, and the liabilities incurred by them, in proportion to the respective interests in the logs. It was further stipulated in the agreement, that the logs of each should be holden, in proportion to his respective interest, to the committee, for all expenses, disbursements and liabilities incurred; and that they should have such lien upon the logs, as is given to those driving logs, by the statute of 1848, chap. 72; and that they should have authority "to assess said logs as they have occasion to use money, and we agree to pay such assessments when called for." Hayward, one of the defendants, Crane and Henderson, all being owners and parties to the agreement, were appointed a committee for the purposes specified. They built a dam and hired men. The plaintiff was one of the men hired by them on the dam. He took a certificate of the amount due him for his labor, signed, "T. E. Crane, for the committee." This suit is brought to recover for that labor.

The principal question presented by the parties is, whether the owners of the logs are liable to the plaintiff, or whether he must look to the committee solely for the payment of his claim.

The plaintiff offered the deposition of Crane, before mentioned, and the question of its admissibility, wholly or partially, is submitted; "the Court to give effect to such facts as are legally admissible, and all facts not admissible, on objection, are to be excluded." It may not be material to determine the question of competency of the deponent, arising from his position as an owner in the logs, or as one of the committee.

The 5th direct interrogatory was this; "Did you hire the men on the credit and responsibility of the parties who signed that paper?" The question was objected to.

The deponent's answer was, "I did." That interrogatory suggested the answer desired, and was therefore *leading*, and must be stricken out together with the answer.

By their agreement in writing, the owners contracted to pay the committee for their expenses, disbursements and liabilities, but did not stipulate to pay, or to be responsible to others; nor do we find any authority, given directly, or by implication, to the committee to bind the owners, or to accomplish the work upon their credit or responsibility.

There is no evidence that the committee ever undertook to make the owners responsible, or that they assumed to have authority for that purpose. Nor does it appear that the plaintiff rendered his services to the owners, or upon their credit; or that he understood the relation between them and the committee, in making his contract, or performing his labor. Nothing appears in the case indicating that the claim is not valid against the committee, or that they avoid or refuse payment.

Though the committee may be regarded as special agents of the owners, for a particular purpose, yet the agency did not affect the contract or rights of the plaintiff, as no privity was shown between him and the owners. This presents but the ordinary case of one employing another to do a particular job at a fixed price, or at cost, where sub-contractors or laborers cannot look to the principal, but to their immediate employer.

Generally, where one is bound by a special contract, the

law will not imply a promise, on the same account, either in favor of a party to the contract, or of third persons. If one knowingly receive the services of another directly, the law will imply a promise to pay; but where it appears that another person procured the services, in the absence of other evidence, the presumption will be that the latter promised to pay, and that the person employed looked to him for compensation. In this case there is not proof of an express promise of the owners, or evidence from which a promise may be implied, to pay the plaintiff for his services upon the dam. From the facts stated, his remedy would appear to be upon his employers.

The plaintiff may amend his writ, by striking out the name of the defendant Stockwell, on paying him costs, and may then take judgment against Hayward who has submitted to a default. R. S. chap. 115, sect 11.

WILLIAM H. MANNING, and RUTH ANNE MANNING, *his wife*, *versus* LABOREE.

An *unsealed* instrument, in form of a deed of conveyance of land, signed by husband and wife, though containing a formal relinquishment of her dower, is no bar to a suit brought by her to recover dower.

To an action of dower, non-tenure can be pleaded in abatement only. It cannot be proved under a brief statement.

An outstanding title, purchased by a defendant, after the commencement of an action of dower against him, cannot be set up in bar of the suit.

A widow is dowable in an equity of redemption.

In an action of dower against the heir, the increased value of the land, independent of the labor and expenditures of the tenant, is subject to the demandant's claim.

It is not a bar to an action of dower, that the widow of an earlier proprietor has already recovered dower against the tenant.

Such a recovery may, however, reduce the demandant's right from one third of the whole to one third of the remaining two thirds. But this reduction would be connected with a contingent right to an endowment in the first third, whenever the first endowment should be extinguished.

ON REPORT from *Nisi Prius*, TENNEY, J. presiding.

DOWER.

The demandants allege *that* Mrs. Manning was formerly the wife of Miles Laboree; *that*, during her coverture with him, Miles was seized of the premises demanded; *that* he afterwards deceased; *that* she subsequently intermarried with Mr. Manning; and *that* a demand for an assignment of her dower was duly made upon the tenant, who was the father of said Miles, and his heir at law.

The tenant pleaded, 1st, that the demandant, Ruth Anne, was never accoupled in marriage with said Miles. 2d, that Miles was never seized of such estate in the demanded premises, as that the tenant could endow her thereof.

The tenant further pleaded, by brief statement, *that* Ruth Anne had released to him her right of dower in an undivided half of the premises; *that* no demand of dower was seasonably made; *that* the tenant was not tenant of the freehold, as heir to said Miles, as alleged; *that*, long before the alleged marriage of Miles with Ruth Anne, Miles had mortgaged the premises to one Crosby, and that, since the death of said Miles, the tenant has become assignee of the mortgage; *that*, since the death of Miles, the premises have been greatly increased in value by improvements made by the tenant, and *that*, since the commencement of this suit, one Nancy Giddings, the widow of Stephen Giddings, who was formerly seized of the premises, has recovered a judgment against the tenant for her dower in the premises.

The demandants offered an office copy of a deed from James Crosby, conveying to Miles the demanded premises. This was objected to, but it was received. They also proved the intermarriage of Miles and said Ruth Anne, and that Miles died without children, leaving Ruth Anne, his widow, and the tenant, his father; they also proved their own intermarriage, and that the dower had been seasonably demanded.

The tenant introduced an instrument of conveyance from Miles to the tenant, of one undivided half of the demanded premises. It was without seal, and was signed by Ruth Anne,

there being a paragraph in it, purporting her relinquishment of dower.

The tenant also proved, that Mrs. Giddings, the widow of a former proprietor, had recovered judgment against him for her dower, and that commissioners had been appointed by this Court, at its present session, to assign the same.

The tenant then proved that Miles, when the land was deeded to him by Crosby, mortgaged back the same to secure certain described notes, given jointly by Miles and the tenant; and, that since this suit was commenced, the mortgage with one of the notes, (the others having been paid,) had been assigned to the tenant.

The case was submitted to the Court for a decision.

A. W. Paine, for the demandants.

Wm. Fessenden, for the tenant.

HOWARD, J. — The marriage of the demandants was admitted; and the prior marriage of Mrs. Manning, in whose right dower is claimed, to Miles Laboree, his seizin during coverture, his death, and the demand of dower were proved. Both issues, therefore, the first upon marriage, and the second upon the seizin of Miles Laboree during coverture, must be determined for the demandants.

The tenant presented special matters by brief statement, which are relied upon in defence.

1. That Mrs. Manning released all her right to dower in an undivided half of the premises, in which it has been demanded.

It has been provided by statute, that "a married woman may bar her right of dower, in any estate conveyed by her husband, by joining with him as a party in the deed of conveyance, and thereby relinquishing her claim of dower, or by a subsequent deed, executed jointly with her husband, or legally authorized guardian of her husband." R. S. chap. 95, sect. 9. The tenant offered an instrument, in form of a deed from Miles Laboree to himself, purporting to convey an undivided half of the premises, and containing a formal

clause of relinquishment of dower, which was signed by Mrs. Manning, as the wife of the grantor. But this instrument had no seal upon it, and cannot be regarded as a deed; for in law, a deed is an instrument under seal. Co. Litt. 35, b; 2 Bl. Com. 295; Shep. Touchst. c. 4, p. 50, 56; 4 Kent's Com. 452; *Warren* v. *Lynch*, 5 Johns. 239; *Jackson* v. *Wood*, 12 Johns. 73. The instrument not having been executed in the manner required to give it the character and effect of a deed, does not bar the right of the demandants to any portion of the premises described.

2. The case finds that there was proof of a demand of dower, more than one month before the commencement of the action, and that is a conclusive answer to the second branch of the brief statement.

3. Non-tenure may be pleaded in abatement to an action of dower, but not in bar. R. S. chap. 144, sect. 4. Matter in abatement can be pleaded specially, only, and cannot be presented by brief statement. The defendant is therefore precluded from urging in his defence that he is not tenant of the freehold. By the statement of the case he appears as father, to be the sole heir of Miles Laboree.

4. The mortgage to Crosby, by Miles Laboree, with which the tenant had no connection, when this action was commenced, cannot be set up in bar, as an outstanding title. The equity of redemption was in the mortgager during coverture, and at his death he was seized of the estate against all but the mortgagee, and those claiming under him; and in that his widow is dowable, as of a legal or equitable estate. When of a legal estate, as in the case under consideration, her remedy is at law; but when she has but an equitable claim, it may be established in a court of equity. *Smith* v. *Eustis*, 7 Maine, 41; *Carll* v. *Butman*, 7 Maine, 102; *Wilkins* v. *French*, 20 Maine, 111; *Campbell* v. *Knights*, 24 Maine, 332; *Snow* v. *Stevens*, 15 Mass. 278; *Walker* v. *Griswold*, 6 Pick. 417; *Lund & ux.* v. *Woods*, 11 Metc. 566; 1 Kent's Com. 43–45; *Van Dyne* v. *Thayer*, 19 Wend. 168; R. S. chap. 95, sect. 15.

The tenant produced an assignment of the mortgage, by Crosby to himself, since this suit was commenced. But that will not avail him in defence, in bar of the action; for no matter of defence, arising after action brought, can be thus pleaded in bar generally. *Evans* v. *Prosser*, 3 D. & E. 186; *LeBret* v. *Papillon*, 4 East, 502; *Andrews* v. *Hooper*, 13 Mass. 476; 2 Greenl. Ev. sect. 556.

5. The increased value of the premises since the death of the husband, Laboree, independent of the labor and expenditures of the tenant, is subject to the claim of the demandants. *Mosher* v. *Mosher*, 15 Maine, 371; *Hobbs* v. *Hervey*, 16 Maine, 80.

6. It is no bar to the right of the demandants, that Nancy Giddings, the widow of Stephen Giddings, is dowable in the estate. If she should be endowed it might affect the interests of the demandants, but would not defeat their right. Both may be justly entitled to endowment. The first, in order of claim, in one third of the whole estate, and the other in one third of the remaining two thirds, with a contingent right to a further endowment, in the first third, upon an extinguishment of the first endowment. Co. Litt. 31, d; 4 Kent's Com. 64; *Geer* v. *Hamblin*, in 1808, by C. J. Smith, N. H.; 1 Greenl. 54, note.

Judgment for demandants. The damages to be assessed by commissioners, according to the agreement.

WHEELER, *administratrix*, *versus* WHEELER.

The sale of personal property by one tenant in common, does not, *as against another tenant in common*, vest the property in the vendee.

Such other tenant in common may, however, at his election, maintain trover for his share against the vendor.

The assuming, by one tenant in common of a chattel, to own and to sell the whole of it, is sufficient evidence of conversion, in an action of trover against him by the other tenant in common.

ON REPORT, from *Nisi Prius*, TENNEY, J.

TROVER, for one undivided half of a dwellinghouse.

The facts, as ascertained by the verdict, were, that the plaintiff's intestate and the defendant jointly built the house on their father's land, and with his consent. The father afterwards conveyed the land by a deed, (making no mention of any buildings,) to the defendant and another person, and those grantees conveyed the land to one Whittier by a warranty deed.

The Judge directed a verdict for the defendant, on the ground that no conversion was proved, but requested the jury, by consent of parties, to find the value of the plaintiff's interest in the house.

The parties then agreed, that if the direction of the Court was incorrect, the verdict should be set aside and a default entered for the value of the plaintiff's right in the house, as returned by the jury, with interest thereon.

Cutting, for the defendant.

Mudgett and *Peters*, for the plaintiff.

SHEPLEY, C. J. — The facts, according to the finding of the jury under the first clause of the instructions, are, that Philander Wheeler, the plaintiff's intestate, and the defendant jointly built a dwellinghouse upon the land of their father, Daniel Wheeler, by his consent. That Daniel Wheeler conveyed that land to Daniel Wheeler, Jun., and the defendant, who conveyed the same to Nathaniel P. Whittier. The buildings upon the land were not named in the deed of conveyance. There is no proof that Whittier had any knowledge, that the whole house was not owned by the vendors. The defendant, when called upon in behalf of the plaintiff, stated that he had sold the house, alluding, it is admitted, to the conveyance to Whittier.

By that conveyance Whittier would not obtain a legal title to the share of the house owned by the intestate, according to the cases of *Russell* v. *Richards*, and *Hilborn* v. *Brown*. But those cases do not decide, as it respects the grantor, that the whole house would not be conveyed. According to the

established rule of law, a conveyance of land conveys the buildings upon it, without any description of them; and the whole house as between the parties to the deed was conveyed to Whittier, who if legally deprived of any portion of it might maintain an action upon the covenants of his deed to recover his damages.

It does not therefore follow, that there has not been a conversion of it by the defendant, because Whittier did not obtain a legal title to the whole of the house. Nor that there has not been a conversion of it, because the plaintiff in her capacity of administratrix, may have a title superior to that of Whittier in a share of the house.

When one of two persons owning personal property jointly assumes to be the owner, and to convey the whole of it, the purchaser does not acquire a title to the whole, as it respects the other owner, who may assert his title to his own share, and if not resisted he may take possession and hold the property rightfully, but not exclusively. While at the same time he may omit to do so, and may maintain an action of trover against the other owner, who assumed to convey, and who, as between himself and the purchaser, did convey the whole of the property. The act of assuming to be the owner of the whole, and to convey it, is a conversion of the other's share of it. *Wilson* v. *Reed*, 3 Johns. 175; *Weld* v. *Oliver*, 21 Pick. 559; *Dain* v. *Cowing*, 22 Maine, 347.

In the latter case it was decided, that trover could not be maintained in such cases, against the purchaser, without proof of a conversion, other than that arising out of his becoming a purchaser, and claiming to be the sole owner.

The defendant having with another person assumed to be the owner of the house, to the exclusion of the intestate, and to convey the whole of it to Whittier, was guilty of a tortious act amounting to a conversion.

According to the report, the verdict is to be set aside, and the defendant defaulted, and judgment is to be rendered for the amount found by the jury, with interest upon it.

LORD, *in error, versus* PIERCE *& als.*

Error does not lie to reverse a judgment of the District Court, rendered upon default, if the action was in its nature appealable, and if no cause be shown why the defendant did not appear and answer. Since the Rev. Stat. have been in force, no judgment can be "reversed for any want of form which might have been amended."

A count in trover, which alleges the property in the plaintiff, and that it came to the defendant's hands by finding, may be amended by adding an allegation of the conversion.

THE defendants in error, were plaintiffs in the former suit, and recovered judgment against Lord in the District Court, in a plea of the case, "for that the said plaintiffs, at, on, &c. being possessed of [certain lumber,] of the value of $900,00, casually lost the same, which came into the defendant's hands by finding. Yet though often requested, said defendant has not paid said sum, or any part thereof, but neglects and refuses so to do. To the damage," &c. The defendant in that suit was defaulted, and the then plaintiffs recovered judgment against him. This is a writ of error brought to reverse that judgment. *In nullo est erratum* was pleaded.

W. C. Crosby, for the plaintiff.

It has been said that this writ does not lie to reverse a judgment, in which the plaintiff in error might have entered an appeal. That was never a fixed rule. It was a course sometimes taken for the sake of expediency. Its expediency was doubted in *Skipwith* v. *Hill*, 2 Mass. 35. It was affirmed, 4 Mass. 171, and again questioned and virtually abrogated in 10 Metc. 172.

The general rule is, that error lies whenever, in the particular instance, the party could not appeal. 11 Mass. 300; 1 Mass. 179; 2 Mass. 35; 4 Mass. 516.

A default is no more a waiver of rights, than an agreement not to appeal. In *Monk* v. *Guild*, 3 Metc. 372, the Court do not consider a party, who never appeared, to have been barred from his writ of error.

No appeal lies from a judgment on default. R. S. chap. 97, sec. 13. *Hawes* v. *Hutchins*, 28 Maine, 102.

If the declaration be insufficient, error lies to reverse the judgment, though rendered on a default, the error being of record. *Perry v. Goodwin*, 6 Mass. 498.

If a Court ought to abate a writ *ex officio*, then, if it be not abated, though no exception was made at the time, it will be error. Story's Pl. 368.

Appleton, contra.

SHEPLEY, C. J. — This writ of error is brought to reverse a judgment rendered in the District Court upon default, in a case appealable to this Court.

The law is well settled, that when a party might have appealed and by it have opened the whole case for a new trial, he cannot maintain a writ of error. *Monk* v. *Guild*, 3 Metc. 372.

Although the plaintiff in error was defaulted, it does not appear that he had not full knowledge of the suit, that he was under any disability, that he was absent from the State, or that he was by any other obstacle prevented from appearing and answering to it. Writs of error have been sustained, when the plaintiffs in error have been defaulted in the original actions, but not in cases, in which they chose voluntarily to suffer a default to be entered.

It has not been the intention of Courts to permit a party to yield to a default without any stipulation, that he would not appeal, and then to bring a writ of error to reverse that judgment against him, thereby occasioning two suits, when all his just rights might have been determined in one.

The cases of *Day* v. *Laflin*, 6 Metc. 280, and of *Peck* v. *Hapgood*, 10 Metc. 172, do not, as supposed, abrogate this rule.

In those cases the only appeal from the original judgment permitted was, one in matter of law, and not one opening, as in this case, the whole cause for a new trial upon the facts and the law.

It is provided by statute, chap. 115, sect. 9, that no declaration or other proceeding in a Court of justice shall be

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."

There is little of difficulty in understanding, that the original was an action of the case with an informal and insufficient declaration in trover. And that informal and defective declaration might have been amended by the tenth section of the same statute. Since the Revised Statutes were in force no judgment can be reversed for any want of form, which might have been amended.

It is essential in an action of trover, that a conversion of the property should be alleged; and so it is, that it should have come to the hands of the defendant by finding.

The substantial matter upon which the action is founded is, that the defendant has without right the property of the plaintiff in his possession and that he refuses to surrender it.

Writ dismissed.

INHABITANTS OF BANGOR *versus* INHABITANTS OF BRUNSWICK.

A judgment for the defendant town in *either one* of two actions commenced at different times by the same plaintiff town, for the support of the same pauper, may be proved as a bar to the other action.

In the action last tried, though first commenced, the record of such judgment cannot be excluded by an agreement of the defendants, in writing, (made at a term when the last commenced action was under advisement upon exceptions,) that the first commenced action should stand on as favorable grounds as if tried at the term when such agreement was made.

ON EXCEPTIONS from *Nisi Prius*, TENNEY, J.

ASSUMPSIT to recover for supplies furnished to a pauper. The writ was dated in 1843. Under an appropriate brief statement, the defendants offered in evidence the record of a judgment, recovered by the defendants in 1849, in a suit commenced in 1845, by the plaintiffs, to recover for supporting the same pauper. This evidence was objected to, but was admitted; and it was ruled by the Court to be a bar to

this suit. To that admission and to that ruling, the plaintiffs excepted.

The objections to the receiving of the record, were, that it was irrelevant, because received in a suit brought after the commencement of this suit, and also that the defendants were precluded from using the record, by an agreement of record, filed in this case, at the October term, 1848. At that term, *this* action was numbered 34, and the action *in which* the above named judgment was recovered, was numbered 103. In both suits, questions of law had been raised, and in No. 34, a verdict had been set aside. The agreement related to the order in which the actions should be tried, and contained the following expression, "the intention of the parties being that No. 34 shall stand on as favorable grounds, as if tried at the present term."

Wakefield, for the plaintiffs.

I. When the agreement was made, (October, 1848,) the judgment had not been recovered, and of course could not be used by the defendants. If they can now use it in evidence, this action, No. 34, will stand on a less favorable ground, than if tried at said October term, 1848; a result, which the agreement expressly forbids.

II. The plaintiffs are not estopped by said judgment. R. S. Chap. 32, sect. 30, merely provides that a judgment recovered, not in a *subsequent* but in a *prior* action, may be a bar. This action, No. 34, was of earlier commencement than No. 103, in which said judgment was recovered.

Shepley, C. J. — The plaintiffs commenced two actions against the defendants for the support of the same pauper at different times.

A verdict for the plaintiffs had been obtained in the action first commenced, which had been set aside and a new trial granted. The defendants had obtained a verdict in the action last commenced, and exceptions to the instructions given to the jury had been taken, but had not been argued, when the first action was in readiness for a second trial.

The counsel thereupon made a written agreement, a copy of which is presented by the bill of exceptions taken in this case, and the action was continued. Judgment had been rendered on the verdict obtained in the second action before the second trial took place in the first action.

The presiding Judge considered, that the judgment rendered in the second action operated as a bar to a recovery by the plaintiffs in the first action, and the correctness of that ruling is presented by exceptions.

The statute, ch. 32, § 29 and 30, provides, that an action may be maintained by one town against another, to recover for the expenses incurred for the support of a pauper, whose legal settlement is established in such town; and that "a recovery in such action shall bar the town, against which it shall be had, from disputing the settlement of such pauper with the town so recovering in any future action brought for the support of such pauper."

The argument is, that by the words "in any future action brought," an action to be brought after the commencement of the first action, was intended, and not an action to be tried after a recovery had in an action between the same parties for the support of the same pauper.

It is not probable, that the framers of the statute contemplated that a judgment would be first obtained in an action last commenced; and yet such are the various occurrences happening in the course of judicial proceedings, that such a result is not very unusual. It is however quite apparent, that the intention was to afford one opportunity to have a final decision upon the legal settlement of the pauper; and not to allow it to be the subject of continued litigation as often as either town should commence an action to recover for expenses incurred in the support of the pauper. If the legal settlement of the pauper might be contested on trial of an action, whether commenced before or after the one, in which a judgment had been already obtained, this intention would be defeated; and there might be two contradictory decisions and judgments respecting the legal settlement of the pauper. The

intention being quite clear and certain, that one decision upon the legal settlement should be conclusive, the language of the statute should, if possible, receive such a construction as will carry into effect that intention.

The words "future action" may be fairly construed to mean an action to be tried after a judgment had been recovered by one town against the other for the support of the same pauper. The word "brought" is not inappropriate to designate an action, which had been commenced at any time before the trial, and it does necessarily designate one, commenced after the action on trial was commenced.

It is further insisted, that the agreement made between the parties, precludes the defendants from presenting the recovery in the second action, as a bar to the first.

The agreement, however, has reference to the disposition of the other, and not to the disposition of this action. The reasons are stated in the opinion in that case, why their agreement could not be permitted to affect the disposition of it. *Bangor* v. *Brunswick*, 30 Maine, 398.

The agreement states, that the intention of the parties was, that "34 shall stand on as favorable grounds, as if tried at the present term." If such intention fails to be carried into effect, it will be because the manner provided in the agreement to accomplish it was insufficient. It assumed to control the disposition of an action, which had before passed the stage, in which it could be subject to such control.

Exceptions overruled.

DOAK *versus* WISWELL.

A judgment for the demandant in a real action with possession taken under it, will preclude the tenant in that action from afterwards asserting against such demandant any personal property in the buildings which he had erected on the land.

ON REPORT from *Nisi Prius*, TENNEY, J. presiding.

ASSUMPSIT.

In 1838 and 1839, the plaintiff erected buildings upon land belonging to his wife. She died in 1845, and her heir-at-law, in 1847, recovered judgment in a real action against the plaintiff for the land, and entered into possession under the judgment. This suit is brought against the heir to recover for the value of the buildings. The case was submitted to the Court for a legal decision.

Cutting, for the plaintiff.

The legal presumption is, that the buildings were erected by the wife's consent. They were, therefore, personal property belonging to him, such as his creditors might have attached. The defendant having taken the possession and use of them, is bound to repay their value. *Osgood* v. *Howard*, 6 Maine, 404; *Russell* v. *Richards*, 10 Maine, 429; *Wells* v. *Bannister*, 4 Mass. 514; 7 Howard's Miss. 421; 1 Dane's Abr. 191.

Fessenden, for the defendant.

TENNEY, J., orally. — Let it be supposed that the buildings belonged to the husband. The action for the land was brought directly against him. It was his duty to defend and protect, *in that action*, all his rights, connected with the land.

Whether he did or did not then set up his rights, by betterment claim or otherwise, does not appear by the report, and it is of no importance; for the judgment with the possession taken under it, are a bar to this action. *Nonsuit.*

PHILLIPS *versus* ROUNDS.

The surety in a debtor's relief bond is discharged, if without his consent, the obligee, for a valuable consideration, extend the time for the principal to make his disclosure beyond the six months prescribed in the bond.

A consent by the principal, at the request of the creditor, to delay the making of his disclosure, is a valuable consideration.

The making of such a contract, on behalf of the creditor, for extending the time, is within the powers pertaining to his attorney appointed to act for him at the disclosure.

DEBT, upon a debtor's relief bond dated March 13, 1849. It is resisted by the surety. On the 12th of September, a court of two justices of the quorum was constituted to hear the disclosure of the debtor. The plaintiff had been duly cited, and appeared by his attorney. After a partial disclosure by the debtor, the plaintiff's attorney requested an adjournment to the 13th of September, which was granted. On that day the debtor attended, and the plaintiff's attorney requested and obtained a further adjournment to the 15th of September, he agreeing verbally with the debtor, that the proceedings on the 15th, (which would be after the expiration of the six months stipulated in the bond,) should have the same effect as if had on the 13th. On the 15th he obtained with the consent of the debtor, another adjournment to the 19th, upon entering into the following contract with him: —

"In the matter of the disclosure of Wm. Rounds on execution, *Ruel Phillips* v. *William Rounds*, before William C. Crosby and David McCrillis, Esqrs., I request that the hearing of the disclosure of said Wm. Rounds may be delayed, and I agree, that in case of there being a failure hereafter to disclose by reason of the act of God or sickness or any other unforeseen event, or any cause for which said Rounds is not responsible, that in consideration of delay granted at the instance and request of the creditor, that the condition of the bond shall be considered as fully complied with and its terms performed, and that the parties to said bond are to be discharged and are hereby discharged therefrom.

"It is further agreed, that the justices, or in case of disagree-

ment, the Court as hereafter constituted may administer the oath as if no delay now or heretofore had been granted and that said oath and certificate shall be binding, said disclosure to be continued till Wednesday next at 10 o'clock.

"I further engage and consent, if the justices determine that said Rounds is entitled to his discharge, to cancel and surrender up the bond."

The debtor failed to appear at the day of the adjournment, though not prevented by any of the causes mentioned in the agreement; and the justices decided, that he was not entitled to the benefit of the poor debtor's oath.

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

Prentiss and *Rawson*, for the plaintiff.

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

SHEPLEY, C. J. — The defendants did not perform the condition of their bond; and the plaintiff will be entitled to judgment, unless he has by a valid agreement to extend the time of performance discharged the surety.

The attorney of the plaintiff by a written contract, not under seal, requested that the principal should delay performance for a stipulated time. The contract was declared to be made "in consideration of delay granted at the instance and request of the creditor."

It was stated in the case of *Leavitt* v. *Savage*, 16 Maine, 72, that a parol agreement of this description would discharge a surety. The consideration of delay named in this contract is a sufficient one; the case having been continued, so that the defendant could not perform until the subsequent day.

An attorney retained to manage a cause before any tribunal, has authority to apply for a continuance or postponement of the trial or hearing; and he may make an agreement to effect that object, which will be binding upon his client. This power was recognized in the cases of *Moore* v. *Bond*, 18 Maine, 142; *Washburn* v. *Mosely*, 22 Maine, 160, and *Fales* v. *Goodhue*, 25 Maine, 423.

The counsel for the plaintiff contend, that proof, that time

was given to the principal without consent of the surety, cannot be received under the general issue and the brief statement filed in this case; and refer to the case of *Washburn* v. *Mosely*, as so deciding.

The parties in this case have agreed upon a statement of facts, and that the Court shall decide the case upon the facts agreed, and not upon such part of them as are legally admissible under the pleadings. The Court cannot therefore exclude from its consideration any of the agreed facts, or refuse to apply the law to them.

In the case of *Fales* v. *Goodhue*, it does appear that an adjournment for the debtor to make his disclosure, was ordered on motion of the plaintiff's attorney, to a time beyond the day of performance. This was the only agreement. The fact appears to have been used only as proof, that the plaintiff could not be permitted to object, that performance on the day, to which the proceedings were adjourned, would be good.

No question appears to have been presented or decided respecting its effect upon the surety.

Plaintiff nonsuit.

YOUNG *versus* WARD *& al.*

A promise by a debtor, made without legal consideration, that, before the pay-day of his debt arrives, he will make a partial payment, does not expedite the creditor's right of action.

Neither will a partial payment in advance expedite the right of action for the balance.

Where a written instrument, intended as an agreement to be signed by both parties, shows that services were to be rendered by the plaintiff, for which he was to be paid at a future day, the term of credit is binding upon him, although the instrument was signed by himself only, if he admits the services to have been rendered under that agreement.

J. Hill, for the plaintiff.

J. A. Peters, for the defendant.

Osgood *versus* Lansil.

The Court is not bound, unless requested, to give instruction as to the legal correctness of a proposition urged by counsel to the jury.

Where evidence had been given in support of a set-off claim, and a general verdict was rendered for the defendant, (without showing whether the plaintiff had failed to establish *any* claim or whether his demand was balanced by the set-off,) there is no right in the plaintiff to except, that the Judge did not give instruction to the jury *in relation to the cost;* unless such instruction was requested.

Where the Judge refers to the jury a question of law, which he ought himself to decide, there is no ground for exceptions, if it be decided correctly by the jury.

Blake *versus* Russ.

Where one party is notified by the other party, according to the rules of the Court, to produce any specified books or papers, and they are accordingly produced in Court and examined by the party calling for them; if he then omit to introduce them, they may be used as evidence by the party producing them. The English rule upon that point, adverted to in 1 Greenl. Ev. § 563, is the law of this State.

The ruling upon this point, in *Penobscot Boom Co.* v. *Lamson*, though not called for by the facts of that case, is approved and affirmed.

Blake, for the plaintiff.

McCrillis & Crosby, contra.

Gillighan & *al. versus* Tebbetts.

In a suit upon an assigned claim, brought in the name of the assignor for the benefit of the assignee, it is not the right of the defendant to prove declarations, made by the assignor *subsequently to the assignment.*

If, after the dissolution of a copartnership, one of the copartners have assigned to the other his interest in a copartnership claim against the defendant, it is not the right of the defendant, (in a suit upon such claim brought in the name of both copartners for the benefit of the assignee,) to prove declarations, made by the assignor *subsequently to the assignment.*

STATE *versus* PIKE.

In order to a recovery of the threefold damage, allowed by the statute, chap. 162, sec. 13, for the wilful destruction of property, it is not a prerequisite, that the defendant should have been convicted of the offence, in a criminal prosecution.

In a criminal prosecution under R. S. chap. 162, sec. 13, for wilfully destroying property, the party injured may therefore be a witness for the state.

In a criminal prosecution, under R. S. chap. 162, sec. 13. for wilfully destroying the property of a person without his consent, it is immaterial whether the property came rightfully or wrongfully into possession of the defendant. A wrongful taking is not an essential ingredient in that class of offences.

ON EXCEPTIONS from the District Court, HATHAWAY, J.

INDICTMENT for wilfully and maliciously destroying two promissory notes, belonging to one Putnam.

Putnam was offered as a witness for the State. He was objected to, on the ground of interest, but was admitted. He testified *that* he and the defendant had been copartners; *that* he held two notes against the defendant, which were the property of the witness; *that*, on going a journey, he lodged his pocketbook, containing the notes and other papers, with the defendant for safe keeping, the defendant promising to redeliver the same upon the witness' return; *that*, after returning from the journey, he called upon the defendant for the pocketbook, notes, and the other papers; *that* the defendant delivered him the pocketbook and papers, except the two notes; *that* upon being questioned as to the notes, the defendant said, "you cannot have them," "they are not in being, for I have destroyed them;" *that* the defendant refused to give any security for them, saying, he had got the staff in his own hands, and meant to keep it there, because the witness could not prove that he, the defendant, ever owed him a dollar, or that he had ever withheld any notes from him.

The defendant's counsel requested instruction to the jury, that the indictment was not sustained.

The Judge instructed the jury, that "if the pocketbook,

and notes were left with the defendant, in manner and condition, as testified to by Putnam; and, if afterwards, in Putnam's absence, and without his knowledge or consent, the defendant destroyed the notes, as alleged in the indictment, the indictment can be sustained." The defendant excepted.

Cutting, for the defendant.

1. Putnam was wrongfully admitted as a witness; for upon the defendant's conviction, a liability is created upon the defendant *as a part of the penalty*, to pay to him three times the value of the property. R. S. chap. 162, sec. 13. This threefold penalty does not attach until after conviction. A judgment, therefore, in this case is necessary, in order to give to the witness a right to recover that penalty. *Belknap* v. *Milliken*, 23 Maine, 381. *Boody* v. *Keating*, 4 Maine, 164. The statute of 1844, giving a civil remedy prior to conviction, applies to larcenies only, and gives but single damage.

The admission of a witness, so situated, could but give a terrific encouragement to perjuries.

2. The omission to return the notes was not a crime; it was merely the breach of a contract. *Commonwealth* v. *Hearsey*, 1 Mass. 137.

In order to support this indictment, it must be shown that the possession of the notes by the defendant was obtained wrongfully. But, in fact, his possession was rightful, having been obtained upon a contract with the owner himself.

Appleton, for the State.

Wells, J., orally. — The testimony of Putnam is objected to, upon the ground that a conviction upon this indictment, and nothing but that, would put him in a condition to recover the threefold damage, allowed by the statute, to the injured party. If this be a sound legal position, Putnam would certainly have an interest in this trial. But such is not the just construction of the statute. Putnam's right to recover does not depend upon a previous conviction of the defendant. In a suit by him for the threefold damage, the verdict in this

prosecution could not be used as evidence. His testimony was therefore admitted legally.

An objection is also taken to the indictment, that it alleges no crime, but simply a breach of trust.

In charges of larceny, a wrongful taking must be alleged.

But to constitute the crime of wrongfully destroying property, without the consent of the owner, it is not necessary that the possession of the property was wrongful. The statute intimates no such necessity. The offence may be equally committed, whether the possession in the defendant was by right, or by wrong. *Exceptions overruled.*

Case remanded to the District Court.

CHASE *versus* GATES.

By the Stat. of 1821, chap. 39, sect. 1, one of the modes of foreclosing a mortgage of real estate was by an entry "with the consent in writing of the *mortgager or those claiming under him.*"

When the mortgager has conveyed the right of redemption, the consent to an entry for foreclosure must be obtained from the party who claims under him.

If one, to whom such right of redemption has been transferred, shall convey the same, taking back a mortgage, the entry, to foreclose the first mortgage, in order to be effectual, must be by consent of the last mortgagee.

An indorsed note, lodged with a depositary to be delivered to the beneficiary when a specified incumbrance shall be removed from the property for which it was given, becomes the absolute property of the beneficiary, upon the removal of the incumbrances.

Upon such a note, the incumbrance having been removed, the beneficiary may maintain an action, although the depositary wrongfully refuses to surrender the possession of it.

ON REPORT from *Nisi Prius*, TENNEY, J.

ASSUMPSIT, by the indorsee against the maker of a promissory note of $250, dated in 1846.

One Sanborn, after having mortgaged real estate to Moor, conveyed the same by warranty deed to Herring. Herring conveyed it to H. Bradbury, taking back a mortgage for the

purchase money. H. Bradbury then conveyed by warranty to J. Bradbury.

In order to foreclose the first named mortgage, Moor entered upon the land in 1838, by the written consent of J. Bradbury, and in 1843, assigned his mortgage, with quitclaim of the land, to the plaintiff, who in 1846, conveyed the land by warranty to the defendant, and took in part payment therefor the note now in suit. This note was not made payable to the plaintiff, but to White & Co., who wrote their name upon the back of it, and held it in their hands for the plaintiff, upon an agreement, that it should not be delivered to him until Herring's claim upon the land should be settled or adjusted, and that, if the defendant should be obliged to pay any thing to dislodge Herring's claim, the amount so paid should be allowed upon the note. In order to dislodge Herring's claim the defendant was compelled to pay $250, in 1850. White & Co. refused to surrender the note to the plaintiff. It was brought into Court by them under a *subpoena duces tecum.*

The case was submitted to the Court for a legal decision.

McCrillis and *Crosby*, for the plaintiff.

Paine and *Prentiss*, for the defendant.

HOWARD, J. — Sanborn having mortgaged the premises to Moor, in 1835, subsequently conveyed them, by deed of warranty, to Herring, who conveyed to H. Bradbury, and took from him a mortgage to secure the consideration for the conveyance. H. Bradbury conveyed with covenants of warranty to J. Bradbury in 1837. In order to foreclose his mortgage, under the provisions of the statute of 1821, chap. 39, sect. 1, Moor, in 1838, procured J. Bradbury's consent in writing to an entry for that purpose. The statute provided that the entry to foreclose should be "by process of law, or *by the consent in writing of the mortgager or those claiming under him*, or by the mortgagee's taking peaceable and open possession of the premises mortgaged, in presence of two witnesses." Moor quitclaimed to the plaintiff in 1843.

It is contended that such entry of Moor was effectual to foreclose the mortgage at the expiration of three years from its date. But, at that time, Herring held the entire interest of the mortgager to Moor, subject only to the right of J. Bradbury to redeem the equity from him, and his consent in writing to the entry was not obtained. The consent in writing to an entry for foreclosure was not sufficient, under the statute of 1821, unless given by the mortgager, or those claiming the entire equity under him.

The entry of Moor, not having been in conformity to any of the provisions of the statute then in force, did not effect a foreclosure as against Herring. By his conveyance in 1843, to the plaintiff, he transferred his interest as mortgagee, only, in a mortgage not foreclosed or extinguished.

The note in suit was given as part of the consideration for the conveyance of the premises, in 1846, by the plaintiff to the defendant, with general covenants of warranty. In order to secure the defendant against the asserted claims of Herring, to an equity of redemption in the estate, the note was made payable to White & Co. or order, and to be held by them for the benefit of the plaintiff; but "not to be negotiated, or given up to him until the claim or right of said Herring shall be settled or adjusted; and in case said Gates shall be held to pay any thing to said Herring, to remove, or get a release of said claim, or shall be put to any trouble or cost thereon, the amount thereof shall be allowed upon said note." An agreement in writing was given by the plaintiff to the defendant, containing these stipulations, and bearing even date with the deed and note.

It appears, that the plaintiff did not settle or adjust the claim of Herring, and that the defendant, on January 30, 1850, about six months after the note, in terms, became payable, and by advice of counsel, paid $250, to settle and extinguish Herring's claim upon the estate, and took from him a deed of release and quitclaim. As this claim upon the estate appears to have been legal and just, and the amount paid to remove it is not pretended to be excessive or unreasonable, and as the

payment was made according to the agreement of the parties, that sum should be "allowed upon the note."

The claim of Herring constituted the only incumbrance contemplated by the parties, and when that was removed, the legal and equitable interest in the note was in the plaintiff. It was in the hands of White & Co., indorsed for his benefit. The terms and conditions of their trust having been accomplished, they could not legally control or retain the note. The plaintiff could institute a suit upon it, in his own name, and upon the statement of facts, is entitled to judgment for the remainder after deducting the payment before mentioned.

Cony *versus* Wheelock.

A valid title to a negotiable promissory note, payable to a copartnership firm, may be transferred by an indorsement made in the name of the firm, by one of the copartners, *though after a dissolution of the copartnership, if* such dissolution was unknown to the indorsee.

Attorneys; — *Cutting & D. McCrillis.*

McDonald *versus* Philbrook.

Writ of Entry.

The demandant offered in evidence three deeds duly executed and acknowledged, conveying an interest in land; — two of them directly to himself and the other to a party under whom he claimed. They had not been recorded, and were for that reason objecteed to and excluded. He offered them again on the same day, having in the intervening time caused them to be recorded. The tenant again objected to them, because not seasonably recorded, but they were admitted. *Held;* the admission of the deeds was rightful.

TRULL *versus* TRUE.

Testimony cannot be excluded as irrelevant, which would have a tendency, however remote, to establish the probability, or improbability of the fact in controversy.

S had signed the name of H to a promissory note. The question before the jury, was, whether H had given S authority so to do. *Held*, that evidence was relevant, which tended to show that H had in his hands some business operations of S, as security for liabilities, and was to have a commission upon advances made by him for S, in the prosecution of such business, and that the note was given for articles in aid of that business.

WENTWORTH *versus* KEIZER *& al.*

In a suit upon a judgment, recovered before a justice of the peace, the plaintiff is bound to establish the existence of the record.

For that purpose it is not sufficient to introduce a book, alleged to contain the record, without some proof of its authenticity.

ON REPORT from *Nisi Prius*, TENNEY, J.

DEBT on a judgment, alleged to have been recovered before a justice of the peace. Plea, *nul tiel record.*

The plaintiff introduced a book, containing what he stated to be the justice's record. The book was objected to, and was not supported by any other evidence than itself.

The justice removed from the State, more than two years prior to the commencement of this suit, without having lodged with the clerk the records and papers pertaining to his office. The case was submitted.

A. Sanborn, for the plaintiff.

Dinsmore, for the defendants.

WELLS, J. — It was incumbent on the plaintiff to establish the existence of the record, upon which he relied for the maintenance of the action. He introduced no proof whatever of the authenticity of the book, containing the alleged record. He did not show, that it had been in the possession of the

justice, and used by him as a book of records, or that it came from his hands. There should have been some satisfactory evidence of its genuineness, other than the book itself. *Sumner* v. *Sebec*, 3 Greenl. 222; *Baldwin* v. *Prouty*, 13 Johns. 430; *Turnpike Co.* v. *McKean*, 10 Johns. 155; *Whitman* v. *Granite Church*, 24 Maine, 236. Objection was made to the introduction of the book, and the plaintiff should have furnished the requisite evidence. *Plaintiff nonsuit.*

McKeenan *versus* Thissel *& al.*

A contractor agreed to do a prescribed work for L, and employed laborers to work upon it at his own credit. That the work might not stop, L, *with the consent of the contractor*, promised the laborers, that, if they would continue to labor, he would pay their wages for the past as well as for the future; provided the funds in his hands, belonging to the contractor should be sufficient. *Held*, the promise was not within the statute of frauds, or without legal consideration.

Crosby, *in error*, *versus* Boyden.

A judgment obtained against a defendant, before a justice of the peace, is erroneous and reversible, if it was rendered before the day at which the defendant was summoned to attend.

Writ of error.

The plaintiff in error was sued before a justice of the peace, and was in April summoned to attend in the suit on the 28th of May. The judgment was, however, rendered against him upon default, upon the 21st of May, seven days before the time at which he was summoned to attend. This suit is brought to reverse that judgment.

J. Crosby, in support of the writ of error, cited 4 Mass.

516; 11 Mass. 300; 4 Mass. 171; 13 Pick. 172; 11 Mass. 413; 13 Mass. 271; 11 Mass. 507.

HOWARD, J., orally. — There was error in the proceedings before the justice, and the judgment must be reversed.

ASSESSORS OF CLIFTON, *petitioners for location of public lots.*

When persons, appointed to decide upon the property rights of others, are required by law to give previous notice of the time or place of their proceeding, the giving of such notice is not an outside act, but is one *embraced in the trust* to them committed.

If the law require that such persons, *before* acting under their appointment, shall take an oath of faithfulness, they must take the oath *before proceeding to designate, by notifications*, the time and place of their proceeding.

Proceedings had pursuant to such notifications, issued before the taking of the oath, cannot be sustained.

Thus, commissioners appointed under the R. S. chap. 122, to locate public lots, in lands granted by the State, must be sworn *before* giving to parties the notice to which the Act entitles them.

If not so sworn, their doings under their warrant cannot be accepted.

EXCEPTIONS from the District Court, HATHAWAY, J.

Three commissioners were appointed by the District Court, under R. S. chap. 122, to set off the public lands, reserved in a tract which had been granted by the State.

The statute requires that, before acting under their warrant, they should take an oath of faithfulness, and that they should give thirty days previous notice of the time and place of their meeting to discharge their trust.

Such a notice they gave. They took the oath prior to the meeting, but not until after having given the notice.

Having acted upon the subject committed to them, their report was offered at the District Court. Its acceptance was resisted by J. B. Hill, Esq., one of the proprietors of the tract.

One of his objections was, that the time and place of the commissioners' meeting had been fixed upon and notified *before* they had taken the oath of faithfulness.

For that reason, *as a position of law*, the report was rejected; and to that rejection, these exceptions were taken.

Peters, for petitioners.

Appleton, for respondent.

WELLS, J., orally. — The thirty days notice was a requirement of law. It was therefore an *official* act, an act involving the exercise of impartiality in the selection of the time and place of hearing. The law contemplated that the oath would be a guaranty for their impartiality, as well in selecting the time and place, as in any other part of their doings.

Such a guaranty the respondents were entitled to, and they were deprived of it, for the selection of the time and place was made when no oath had been taken.

Exceptions overruled.

PARSONS *versus* COPELAND.

The record of a suit, in which a plaintiff had recovered judgment, cannot be used against him as an *estoppel* in a subsequent suit between him and a person who was not a party or privy to the first suit.

The allegations of a former writ, in which the present defendant had recovered judgment as plaintiff, may be used as *evidence of his admissions*, although the present plaintiff was neither party nor privy to such suit.

Such allegations may be shown, by introducing the record of the former suit.

The general rule that titles and interests in real estate are to appear of record, has been, to some extent, controlled by the statute, which gives liens upon land, for labor and materials furnished in the erection or repair of buildings thereon.

Contracts for such labor or materials, and the furnishing of the same, are proveable by parol.

ON REPORT from *Nisi Prius*, TENNEY, J.

PETITION for partition of land.

The petitioner stated his case to be *that* Buswell and Copeland, jr. formerly owned the whole land, of which a partition is now sought; *that*, while owning it, they contracted

with the petitioner to labor for them in the erection of a factory building thereon; *that* he labored in pursuance of the contract; *that*, in order to establish his lien, and to recover payment for his labor, he brought an action against them on the 29th of July, and attached the whole estate on the 30th of July 1847, being within ninety days of the stipulated pay-day; *that* he recovered judgment in the suit, and set off on the execution an undivided portion of the real estate; *that* this process is brought to have that portion set off to him in severalty; *that*, on the 8th of Dec. 1846, before the rendition of said judgment, Buswell and Copeland, jr. conveyed the whole estate to this respondent, by deed with covenants of warranty, one Lydia White having joined with them in making the covenants.

It appeared that the petitioner's suit above named was brought upon an account, as follows: —

157 1-2 days work as joiner, commencing 5th of May and ending last of November, 1846,	$157,50
Interest from Dec. 1, 1846, to July 29, 1847, [date of writ,]	6
	163,50

That conveyance to the respondent was shown by evidence from the registry of deeds.

In order to show that he was entitled to the lien, and had perfected it as above stated, the petitioner proved by record evidence the ownership in Buswell and Copeland, jr., also his attachment, judgment and levy. To prove the contract, the pay-day, and the performance of the labor under the contract, he introduced a record of a suit at law brought by the respondent against said warrantors for a breach of their covenants, wherein he alleged, as a breach, the fact of the petitioner's title as he has above stated it, and in which suit the respondent recovered judgment against said Lydia White upon her offer to be defaulted, and the petitioner contended, that the respondent is estopped to deny the truth of those allegations, made by himself in said suit.

To the introduction of the record of that suit, the respondent objected, on the ground, that the petitioner was no party to it, and denied that he was, in this process, estopped by it to deny its allegations.

That suit had been submitted to the full Court, upon a report drawn up by the then presiding Judge. A copy of that report was put into this case by the petitioner, though it was objected to by the respondent.

This case is submitted for decision.

J. Crosby, for the plaintiff.

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

The defendant's title has been shown by deed. The plaintiff to recover must show *a better record title.* Both must alike claim by and through a recorded title. The protection of the public, the spirit and object of the registry law, require this. The only sources for information, upon which a purchaser is to rely, are the records found in the registry of deeds and in the records of the several judicial Courts of the State. The facts necessary to sustain or establish a title, must there appear and of record. The inquirer is bound to seek no further. He is bound only by what there appears. This statute gives special favors to mechanics, and if they would claim the advantage of its provisions, they must affirmatively show their claim to be within the statute. This must appear of record, for a purchaser is not bound to look elsewhere, and is to be affected only by what he may find on such examination. If he is once required to look beyond the records, what are the limits?

These remarks apply as much to the fact of *time when* the suit was brought and that it was *seasonably* brought, as to the fact that the work was done upon a building, or any other fact necessary to be shown to make out a case under this statute. It should then appear *of record*, that the suit was brought within "*ninety days from the time, when such payment becomes due.*" It must so appear *of record*, else the individual, who examines the records, may examine them in vain.

The petitioner's writ in the former suit shows, upon its face, that it was not issued within the ninety days. The work was completed Nov. 30, 1846. The time of payment was when the work was done. It is nowhere alleged that it was payable on time, nor on what time, if any. Yet the writ was not sued out till July 29, 1847.

To avoid this impediment, the counsel claim to prove, *ab extra*, that the debt, though apparently due when the work was done, and though it so appears in his declaration, was in fact payable at six months. For that purpose he introduced the record of the judgment, *Copeland* v. *Buswell & al.*, to show from the respondent's own allegations in that writ, that this petitioner had performed the service and had brought his suit *within the time* allowed by the statute. But that record is inadmissible. It is *res inter alios*. The petitioner was, or might have been, a witness.

Upon no principle can he invoke a judgment obtained upon his testimony, or where his testimony was admissible.

To render a judgment admissible, the right must be *mutual*. Now the defendant could not bind the plaintiff by this judgment, neither can the plaintiff bind the defendant thereby. 1 Greenl. Ev. § 522, 523, 524.

It is not admissible because the object of its introduction is to *contradict or vary* the record of the judgment, upon which the plaintiff relies and through which he claims. The plaintiff's claims, as set forth in his writ, are on an account annexed, which was due Nov. 30, 1846, the day the labor was finished, — the plaintiff claims to contradict the record of his own judgment by the record of the judgment in the case, *Copeland* v. *Buswell & al.* It is not competent for him to do so.

The law of estoppel does not arise. The plaintiff is not a *party* nor a *privy* to the judgment, *Copeland* v. *Buswell & al.*, which he invokes in aid of his title.

"None but parties and privies shall have advantage by estoppels," &c. Jacob's Law Dic. Estoppel.

It is only an estoppel between the *same parties and privies*

in respect of the same fact or title. *Outram* v. *Marwood*, 3 East, 345.

SHEPLEY, C. J. — The title of the petitioner must depend upon proof, that he performed labor by virtue of a contract, upon a building erected by Copeland and Buswell, whereby a lien upon the estate for its payment was created under the provisions of the statute, chap. 125, sect. 37, 38.

He appears to have commenced a suit against them on July 29, 1847, and to have caused the estate to be attached, and to have recovered judgment and caused an execution issued thereon, to be levied upon an undivided portion of the estate.

The respondent exhibits a conveyance of the whole estate from Copeland and Buswell with Lydia White to himself, made on December 8, 1846.

To prove that he performed the labor and thereby acquired a lien upon the estate, before it was conveyed to the respondent, the petitioner introduced a copy of the record of a suit commenced by the respondent against his grantors.

The counsel for the respondent insist, that it is not legal testimony.

Although it is not the record of a suit between the same parties, it may be legally introduced to prove the declarations or averment made by the then plaintiff and present respondent respecting the rights of the petitioner. *Ellis* v. *Jameson*, 17 Maine, 235; *Cragin* v. *Carleton*, 21 Maine, 492; *Heane* v. *Rogers*, 9 B. & C. 577; 1 Greenl. Ev. sect. 195, and sect. 527, a.

The counsel for the petitioner insists, that the effect of the averments contained in that declaration, is to estop the respondent from denying their truth.

Parties and privies only are bound by estoppels, which must be mutual.

That record constitutes no muniment of title, and the petitioner was no party to it. It does not therefore operate by way of estoppel. Those averments operate only by way of

admission of the petitioner's rights. They are full to the effect, that the petititioner had acquired a lien upon the estate for the payment of his labor. There is no proof introduced by the respondent, that they were made under any misapprehension of his legal rights; or tending to explain or contradict them.

The report of the presiding Judge made in that case, was but an exhibition of the testimony introduced. It did not contain any declaration or admission made by either party; and it is not admissible as testimony in this case.

The declaration in the action of the petitioner against Copeland and Buswell contained averments, that the labor was performed by virtue of a contract upon a woolen factory, according to an account annexed, which appears to have been for 157½ days work, commencing on May 5, and ending last of November, 1846. The declaration does not state, that payment was to be made at a future day or time, or that it was not to be made as soon as the labor had been performed.

It does not therefore appear *of record*, that the petitioner had acquired a title superior to that of the respondent. The petitioner's title is therefore resisted by an argument alleging in substance, that if allowed to be effectual, no purchaser can in such cases ascertain by the records, whether he can acquire a good title to an estate; that, if parol evidence may be admitted to prove any fact necessary to make out a title to real estate, there can be no safety in taking titles and conveyances of it.

If the effect should be, that the records cannot be so much depended upon for information respecting titles, as they formerly were, this Court cannot refuse to give effect to a title acquired according to the provisions of a statute. The legislature must determine how far it is expedient to authorize titles to real estate to be acquired without requiring all the facts necessary to make out such titles to be exhibited by the records.

This Court can only explain and apply the enactments of the legislative department, when they are made in conformity

to the provisions of the constitution. It cannot determine that no fact necessary to make out a title to real estate shall be established by parol testimony.

The statute provides, that "such lien shall continue in force for the space of ninety days from the time, when such payment becomes due;" and that the benefit of it may be secured by attachment within the ninety days.

There is no provision, that the declaration shall state, whether any time for payment was allowed; or the time "when payment becomes due." It must be proved therefore like any other fact, by any legal testimony.

No other objections to the title of the petitioner are presented. *Judgment for partition.*

COOPER *versus* BAKEMAN.

A magistrate, in taking a deposition, acts in a *ministerial* and not in a *judicial* capacity.

If in the caption, he certify falsely, he is accountable to the party injured.

In the caption of a deposition, taken within this State, the magistrate's certificate, as to the notice, manner or cause of the taking, is conclusive evidence of the fact certified, and no evidence can be received to control it.

Thus, the magistrate's certificate, that 'the adverse party was notified to attend,' was *Held*, to exclude parol testimony, offered to show, that the time between the notice and the caption was less than that allowed by the statute.

Whether a deposition, taken within the State, is or is not admissible, is merely a question of law. No discretionary power to admit or reject it is lodged with the Court.

In a replevin suit, the interest of a surety on the replevin bond is removed by a deposit for his use, made with the clerk of the Court, by the plaintiff, of an amount equal to the penalty of the bond. A deposit so made is subject to the control of the Court, until accepted by the party for whose use it was made.

ON EXCEPTIONS from *Nisi Prius*, TENNEY, J. presiding.

REPLEVIN for a horse and wagon of the value of *ninety* dollars. The plaintiff offered two witnesses. They were shown to be sureties on the replevin bond and were, for that reason, objected to. The plaintiff's counsel then deposited

with the clerk $180, the penalty of the bond, as an indemnity to the defendant if he should prevail in the suit. The witnesses were then admitted subject to the objection, and testified to matters material to the issue.

The defendant offered two depositions. The captions stated, "that the adverse party was notified to attend," and "that he did not attend." The plaintiff introduced a witness, who testified, subject to objection, to facts tending to show that the time allowed to the plaintiff between the giving of the notice and the taking of the deposition was less than is prescribed by the statute. The depositions were excluded, and the defendant excepts.

Cutting, for the defendant.

I. The sureties on the replevin bond were inadmissible for the plaintiff. A judgment for the plaintiff would defeat their liability on the bond. That liability may exceed the penal sum, for it binds them contingently to pay damage and cost, and to restore the property replevied.

At least, it extends to interest upon the penal sum. 1 Mass. 308; 2 Mass. 118. The case of *Warner* v. *Thurlo*, 15 Mass. 154, is especially to the point now in question.

The clerk had no authority to receive the deposit. He was not bound to take it, and his official bond is no security for it. It was therefore out of the defendant's control, and was of no value to him.

II. The depositions were improperly excluded. R. S. chap. 133, sect. 10.

Rowe & Bartlett, for the plaintiff.

I. The interest of sureties on the replevin bond was dislodged by the deposit. *Hall* v. *Baileys*, 15 Pick. 51, 53.

II. The depositions were rightfully rejected. The magistrate's certificate of notice given, was but *prima facie* evidence; and therefore controllable by parol proofs. But, if *conclusive*, the testimony introduced did not contradict it. The certificate merely stated that the adverse party was notified. The testimony showed definitively what that notice was,

and was therefore admissible. It proved that the notice prescribed by the statute was not given, and it was rightful therefore in the Judge to reject the depositions.

SHEPLEY, C. J. — The right to use depositions is regulated by the Revised Statute, c. 133. It does not depend upon judicial discretion. When a party has complied with the provisions of the statute, his right to use such testimony becomes perfect and absolute, unless there be proof of some fact, which, according to the provisions of the statute, prevents its use.

The first section of the statute provides, that "depositions taken for any of the causes and in the manner hereinafter mentioned may be used." There are but two facts to be established to perfect the right. These are, that the deposition has been taken for a prescribed cause and in the prescribed manner.

The third section also provides, that no depositions "taken as aforesaid shall be used," "unless the notice hereinafter mentioned shall have been duly given to the adverse party." The statute by other sections prescribes the notice to be given, and the manner in which the certificate of the magistrate shall be made to constitute proof, that the notice has been given and that the deposition has been taken in the prescribed manner.

The provision contained in the twenty-second section, that depositions taken out of the State, may be admitted or rejected by the Court at its discretion, shows, that it was not the intention to submit to the discretion of the Court the right to use depositions taken within the State for causes and in the manner prescribed.

If a party by a correct construction of the provisions of the statute becomes thus entitled to use a deposition, the argument derived from any apprehended inconvenience and danger to the rights of other parties can have no place. Such an argument can only be considered for the purpose of ascertaining the intention of the legislature, and the correct con-

struction of the statute. When thus considered, the inconveniences, mischiefs, and injuries, which in practice may be reasonably expected to arise from a decision, that the certificate of a justice is not conclusive of the facts required to be and stated in it, will be much greater than those, that can be anticipated from a decision, that it is conclusive.

A party injured by a false certificate made by a magistrate will not be without the means of obtaining redress. Justices of the peace in taking depositions act in a ministerial and not in a judicial capacity; and a party injured by their misconduct will not be without remedy.

If their certificates be not considered as conclusive, and testimony of witnesses may be received to contradict them, it must be received respecting each deposition to ascertain whether the witness was sworn according to law; whether the adverse party was or was not notified as the statute requires; and whether the cause assigned for taking it really existed. The party, who has taken a deposition, may not be informed, that any such testimony is to be introduced, and he may without negligence be unable to produce instantly any opposing testimony, and he may therefore be deprived of the use of the testimony of a witness, whose attendance cannot be procured, and whose testimony cannot be taken again. If informed of it, he may produce counteracting testimony, and the time of the Court may be much occupied in receiving, discussing and deciding upon such testimony; and the trial of causes may be rendered uncertain and unsatisfactory by the exclusion of testimony prepared according to the provisions of the statute. The presiding Judge must be authorized to decide finally according to his discretion to admit or to reject the deposition upon the testimony introduced, or new trials must be granted, when the discretion of the full Court shall differ from that of the presiding Judge, or when the discretion of the superior shall differ from that of the inferior tribunal.

No certain rules for the exercise of such a discretion can be established and made known, upon which parties can safely

rely and be assured, that their testimony has been so taken, that their causes can be tried safely and without delay.

Certificates attached to depositions taken *in perpetuam* can be no more conclusive, than they are in other cases; and if the right to use them is not to depend upon the facts stated in the certificate, but upon the testimony of witnesses, it may be introduced many years after they have been taken and recorded, and all security of titles to property depending in any degree upon such depositions will be shaken.

In cases of equity, depositions may be taken as in cases of law, and if the certificates be not conclusive, the facts respecting the manner of taking them may be introduced by other depositions, and it may be quite uncertain, whether a party can have his cause decided upon testimony taken in all respects according to the forms prescribed by law.

No person can be expected to anticipate all the inconveniences and mischiefs to be expected from the admission of the testimony of witnesses, respecting the manner of taking depositions.

Should it be suggested, that no such mischiefs have been experienced in Massachusetts or in this State, from a decision, that a certificate of the magistrate was not conclusive, the answer is, that under that rule no such testimony as that named, or as that admitted in this case appears ever to have been received.

The case of *Minot* v. *Bridgewater*, 15 Mass. 492, decided, that a certificate was not conclusive, that notice had been given according to the provisions of the statute then in force, which contained no language expressly giving to a party the right to use a deposition taken for the causes, and in the form prescribed. But the only testimony admitted to disprove the truth of the certificate, was the written notice, which had been served upon the adverse party.

The case of *Homer* v. *Brainard*, 15 Maine, 54, does not decide, that the certificate may be contradicted. It does decide, that when the fact, that notice was given, is omitted to be stated in the certificate, it may be proved by a production

of the notice served. This decision was made under the statute of 1821, chap. 85, which was in substance the same as the Act of February 3, 1798.

In the case of *Pierce* v. *Pierce,* 29 Maine, 69, the decisions made in these two cases are noticed; and the case decides that a certificate stating, that "the adverse party was notified according to law by a notice to George B. Moody, as attorney of the adverse party," was not proof, that he was such an attorney as might according to the provisions of the statute be notified. The certificate only stated, that notice was given to Mr. Moody as attorney to the adverse party. It did not state, that notice was given to the attorney of the adverse party, or to the adverse party, and it was on its face without regard to any extrinsic testimony insufficient to authorize the use of the deposition. The certificate was not contradicted by the proof shewing, that he had not become an attorney in such manner, that notice might be given to him, according to the provisions of the statute.

In the case of *West Boylston* v. *Sterling*, 17 Pick. 126, it was decided that a certificate of a justice, that the deponent was so aged and infirm as to be unable to travel, and attend at the trial, could not be contradicted. The opinion states that it is not intended to say that if the magistrate is imposed upon by some false pretence, and if there be any fraud, this may not be shown.

There does not appear to have been any decision made in this State, since the Revised Statutes were operative, that the certificate of a magistrate who has taken a deposition can be contradicted.

The sureties on the replevin bond were admitted to testify after the plaintiff had deposited money with the clerk equal to the amount named as the penal sum. The clerk received the money as the officer of the Court, as he does money tendered and brought into Court. In such cases he receives it subject to the control of the Court; and if there be any just cause to fear, that it may be lost, he may be directed to deposit it, where it may be safely kept. The case of *Roberts* v.

Adams, 9 Greenl. 9, appears to authorize a deposit of money with the clerk for such purposes.

The sureties could be liable for no greater amount than the penal sum named in the bond, without proof of delay of payment after its breach; and such delay could not be presumed, when the money, from which payment could be obtained, was within the control of the Court.

Exceptions sustained, verdict set aside, and new trial granted.

DAGGETT *versus* BAKEMAN *& al.*

In constituting a justice's court to take the disclosure of a poor debtor upon his relief bond, if the creditor neglect to appoint, the law provides that an appointment may be made in his behalf, by any officer who might have served the execution upon which the debtor was arrested.

Bangor and Brewer being adjoining towns, and the debtor, whose residence was in Brewer, having been arrested upon execution by a constable of Brewer, *Held*, that the appointment of a justice resident in *Bangor*, might be made by a constable of *Bangor*, though the disclosure was to be had at *Brewer*.

ON EXCEPTIONS from the District Court, HATHAWAY, J.

DEBT upon a poor debtor's six-months' relief bond.

The debtor resided at Brewer, and had been arrested on the execution by a constable of that town.

The defence was, that the debtor had been discharged upon a disclosure, made at Brewer, of his affairs before two justices, &c.

The plaintiff contended that the justices' court was not legally constituted, and proved that he neglected to appoint a justice, and thereupon one, who resided at Bangor, was appointed in behalf of the creditor by a constable of Bangor, which adjoins the town of Brewer.

The plaintiff's objection to the Court was, that the constable of Bangor had no authority to make that appointment.

A nonsuit was directed, and the plaintiff excepted.

A. Sanborn, for the plaintiff.

I. Whether the constable of Bangor had authority to make the appointment, depends upon the question whether he might have served the execution. This he might have done, only in case he could find the debtor or his personal property in Bangor.

But there was no evidence that *on the day of making the appointment*, the debtor or his property was in Bangor. The constable's authority, then, was not proved.

II. The disclosure was to be taken at Brewer. In that town, the constable of Bangor could do no official act. *A fortiori*, he could confer upon no other person the power to do an official act in Brewer. But the taking of the disclosure by the justice was an official act. Upon what principle then can it be supported?

Prentiss and *Rawson*, *contra*.

WELLS, J. — The question presented is, whether a constable of Bangor had authority to select one of the justices residing in that place, the debtor's home being in Brewer, and the disclosure taken in Brewer.

The Act of Feb. 23, 1844, chap. 88, amendatory of chap. 148 of the Revised Statutes, authorizes the selection of justices, when the parties do not make it, "by the sheriff, or any deputy, constable or coroner, who might legally serve the precept on which he was arrested." The constable of Bangor might have served the precept on which the debtor was arrested, if the debtor had come within the limits of Bangor, or if his property had been found there. The service of it would have been compatible with his legal power. The meaning of the statute is, to confer the authority to make the selection on the officer who might serve such precept, or a precept of that class; that is, on him who had the power to do so, when the opportunity might offer, when a legal precept was put into his hands, and the debtor or his property was within his jurisdiction. Those events might never happen,

but still the power would exist. The constable acted within his jurisdiction, where a constable of Brewer could not, and the selection was properly made. *Worthen* v. *Hanson*, 30 Maine, 101.

By the statute, the justices may be selected from a town adjoining that in which the disclosure is made. The constable can select them, but aside from the exercise of that official duty, he can confer no authority; the law empowers them to act, and it is not necessary that he should follow them, or be able to perform any official act in the place where they may take the disclosure.

Exceptions overruled.

SMITH *& al. versus* DILLINGHAM *& al.*

If, in a judgment for return in a replevin suit, there be no assessment of damages occasioned by the detention, and if upon the restitution writ no return of the goods was obtained, the damage for the detention may be assessed and allowed in an action upon the replevin bond.

In such a case, the damage will be computed from the time of the original taking.

ON REPORT from *Nisi Prius*, TENNEY, J.

DEBT on a replevin bond.

These defendants had issued a replevin writ against these plaintiffs, directing the officer to replevy 1478 saw logs, valued at $6660. The officer returned that he had replevied 1386 logs.

At the trial in that suit the ownership of the logs was in controversy. Upon that point some questions of law arose. Under the expression of some opinions by the Judge, the then plaintiffs consented to become nonsuited, upon a stipulation, that if any of the opinions expressed by the Judge were erroneous, the nonsuit should be taken off. In that stipulation no provision was made for the allowance of damage for the detention. The action was then continued *nisi*, till in the vacation, the Court ordered that the nonsuit be confirmed,

and judgment rendered for a return, but without any order as to the damages for the detention. See the case as reported, 30 Maine, 370. At the next term, the then defendant moved the Court for an allowance of damage for the detention. This was refused, for reasons stated in 32 Maine, 182.

A writ of restitution was issued, upon which the officer returned that he could not find the logs, and that the defendants, though a demand upon them was made, had refused to make any return of them.

This is an action upon the replevin bond. It was defaulted, and the Judge assessed the amount to be recovered for the plaintiffs, *for the* 1386 *logs*, at $6245,44, which, it will be seen, was done by averaging them with the 1478 logs, as described and valued in the replevin writ. To that assessment no objection was made. Upon that amount, $6245,44, the Judge also allowed damage for the detention at the rate of six per cent. annually, from the *date of the bond.* To this allowance exceptions were taken by the defendants.

Rowe and *Bartlett*, for the defendants.

The replevin suit was prosecuted, as the bond required, to final judgment. The only breach of the bond then was committed when the defendant refused to deliver the logs upon the restoration writ; or at most, when the judgment for return was rendered. The damage for detention, then, could be allowed only from one or the other of those periods.

Hilliard, for the plaintiffs.

The damage was rightfully assessed. The defendants are bound by the valuation fixed in their bond. *Parker* v. *Simons*, 8 Metc. 212; *How* v. *Hanly*, 28 Maine, 250; *Huggeford* v. *Ford*, 11 Pick. 224.

The interest, allowed as damage, reaches only to the time when our property was taken. It is analogous to the rule in trover, which allows interest from the time of the taking, and it conforms to the highest justice. 15 Pick. 71; 16 Pick. 194.

Rowe and *Bartlett*, in reply. —

Last year, the plaintiffs applied to the Court for allowance of damage. It was refused, because the Court found it was not within their right to make the allowance. 32 Maine, 182.

The Judge, in the assessment to which we except, has done what the Court had already decided they had no right to do.

Our bond was to pay what might be recovered against us in the replevin suit. No damage was then recovered, and we are therefore not bound to pay any. If the plaintiffs *might* have then recovered, they waived the right.

Further, we had right to a jury trial.

What law gives six per cent.? Jury not so bound. If then there must be an allowance of damage, the amount should be passed upon by the jury. We might then be allowed to prove, for the purpose of reducing the damage, (what is the exact truth of the case,) that a part of the logs replevied were our own. The rule in the case cited from 11 Pick. is not law in this State. It grew out of some statute of that State. A rule different from that was applied in 12 Mass. 406. There the interest was computed from the time when the goods should have been returned on the restoration writ. In this case, there is nothing upon which the Court can base an authority in themselves to assess damage.

WELLS, J. — The only question raised in the argument relates to the amount of damages, which the plaintiffs are entitled to recover.

The condition of the bond required, that the plaintiffs in the original suit should prosecute the replevin to final judgment, and pay such damages and costs as the defendants in that suit should recover against them; and also to return and restore the same goods and chattels, in like good order and condition as when taken, in case such shall be the final judgment.

The statute, chap. 130, sect. 11, provides, that "if it shall appear upon the nonsuit of the plaintiff, or upon a trial or otherwise, that the defendant is entitled to a return of the

goods, he shall have judgment therefor accordingly, with damages for the taking thereof by the replevin, with his costs and a writ of return and restitution thereupon accordingly."

The statute contemplates, that the property will be returned, when such is the judgment, and the damages are then assessed upon that expectation, and if the damages, with the interest, which the Court by statute, chap. 96, sect. 20, has power to allow on them, from the time the verdict was rendered to the time of rendering judgment on it, and the costs are paid, and the property is returned, there would be no breach of the bond. And if, in the present case, the property had been returned, the costs having been paid, and no damages recovered in the replevin suit, this action could not have been maintained, because there would have been an entire compliance with the judgment rendered. *Pettygrove* v. *Hoyt*, 2 Fairf. 66. But the property was not returned, and there was then a breach of the bond, and the statute does not prescribe how the damages shall be assessed in such contingency. The general rule of law would give in such case, as an indemnity, the value of the property at the time it was taken, with interest from that time to the time of trial. Such is the rule in relation to interest for the detention of money, and the delay of satisfaction for the conversion of property.

If damages for the taking had been assessed, as the statute provides, up to the time when the nonsuit was ordered, the estimate of damages in this suit for the detention, would have been commenced at that period. But the record shows that no such assessment was made. The wrong done to the plaintiffs consists in the taking of their property, and in the delay of making compensation for it. There is nothing in the statute which precludes the allowance of interest on the value of the property from the time when it was taken.

Exceptions overruled.

SARGENT *versus* POMROY *& al.*

In a suit for the breach of a bond, given to procure the release of a debtor from arrest *upon mesne process*, the penal sum may be chancered to the amount of the actual damage.

In the absence of proof upon the point, the sum due on the execution recovered in the suit, will be considered the actual damage.

That rule of assessing damage will not be varied by proof that the debtor was without attachable property at a period several months later than the breach of the bond.

ON FACTS AGREED in the District Court.

DEBT for the breach of a bond, given to procure the release of Pomroy from arrest on *mesne process*. Pomroy made no disclosure upon the bond. Judgment went against him in that suit, and upon the execution he gave a poor debtor's six months' relief bond, from which he was discharged, since the commencement of this suit, by taking the poor debtor's oath.

Knowles, for the plaintiff.

Prentiss and *Rawson*, for the defendant.

I. The bond is subject to chancery. 22 Maine, 483.

II. The onus of proving damage is on the plaintiff. 2 Greenl. 13; 24 Maine, 362. He has offered no proof, and therefore can recover but a nominal sum.

III. The *defendant has* shown, that the breach of the bond was of *no* damage to the plantiff.

1. The object of arresting a debtor on mesne process is to secure his appearance to be taken on the execution. By taking him on the execution, the plaintiff obtained all the benefit intended by the previous arrest.

2. The discharge of Pomroy upon taking the poor debtor's oath on the execution, proves his poverty and that a disclosure on the bond, now in suit, could have been of no benefit to the plaintiff.

WELLS, J. — It has been decided in the cases of *Burbank* v. *Berry*, 22 Maine, 483 and *Waldron* v. *Berry*, Ib. 486,

that a bond, taken to liberate a debtor from arrest on *mesne process*, is subject to chancery under the Revised Statutes. The thirty-sixth and thirty-seventh sections of chap. 148, R. S. relate to the proceedings therein specified, and in the latter, provision is made for the amount for which execution shall issue when the officer, having the execution, shall return that the debtor is not found. The present case does not come within those sections. The bond is subject to chancery, and there is no limitation by statute of the amount for which judgment should be rendered, in the position of this case.

But there are no facts introduced by either party, showing the condition of the debtor as to property, at the time the bond was forfeited. If he had then disclosed and had been possessed of property as mentioned in the thirty-sixth section of the statute, the creditor might have taken the same in the manner therein stated, and obtained satisfaction of his debt, or have arrested the debtor on his execution. It does appear, that he was at a subsequent time arrested on the execution, which issued on the judgment rendered in the action, in which the bond in suit was taken, that he was liberated on giving bond, and was discharged from that by taking the poor debtor's oath. This discharge, it is stated, took place after the commencement of the present suit, but how long afterwards does not appear. No inference can be drawn from that fact, that the debtor was unable to pay the debt, when the forfeiture of the bond in suit took place. He might then have had abundant means to pay all his debts, and the oath, not taken about that time, but at some subsequent and remote period, would have of itself no tendency to show what his ability was at the time of the forfeiture.

The plaintiff proves what he is entitled to recover on the bond by the exhibition of his debt, and if the debtor would reduce that amount by proving his poverty at the time of the breach of its condition, and show that the creditor could not have obtained any thing by the performance of it, the burden of proof is on him to do so. The plaintiff does show

what is due in equity, in accordance with the case of *Gowen* v. *Nowell*, cited in argument.

According to the agreement of the parties, the defendants are to be defaulted for the amount due on the execution against Pomroy, and interest.

Defendants defaulted.

THOMAS *& al. versus* DOW *& al.*

The surety on a poor debtor's six months' relief bond is discharged by a contract made, for a valuable consideration, between the creditor and the principal, without the knowledge of the surety, that the bond should be discharged, if the principal at a time beyond the six months shall pay a specified part of the amount due.

ON FACTS AGREED in the District Court.

DEBT upon a poor debtor's six months' relief bond. The principal debtor was defaulted. The surety defended.

The bond was dated July 14, 1848. On January 13, 1849, the plaintiffs, without the knowledge or consent of the surety, agreed in writing with the principal, that if he would on that day pay $5,00 and would also pay $30 more in goods at the end of thirty days, the plaintiff "will discharge and deliver up the bond and the judgment." The principal paid the $5,00 pursuant to the contract.

Rowe & Bartlett, for the plaintiff.

This case differs from *Leavitt* v. *Savage*, 16 Maine, 72, in this; that here is no express agreement not to sue, and none can be implied by law.

The plaintiffs retained their right to commence a suit, at the expiration of the six months, on the bond, if forfeited; or on the judgment, if the condition were performed; and the agreement merely placed it in the power of the debtor to defeat such action, if commenced, by a performance, or a tender on his part.

Such agreements, to take a less sum in discharge of a greater, if paid in a given time, are of daily occurrence. Does

the creditor thereby lose the right to secure his claim by attachment? It will not be pretended.

The language of the agreement negatives the idea of an intention on the part of the creditors, to extend the time on the bond. The expression is, "will discharge and deliver up the bond and the judgment," thus contemplating a continued liability on the bond; and agreeing to discharge it, whether sued or not.

It was the duty then of the surety to see to the performance, either of the bond, or of the condition which was to discharge it.

J. E. Godfrey, for the defendant.

HOWARD, J. — The plaintiffs contracted with the principal, for a valuable consideration received, before forfeiture, and without the knowledge or consent of the surety, to enlarge the time of payment or performance of the conditions of the bond. This contract was valid and binding upon them, and suspended their remedy upon the obligation, until the time of extension had elapsed. If, in violation of the stipulation, the obligees had instituted a suit upon the bond, the principal could have obtained relief in a court of equity by injunction. The argument, therefore, that the plaintiffs waived no rights by the agreement, and that they retained the right to commence a suit at the expiration of the six months, on the bond, if forfeited, cannot be supported.

While the rights of the plaintiffs were suspended, by their contract, the surety could not proceed, by substitution against the principal in their names; nor by furnishing indemnity, compel them to proceed against him. The effect of their agreement was to alter the contract of the surety, to impair his rights, and discharge him from all responsibility on the obligation.

In *Leavitt* v. *Savage*, 16 Maine, 72, doctrines decisive of this case were fully considered, and settled upon principles deduced from authorities in law and equity. *Greely* v. *Dow*, 2 Metc. 176.

As the principal has been defaulted, the plaintiff may have judgment against him, by amending his writ, and striking out the name of the surety, on payment of his costs. R. S. chap. 115, sect. 11.

BUTTERFIELD *versus* HASKINS.

A devise of the *income* of land to the use of the devisee during his life, confers upon him a life-estate in the land.

A devise of the care and management of land and of the disposition of its income, during the life of the devisee, *for the benefit of another*, confers upon the devisee a life-estate, *in trust*.

If, under the will, the devisee take an estate in fee, subject to such life trust, his creditor, by a levy of his estate in remainder, can take no enjoyment of the income, until the death of the devisee.

An entry upon the land by the creditor to make such a levy, without his retaining or otherwise interfering with the possession, is not a trespass against the debtor.

WELLS, J. — The *locus in quo* was devised by Joseph Butterfield to the seven children, by name, of the plaintiff, and to his after-born children, by the wife, which he then had, who were to be entitled to equal shares of his estate with the other seven.

Seven children were born after the death of the testator, but four of them have died, and as we understand by the statement of facts, in infancy and without issue.

The children named took a vested, but qualified fee. According to the rules of conveyancing at common law, the devise to the after-born children would be void, because it was a conveyance of a freehold to commence *in futuro*, and to persons not *in esse*. But a different rule prevails in relation to devises, and after-born children may take in such cases by way of executory devise. The fee may be so limited as to open and let in their claims. *Dingley* v. *Dingley*, 5 Mass. 535; *Annable* v. *Patch*, 3 Pick. 360; 1 Fearne's Cont. Rem. 302 and 319; 6 Cruise's Dig. J. 38, chap. 17.

Another provision in the will is as follows: — "It is my intention and will that if any of the children of said John and Betsey, whether now born or hereafter to be born, shall die during their minority, *and* without any heir or heirs of his or her body or bodies, then the share or shares of such deceased child or children shall go to and be equally shared by all the brothers and sisters, of the whole blood of such deceased child or children."

By the principles applicable to executory devises, the shares of the four children born after the death of the testator, and who have since died, would pass to the survivors, and there being ten of them at that time, each one would take an undivided tenth part. Charles W. Butterfield was one of the ten surviving devisees, and took a tenth part of the estate. He died after he had arrived to the age of twenty-one years, leaving a wife but no children.

It is contended on the part of the plaintiff, that the word *and* in the clause of the will cited, should be changed into *or*, in order to carry into effect the intention of the testator. But if such change should be made, then if he had died during minority leaving children, the estate would go to his brothers and sisters, to the exclusion of his children. It cannot be supposed that the testator intended any such result. He has provided otherwise in plain and positive language, and to deprive a devisee of a share of the estate, such devisee must die during minority *and* without heir of his or her body. If the word *or* had been inserted in the will instead of *and*, a proper construction of it might have required a substitution of *and* instead of *or*. *Jackson* v. *Blanshaw*, 6 Johns. 54; *Sayward* v. *Sayward*, 7 Greenl. 210. There is nothing in the will from which it can be inferred, that the testator intended to put any other construction upon the clause under consideration, than its strict grammatical sense would imply. The plaintiff offered proof of his insolvency, and of the knowledge of it by the testator. But that proof creates no ambiguity in the will in any respect. If it were admitted, it could not have any effect upon the express terms of the will.

It might show a reason why the testator would not give his property to the plaintiff, upon the presumed repugnancy, which the testator might have to the appropriation of his property by the creditors of the plaintiff to the payment of his debts. The will itself indicates very clearly, that the testator did intend, to a certain extent, that the plaintiff should not take any interest under the will, which would be liable for his debts. But it must be presumed, that the testator understood the import of the language employed, and that in certain contingencies the plaintiff might acquire such interest. By the terms of the will, each devisee acquired an absolute estate in fee simple as soon as such devisee became twenty-one years of age, and upon dying without issue, and without making a disposition of it, the father would inherit the share of such deceased devisee. The testator might have been willing to dispose of his estate with a full knowledge of that contingency, and to leave to each devisee the entire control over it, after his or her arrival at the age of twenty-one years. Each child could then make a will, or permit the estate to follow the law of inheritance. The language used evinces such intention, and the testimony offered, if received, could not have the effect to show, that the testator did not so intend, and that he had made a mistake in using *and* instead of *or*. Upon the death of Charles W. the plaintiff, his father, inherited his share.

The defendant, after the death of Charles W., caused the interest of the plaintiff to be attached, and levies were made upon one-seventh part of the real estate devised to his children. By the will the plaintiff was to have the care and management of the estate during his life, for the benefit of his children, and was to "use and dispose of the income thereof for their support, education and comfort, according to his best skill and judgment." The plaintiff could not perform what was required of him by the will, unless he had possession of the estate and the control of it. If the income had been given to him for his own use during his life, he would have taken a life-estate. *Andrews* v. *Boyd*, 5 Greenl. 199;

4 Kent's Com. 536, and the cases there cited. But the care and management of the estate and the disposition of the income are given to him for the benefit of his children. It is therefore a trust estate during his life, he being the trustee, and holding it for his children.

The death of Charles W. did not authorize any change in the care and management of the estate.

The plaintiff's duty remained the same, he was to continue to take the income, not for himself, but for his children, during his life. And although he became the heir of Charles W. he could not appropriate the income of the share of the deceased devisee to himself. It appears to have been the intention of the testator, that the plaintiff should devote the income of the whole estate to the benefit of the children, and if he should retain to himself any part of it, that intention would be frustrated.

By the death of Charles W. the plaintiff became the owner in fee of his share, but as the plaintiff could not hold the profits for his own use, his creditor could not take them by a levy on that share, during the lifetime of the plaintiff. But the estate in remainder, after the termination of the trust estate, belonging to the plaintiff, by statute, chap. 94, sect. 1, might be taken in execution, but there could be no enjoyment of the rents and profits by the creditor, until after the death of the plaintiff.

The levies were made upon one-seventh part of the premises devised by the will, but the plaintiff was the owner of one-tenth part only, that being the share of Charles W. By the statute before cited, sect. 10, it is provided, that "all the debtor's interest in the premises shall pass by the levy, unless it be larger than the estate, mentioned in the appraisers' description." The debtor's interest in the premises was smaller than that mentioned in the appraisers' description, and it therefore passed by the levies.

The plaintiff had continued in possession of the land since the testator's death. The defendant was the owner of the judgment upon which the executions issued, and entered upon

the premises with the officer, and took possession under the levies from him, and this is the alleged trespass for which this suit is brought. He did not retain the possession or in any other manner interfere with it. Such an act would not make him a trespasser. When the statute authorizes a levy to be made upon a remainder, all the acts necessary to be done are embraced within the authority given, and an entry by the creditor for the purpose of taking a momentary seizin and possession, would not constitute a trespass. And this conclusion is in accordance with the seventeenth section of the statute.

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

Plaintiff nonsuit.

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

A. W. Paine, for the defendant.

BEULAH FRENCH *versus* EDWARD D. PETERS.

The statutes of 1821, relating to the mode of relinquishing a right of dower, superseded all former ordinances, Acts and usages, upon that subject.

The statute of 1821, chap. 40, sect. 6, under which a married woman might relinquish her right of dower by "deed under her hand and seal," gave no efficacy to her deed, unless the husband joined in its execution.

Thus, a release of dower by a married woman, executed while that statute was in force, and in which the husband did not join, though indorsed upon his conveyance, and alleged to be in consideration of the sum mentioned in the conveyance as the price paid by the grantee to the husband for the land, constitutes no bar to her claim of dower.

An assignment to a widow, by the Court of Probate, of an entire parcel of land as her dower, instead of one third in each of the parcels of which her husband died seized, has been denominated an "assignment against common right."

When an assignment made against common right has been avoided in a portion of the land assigned, by virtue of a foreclosed mortgage given by the husband, the widow is restored to her original right of dower in such portion.

ON FACTS AGREED.

DOWER, *unde nihil habet*, brought by the widow of Zadoc

French, who, at one period during her coverture with him, owned the land upon which the Penobscot Exchange House stands, and also many other tracts of valuable land in the city of Bangor. This suit is brought to recover dower in the Exchange House lot. On January 19, 1829, the husband, in order to raise money for his own use, mortgaged that lot to Eben. French, alleging the consideration to be $12,000.

The demandant did not join with her husband in executing the deed. But, on the 4th of February, 1829, she executed upon the back of that deed, an instrument under her hand and seal, relinquishing to the mortgagee her right of dower, reciting therein that the relinquishment was done by the consent of her husband as testified by his being a party thereunto. The husband however did not join with her in that instrument. The consideration of her said relinquishment was stated to be "the within named sum of $12,000."

The mortgagee, on the next day, (5th February, 1829,) assigned the mortgage to this defendant, Peters.

In July, 1831, after her husband's death, she applied to the Probate Court for an assignment of her dower, and thereupon several entire parcels of the land, including the Exchange House and its lot, were assigned to her in dower, instead of one-third in each of the parcels, of which her husband was seized at his death. To this assignment she and the heirs assented, and she entered into the possession of the parcels so assigned.

In 1842, the mortgage was fully foreclosed, and the demandant was thereupon evicted of the most valuable of the parcels assigned to her in dower.

Zadoc French's administrator sold lands belonging to the estate, having been duly licensed, on giving to the Judge of Probate a bond, (upon which this demandant was a surety,) to account for the avails. He, however, misappropriated a large amount of the proceeds of the sale.

The grounds taken in defence were : —

1st. That the demandant's right of dower was barred by the

relinquishment which she had executed and indorsed upon the mortgage deed ; —

2d. That the assignment of dower made by the Probate Court is a bar to this suit ; —

3d. That the mortgage debt due to the tenant, Peters, ought to have been paid from the avails of the land sold by the administrator, upon whose bond the demandant, as a surety, will be liable to repay to the tenant the balance of that debt. And that debt will be made the larger by her recovery in this suit, and to the very amount of such recovery, because it lessens to that extent the value of the property upon which the mortgage was foreclosed. Wherefore, to avoid circuity, the demandant must be estopped to recover in this suit.

Moody, for the demandant.

The instrument, executed by the demandant upon the back of the mortgage deed, is no bar to her right of dower. It was the deed of herself alone, unapproved by her husband. It does not recite the mortgage as a consideration. That it was indorsed upon the mortgage has no effect to make it a part of the mortgage, any more than an assignment upon a mortgage becomes a part of the mortgage. It bears a subsequent date, and was made at a subsequent time. It shows upon its face that she did not intend to be bound by it, unless her husband should join in its execution.

But, if she did design and attempt to bar her right of dower by that deed, it was not effectually done. At the common law the sole deed of a *covert feme* is merely void. 7 Mass. 14; 14 Maine, 435.

It becomes important to ascertain what modifications of the common law have been introduced by the legislature. The colonial ordinance of 1641, by implication, provides that a wife might bar her dower by a writing acknowledged before a magistrate. Anc. Charters, page 99. That ordinance was abrogated upon the revocation of the first charter in 1685. The principle, however, was revived by two provincial statutes passed in 1692. Anc. Charters, chap. 213, 229. These statutes were virtually repealed in 1697 by the proviso to the

"Act for registering deeds." Anc. Charters, page 303; *Rowe* v. *Hamilton*, 3 Maine, 63; *Fowler* v. *Shearer*, 7 Mass. 14. These cases conclusively show that after the passing of the Act in 1697 "for registering deeds," no statute was in force to authorize a *feme covert*, by her deed alone, to bar her right of dower.

In *Fowler* v. *Shearer*, there is a remark of PARSONS, C. J., that a wife's right of dower was sometimes barred by her separate deed, in which the sale by the husband was recited as a consideration.

The remark was uncalled for by any thing in that case. It was mere *dictum*. But the "separate deed" there spoken of did not mean her *sole* deed, but only a *subsequent* deed. And there is nothing to show that, in such subsequent deed, it was unnecessary for the husband to join. This conclusion is equally grammatical, and is in accordance with the spirit of the case and with the context.

The argument of the opinion shows that the deed of a married woman was void at the common law, but that some cases existed by usage where it might operate to bar her dower; viz.: — Where she joins her husband in conveying her own estate; — where she joins in his deed of his own estate, for the purpose of relinquishing her dower; — and where by a deed, distinct and separate from his conveyance, she relinquishes dower. Can it be questioned, that by this last expression, *used in such a connection*, there must also be meant that the husband should join in the deed? *Shaw* v. *Russ*, 14 Maine, 435. The *dictum* was based upon a supposed usage. But there is not, and there never was, such a usage.

C. J. WESTON, in *Shaw* v. *Russ*, says, "as to a usage to this effect, we are not aware that an instance has been presented to the consideration of the Court there, (in Massachusetts,) and this is the first attempt of the kind, which has come to our knowledge here."

The deed of a *feme covert*, in which the husband does not join, is void. *Andrews* v. *Hooper*, 13 Mass. 476. The *dictum* of PARSONS, C. J. if intended to apply to the deed of

the wife alone, is denied by STORY, J. in *Rowell* v. *M. & B. Manf. Co.* 3 Mason, 347. At any rate, such a deed, in order to be operative, must recite the husband's conveyance as a consideration. Such is not the character of the demandant's deed. It recites a different consideration. But we consider the case of *Shaw* v. *Russ*, decisive.

With regard, then, to the instrument of Feb'y 4, 1829, there is nothing left for the defence, except what argument may be derived from the language, "or where she may have relinquished her right of dower by deed under her hand and seal," found in statute of 1821, chap. 40, sect. 6. But the obvious answer to that argument is, that by the deed, there referred to, is meant a deed *according to law*; in other words, a deed in which the husband joins. I am not aware of any case, in which her sole deed has been upheld under that statute.

The provision is nothing more than a transcript of Massachusetts statute of 1783, chap. 37, and that of 4 & 5, W. and Mary, chap. 16, sect. 5, which STORY, J. construes as not intended to let in any usage or practice, not consonant to the principles of common law, but merely to refer to the "extinguishment of dower in any legal manner whatsoever."

The commissioners, who compiled the R. S., have shown their understanding of the provision by R. S. chap. 95, sect. 9, wherein it is expressly said that a subsequent deed "executed jointly with the husband," is necessary.

This certainly may fairly be regarded as an exposition on the part of the legislature, of their views of the existing law as to releasing dower.

But whatever may be the construction on this part of the clause, it is a perfect answer to say that the instrument of Feb. 4, 1829, if intended for a deed, was but a joint deed, uncompleted and therefore inoperative.

No defence can be drawn from the assignment of dower, made by the probate court. The defendant, by the foreclosure of his mortgage, divested the demandant of all title and claim to the Bangor Exchange House. The dower assigned her in

that property was then taken away by that foreclosure. She has had no dower or equivalent for dower in these premises. The assignment of dower which she accepted was *inter alios*. The defendant was not affected by it. As to him, it was a nullity. *Sheafe* v. *O'Neil*, 9 Mass. 9; *Wilkins* v. *French*, 20 Maine, 111. Neither was it a release or in the nature of a release. And if it were, it could not be pleaded where there is no privity. A release of dower to a stranger, under whom the tenant does not claim, is not pleadable in bar of dower. *Pixley* v. *Bennett*, 11 Mass. 298.

J. A. Peters, for the defendant.

The demandant is barred by her release of February 4, 1829. The effect of that instrument is to be found in the Acts of 1821. The chap. 36, §. 2, provides that nothing in the Act should bar a widow of her dower, who did not join with her husband in such sale or mortgage, or otherwise lawfully bar or exclude herself. Chap. 40, sect. 6, provides that the widow shall be entitled to dower in all lands of which her husband was seized during coverture, except where she may by her own consent have been provided for by way of jointure prior to the marriage or where she may have relinquished her right to dower by "deed under her hand and seal."

The legal doctrine upon this point is found in the opinion of PARSONS, C. J., in *Fowler* v. *Shearer*, 7 Mass. 14 and 20. That opinion has ever since continued to be the law in Massachusetts. 9 Mass. 143, 149, 161, and 173; 8 Pick. 536. The same has been the law of New Hampshire. *Shepherd* v. *Howard*, 2 N. H. 176 and 507, and cases there cited. In this State, (3 Greenl. 63,) the doctrine of the Massachusetts cases is discussed at length by MELLEN, C. J. and approved and adopted. Though the case of *Shaw* v. *Russ*, 14 Maine 432, undertakes to modify, it by no means overrules it. The marginal note does not correctly indicate the point decided. The decision went upon the ground that the subsequent and separate deed of the wife "was not made in consideration of the husband's conveyance," but for a consideration "altogeth-

er independent and distinct, so that it is not sustained by the case of *Fowler* v. *Shearer*."

The case of *Russ* v. *Shaw* proves our position, for, in the release of the demandant, indorsed upon her husband's deed, she declares that it was made "in consideration of the *within named* $12000 paid" to her husband, &c. this being done "in fulfillment of his and my intention to convey a clear title by virtue of the within written deed."

Thus the release was amply expressed to be in consideration of her huband's conveyance; so that if *Russ* v. *Shaw* in some respects limits *Fowler* v. *Shearer*, it however leaves our defence fully within the folds of both cases.

Judge PARSONS asserts that it had been usual to make such instruments. He knew *then* much better than we can ascertain *now*, what every day practice, what the usage was, *and* what the law was understood to permit; and he embodied it in 7 Mass. It was acquiesced in as the law of New England. Thousands upon thousands of instruments have undoubtedly been drafted in accordance with the rules laid down in that case. It is too late to disturb it. And although C. J. WESTON undertook to cavil at it a little, he left it unmarred and unimpaired.

Judge STORY too, who loved to magnify the greatness of great men, and then show where he had found they were mistaken, in a case hereafter named, undertook also to limit Parsons' opinion, but at same time said of him "no man was better acquainted with our local law."

Neither was the law of Massachusetts overruled in 3 Mason, 347, cited by demandant's counsel. That case undertook to say that the case of 7 Mass. must be understood as making a *separate* deed of the wife valid to release her dower when her husband does not join with her, only in cases where her conveyance was in consideration of his conveyance, and was for the same consideration. The case went off upon that point, in the same manner as did our own in 14 Maine. So that the opinion of STORY with that limitation or rather construction of PARSONS' opinion, actually confirms our defence.

There is another decision in the case from 3 Mason, which makes our defence at bar a good one. Judge STORY, discussing in that case what Parsons intended by "a separate deed," says, "If it means that it may be done by a separate deed of the wife executed after the deed of her husband, but *on the same day, or as part of the same transaction*, then there is no difficulty in reconciling it with the language of the statute, for the wife may truly be said to join in the sale, when she is a party to it at the time it was made, whether she join in her husband's deed, *or execute a separate deed.*"

We say that Mrs. French's release on the back of her husband's deed of mortgage, was a part of *the same transaction.*

The facts agreed state, that Zadoc French made the mortgage to Eben, his son, to raise money upon for himself, *Zadoc.* It was not therefore a mortgage, in the ordinary course of business, but was made in trust to Eben for Zadoc's benefit. Therefore in legal effect, at all events in equity, Eben was nothing more than a conduit of the title for convenience sake. He held the legal title for his *father, as* his father's, until, as his father's agent, he passed it to Peters for money which was procured for and went to Zadoc. 2 Fairf. 1; 2 Pick. 508; *Warren v. Ireland*, 29 Maine, 62.

Eben took the deed January 19, 1829, and it was recorded on same day, undoubtedly by Zadoc, and on 4th February, A. D. 1829, received the release of his mother, and *on the fifth, next day following*, assigned the mortgage and sold the notes to Peters for his father. Her release is for same consideration expressed in the mortgage deed. She recites the deed, fully admits and acknowledges it, makes hers a part of his deed, couples them, concludes her deed by the words "as witness OUR hands and seals this day, &c." Eben all the time holding it in his own hands as an uncompleted conveyance, till his mother had signed, before Peters would buy.

There cannot be any question that delivery of that assignment to Peters, was in legal effect the first delivery that was ever made of the mortgage deed. It was handed Eben, to

deliver Peters on 5th February. Till that day it was precisely the same as if it had remained in *Zadoc's own hands.*

It was never delivered Eben to be the property of Eben. Eben paid no consideration for it — did not claim it. The making of the mortgage, and the release of dower and the assignment of the mortgage, were all for one and the same consideration. They were all made for one purpose, were all delivered at one time to Peters, who took from Zadoc French, or from Eben for Zadoc, all the papers, and paid the money.

How else can this be than one transaction? How can it be said there was any delivery till that to Peters?

The practice of executing a deed by the wife, in order to bar her claim to dower, at a time many days subsequent to that on which her husband had executed it, is common and unobjectionable. *Frost* v. *Deering*, 21 Maine, 156. Our case is within that decision.

In the case, 3 Mason, Judge STORY seems to think, if the husband's assent is necessary to the wife's deed, that it may be *by parol.* His consent must be presumed in this case, because it was done for his benefit. More than that, the full consideration was paid him, or Eben for him, after her release.

"Where on one side of a paper was a deed apparently absolute, dated and duly executed, and on the other side a writing, in the usual form of a condition to a mortgage, without date, signature or seal, this condition was a part of the deed." *Stocking* v. *Fairchild*, 5 Pick. 181.

How much stronger is the argument in this case, that her release was a part of the deed?

The question of plaintiff's dower in these premises has been before this Court several times before. *Wilkins* v. *French*, 20 Maine, 111; *French* v. *Crosby*, 23 Maine, 276; *French* v. *Pratt*, 27 Maine, 381.

In each of those cases the mortgage deed and the assignment now in question were before the Court, and parts of the cases; and in each case it was assumed by the counsel on both sides, and stated in the opinions of the Court, that the

plaintiff, had by her separate release after her husband's deed, released her dower. It was in neither case regarded as a question.

The case 27 Maine, 381, decides this case. The only difference between the cases is, that the premises now in question are a portion of the very dower assigned to the demandant. But on principle this difference is nothing; it is only in feature.

When the widow was endowed against common right and accepted the assignment made in that way, it barred her from obtaining it in any other mode, she abides by whatever rights she can obtain in that way, she cannot be endowed anew. 27 Maine, 381.

The accepting of that assignment was a release of all other right or mode of dower. If she had a common law claim of dower in defendant's property, which she could demand and obtain by an action, she released it by the acceptance of that assignment.

She does not claim any thing that was given her by that assignment now, but something else. By that assignment she was put into the possession, with claim of freehold, of the whole of the premises in question, she now abandons that claim, or has been defeated of it, and claims *one third* of the same in right of dower, which claim, in that mode, she is estopped to make.

It was decided in *French* v. *Pratt*, that when she received the Exchange House property, she received it subject to incumbrances, all incumbrances made by the husband. The cases cited by Court and counsel are full authority to that effect. In this connection I will also cite, as perhaps analogous upon principle, the cases in 13 Wend. 553; 5 Metc. 277.

Her right to dower in the various premises of her husband of which he died seized, (and this comes under that head,) was merely an inchoate right, and lies only in action till assignment.

After assignment she is considered as holding immediately from the death of her husband, so that the heir is not con-

sidered as having ever been seized of that part of his ancestor's estate, whereof the widow is endowed. Cruise on Real Property, Title 6, Dower, chap. 111, sect. 24.

Her endowment was against common right. This was more beneficial to her than to have taken a third in every lot of which her husband died seized. She accepted that endowment, and it was a freehold, and she took it subject to all incumbrances. 27 Maine, 381.

If she continues her husband's seizin, she continues it subject to the incumbrances, and his seizin in this case having been subject to a mortgage, it must defeat the widow of her claim till paid, and if, as in this case, it is absolute, her rights are gone.

Another ground of defence is, that the plaintiff signed the bond which Eben French gave for selling land and paying the debts of the estate. Upon that bond she would be liable to Peters for the misconduct of the administrator. As his mortgage has become foreclosed, the presumption is, that it was of more amount than the Exchange House in value. He could therefore maintain an action against her. She is then estopped in this suit, so as to avoid circuity of action.

Permit me now to refer the Court to a beautiful arrangement of the facts of the case, and a clear exposition of the law upon them in the argument of Mr. Cutting, in the case of *French* v. *Pratt*. It is a handsome structure, upon a strong basis, and will endure as long as truth can last. It saves me much labor, and does him much honor. I shall admire to see the degree of his composure, if in the close of this case he shall undertake to tear that structure in pieces.

Cutting, in reply.

My associate has proved, I think, that the case of *Fowler* v. *Shearer*, if it ever was law, has ceased to be so.

The pretence that the statutes of 1821 do not require a deed in which the husband shall join, he has also fully obviated.

The defendant contends that the release upon the back of the deed is to be viewed as a part of the same transaction

with the giving of the deed. But it cannot be so. The acts did not occur upon the same day. A bond of defeasance, in order to constitute a mortgage must be of the same day with the deed, and intended at the time to be a part of the same transaction.

The case of *French* v. *Pratt*, upon which the counsel so strongly relies, was essentially different from this. The demandant had been endowed against common right; that is, she had taken an assignment of certain entire parcels of land for her dower, instead of one third in each parcel. In that case she sued for dower in one of the parcels which *had not* been assigned to her. In this case her claim is for dower in a parcel which *had* been assigned to her, but of which she was evicted by the foreclosure.

The demandant's suretyship upon the administrator's bond can operate as no estoppel to this action; most certainly it could avail nothing till after judgment. If sued upon it, she might defend upon several grounds. Among other things, proof that she had been deprived of this dower, by failing to recover in this suit, would be a defence.

Shepley, C. J. — The tenant derives his title to the premises by virtue of a conveyance in mortgage made by the husband of the demandant to Ebenezer French on January 19, 1829. The demandant did not join with her husband in that conveyance, but by a separate deed written upon the back of it, and executed by her alone on February 4, 1829, she relinquished to the mortgagee her right of dower. She recites in that deed, that this is "done by the consent of my said husband, testified by his being a party hereto," but the deed contains no other language suited to indicate, that her husband was to be a party to it. As the consideration is stated to be "the within named sum of twelve thousand dollars paid to him, the words first named, may have reference to the husband's being a party to the within deed.

Whether the deed executed by the demandant operated as

a valid relinquishment of her right of dower, is the question first arising for decision.

It has become part of the history of this branch of the law, that PARSONS, C. J. in the case of *Fowler* v. *Shearer*, represented the authority of a wife to bar herself of dower by deed, to have been derived from an ordinance of the province of Massachusetts Bay and from an act of the provincial legislature, and that he states it to have been "sometimes done by her separate deed subsequent to her husband's sale, in which the sale is recited as a consideration, on which she relinquishes her claim to dower." He refers to it also as a usage and as New England common law. What the usage was, as it respects the mode of execution by the wife, there was no means of ascertaining except from the remarks of the chief justice, and those have not been regarded as free from ambiguity.

When the same question came under consideration in the case of *Rowe* v. *Hamilton*, 3 Greenl. 63, the ordinance and usage were not regarded as of practical importance as it respected deeds executed after the passage of the provincial act of 1697, for the court considered, that all previous statutes and provisions were thereby superseded. The act last named could have no effect upon such conveyances made after the passage of the Act of March 10, 1784, directing the mode of transferring real estate: and this act was superseded in this State, by the Acts of Feburary 19, 1821, chap. 40, and of February 20, 1821, chap. 36.

The former Ordinance, Acts, usages, and decisions, can have no further effect than to aid one in arriving at a correct construction of the acts last named.

The construction of the Ordinance, Acts and usages of Massachusetts was considered in the case of *Rowe* v. *Hamilton*, and of *Powell v. Monson* and *Brimfield Manf. Co.* 3 Mason, 347, and of *Shaw* v. *Russ*, 14 Maine, 432. In the latter case the Court concluded, that a release executed by the wife alone on January 9, 1817, for a consideration paid to the hus-

band, was unauthorized by the statute then in force, and that it was void.

It having been stated in the case of *Fowler* v. *Shearer* that the sale by the husband should be recited as the consideration for the separate deed of the wife, it has been considered in some of the subsequent cases to have been an essential ingredient to a valid relinquishment of dower by the wife.

Whatever foundation there may have been in the usage referred to for such a position, there will be found none in the language of the Act of 1784, or in any of the preceding or subsequent enactments. Whether an intention ever did exist or could have existed and have been so frequently carried into effect in the execution of such deeds as to become a usage so as to make the validity of a deed depend upon such a recital may well be doubted.

The provisions of the Act of February 20, 1821, in force, when the deed of the demandant was executed, declared that a widow should not thereby be deprived of her dower "who did not join with her husband in such sale or mortgage, or otherwise lawfully bar or exclude herself from such dower or right." The latter clause, as stated in the case of *Powell* v. *Monson* and *Brimfield Man. Co.*, has never been construed to let in any usage or practice not consonant to the principles of the common law. It doubtless had reference to modes recognized by that law as effectual for such a purpose, such as jointures, marriage settlements, and accepted devises. If this be the true construction of that clause the only mode provided by that statute for a relinquishment of dower by the conveyance of a wife, was by her joining with her husband. By the provisions of the other statute, chap. 40, sect. 6, a widow is entitled to dower, except when by her own consent she has been provided for by a jointure "or where she may have relinquished her right of dower by deed, under her hand and seal."

It was not the purpose of that statute to prescribe the kind of deed, which should have that effect, but to declare, that when she executed a deed under her hand and seal, that

would have the effect to relinquish her dower, it should operate as a bar. A deed executed by her with her husband is a deed under her hand and seal. One executed by her alone, the law does not recognize as her deed. The words of the statute, by deed under her hand and seal, are fully satisfied by a reference to the law, to ascertain, what would be her deed; and they do not call for a construction, that would make any instrument signed and sealed by her a valid deed. If a construction should be given to these words, which would confer powers not known to the law, that clause of the statute would be in conflict with the provisions of the statute, chap. 36, § 2; and by the provisions of one statute she could only bar herself of dower by joining with her husband, and by another she could do it alone without the aid or consent, and even against the will of her husband.

It is worthy of notice, that by the Revised Statute, chap. 95, sect. 9, provision is made that a wife may be deprived of her dower by joining with her husband or with his legally authorized guardian in a deed releasing it. In a note appended by the commissioners of revision to that chapter and section as presented by them it is said, "there have been differing opinions on the subject of a married woman's release of her right of dower as to the mode. The better and the received opinion now is, that the law on the subject is correctly stated in this section."

The Legislature enacted the section, to which this note was appended, with some verbal but not substantial alterations, thereby presenting, as it were, a legislative sanction to such a construction.

In the cases of *Wilkins* v. *French* and of *French* v. *Pratt*, the opinions state, that the demandant had relinquished her right of dower in the premises, but it is so stated historically only in a recital of the facts, and not as a matter considered and decided by the Court.

The deed of the demandant must therefore be regarded as inoperative and ineffectual to release her right of dower in the premises.

The next question presented is, whether the assignment of dower made by the Probate Court is a bar to this action.

Although dower may be assigned to a widow in an estate conveyed by her husband during coverture in mortgage, that assignment cannot be valid against the title of the mortgagee, without an extinguishment of his mortgage. When the mortgage is foreclosed, his title commences from its date, and the widow can have dower only in that estate as in one conveyed by the husband, and can receive only one third part of the rents and income; and an assignment by the heirs or by the Probate Court of the whole estate as dower, is avoided by a foreclosure of the mortgage.

It is insisted, that an acceptance of that assignment by the widow is a bar to an action at law to recover her dower, and that it was so decided in the case of *French* v. *Pratt.*

That case and the case of *Jones* v. *Brewer*, decide only, that an assignment of dower against common right and an acceptance of it, deprive a widow of her right to dower in lands, in which dower was not assigned, not in lands in which dower was assigned. Nor are the principles or authorities on which those decisions were based, applicable to a case like the present.

The rule as stated by Lord Coke is, that if the heir endow the widow of certain lands, of which the husband died seized, in satisfaction of all dower, as well in the lands of his feofees as in his own lands, the several feofees shall take advantage of it, whether she be deprived of the benefit of such dower or not.

This rule does not affect the relation existing between the widow and the owner of lands, in which dower has been assigned.

If a widow be endowed against common right in several tracts of land, one of which had been conveyed in mortgage, by the foreclosure of which she is deprived of her dower in that tract, the owner of it cannot plead to an action of dower commenced by her, that dower was assigned to her in other lands, in satisfaction of all dower. When thus de-

prived of a part of her dower by the act of the mortgagee or his assignee, no injustice is done to him by considering the assignment of dower so far void as to enable her to recover her dower in the premises, as she might have done, if her dower had been assigned according to common right. His estate is not subjected to any greater burdens on account of dower, than it might have been, had no such assignment been made. While no injustice is done to either by considering the parties after such avoidance of the assignment of dower, as remitted to their original rights, it appears to be the only mode, in which the rights of the widow can be protected.

If a husband should die seized of one tract of land only conveyed by him in mortgage, the widow, according to the case of *Wilkins* v. *French*, should have her dower assigned by the Probate Court; and if she had no other property, she might be deprived of her whole dower by a foreclosure of the mortgage, unless such assignment were held to be good as against him as well as against the owner of the equity of redemption. She might thus lose her whole dower without fault on her part, or on the part of the mortgagee; and if the assignment made by the Probate Court were to be regarded as an effectual bar to an action to recover her dower in the same land, the owner would be relieved from her claim to dower in land clearly subject to it, by presenting an assignment made by the Probate Court, as ineffectual to give her dower as against him, and yet as effectual to bar her action at law to recover it. Such an assignment cannot be considered as effectual for one purpose and as void for another purpose, so far as it relates to the same estate. Nor is there any sufficient reason to distinguish such a case from one like the present, in which the assignment has been avoided in part only, so far as it respects the land, in which the assignment has been avoided.

The strength of the position presented in defence may be tested by considering it, as it would be presented by a special plea setting forth an assignment of dower made to the demandant by the Probate Court and an acceptance of it by her,

to which a replication had been made setting forth the execution of the conveyance in mortgage, its assignment to the tenant, and its foreclosure, by which the assignment of dower had been avoided so far as it respects the premises, and that to this replication there had been a demurrer. Judgment could not be rendered for the tenant without deciding, that proceedings which had been avoided so far as it respects the premises, were still operative to bar an action to recover dower in them.

The conclusion is, when dower has been assigned against common right, and such assignment has been avoided in certain portions of the land by the acts of the owner, both parties are restored to their original rights in such portions.

A third ground of defence presented is, that the demandant was surety on the bond of the administrator on her husband's estate, who has misapplied a sufficient amount of that estate to have paid the mortgage held by the tenant, who would thereby have been exempted from any loss occasioned by a recovery of dower.

This assumes, that the premises after the recovery of dower will be insufficient to pay the whole of the debt secured by the mortgage, and that a suit upon the bond of the administrator could be maintained to recover for any loss occasioned by the recovery of dower. Neither this, nor some further grounds of defence presented, can be regarded as sufficient to prevent a recovery by the demandant.

Tenant defaulted.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF WASHINGTON,

1851.

PRESENT:

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

LOVEJOY *versus* ALBEE *& Trustees.*

The courts of a Country or State have no jurisdiction beyond its sovereignty.

Judgments, rendered by Courts not having jurisdiction, are merely void.

Courts of this State have no jurisdiction to render judgment against a foreigner, when neither he or his property has been found here.

When property of a person is within the State, he not being present, a judgment against him will be effectual only as a judgment *in rem*, acting upon that property.

It is a principle of the common law adopted in this State, that no judgment can be rendered against one as trustee, if neither he or the principal defendant resides within the jurisdiction, and if no tangible property of such defendant has been found here.

That principle is yet in full force, unimpaired by any statute provision.

ON EXCEPTIONS from *Nisi Prius*, SHEPLEY, C. J.

TRUSTEE PROCESS.

The question was, as to the liability of the trustees.

It appeared from the writ, disclosure and the testimony, that the defendants and the persons summoned as trustees all resided in the Province of New Brunswick, and that no attachment of any tangible property of the defendants had been made, and that neither of their bodies had been arrested.

For that reason the Judge ordered that the trustees be discharged, and to that order the plaintiff excepted.

Fuller and *Harvey*, for the plaintiff.

The Rev. Stat. chap. 119, sect. 12, provides, "that any person on whom a trustee process shall be served, shall be liable to be adjudged trustee, though he was not then and never had been an inhabitant of the State, and that the writ may be returnable in the county, in which either the plaintiff or the principal defendant may reside."

Express provision is made for cases where defendant resides out of the State. It does not require, that both plaintiff and defendant should reside in the jurisdiction. Section 7, chap. 119, refers to sect. 28, chap. 114, and sect. 2 and 3, chap. 115. See also sect. 80 and 82, chap. 119, R. S; Stat. of 1845, chap. 136.

The intention of the legislature is plain, that a trustee should be chargeable if he comes here, though his domicil is elsewhere.

The statute of 1845, directs the mode of making demand upon trustees living out of the State. When so made, if the trustee refuse, the plaintiff has remedy when the trustee again comes within the State.

The law and the Acts that make a trustee a party, are distinct from the Acts that bring in the principal defendant. R. S. chap. 119, sect. 20.

Courts of general jurisdiction do not inquire as to the domicil of the parties in transitory actions. Our Courts are open to the world. *Barrel* v. *Benjamin*, 15 Mass. 355; Story's Conflict of Laws, 453 and 457, and 545 and 546.

A judgment may be good here which will not be respect-

ed in foreign courts. The legislature have the power to authorize the rendering a judgment here, though the courts of defendant's domicil may not enforce it. Story's Conflict of Laws, 547; *Folliot* v. *Ogden*, 3 D. & E. 125.

Personal contracts follow the person of the debtor. 16 Mass. 302.

J. Granger, for the trustees.

SHEPLEY, C. J. — No country can by its laws act directly upon persons not resident or found therein, or upon their property not found therein. The courts of a State or country can have no jurisdiction beyond its sovereignty. No court in this State can rightfully have jurisdiction to render judgment against a foreigner, when he has not been found within the State, and when no property owned by him has been found within it.

When the person is not within the jurisdiction of a court and his property is within its jurisdiction, a judgment against him will be effectual only as a judgment *in rem* acting upon that property. Should a court render a judgment without obtaining such jurisdiction it would be merely void. Story on Conflict of Laws, sect. 21, 539, 543, 546, 549, 550, 556; *Bissell* v. *Briggs*, 9 Mass, 462; *Borden* v. *Fitch*, 15 Johns. 121; *Piquet* v. *Swan*, 5 Mason, 35; *Douglas* v. *Forrest*, 4 Bing. 686; *Becquet* v. *MacCarthy*, 2 B. & Ad. 951.

It is undesirable to have a state or country attempt by its laws to give its courts a jurisdiction beyond its sovereignty, for it could only cause a conflict of duties among persons thus subject to be acted upon by different laws and tribunals. It would exhibit a wrongful exercise of authority on the part of a state or country enacting such laws. Its statutes should not receive such a construction, unless it be unavoidable.

It is not contended, that by the common law, or by the provisions of any statute existing previous to the year 1834, a judgment could be rightfully rendered against a person summoned as a trustee in a case like the present. It had been decided, that no such judgment could be rendered. *Ting-*

ley v. *Bateman*, 10 Mass. 343; *Nye* v. *Liscome*, 21 Pick. 263; *Jones* v. *Winchester*, 6 N. H. 497.

It is insisted that the Act of March 12, 1834, chap. 139, conferred a jurisdiction sufficiently extensive to embrace this case; and that the same provision has been re-enacted in the Revised Statutes, chap. 119, sect. 12.

The section last named does provide, that a judgment may be rendered against a person summoned as a trustee, who has never been an inhabitant of this State. But it has reference to a case in which the court has jurisdiction of the suit between the principal parties. This is manifest from the clause, which refers to an action, that may be brought in the county, where either the plaintiff or the principal defendant resides. The provision assumes, that the court has rightfully jurisdiction of the suit between the principal parties. The purpose of the statute appears to have been to provide a remedy in a case, where a person at no time a resident within the State was indebted to, or had property belonging to a person resident or found within the State. In such case the court having jurisdiction of a suit against the principal defendant might act upon his personal property and choses in action, entrusted to or due from a person, not an inhabitant of or found within the State, upon the principle, that such property is supposed to follow or accompany the person of the owner.

This enactment should not receive a construction that would make it embrace cases, over which the court has no jurisdiction; for it could be of no practical importance. Such a suit might at any time be defeated by the parties defendant; or by the interposition of the court, when the facts came to its knowledge. If judgment should in such a suit be rendered against a trustee and he should make payment thereof to the plaintiff, that would afford him no protection whatever, when called upon in the place of his domicil to pay to the principal defendant.

In the present case it appears from the facts stated in the exceptions, that this Court has no jurisdiction of the suit be-

tween the principal parties. It has obtained no jurisdiction to render a judgment against the principal defendant by his being a citizen or resident, or found within this State, or by his having any property found within it.

The provisions of statute chap. 119, sect. 82, and of the Act of February 28, 1845, apply to cases already named of trustees not at any time an inhabitant of the State, and to cases in which the trustee after having been summoned, has removed from or cannot be found within the State.

The provisions of the seventh section of chap. 119 have reference to cases, in which a defendant having a residence within the State, is absent from it at the time of service without having a last and usual place of abode or an agent within the State; and also to cases, in which a suit has been commenced against a person not resident or found within the State, whose property has been found within the State and attached in some form.

This would seem to be the appropriate and correct construction of the statutes named; but if it were not the more obvious construction, they should upon the authority of decided cases receive such a construction in preference to one, that would attempt to give the court jurisdiction beyond the sovereignty of the State. *Buchanan* v. *Rucker*, 9 East, 192, *Cavan* v. *Stewart*, 1 Starkie, 525.

As the Court in this case has no jurisdiction over the persons or property of the principal defendant or persons summoned as his trustees, there was no error in the adjudication, that the persons summoned as trustees should be discharged.

Exceptions overruled.

CAMPBELL *& al. versus* INHABTANTS OF MACHIAS.

The hiring of logs to be sawed, does not constitute the owner of them, if non-resident, to be such an "occupant" of the saw-mill, as to subject the logs to taxation in the town wherein the mill is situated.

Neither does the payment by him of wharfage for manufactured lumber constitute him to be such an "occupant" of the wharf, as to subject the lumber to taxation in the town wherein the wharf is situated.

ON FACTS AGREED.

ASSUMPSIT.

SHEPLEY, C. J., orally. — This is an action to recover the amount of a tax collected of the plaintiffs. The plaintiffs were inhabitants of Cherryfield. On the first day of May, they owned logs lying in the Machias river within the town of Machias, and a quantity of sawed lumber lying on a wharf in that town. They were assessed for the same by the assessors of Machias. They refused to pay the tax, and the collector seized and sold their property to pay it.

The plaintiffs owned no mill or wharf in Machias and kept no store there; but employed the Machias Mill and Water Power Co. to saw their logs at Machias in mills owned by that company, and paid wharfage on their lumber, when sawed. The question presented is, whether under such a state of facts, the plaintiffs were liable to be taxed in Machias for the lumber. The only provision of law on which the defendants rely is found in the statutes of 1845, chap. 159, sect 10, clause 1, which is as follows: — "All goods, wares and merchandize, all logs, timber, boards and other lumber, or any stock in trade, including stock employed in the business of any of the mechanic arts in any city, town or plantation within this State other than where the owners reside shall be taxed in such city, town or plantation, if the owners occupy any store, shop, mill or wharf therein, and shall not be taxable where the owners reside."

Did the plaintiffs so occupy a mill or wharf in Machias as that they could legally be assessed there? "It is agreed, that they owned no mill or wharf and kept no store there."

Could they be regarded as occupying a mill because they hired the owners of a mill to saw their lumber at an agreed price per thousand. Does a payment to a mill owner for sawing lumber constitute the occupancy of a mill? Does the paying for wharfage constitute the occupancy of the wharf? Such a construction would, we think, be a forced one.

The design of the statute was to render liable to taxation the property of individuals, who *so* occupy a mill or wharf, as that they should be *entitled to receive* and not *liable to pay* mill rent for the lumber from time to time sawed in the one, or wharfage for lumber deposited on the other.

Freeman, for the plaintiffs.

Thacher and *Lane*, for the defendants.

ALLEN *versus* DOYLE.

In order to the taking of a deposition, the adverse party or his attorney must have notice to attend.

Though a practising attorney-at-law be notified to attend, and do attend and act at the taking, as the attorney of the adverse party, the deposition is not thereby rendered admissible, unless he had indorsed the writ or the summons, or had appeared in the cause, or had given notice in writing that he was the attorney of the adverse party.

In a suit against an officer, (who had attached property upon a writ, and taken a receipt for the same,) for not delivering either the property or the receipt, it is not competent for the defendant to show, in mitigation of damage, that the property was of a value less than that which he had alleged in his return upon the writ.

The approval by a plaintiff, *as to the ability* of the person taken as receiptor, for property attached upon his writ, does not exonerate the officer from effort to find the property that it may be sold on the execution, or from the duty of bringing a suit upon the receipt.

ON REPORT from *Nisi Prius*, SHEPLEY, C. J. presiding.

CASE against the sheriff, for an alleged default of his deputy, Charles W. Doughty, in neglecting to keep and to deliver property attached by him.

It appeared *that* the deputy made a return of an attachment

of certain personal property on a writ in favor of the plaintiff against Henry Rolfe ; *that* he took a receipt therefor signed by Rolfe and two sureties, whose ability was appoved by the plaintiff; *that* the plaintiff recovered judgment in the suit; *that* an execution issued thereon which was delivered to another deputy, who, within thirty days after judgment, returned on the execution that he had "made a demand upon the defendant for a delivery of the receipt and of the property attached, and that it was not delivered."

The execution was returned in no part satisfied. The receipt was, upon notice, produced by the plaintiff.

In defence, the deposition of Edmund Watson was offered.

The caption showed J. W. Tabor, Esq., was notified to attend and did attend at the taking.

The deposition was excluded, because it did not appear that Tabor had, before the time of the taking, acted as attorney to the plaintiff, or had indorsed the writ or otherwise, held himself out as such attorney.

A deposition for the defendant was read, tending to show that the property attached was of much less value than in the return upon the writ and in the receipt, it was stated to have been.

The Judge ruled that this fact, if the jury should consider it proved, would constitute no defence.

The defendant then submitted to a default, which is to be taken off, if the ruling was incorrect.

B. Bradbury, for the defendant.

1. The acceptance and approval of the receipt by the plaintiff discharged the officer from his liability for not retaining possession of the attached property. *Jenny* v. *Delesdernier*, 20 Maine, 183; *Rice* v. *Wilkins*, 21 Maine, 558; *Farnham* v. *Gilman*, 24 Maine, 253, 254.

2. The approval and acceptance of the receipt by the plaintiff gave the creditor an equitable interest, founded on a sufficient consideration, which would enable him to maintain

an action in the officer's name against the receiptors. *Farnham* v. *Gilman*, 24 Maine, 254.

3. The execution having been placed in another officer's hands, within the thirty days after final judgment, nothing further remained to fix the liability of the receiptors but a demand upon them. For any failure to do this, Doughty was not liable. It was the duty of the creditor to cause it to be done.

4. If it be said that Doyle, the sheriff, did not deliver the receipt taken by Doughty, the reply is that no demand for it was made on Doughty, and for aught that appears the plaintiff may have had it at the time. It is produced here in court by him. When, where and how did he get it? Was it not returned to him with the original writ? The fair presumption is, that it was in his possession from the time of its approval.

5. The deposition of Watson was admissible. Tabor attended and acted for the plaintiff. His authority should be at least presumed. When an attorney enters his name for a party on the docket, it not only furnishes a *presumption*, but, as between the litigating parties, it is *conclusive*, that he had authority. If the wrong person had been notified as attorney, and had not appeared, the deposition might very properly be excluded.

6. In determining the question of damages, evidence to show the value of the property receipted for to be less than the amount stated in the receipt, should be received.

"The sum, at which property is valued in the receipt, is *prima facie* the measure of damages, but an over-valuation may be proved in reduction of damages. *Sawyer* v. *Mason*, 19 Maine, 49.

As the liability of the officer is limited in this case by the extent of the liability of the receiptors, and as the receiptors could have proved an over-valuation in reduction of damages, the officer may do the same.

J. Hodgdon, for the plaintiff.

1. The approval of a receipt does not discharge the officer

from his obligation to deliver it to the plaintiff, or to the officer having the execution, on demand, within thirty days of the rendition of judgment.

2. Doughty had left the county before judgment, and the execution was placed in the hands of another deputy of the defendant, which was all the plaintiff could do, and has the same legal effect upon him, as if it had been placed in the hands of Doughty.

3. The officer, in order to make a demand upon the receiptor, must have had the receipt. He could not otherwise have known its conditions, nor even the names of the receiptors.

4. A demand on Doyle obviates the necessity of a demand on Doughty. The receipt is produced by the plaintiff on the defendant's call, and if it was handed to him by the defendant, it would not be in the plaintiff's power to show the time when. If the defendant seeks to make it appear that the receipt was in the plaintiff's hands in season to charge the receptors, the burthen of proof rests upon him.

5. The claim to have Watson's deposition admitted is sufficiently answered by R. S. chap. 133, sect. 7.

6. The liability of the receiptors is usually limited by the liability of the officer, as stated in *Sawyer* v. *Mason*, but the converse of the proposition does not necessarily follow. The sum at which the property is valued in the receipt is only *prima facie* evidence of value against receiptors, but conclusive against an officer.

SHEPLEY, C. J., orally. —

The deposition of Edmund Watson was excluded, because it did not appear that Mr. Tabor, who was notified and was present as the attorney of the plaintiff at the taking of the deposition, had before that time acted as his attorney, or had indorsed the writ or had otherwise held himself out as such attorney. His authority to appear could be shown only by his having indorsed the writ, or indorsed his name on the summons left with the defendant, or appeared for his principal

in the cause, or given notice in writing, that he is attorney. R. S. chap. 133, sect. 7. The statute is peremptory on this point, and the deposition was properly excluded.

The defendant offered to prove, that the property attached was of less value than stated in the officer's return in the writ.

Whether, in an action on the receipt, it would be competent for the parties to show, that the property was of less value than stated in the receipt, is not now the question.

The officer's return on the writ states the value of the property attached. The creditor had a right to rely upon that return, and to abstain from efforts to get further security. The officer is not now at liberty to deny or qualify the facts stated in that return.

The approval of the receipt by the plaintiff only shows, that he took the risk of their inability. It did not exonerate the officer from making effort to find the property which had been attached, or from the duty of bringing a suit upon the receipt. It does not appear, that the goods could not be found, or that, if the action had been brought upon the receipt, the amount of it could not have been collected.

The default is confirmed.

Waite *versus* Foster *& al.*

Of two joint debtors, though not co-partners, if one give a note for the debt, signed in their joint names as co-partners, a ratification by the other gives validity to the note as against both.

A subsequent promise by such other debtor to pay the note, made with a full knowledge of the facts, is a sufficient ratification.

An indorsement "without recourse" of a promissory note, creates no liability upon the indorser, and operates merely as a transfer of the property.

On facts agreed.

Assumpsit by the indorsee against the makers of a promissory note.

Shepley, C. J. — The case is presented for decision upon

an agreed statement composed in part of the testimony of two witnesses, John and Robert Stickney, who were formerly partners in trade under the firm name of John Stickney & Co.

The note was *signed* by one of the defendants by the name of L. C. & W. W. Foster and made payable to John Stickney & Co. or order.

The partnership of the defendants or the right of one thus to use the name of the other is denied.

It appears, that a contract was signed by each of the defendants making themselves liable to the firm of John Stickney & Co. for goods purchased "to carry on a lumbering concern," in which both were interested; and the note was made in payment of a balance due for those goods.

John Stickney states that he wrote the note, and that it was signed, he thinks, by Leonard Foster and that both were present, but he is not certain of it. He only judges, that they were from his general practice.

Robert Stickney states, that the supplies were advanced to them as partners, and charged to L. S. & W. W. Foster; that he never should have so charged the goods, unless he had been directed by them to do so; that he thinks both were present, when the note was made; that he has repeatedly asked both of them to pay the note, and they have always said, that they would pay it.

The defendants are thus proved to have been jointly interested in the business, for which the goods were supplied and the note given. If it may be doubtful, whether they were partners, or whether both were present, when one of them signed it, there can be none, that both have repeatedly promised to pay the note. If Leonard signed the name of W. W. Foster without authority, the promise of the latter to pay it with a full knowledge of all the facts would amount to a ratification of that assumed authority; and it would seem, that he must have known all the facts, when he made those promises. This branch of the defence therefore fails.

It is further contended, that the plaintiff acquired no legal

title to the note by the indorsement without recourse of the firm name of John Stickney & Co. made by John Stickney after the dissolution of that partnership.

By the terms of the dissolution John Stickney was authorized to settle the affairs of the partnership; and before the indorsement was made he had purchased of Robert all his remaining interest in the partnership property and effects, including this note, and had paid him therefor. By that sale the property in this note was entirely vested in John Stickney, who had the same right to use and dispose of it, as he would have had if Robert had never been interested in it.

He could make no contract respecting it, by which Robert would be made in any manner liable. An indorsement without recourse does not assume to make him thus liable. It is simply a transfer of the property. When Robert sold his interest in the note, he must have intended to give to the purchaser an entire control over it and a right to dispose of it as he pleased. This was equivalent to a parol authority to sell it; and that has justly been held sufficient to authorize the indorsement of a note by the partnership name, after a dissolution of the partnership. *Gale* v. *Eames*, 1 Metc. 486. John Stickney, by making such an indorsement on this note, has not in any manner violated his duties to the partnership formerly existing or to his former partner.

This is not only an indorsement by one member of the former firm by the use of the partnership name, by the consent of the other, inferred from his having sold all his interest in it and thereby authorized him to dispose of it without any other act to be performed; but the other partner after the indorsement became known to him appears to have fully approved of it, and thereby ratified the act.

Defendants defaulted.

Dyer, for the plaintiff.

J. Granger, for the defendants.

Inhabitants of Machias *versus* Inhabitants of East Machias.

Insanity, occuring *after* a *residence* has been established, will not prevent the acquisition of a *settlement*, if the residence be continued five years without the receiving of pauper-supplies.

Attorneys. — *Thatcher*, and
J. A. & S. H. Lowell.

The State *versus* Coyle.

Of the place at which a seal must be affixed upon a justice's warrant in a criminal prosecution.

Tenney, J., orally. — This was a prosecution for a violation of the statute regulating the sale of intoxicating liquors. In the District Court, a motion was made in arrest of judgment on the ground that no seal was affixed to the original warrant.

The complaint and warrant were in the common form. There was a seal at the right of the Justice's name on the complaint, but not on the margin of the warrant, if they should be separated by a straight line.

No seal is required on a complaint, nor does the complaint in this case, by any of its language, show that there was any intention that a seal should be annexed.

The warrant shows that *that* was designed to be under seal.

There is no difficulty in so separating the complaint from the warrant as to leave the seal on the warrant, without mutilating either instrument, although it must be done by a line other than a straight one.

The magistrate does not say that there was a seal on the complaint: but he does say that the warrant was under seal. Can the Court say that they must necessarily be separated by a straight line? They were both on one paper, and the court consider the seal as attached to the warrant.

Exceptions overruled.

Livermore *versus* Claridge *& al.*

A partial payment, made by a party, who was indebted *severally* and also *jointly with another*, to the same creditor, for items of book charges, is to be applied upon the *several* debt, unless a different appropriation is proved to have been intended at the time of the payment.

In such a case, though the creditor have credited the money to the joint account, he is not thereby precluded to transfer it to the several debt, by proving that, as to a part of the items, he was, by the unauthorized pretensions of the party, paying the money, deceptively led to charge the *joint* instead of the *several* account.

On exceptions from the District Court, Hathaway, J.

Shepley, C. J., orally. — The plaintiff, being a trader, supplied certain goods, and charged them to the defendants, Sprague & Claridge. These goods are the subject of this controversy. Sprague was defaulted, thus admitting a joint liability. Claridge defends, and denies such liability.

The verdict was for the plaintiff.

Some of the articles were delivered upon orders, drawn by Sprague in the name of Sprague & Claridge. There was evidence tending to show that these articles were purchased by Sprague for his separate use. Certain sums of money had been received from Sprague, which the plaintiff credited on the joint account.

A question arose at the trial whether, if those articles ought to have been charged to Sprague alone, the moneys received from him should be appropriated by the jury to pay for those articles, or should be allowed wholly upon the *joint account.*

The Judge instructed the jury that, if Sprague was alone liable upon the orders, and if there was a joint liability for other articles, the money received of Sprague, unless the evidence proved a different intention, should be appropriated first to payment of the orders, and the residue, if any, to the joint account.

To this instruction the defendant excepted, and he has argued that money paid by a partner, and taken from the partnership funds, should go to pay the partnership debt.

The instruction given was not at variance from that legal proposition.

When a payment is made by one, who is under a *several* and also under a *joint* liability to the same party, and the money is not shown to have been derived from the fund from which the joint liability was to be met, the law applies it to discharge the *several* liability, as being the appropriation most favorable to the creditor. In this case, there was no proof from what source Sprague obtained the money. And, it was rightfully left to the jury, if they should find a several liability against him, to apply the money to that liability, unless shown by the evidence that a different appropriation was intended.

The defendant also contended that the crediting the money by the plaintiff to the joint account, proved an appropriation, which he is now estopped to deny or to alter.

The entry of that credit upon the plaintiff's book was made under a belief that Sprague had authority to draw the orders for the joint benefit of both the defendants. But the jury have found that Sprague had no such authority. The plaintiff then, in giving the credit, acted under a mistake of the facts upon which his rights depended.

In entertaining that mistake he was in no fault. It was created wholly by the wrongful act of Sprague, in assuming an authority which he did not possess. It cannot be that merely by such an entry, *so occasioned*, upon the plaintiff's book, the jury should be precluded from making an appropriation of the money, according to the plaintiff's just rights.

Exceptions overruled.

B. Bradbury, for the defendant Claridge.

D. T. Granger, for the plaintiff.

Doe *versus* Monson and Seavy, *his trustee.*

Generally, it is only by the act of the owner that a contract-lien upon property can be created.

That rule was changed by the Act of 1848, which created a lien in behalf of laborers upon logs, masts, spars and lumber.

An owner of logs employed a contractor to drive them down the river at a stipulated price per thousand feet. The contractor hired laborers, who assisted in the driving. *Held*, that the laborers acquired a lien upon the logs.

Such owner, being summoned as trustee of the contractor, was allowed, out of the stipulated price for the driving, to discharge the laborers' liens.

When, in the same stream, there are logs of different owners, and each owner has employed sufficient laborers to drive his own logs, the lien of such laborers is solely upon the logs they were employed to drive, although it happen that the logs of all the ownerships, being intermixed, are driven collectively by all the laborers employed by all the owners.

On Exceptions from the District Court, Hathaway, J.

The question was whether Seavy, the supposed trustee, was liable upon his disclosure.

The disclosure exhibited substantially the following facts.

There had been placed in the stream a large quantity of logs, in several lots and of different ownerships, to be driven to a place of manufacture. Seavy, the supposed trustee, owned one of these lots. He contracted with Monson, the principal defendant, to drive that lot, at a stipulated price per thousand feet. Monson hired five laborers who assisted him in the driving. The owners of the other lots furnished a suitable number of other laborers to drive their respective lots. The logs soon became intermixed, and were all driven collectively by all the laborers, under an arrangement to which Monson assented.

Seavy was indebted for the driving of his logs. The laborers employed by Monson claimed to have, upon Seavy's logs, a lien for their labor, and, to secure that lien, brought suits against Monson, and therein attached Seavy's logs, but attached none of the other owners' logs.

Doe then brought this action, and summoned Seavy as the trustee of Monson. Seavy, *after the service* of the trustee

writ upon him, and for the purpose of dislodging the attachments and obtaining possession of his logs, paid provisionally the asserted lien-claims, amounting to the full sum for which he was indebted for the driving. The lien actions against Monson were however entered, and defaulted at the present term.

The Judge ruled that the supposed trustee should be discharged. To that ruling the plaintiff excepted.

J. A. & S. H. Lowell, for the plaintiff, presented, in argument, the following points: —

1. If any lien pertained to the laborers employed by Monson, it was upon the whole mass of logs, to whomsoever belonging, upon which their labor was expended. Seavy's logs were holden for only his proportionate part of their wages. If he had paid but that proportion, he would stand indebted to Monson, and would therefore be holden as his trustee in this suit. When he paid more than that proportion, he did what he was not bound to do, and the payment was in his own wrong.

2. The laborers who attached Seavy's logs, were never employed by him, and they had, therefore, no lien upon them. He hired Monson to drive at a fixed price per thousand. And Monson, without any direction of Seavy, employed the laborers. They must be considered as working upon his credit. Seavy, therefore, was under no obligation to pay them.

3. The lien-rights, if any existed, were never perfected by a seizure of the logs upon the executions. Perhaps the suits would have been otherwise adjusted. The executions might have been collected of Monson. The payment by Seavy was therefore premature and unauthorized.

G. F. Talbot, for the trustee.

Wells, J. — By the Act of August 10, 1848, chap. 72, "any person who shall labor at cutting, hauling or driving logs, masts, spars or other lumber, shall have a lien on all logs and lumber he may aid in cutting, hauling or driving as aforesaid, for the amount stipulated to be paid for his personal services, and actually due. And such lien shall take prece-

dence of all other claims except liens reserved by the State of Maine or the Commonwealth of Massachusetts for their own use, and the lien shall continue sixty days after the logs, masts, spars or other lumber subject thereto shall have arrived at their place of destination, previous to being rafted for sale or manufacture." And "any person having a lien as aforesaid may secure the same by attachment," &c.

The persons claiming the lien in this case were employed by Monson, the defendant, and not by the trustee. A lien is a qualified ownership, and, in general, can only be created by the owner, or by some person by him authorized. *Hollingsworth* v. *Dow*, 19 Pick. 228. But the language of the Act very clearly shows the intention of the Legislature, to give a lien to all persons, who should perform labor in driving logs, and therefore those, who were employed by the defendant Monson, had a lien upon them.

It appears, that there were logs of other persons driven with those belonging to the trustee. And those persons employed men to perform their portion of the labor; each one such number of men, as was supposed to be equal to his proportion of the timber collected together in one body. The different owners, employing their own men to drive logs, would not be debtors of any but of those by them employed, and the lien could attach to those logs only, which, the men, claiming it, were employed to drive. The men under Monson were not employed to drive the logs of the other owners, but the logs of the trustee. By the statute they are to have a lien for the amount stipulated to be paid, and it must be upon the logs for the driving of which they are to be paid. They were not to be paid for driving the logs of others, but those of the trustee.

The arrangement between Monson and the other owners, was not a contract to drive their logs, but for the men employed by each to unite and drive in common. It did not alter the contracts previously made between the parties, but provided a different mode for the performance of the labor, for the interchange of which, satisfaction was made in the mutual aid

rendered. The men employed by Monson have no claim on the other owners for their services, nor does it appear that he has any claim on them, and consequently there is no lien on their logs, and it must be confined to the logs of the trustee, and cannot be apportioned upon the logs owned by others. If the lien extended to the logs of the several owners, whether those claiming it could insist upon satisfaction out of the logs belonging to one of them, for the whole sum due, it is not necessary to consider.

The lien being an incumbrance upon the property of the trustee, he had a right to discharge the attachment, by which it was secured, and was not bound to wait and allow his property to be sold on execution. The statute does not require him so to do, and it would be exceedingly oppressive on the part of the owners of logs, if they were not permitted to discharge such liens, and relieve their property from the embarrassments and delay incident to attachments and sales.

There are no facts presented by which it can be inferred, that the debts paid were not due. The trustee had no control over the actions brought against Monson, so as to direct the disposition of them, after he had paid the several claims for which they were brought, and his rights cannot be affected by the defaults in those actions.

The exceptions are overruled.

NICKERSON *& al. versus* THOMPSON.

An inspector of fish is bound to such thorough examination of the article inspected, as to become satisfied that it is of the quality and condition regarded by law, and designated by his brand.

He is not responsible, as upon a *warranty*, for the correctness of the brand which he places upon an inspected article.

But he is responsible for the possession and for the exercise of skill and care, sufficient for performing the duty, affixed by the statute to his office.

If an inspector affix his brand to an article, without knowing its condition, he is responsible for all injury occasioned thereby to a person, purchasing upon the credit of the brand.

In a suit against an inspector for an unskillful and unfaithful performance of his inspection-duties, it is not competent for him to prove the customary mode pursued by other inspectors, or that it is usual for inspectors to take bond of indemnity against a deficiency in the quality, or in the condition of the article branded.

On Exceptions from *Nisi Prius*, Shepley, C. J. presiding.

Tenney, J., orally. — This is an action for damages alleged to have been sustained by the plaintiffs in consequence of the unfaithful and unskillful discharge, by the defendant, of his duty as an inspector, in inspecting and branding a quantity of barreled herrings, purchased by the plaintiffs. The jury found that the defendant had been guilty of the unfaithful and unskillful performance as charged. The plaintiffs purchased the herrings, the brand of the defendant having indicated them to be of a particular kind and quality.

The questions presented by the exceptions, arise upon certain instructions to the jury, and upon the exclusion of certain testimony.

The statute provides, c. 54, sect. 6, 7 and 8, that "every inspector who shall inspect any kind of fish," &c., "shall see that they are in the first instance well struck with salt or pickle, and preserved sweet, free from rust, taint or damage; and such of said fish as are of good quality and in good order, shall be packed," &c., "and the same shall be packed with clean and good coarse salt, at the rate of thirty-five pounds for every two hundred pounds of fish; each cask, thus packed and headed up, shall then be filled with clear, strong pickle. — Each cask, thus prepared, and the contents free from taint, rust or damage, shall be branded by the inspector with the name of the kind of fish contained in it;" * * * "none being allowed, under either mark, except such as are sweet and wholesome." Provision is then made in relation to the branding of the casks.

The plaintiffs complain *that* the defendant performed his duties unfaithfully; *that* by his brand he held out false assurances as to the quality and condition of the fish; *that* the

fish have turned out other than they were represented, and *that* the plaintiffs have, in consequence, sustained damage.

What then is the proper construction of the statute, and what the duty of an inspector?

It is necessary that the inspector should have and should exercise skill and care, sufficient for performing the duties, prescribed by the statute. He is not responsible, as for a warranty, but he is responsible for the possession and for the exercise of the requisite skill and care.

The exceptions mention certain positions contended for by the defendant's counsel. It does not appear that any request was made for instruction upon those positions. The omission to instruct, under such circumstances, does not furnish ground of exception. The Court, however, does not mean to say, that there was any want of appropriate instructions.

The instructions given were, *that* "the duty of the inspector was prescribed by the statute; *that* the intention of the law was to have the inspector's brand correctly state the quality and condition of the fish at the time of the inspection, so that sellers and purchasers might be relieved from opening and examining the fish to ascertain those facts; *that* the defendant was bound to perform the duties required by the Act *skillfully* and *faithfully*, and that if he had done so, the verdict should be in his favor, but, that if he had *negligently*, *unskillfully* or *unfaithfully* performed them, the verdict should be for the plaintiffs; *that* if the defendant, without knowing the condition of the fish, had placed his brand on the barrels he would be liable; *that*, although the defendant under the circumstances might not be bound to empty every barrel and repack them, yet he was bound, by emptying the barrels, or otherwise, to make so thorough an examination as to become satisfied, that the fish were really of the quality and in the condition required by law and designated by his brand.

In none of these instructions does the Court perceive that there was any error.

Certain rulings, excluding portions of the testimony, were excepted to. The defendant proposed to prove the customary mode of inspecting fish. Such evidence, we think, was properly excluded. It could be no protection to the defendant, to show how other inspectors had performed their duties. Though they may have been remiss, the law, and not their practice, was the rule to guide the defendant.

The defendant also excepts, because evidence was excluded of a custom among inspectors, to take an indemnity against fish proving otherwise than represented by the brand.

This exclusion was proper. The taking of such an indemnity could not relieve the inspector from liability to the purchaser, who would have a right to suppose that the inspector's duty was faithfully performed.

Whether such a bond, to indemnify the inspector for negligence in duty, could have any validity, need not now be discussed. *Exceptions overruled.*

A. Hayden, for the plaintiffs.

D. T. Granger, for the defendant.

CROCKER *versus* CARSON.

In trespass for breaking and entering a *building*, no defence is established by proof that an article, belonging to the defendant, had been deposited by his consent within the building, and that the breaking and entering were for the purpose of taking it away.

ON REPORT from *Nisi Prius*, SHEPLEY, C. J. presiding.

TRESPASS for breaking and entering the plaintiff's close, and taking away five tons of the plaintiff's hay.

The case shows *that* the plaintiff owned a farm with a barn standing upon it; — *that* he employed the defendant to cut the hay and put it into the barn; — *that* after being put into the barn, the hay was, by the agreement, to be divided into three equal parts, of which the defendant was to have one for his services; — *that* the defendant was to have the right of keeping his part of the hay in the barn until the next year or

until he could sell it; — *that* the defendant cut the hay and put it into the barn; — *that* the plaintiff then locked the barn and kept the key; — and *that* the defendant, without the plaintiff's consent, forcibly broke into the barn and carried away a portion of the hay.

The case was withdrawn from the jury, and submitted to the Court.

D. T. Granger, for the plaintiff.

Fuller & Harvey, for the defendant.

1. There was, in the contract, an *implied* authority for the defendant to enter the barn and take his part of the hay. The act, therefore, could not be a trespass, even if he took more than his part. It was but the abuse of a license. The remedy would be in trover. Though the abuse of an authority, conferred *by law*, may be a trespass *ab initio*, it is otherwise as to a license conferred by the act of a party. 18 Pick. 110 to 114; 2 Shep. 44.

2. The grass belonged to the plaintiff and the defendant as co-tenants. For the owner of land may sell whatever can be severed from the freehold. Such a sale is a license to enter and take it. 10 Pick. 209; 19 Maine, 253.

SHEPLEY, C. J., orally. — Whether the parties were tenants in common of the hay is immaterial. The barn belonged to the plaintiff, and the hay was in it by the defendant's consent. If the hay was the joint property of the parties, or even if it was owned by the defendant alone, he had no right to break the barn to take it or any part of it away, without consent of the plaintiff.

Defendant defaulted.

SULLIVAN *versus* PARK.

The second section of the Act of 1846, chap. 205, which prohibits the maintenance of suits upon *contracts*, made for liquor illegally sold, cannot be construed to prohibit actions of *trover* for the unlawful conversion of such liquor.

The lien of a common carrier, for the freight of goods, transported by sea from a port of one nation to that of another does not, of itself alone, authorize him to sell the goods for payment of the freight. The usual remedy is by a libel before some tribunal, by whose decree the shipper's rights may be protected.

Of declarations and acts *in pais*, by which the owner of property may be estopped to claim it.

ON EXCEPTIONS from the District Court, HATHAWAY, J.

WELLS, J., orally. — This was an action of trover for a cask of alcohol. It was purchased by the plaintiff at Eastport in this State, and put on board a vessel under the command of one Magee, to be freighted to St. John, in the province of New Brunswick, where it was seized for a breach of the revenue laws, but was after several weeks restored to Magee, who then warehoused it as his own property; took a warehouse certificate, and sold it to the defendant, from whom it was seasonably demanded by the plaintiff.

The seizure was made at St. John, where the plaintiff resided, and there was evidence tending to show that, though he knew the fact, he asserted, at the custom-house department, no ownership or claim of the property, while the seizure continued.

At the trial, exceptions were taken by the defendant to the rulings of the Judge.

1. It was contended, that the action is prohibited by the Act of 1846, chap. 105, sect. 10. But that Act relates wholly to *contracts*. It does not prohibit suits for *acts of tort*.

If it were shown to have been sold to the plaintiff in violation of the Act, that would not give to the defendant a right to convert the liquor to his own use. But it was not even attempted to be proved, that the sale to the plaintiff was illegal.

2. It was contended that Magee had a lien on the alcohol for its freight, and that the plaintiff cannot recover without proof that the freight had been paid or tendered. The Judge ruled otherwise.

That carriers, by the commercial law, have a lien for freight, is true; but that alone gives no right to sell the property, in order to pay that freight. The ordinary remedy, it may be remarked, in such case, is by a libel of the property before some tribunal, by whose decree the rights of the owner may be protected.

Besides, the case shows that Magee did not sell under such a claim of lien, but as his own property. Upon this point, it is not perceived that there was any error in the ruling.

3. The Judge was requested to instruct the jury, that "if the plaintiff knowingly allowed Magee to act as owner of the property in claiming it when under seizure, and afterwards entering and warehousing it in his own name, and as his own property, he is bound by the sale to Park, if Park was an innocent purchaser, without knowledge of the title of the plaintiff.

It is often difficult to prescribe what acts or sayings of a party in relation to property, shall amount to an estoppel, so that he may not be permitted to explain them away. The request in this case was confined to a part only of the facts, which might have borne upon the question. It asks the Judge to instruct the jury absolutely on a portion of the facts, in a particular way, when those facts might be materially qualified by other facts in the case. A refusal, under such circumstances, to give the requested instruction, would not be ground of exception.

The Judge did, however, in effect give the instruction requested, and went beyond it; but this furnished no ground of complaint to the *defendant*. The instructions given were, "*that* mere quiescence on the part of the plaintiff as to the conduct of Magee, would not necessarily destroy his right to maintain this action; *that* the law does not permit a man to stand by and see the person to whom his property has been

entrusted sell the same, and then reclaim that property from an innocent purchaser; *that* such conduct would be equivalent to a disclaimer of ownership; and *that* if the plaintiff, by his acts or words to the defendant or to the public, had virtually disclaimed his ownership in the property, or, by his own conduct concerning it, had induced the defendant to believe the alcohol was the property of Magee, instead of his own, then he could not prevail in this action.

These instructions might have furnished ground of complaint to the *plaintiff*, if the verdict had been the other way. The declarations of a party which should estop him, as to a third person, must be made to one who has a right to know the relations of the party to the property in question: — if made only to a person having no such right, they would not necessarily create an estoppel. The instruction was broader than the request. If there was any error, it was in favor of the *defendant*.

A motion was made to dismiss this action, because prohibited by the Act of 1851. It is enough to say that the Court must be confined to matters presented in the exceptions. The Act referred to, was passed since the trial, and the construction of it is not called for by any of the exceptions presented.

Exceptions overruled.

A. Hayden, for the defendant.

D. T. Granger, for the plaintiff.

GEORGE ENGLISH *versus* CHARLES SPRAGUE.

The contents of a justice's record are to be proved by an authenticated copy of it. His certificate, alleging what facts appear by the record, is not receivable as proof.

ON EXCEPTIONS from the District Court, HATHAWAY, J.

ASSUMPSIT.

TENNEY, J., orally. — This is an action on a note of hand not negotiable. At the trial in the District Court, the defend-

ant offered the record of a judgment before a justice of the peace, in a suit in which the defendant had been summoned as the trustee of one *James* English, and, upon his disclosure, adjudged trustee on account of the note here in suit. The case comes before us on exceptions to the ruling of the Judge in excluding this evidence.

This is a suit by *George* English. The judgment was in a suit against *James* English. The defendant in this suit was adjudged trustee and has paid the amount. Should that record have been received in evidence?

If admitted, the disclosure would show *that* this defendant was charged as trustee on account of this note; — *that* a trade had been made between this defendant and *James* English for the purchase of a cow, for which this note was given; — *that* subsequently the note was changed by the consent of *George* English, *James* English and this defendant; — and *that* *George* English was substituted as the payee.

George English is the plaintiff in the present suit. *James* English was the defendant in the other case. The parties are therefore different.

Although the defendant has paid the amount as trustee, the rights of *George* could not be affected by a transaction, in which he was not a party; and he must be protected here, if he was not notified so as to become a party to that suit.

The Revised Statutes, chap. 119, sect. 35, 36, provide that when it appears, by the answers of the trustee, that any effects, goods or credits in his hands are claimed by a third person, in virtue of an assignment from the principal debtor, or in some other way, the Court may permit such claimant, if he see cause, to appear and become a party to the suit, and maintain his right. Should such claimant not appear voluntarily, notice may be served on him in such manner as the Court may direct.

In order to show that George voluntarily appeared, the defendant introduces a certificate of the justice, subjoined to his attested copy of the record, and alleging it to appear of record, that George appeared by attorney in that suit.

The record itself is made a part of this case, and it does not show any such appearance. It therefore contradicts the certificate, and must control it. The certificate, even if the record were not before us, could not be used as evidence. It does not purport to be an attested copy of any record. A magistrate, in order to show what a record contains, is not merely to certify what his construction of the record is. He must give a copy of it, that the Court may judge of its import. His certificate that it contains any particular fact, is never receivable as proof. The defendant therefore fails to show that George voluntarily appeared to the suit. And there is no evidence that he was summoned in. He was not, therefore, a party to that suit.

Exceptions overruled.

Fuller & Harvey, for the defendant.

Tyler, for the plaintiff.

THE COUNTY OF WASHINGTON *versus* BROWN *& al.*

Of land reserved and set off for the use of the gospel ministry and of schools, &c., in townships not yet incorporated, the county, in which it is situated, by virtue of the Act of 1842, holds the place of trustee to the parties, for whose benefit the reservation was made.

Upon a bond, given to the county to pay for timber taken from such land, the county may maintain suit, though having no beneficial interest in the avails.

ON REPORT from *Nisi Prius*, SHEPLEY, C. J. presiding.

DEBT on bond.

The grant of an unincorporated township of land, to the principal defendant, contained the usual reservations for public uses. Upon a process, instituted by the County Commissioners, a committee had set off and located certain lots for those uses, and their report was in readiness to be returned to the next District Court. Said defendant being dissatisfied with the location and determined to resist the acceptance of the report, proceeded to take timber from those lots.

In order to prevent a seizure of the timber by the County Commissioners, he gave to the County a bond, stipulating to pay for the timber, at a specified price, if the report of the committee should be accepted. The report having been accepted, this suit is brought upon the bond.

The case was withdrawn from the jury, and submitted to the Court.

Fuller and *Harvey*, for the plaintiffs.

Hodgdon and *Madigan*, for the defendants.

Where reservations for charitable uses are contained in a grant of land made by the State, and the beneficiaries are not in existence, the fee does not pass from the State, or if it does pass, remains in abeyance, until the corporation shall come into existence, in which it is to vest.

The State, in virtue of its sovereignty, in either supposition, holds such reservations in trust. *State* v. *Cutler*, 16 Maine, 349.

Actions of trespass, or on contracts, respecting the lands reserved or the timber thereon, must be brought in the name of the State, unless the Legislature has authorized them to be commenced in the name of some other corporation, or individual.

Although the security may be given in the name of an agent, the right of action is not discharged, nor is there any consideration to support the promise, and the action must be commenced in the name of the State. *Irish* v. *Webster & al.* 5 Maine, 171.

The law, giving the custody of these lots to the County Commissioners, constitutes them the *agents of the State.* The fact of their being County Commissioners, can give the county no interest in the lands, or the funds derived from them.

Even were the county, in its corporate capacity, the agent, special authority would be required to substitute its name for that of the State, in the commencement of actions.

By the law of 1848, the agents are to pay over securities and money to the State Treasurer in sixty days after received,

and the County Commissioners are to turn over all securities in their hands, to the agents, forthwith.

The action is neither in the name of the agent, or the trustee, nor is there a privity of contract between the county of Washington and the defendants.

TENNEY, J.—This case is essentially unlike that of *Irish* v. *Webster & al.* 5 Greenl. 171, which was upon a note not negotiable, given by the defendants therein to James Irish, State's agent, for a prior indebtedness to the State for logs cut on its lands, by the permission of the plaintiff's predecessor in office, no discharge for that indebtedness having been given.

The statute of 1842, chap. 33, sect. 21, gave power to the County Commissioners to seize and sell any timber cut by any trespassers on lands reserved for public use, and pay the proceeds of such sales into the county treasury. Under this authority, the County Commissioners of the county of Washington, sold to the principal defendant, timber which he had cut upon the reserved lots in township, numbered 10, in the 3d range, North of the Bingham Purchase, during the winter, previous to the sale, and at the same time, and in consideration of the sale, the defendants bound and obliged themselves to pay to the county of Washington, the sums named therein on certain conditions, which have been fulfilled.

If there were no consideration named in the instrument declared on, it would not be competent for the obligors to defend upon this ground, against a sealed contract.

But there was no other relinquishment of title or sale of the timber, than what is contained in this instrument; by it the transfer of the interest, which had not previously passed, and the contract to pay the stipulated price were simultaneous; and there was full and valid consideration for the defendants' obligation apparent on the face of the paper.

The instrument runs to the county of Washington, a body corporate, capable of commencing and maintaining actions. The suit is for the purpose of obtaining the amount admitted

by the defendants to be due from them, for the benefit of the party, to whom it may belong. The county of Washington holds the place of trustee to such party; and to sustain a suit in its name, it is not necessary that it should be beneficially interested in the fund sought to be obtained. 1 Chitty's Pleading, 4; *Scholey and Dornville* v. *Mearns*, 7 East, 148. The payment of a judgment in this suit will be a perfect protection against any other suit for the same cause.

Defendants defaulted.

HEMINGWAY *versus* INHABITANTS OF MACHIAS.

If a person, liable to taxation in a town for real and personal estate, has also been assessed for, and has paid a tax upon, additional property, for which he was not liable to be assessed, his redress cannot be had by action against the town, although the payment was made under protest.

His remedy is exclusively by application to the County Commissioners upon a refusal by the assessors to make the proper abatement.

ON REPORT from *Nisi Prius*, SHEPLEY, C. J. presiding.

ASSUMPSIT.

The plaintiff resided in Machias, and was in possession of real estate and of a large quantity of lumber, some oxen and a horse, and several other descriptions of personal property, and he was taxed there for the same, though the whole, both personal and real, was owned by a person resident in Massachusetts.

The plaintiff paid the tax under protest, and now brings this action to recover back the money.

WELLS, J., orally. — The questions discussed by the counsel are, whether the plaintiff was liable to the taxation, and, if not, whether a recovery can be had in this form of proceeding.

By law, real estate and also some descriptions of personal property, (among which are oxen and horses,) may be assessed to the party in possession. As to the real estate and as to

the oxen and the horse, it is conceded that the assessment upon the plaintiff was lawful. Whether the assessment for the other sorts of personal property was lawful, it is not necessary, in this action, to decide.

In cases of mere over-taxation, the remedy is not by an action like this; but by application for an abatement to the assessors, and, upon their refusal, to the County Commissioners. To that remedy the plaintiff must be referred, for, as he was liable to assessment for the real estate and a part of the personal, the taxation of the other property, even if not authorized, was simply a case of over-taxation.

Plaintiff nonsuit.

G. Walker, for the plaintiff.

Thacher, for the defendants.

SWEETSER *versus* LOWELL *& al.*

That the employments of a witness have not been such as to require him to distinguish between true and simulated handwritings, is not of itself alone, a sufficient reason to preclude him from giving an *opinion* as to the genuineness of a disputed signature, though the opinion be founded merely upon a comparison of writings.

That a note, offered in evidence, is the one secured by a mortgage of land, may be proved by parol, although it vary, in its date, from the description of it in the condition of the mortgage.

The lapse of twenty years furnishes a legal presumption, that a debt, though secured by a mortgage of land, has been paid.

Parol proof is receivable for the purpose of rebutting such a presumption.

The possession of land by the mortgager, though continued for more than twenty years, is not to be regarded as adverse to the mortgagee, while the debt remains unpaid.

Where testimony is conflicting, it is the province of the jury to decide. The rule is not to be prescribed to the jury, (though laid down in some ancient books,) that a fact is to be considered unproved, when the opposing witnesses are equal in number, of equal means of knowing, and of equal capacity and equal credit.

A covenant, in a deed of land, against incumbrances, made by the grantor, does not estop him from setting up a subsequently acquired title.

Sweetser *v.* Lowell.

A deed has no effect till its delivery. The date is *prima facie* evidence, that it was then delivered. But the actual time of delivery may be proved by parol.

On Report from *Nisi Prius*, Shepley, C. J., presiding.

Writ of Entry upon an alleged mortgage, brought by the assignee of the mortgagee against the grantees of the mortgager. The demandant introduced a paper, purporting to be the mortgage declared upon, and dated in 1824, conditioned for the payment, in 1826, of a note of the same date with the mortgage, given by the mortgager to the mortgagee. The demandant also introduced a note, indorsed to himself, purporting to be signed by the mortgager, and corresponding with that described in the mortgage, except that its date appeared to be 1821, instead of 1824. Upon the back of the mortgage was an assignment to the demandant, dated *March* 10, 1848. It was proved, however, that, though the demandant had purchased and received delivery of the note and mortgage *in* 1848, the written assignment of the mortgage was not in fact made until *March*, 1849.

The tenants introduced a deed from the demandant to them, dated *January* 10, 1849, releasing and quitclaiming all his title in the demanded premises, and declaring that his title was "the same, which he acquired by virtue of a deed of January 15, 1848, from Lorenzo D. Harmon, deputy sheriff, and no other."

The tenants denied the execution of the mortgage. Together with other evidence upon that point, the demandant called two witnesses to testify as to the genuineness of the signature upon the mortgage, by comparing it with other signatures of the mortgager, proved to be genuine. They testified that they had experience and skill in judging of handwritings, but had never been in positions where it became their duty to distinguish between genuine and counterfeit signatures, nor did they know the meaning of the word "expert." Their testimony was objected to by the tenants, but was admitted. They testified to their belief, derived from the comparison, that the disputed handwriting was a genuine signature.

There also was evidence tending to show that the note, produced by the demandant, was the note intended to be secured by the mortgage, though variant, as to the year of its date, from the description in the mortgage.

The Judge instructed the jury, *that* it was competent for the demandant to show by parol proof, that the note offered in evidence was the one secured by the mortgage, although not entirely agreeing with the one described in the mortgage; — *that*, more than twenty years having elapsed from the pay-day of the note before this suit was commenced, the presumption of law is, that it had been paid; — *that* this presumption might be rebutted by parole testimony; — *that* the burden of such proof was upon the demandant; — *that* the deed, if obtained by fraud, would be ineffectual; and the burden of proving the fraud was upon the tenants; — *that* the deed of the demandant to the tenants, of Jan'y 10, 1848, did not transfer any interest to which he was entitled, as assignee of the mortgage, because though made *after* he had become the *equitable*, it was made *before* he had become the *legal* assignee.

Several instructions to the jury were requested: —

1. *That*, if a note, corresponding with the description in the mortgage, in its tenor, date and amount, is not produced and shown to be uncanceled, and if the demandant has not proved it to be unpaid, the verdict must be for the tenants; and *that* the burden of proof is on the demandant to rebut the presumption of payment, arising from lapse of time. This instruction was not given, otherwise than in the general charge.

4. *That*, if Smith and the tenants, who claim under him, had been in the adverse possession of the premises for a period of twenty years from the time when the mortgage debt became payable, and if the mortgage deed was procured by fraud, and if the demandant, at or before the time when the assignment was executed, had actual or constructive notice of the fraud, their verdict should be for the defendants.

This instruction was not given.

5. *That* if Smith, the mortgager, remained in possession of

the mortgaged premises for a period of twenty years after the mortgage debt became payable, claiming them as his own, that is to be held as an adverse possession against the mortgagee, and those claiming under him.

This instruction was refused, and the jury were instructed, on that point, that the possession by the mortgager is in law to be considered the possession of the mortgagee, and not adverse to his rights.

6 and 7. *That* if the testimony of Nash, who testified for the demandant, is directly contradicted by that of Smith, who testified for the defendant, and if the two witnesses are entitled to equal credit, the facts testified to by Nash are to be considered as unproved.

8. *That* the demandant claiming as assignee of the mortgagee, under an assignment purporting to have been executed on the 10th of March, 1848, is estopped by his deed to the tenants, of January 10, 1849, from claiming any title in the premises, which accrued prior to his said conveyance; and is also estopped by the covenants in said deed from claiming under a title subsequently obtained.

9. *That* if the demandant purchased and obtained possession of the note and mortgage, on or about the tenth day of March, 1848, and if, in pursuance of that trade, and as a part of the transaction, the mortgagee, afterwards, in March, 1849, executed a written assignment on the back of said mortgage, said transfer would take effect from the time of the sale and delivery, and that Sweetser, having on the tenth of January, 1849, executed a deed to the defendants, in which, among other things, he declared that his right, title and interest in the premises, was the same he acquired by virtue of a deed from Lorenzo D. Harmon, deputy sheriff, dated January 15, 1848, and no other," is estopped from setting up a title under the purchase of said mortgage from the mortgagee.

The 6th, 7th, 8th and 9th requests were refused, further than already given; and the jury were instructed that the demandant would not be estopped, as contended for in some of said requests.

If the Court shall be of opinion that any of said rulings, opinions or instructions were erroneous, or that any of said requested instructions were improperly withheld, then the verdict, which was for the demandant, is to be set aside.

Thacher, for the plaintiff.

J. A. & S. H. Lowell, pro sese.

TENNEY, J. — The definition of the word "expert" in Webster's Dictionary is, "properly experienced; taught by use, practice and experience; hence, skillful and instructed; having familiar knowledge of."

The testimony of William B. Smith, and Ignatius Sargeant, severally brought each fully within this definition, when applied to the term in reference to skill and experience in judging of handwriting. They are not the less experts, because they did not profess to know the precise meaning of the word expert, or because, they had not been in situations, where their duty required them to distinguish between genuine and counterfeit handwriting. When handwriting is a subject of controversy in judicial proceedings, witnesses, who, by study, occupation and habit have been skillful in marking and distinguishing the characteristics of handwriting, are allowed to compare that in question with other writings, which are admitted or fully proved to have come from the party, and to give opinions, formed from such comparisons. *Hammond's case*, 2 Greenl. 33; *Richardson* v. *Newcomb*, 21 Pick. 315.

Parol evidence is admissible to show a note, produced in evidence, to be the one secured by a mortgage, when it does not correspond in all respects, with that described in the condition. *Brown* v. *Littlefield*, 29 Maine, 302. The refusal of the Judge to give the instruction first requested, was correct.

The second instruction requested, was given in the general charge to the jury, as fully as the law demanded, or as it is believed to have been necessary in order that they should un-

derstandingly apply the law to the facts of the case; and was not essentially different from that requested.

There is no evidence in the case, which made the former part of the fourth and the whole of the fifth instruction requested, material.

The attempt was not made to show that the mortgager was holding adversely to the mortgagee; his possession is deemed in law to be that of the one, who has the legal title, and by whose permission he retains the possession. Such occupations continued for twenty years, cannot be regarded as adverse, so long as the debt secured by the mortgage is unpaid. The jury were instructed, if the mortgage deed was obtained by fraud, it was ineffectual to convey the estate; and that the burden of proof was upon the tenants to make out the fraud. Of this the tenants could not justly complain; it was as favorable to them under the latter part of the fourth request, as the law authorizes, and was not substantially unlike in principle, that requested.

It is the province of the jury to judge of the testimony of witnesses, and to weigh the evidence. If that on one side is irreconcilable with that on the other, they are to decide between the parties from all the facts and circumstances before them. The Judge had instructed them, that more than twenty years having elapsed after the maturity of the note, before the commencement of this suit, the presumption of law was, that the debt secured by the mortgage was fully paid; but this presumption could be rebutted by parol testimony, the burden being upon the demandant, to show, that the note had not been paid. The jury could not have misunderstood this instruction. They were at liberty to consider of the evidence in any mode, which approved itself to them, and come to a determination upon the whole question, as they should believe a careful examination of the evidence required. The Judge was not required to give rules, as to the manner in which they should analyze the testimony of witnesses which was in conflict. There was no error in withholding the sixth and seventh instructions requested.

The eighth and ninth instructions, which the Judge was requested to give, were properly refused. A deed has no effect till its delivery. The date is *prima facie* evidence that it was then delivered. But it is not conclusive. The actual time of delivery may be proved by parol. And any fact tending to show the time, when it was delivered, is also competent. No parol evidence can be more satisfactory to show that the delivery was at a time subsequent to its date, than the fact, that the deed did not exist at the day of the execution, apparent upon its face. The Judge was requested to instruct the jury as an inflexible principle of law, that the assignment of the mortgage to the demandant, being dated on March 10, 1848, he is estopped by his quitclaim deed of January 10, 1849, in which he recites that he holds under no other title than that of Lorenzo D. Harmon, dated January 15, 1848, from claiming any title in the premises under the assignment; and also is estopped by the covenants in his deed from setting up a title, afterwards acquired in fact. Evidence, uncontradicted, was adduced, that no assignment was made till a time subsequent to the deed of demandant, of January 10, 1849. Although he had made an agreement for the purchase of the mortgage and the note secured thereby, prior to that time, the legal title was in the mortgagee, till afterwards; and the demandant's deed was only of the equitable interest in the land, which he claimed to own. He acquired no interest in the mortgagee's right, till the assignment was made by deed. And he could not convey an estate, which he did not own; nor could there be an estoppel by means of that which did not exist.

The covenant, which the tenants rely upon as an estoppel, was the one which is usual in quitclaim deeds against incumbrances made by the grantor. A title does not enure to the grantee under such a covenant, when it is acquired subsequently to the conveyance in which the covenant is inserted. *Pike* v. *Galvin*, 30 Maine, 359.

According to the agreement of the parties, judgment is to be rendered as upon mortgage.

INHABITANTS OF COOPER *versus* INHABITANTS OF ALEXANDER.

When a town, in which an insane person was *resident*, has incurred expense in maintaining him at the Insane Hospital, such town, in order to recover for such expenses against the town of the pauper's *settlement*, must notify the defendant town in the mode prescribed in the general pauper law.

Under that law, the notice must be signed in the name of the overseers of the poor, or of some one of them in their behalf. A notice, signed in the name of some other person in their behalf, is not sufficient.

ON REPORT from *Nisi Prius*, SHEPLEY, C. J. presiding.

ASSUMPSIT to recover for expenses incurred in clothing and in committing and maintaining at the Insane Hospital, an insane pauper, resident in Cooper, but legally settled in Alexander.

The notice given to the town of Alexander was written and signed by the town agent at the request of the overseers of the poor of Cooper. He signed it either with the names of the overseers, or with his own name as town agent, by order of the overseers. It did not appear which of these forms was used. The town agent was not one of the overseers. The case was withdrawn from the jury and submitted to the Court.

Fuller & Harvey, for the plaintiffs.

Bion Bradbury, for the defendants.

WELLS, J. — The plaintiffs claim in this action to recover the expenses incurred in removing Frances Gooch to the Insane Hospital, and for supporting her while there. By the Act of August 2, 1847, chap. 33, sect. 11, the city or town, where an insane person is found at the time of his arrest and examination, is made liable for such expenses in the first instance, but such city or town, which has been made chargeable, and shall have paid for committing and supporting the lunatic, may recover "the same from any city or town, in the same manner as if incurred for the ordinary expense of any pauper," &c. By the Statute in relation to paupers, chap. 32, sect. 29 and 42, notice is to be given of the relief needed, and of the facts relating to the person, who has become

chargeable, to the town where the pauper's settlement is, and a request made for his removal. A recovery "in the same manner" implies, that the same steps are to be taken, and as the general pauper law requires notice to be given, before an action can be maintained for supplies furnished to a pauper, the legislature must have intended, that a like notice should be given under the Act of 1847. The plaintiffs were bound by law to pay these expenses in the first instance, and so are all towns to provide relief for persons falling into distress within their limits, although their lawful settlement may be in other places.

It is true, that the town notified cannot remove the lunatic before his recovery. So in other cases, paupers may be so sick or infirm as to prevent their removal, yet their condition would not excuse a want of notice. They might subsequently be able to be removed. And after the lunatic has recovered from his insanity, if he continues a pauper, it would be the duty of the town where he has a settlement, to remove him, and take care of him. And although one of the objects of the notice, prescribed by the statute, is to induce a removal, that is not the only one; another is, to give information of the liability, so that preparation may be made to meet it.

At what time, the expenses may be said to have been incurred under the Act of 1847, from the view taken of this case, it is unnecessary to determine. That question is discussed under a similar statute in Massachusetts, in the case of *Worcester* v. *Milford*, 18 Pick. 379.

It is incumbent on the plaintiffs to prove that legal notice was given.

The notice in this case was not given by the overseers, but by the agent of the town at their request. He is uncertain whether he signed the names of the overseers, or his own as town agent, but thinks he stated in the notice, if he signed it as town agent, that it was done by their direction. No case has been cited to show that such notice would be sufficient. It does not appear that it was signed by the overseers or some one of them by their order, or that the name of either of them

was affixed to it by their direction. The defendants were not obliged to consider any other person as duly authorized to give this notice. They could not know that the agent had authority to do it, by the mode in which it was communicated. *Dalton* v. *Hinsdale*, 6 Mass. 501. The forty-second section of the statute before mentioned implies, that the notification shall be signed by the overseers, and it is best that the ordinary course of giving notice should be followed; a departure from it leads to doubt and uncertainty.

We do not consider that a legal notice was given, and a nonsuit must be entered.

Plaintiffs nonsuit.

MERRILL *versus* MOWRY *& al.*

An agreement in writing, made by the payee when taking a promissory note, that the amount of an account previously due from him to the maker of the note, "shall go to reduce the note," is but an executory promise, and does not convert the account into a payment upon the note.

If, upon the bankruptcy of the maker of the note, such account be sold by his assignee and paid to the purchaser by the payee of the note, the executory agreement will not preclude the payee from recovering the whole amount of the note against the maker.

ON FACTS AGREED.

ASSUMPSIT, by the payee against the makers of a promissory note.

TENNEY, J., orally. — Mowry, when decreed to be a bankrupt, had an account against the plaintiff, justly due. The amount of it ought to have been allowed upon a note which the plaintiff held against Mowry, and another person, since deceased. After that decree in bankruptcy, Mowry, jointly with the other defendant, gave to the plaintiff the note now in suit, in discharge of the note aforementioned, the plaintiff promising in writing, that the amount due upon the account, should "go to reduce the note."

The assignee in bankruptcy, however, finding the account among the assets of Mowry, sold it at auction to one Nason, to whom the plaintiff afterwards paid the same.

The only question is whether the amount of the account shall be deducted from the amount to be recovered by the plaintiff upon the note. No claim has been filed in set-off.

The defendant contends *that* the transactions between the parties, at the time of giving the note in suit, constituted a payment upon the note to the amount of the account; and *that* the account was thereby discharged; *that* nothing passed to Nason by the assignee's sale; *that* therefore the payment which the plaintiff made to Nason, was in his own wrong.

But such is not the view taken by the Court. The account existed prior to the making of the note. The items of which it was composed could not, therefore, have been furnished as *payment* upon the note. The engagement by the plaintiff that the account should go to reduce the note, was but an *executory* promise. It did not convert the account into a payment upon the note. The property in the account rightfully passed to Nason by the assignee's sale, and the plaintiff has properly paid it.

The claim of the defendants, that the amount of the account be deducted from the note, is not sustained.

D. T. Granger, for the plaintiff.

B. Bradbury, for the defendants.

LONGFELLOW *versus* QUIMBY *& al.*

The statute of 1821, chap. 118, authorized the establishment of highways in unincorporated townships, at the expense of the proprietors.

It also authorized a sale of the land, by the county treasurer, at auction, (after certain prescribed advertisements of the time and place of the sale had been given,) to raise money for paying the assessment.

The recitals in the treasurer's deed are not conclusive, as evidence of the facts therein stated.

A sale, made under such authority, was not rendered void by the fact, that it did not bring price enough to pay the whole assessment; nor by the fact that the assessing officers, in computing the number of acres to be assessed, excluded that portion of the tract, which was covered by water.

In trespass by a proprietor of land for cutting and carrying away growing trees, *Held*, that the plaintiff should recover for the value of the trees, and for the injury occasioned by cutting them prematurely, and for the injury done to the land, with damages at the rate of six per cent. per annum.

ON REPORT from *Nisi Prius*, SHEPLEY, C. J. presiding.

TRESPASS for cutting and taking away trees from the plaintiff's land, in townships numbered six and seven.

The County Commissioners had located and established a highway through the townships. Afterwards, in 1840, for the purpose of opening and making the highway, they assessed upon a described part of No. 6, estimated to contain 13,000 acres, exclusive of water and of land reserved by the State, the sum of $1820, being fourteen cents per acre; and upon No. 7, estimated to contain 29,000 acres, exclusive of water and of land reserved by the State, the sum of $4350, being fifteen cents per acre, to be paid by the proprietors, and ordered the county treasurer "to collect said assessments according to law."

The treasurer, after advertising as the law prescribed, sold the lands at public auction to the plaintiff. His advertisements stated that the sale was to be at *eleven* o'clock. His deed to the purchaser recited that the land was advertised for sale at *ten* o'clock, and that he sold them at that time *after waiting two hours.* Neither of the tracts was sold for enough to pay the assessment upon it.

The defendants afterwards cut and carried away the trees, for which this suit is brought.

A trial was had in 1848, but the verdict, then rendered, was set aside. 29 Maine, 196.

On again coming up for trial, several objections were taken to the plaintiff's title to the land. Some of them were founded upon the alleged illegality of the County Commissioners' assessment. The other objections are stated in the opinion of the Court. After the introduction of the testimony, the case was withdrawn from the jury, and submitted to the Court.

J. Granger, for the plaintiff.

Washburn and *W. Fessenden*, for the defendants.

Shepley, C. J. — When this case was before it at a former term, the Court decided, that the proceedings of the County Commissioners in laying out the highway and in assessing the taxes were to be regarded as valid, until quashed upon a writ of *certiorari*. 29 Maine, 196. The objections now made to those proceedings, cannot therefore prevent a recovery by the plaintiff.

Other objections not then presented or considered, are now made to the proceedings of the county treasurer to collect the taxes by a sale of the lands.

1. It is insisted that he could not lawfully sell them without obtaining for them the whole amount of the taxes assessed upon them.

The statute then in force, chap. 118, sect. 24, provided that so much of the lands should be sold at public vendue as might be necessary to pay the taxes and expenses of sale; and that the money so raised should be applied to open and make the highway; and it contained no provision that the lands should not be sold, unless the whole amount assessed upon them could thereby be collected.

The treasurer could not be excused from a performance of his duty to collect the taxes or as much of them as he could,

if the lands would not sell for an amount sufficient to pay the whole of the taxes.

2. The second objection is, that the lands, without including those covered by water, could not be legally assessed and sold.

Whether the assessment was correctly made or not upon the lands not covered by water, is not a subject for consideration in this case. The treasurer sold all that were assessed.

3. The third is, that the lands were advertised for sale on October 9, at eleven o'clock forenoon, and that the sale was made at ten o'clock of the same day, after waiting two hours.

The treasurer recites in his deed to the purchaser, that they were advertised for sale at ten o'clock, and that he sold them at that time, after waiting two hours. The meaning is, that he waited two hours after ten o'clock, and then sold them.

The recital in his deeds was evidently a mistake. Such recitals are not conclusive evidence of the facts therein stated. Nor will the sale be illegal by such mis-recital, if it appear, that the sale was in fact made at the time and place appointed. The statute did not require him to wait two hours, and it appears that he sold at twelve o'clock, and as he was there two hours before that time, he appears to have been there at the time appointed for the sale, and for the purpose of making it. The statute does not require, that the sale should take place during the hour appointed. It may happen, that the treasurer may be employed in receiving part of the taxes, and that the biddings may be prolonged to a later time. The recitals in the deeds do not prove that the sales were not legally made.

4. Another objection is, that the plaintiff acquired no seizin or possession by his conveyances from the treasurer; and the case of *Stubbs* v. *Page*, 2 Greenl. 378, is relied upon as authority. That case decides, that a collector's deed, void as a conveyance, gave no seizin or possession; not that such would be the effect of a deed conveying the land.

5. It is objected that the plaintiff cannot recover for any

trespass committed on lots in township numbered seven, excepting lot numbered seventy-eight, because he was at that time a tenant in common with Hutchinson and others, under whose license it is admitted, that the defendants cut the trees. A decision was made in the former opinion against the validity of this objection.

The plaintiff will be entitled to recover compensation for the injuries occasioned by the acts of the defendants upon his lands to be ascertained by an estimate of the value of the trees cut and carried away, and of the injury, if any, occasioned by cutting them prematurely, and of the injury, if any, done to the land; and on the amount thus ascertained for being deprived of the use of his property, may be added an amount equal to six per cent. per annum, from the time of taking the property to the time of judgment.

Defendants defaulted.

CHURCH *versus* INHABITANTS OF CHERRYFIELD.

In suits against a town, for injuries, sustained by alleged defects in the highways, it is proper for the jury to take into consideration the nature of the business in the town, "but such business forms only one of the facts, to be considered in connexion with other facts in the case, and with the obligation of the town to keep the highway in a safe and convenient state of repair for the use of the inhabitants of other towns as well as of its own inhabitants."

"The jury are not to infer a defect in a highway at a particular time and place, merely from the fact that an injury was sustained at that time and place."

But they may take that fact into consideration, in connexion with the other facts in the case.

"The terms *safe and convenient* as applied in the statute to roads, do not mean entirely safe and entirely convenient, but are to be considered by the jury in a particular sense, according to their knowledge and experience, in the ordinary transactions of men."

In communicating the rule, the words are employed in their usually accepted meaning.

B. Bradbury, for the plaintiffs.

C. Burbank, for the defendants.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF HANCOCK,

1851.

PRESENT:

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

TISDALE *versus* BUCKMORE.

If a party would rescind a contract, obtained by fraudulent representations, he must restore whatever he received under it.

ON REPORT from *Nisi Prius*, HOWARD, J. presiding.

ASSUMPSIT.

The plaintiff and the defendant had jointly purchased a bond for a deed of land.

The bond was made to the defendant, but the plaintiff was entitled to two quarters of its effects.

There was evidence tending to show *that* the plaintiff applied to the defendant for another quarter; *that* the defendant replied, that he had agreed to let Mr. Dodge have one quarter, but that he would ascertain whether Dodge would let the

plaintiff have it, *that* afterwards the defendant informed the plaintiff, that Dodge would consent to the plaintiff's taking the quarter for $1000, and no less; *that* the plaintiff accepted the offer, and paid that sum to the defendant, who thereupon assigned that quarter to the plaintiff; but *that*, in fact, Dodge never had any rights or interest of any kind whatever in the bond.

This action is brought to recover back the $1000 with its interest.

The Judge directed a nonsuit; which, by consent, is to be taken off, if improperly ordered.

Robinson and *Herbert*, for the plaintiff.

It may be urged in defence, that before commencing the suit, the plaintiff was bound to re-assign the quarter of the bond. That would be true, if the thousand dollars had been paid to the defendant as a compensation to *him* for the one quarter of the bond. But such was not the fact. It was paid to the defendant, not for *his* use, but for the use of Dodge, in consideration of an interest which Dodge was supposed to have. But Dodge had in fact nothing which he could convey to the plaintiff, and the money was never paid to him. It was therefore wrongfully taken from the plaintiff.

The authorities which the defendant's counsel may rely upon as requiring a re-conveyance of property, are only cases where the false representation is as to the *value*. They do not apply to cases of money obtained through false pretences of the defendant, such as would sustain an indictment against him as a cheat.

But the defendant, by his averment, that Dodge owned the quarter, is estopped to deny that fact, and cannot complain, that the plaintiff acted upon the averment as true. If he was bound to re-assign, to *whom* should the re-assignment be made? Surely not to the *defendant*, but to *Dodge*. How then can the defendant complain, that no re-assignment was made? He is not injured by the omission.

The view, then, to be taken is, that Dodge owned the quarter, and the defendant undertook, as agent for the plaintiff,

to purchase it. That the defendant never did purchase it, but falsely pretended that he had, and then made a sham and inoperative conveyance of it to the plaintiff, for the doing of which he fraudulently received of the plaintiff the sum of $1000, and now withholds it. Can the law sanction a proceeding so dishonest? If it can throw a protection over parties in the practice of such gross and unhallowed transactions, where can safety be found?

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

WELLS, J. — The plaintiff was induced to purchase one quarter of the bond, by the fraudulent representations of the defendant, that a third person was entitled to it, and that he would not relinquish his interest for a less sum than one thousand dollars.

It appears by the testimony, that the plaintiff paid the money for the quarter of the bond, and that the quarter was assigned to him by the defendant, the plaintiff having become by a previous arrangement, the owner of one half of the same bond. The defendant relinquished to the plaintiff his title to one quarter of the bond, but falsely represented that the price paid to him, really belonged to another.

The action, being for money had and received, cannot be maintained, under the facts exhibited, without a recission of the contract. And to effect that purpose, it was incumbent on the plaintiff to have re-assigned to the defendant the quarter of the bond, and what he had obtained by virtue of it, before the commencement of his action. It is a well established principle, that where a party to a contract, obtained by fraud, would rescind it, he must restore whatever he has obtained by it.

The action cannot be maintained upon the evidence introduced by the plaintiff, and the nonsuit was properly ordered.

Nonsuit confirmed.

OSGOOD, *Administrator de bonis non, appellant, versus* JOSEPH P. LOVERING.

A testator is presumed to use words in their ordinary meaning, if such a construction would not be in conflict with his manifest intention.

The use of the word "children" does not necessarily, and under all circumstances, exclude a grandchild.

But a grandchild will not be considered as included, unless such intention is clearly exhibited, or unless the word appears to have been used as synonymous with issue or descendants.

A testator, having five children, after making certain legacies, bequeathed the residue of his personal property; viz: to four of his children, one fifth part each, and of the other fifth, one half to a daughter, and the other half to a son of that daughter, to be paid to him when twenty-one years of age *with interest.*

Afterwards by a codicil, he bequeathed, "for the benefit of his family," for the term of ten years, all that residue which, in the will, he had directed to be divided "among his children," after which term it was to be divided as required by the original will. *Held*, that the change made by the codicil was merely to postpone the distribution for the term of ten years; and, that therefore, the interest upon the grandson's legacy was not to commence till the expiration of that term.

APPEAL from a decree of the JUDGE OF PROBATE.

The testator devised and bequeathed to his wife the use of all his real and personal estate, while she should remain his widow. He then bequeathed to her and to three of his five children the sum of five hundred dollars each. He then devised and bequeathed to his son Daniel all his real and personal estate after the decease or marriage of his widow; then bequeathed the residue of his personal estate, goods and chattels, one fifth part each to four of his children, and the other fifth as follows, viz: one half of it to his daughter, Phebe Lovering, and the other half of it to his grandson Joseph P. Lovering, to be paid to him with interest, when he shall be twenty-one years of age.

Afterwards, he executed a codicil containing as follows: "I bequeath for the benefit of my family, for the space of ten years from my death, all the residue of my personal property after my funeral charges and just debts are paid, which in my last will and testament I have directed to be divided

among my several children, after which time it shall be divided as specified in my last will and testament."

The will having been approved, the Judge of Probate decreed that interest on the legacy to said grandson should be allowed from the time of the testator's death. From that decree the administrator *de bonis non* appealed.

J. Appleton, for the appellant.

By the original will, the legacies, referred to in the codicil, were placed on an *equal* footing.

When the *residue* was ascertained, the division was to be made. The children being of full age, were entitled *presently* to their fraction.

The grandson being a minor, was not to receive his share till he should arrive at years of manhood; consequently he should receive interest, to be on an equality with the other legatees.

So the case stands under the original will.

By the codicil, the *use* of this residue, bequeathed to the children, is given for the space of ten years to the family.

Ten years are to elapse, before the children, though of age, can receive, and ten years before the grandson's share can be placed on interest.

The will fixes one period for the distribution of this residue, the codicil one ten years later.

Nothing indicates an intention to prefer the grandson, or change the proportions bequeathed, but the contrary; for the codicil itself requires the division to be "*as specified* in the will."

Consequently the fund was to be ascertained, its *use* for ten years was to be specifically appropriated, and then and not till *then*, that *residue* was to be divided, and divided in *the precise* proportions specified in the will.

To give the grandson interest for ten years, would free his tenth from the incumbrances of ten years use, indicated by the codicil — would give him one tenth *plus* ten years interest.

If the grandson were entitled to his interest it must neces-

sarily come from the *residuary* legatees under this clause, who must *pro rata* contribute, for the residuary legatees have no right to call upon the specific legatees, nor diminish the *ten years use* of this fund by charging it with interest.

It is manifest therefore, that Joseph is not entitled to interest till after lapse of the ten years specified in the codicil.

Hinckley, for the appellee.

By applying the rules of interpretation, the legacy to Jos. P. Lovering is not affected by the codicil.

1st. It is always presumed, that the testator uses the words which he employs, according to their strict and primary meaning.

2d. When there is nothing in the context of the will, from which it is apparent, that a testator has used the words, in any other than their strict and primary sense, and where his words, so interpreted, are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction, that the words shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and though the most conclusive evidence of intention to use them in such popular or secondary sense be tendered. Wigram on Wills, 11; 1 Greenl. Ev. sect. 287.

The words of the testator interpreted in their strict and primary meaning are sensible, with reference to the extrinsic circumstances, without resorting to any popular or secondary meaning of the word "children," used in the codicil.

The primary meaning of the word "children," used in the codicil, does not include grandchildren. *Comer* v. *Pinckney & als.* 3 Barbour's Ch. R. 466.

The testator having directed the legacy to be paid in a specified time after his death, with interest, it became due or a charge on the estate at the testator's death.

Though payment was to be delayed, interest must have been intended from that time.

Shepley, C. J. — The rights of the parties depend upon a

correct construction of the will of Daniel Faulkner. It was evidently drawn by a person not learned in the law.

The residuary clause would seem to be inconsistent with the devise of all his real and personal estate to his son Daniel, after the decease or marriage of his widow, unless the phrase "personal estate" be so restricted as to include only the tangible personal property of the testator. Whether the devise to Daniel became operative, so that this question would be presented, and if so, how it has been settled does not appear.

The only question presented is, whether Joseph P. Lovering is entitled to interest upon his tenth part of the residue, since the decease of the testator. This must be determined by the intention of the testator, to be ascertained from the context of the will and codicil.

He appears to have had two sons and three daughters. So far as he intended to provide for them specially or unequally, he has done so otherwise than by the residuary clause. The intention is clearly perceived to divide the residue equally among them and their children. This is accomplished by the language used in the original will, by which one fifth part is bequeathed to each son and daughter with the single exception, that the fifth designed for the benefit of his daughter Lovering is equally divided between her and her son Joseph.

The legacies from the residue would become payable as soon as the estate was settled. The payment of the tenth to Joseph being postponed until he became twenty-one years of age, it became necessary to keep up the equality to make it payable, as it was, with interest.

By the codicil he makes a change respecting the disposition of the residue, and declares, that it, or upon one construction a part of it, shall remain for the use of his beloved family for the space of ten years after his decease. He speaks of it as follows: "all the residue of my personal property, after my funeral charges and just debts are paid, which in my last will and testament I have directed to be divided among my several children, after which time it shall be divided as specified in my last will and testament."

The purpose of the codicil appears to have been to preserve the residue undivided for ten years, for the common benefit of his family, not to make any further alteration in the disposition of it. This is manifest by the use of the language "it shall be divided as specified in my last will and testament."

This language shows, that the manner, in which it was to be divided after the lapse of the ten years, was presented to his mind, and that he referred to the former disposition, instead of making any new or different one.

By the word family he doubtless intended his widow and children. If he did not intend to include the whole residue in that bequest to his family, the effect would be to make a very material change in the equality designed by the original will. The one tenth bequeathed to Joseph would be accumulating for ten years, while his mother would be receiving a benefit equal to that received by her brothers and sisters from the other nine tenths. The equality would be thus destroyed by the reception of the income by the mother, of one fifth instead of one ninth of the nine tenths, while her son's tenth was also accumulating.

There is no indication in the codicil of an intention thus to disturb the equality established by the original will, unless it appears from the latter clause used to describe the residue. That it was used to describe that residue, and not to make a bequest of it, is most apparent. It is not, therefore, a bequest or devise to children, which it is proposed so to enlarge as to admit a grandchild. This would be inadmissible.

If, in describing the residue, it was not the intention to include the whole of it, it is not reasonable to conclude, that he would have used the words "all the residue," instead of that part of the residue, or all that part of it. If the intention to distribute the residue unequally, was then upon the mind of the testator, it may be presumed, it would have been exhibited by the use of some language designed to make it known, instead of a clause of reference to the original will, for such division.

If no such intention was upon the mind, the language used

to describe that residue is not very extraordinary, when it describes it as the residue, which in my last will I have directed to be divided among my children. He might consider, that he had so directed it to be divided, when it was to be divided for their benefit, and that of their children.

A testator is presumed to have used words in their ordinary meaning, unless such a construction would be in conflict with his manifest intention. The use of the word "children" does not necessarily and under all circumstances exclude a grandchild. Grandchildren will not be considered as included in the term unless such intention is clearly exhibited, or the word appears to have been used as synonymous with issue or descendants. 2 Jarman on Wills, chap. 38; Wigram's Prop. 1; *Radcliffe* v. *Buckley*, 10 Ves. 195; *Izard* v. *Izard's Ex.* 2 Desau. 303; *Mowatt* v. *Carow*, 7 Paige, 328; *Tier* v. *Pennell*, 1 Edw. 354; *Ewing's Heirs* v. *Hanly's Ex.* 4 Litt. 349; *Cromer* v. *Pinckney*, 3 Barb. Chancery, 466.

All difficulty respecting the interpretation of the word children disappears, when it is considered, that the clause, in which it is found, was not used to designate the legatees or to determine how the residue should be distributed, but to describe the fund to be bequeathed. It then becomes only at most, a mis-description of it in part.

The whole residue being then appropriated by the codicil to the use of his family for ten years after his decease, it could not have been his intention to have the interest accumulate on the tenth bequeathed to his grandson during that time. The executor could have no fund from which an interest could be obtained. The income of the whole residue was to be so disposed of, that there could be no accumulation of interest. To allow interest to Joseph from the death of the testator would be inconsistent with the disposition of the residue for ten years by the codicil, and it would violate the equality which the testator intended to establish and preserve.

The decree of the court of probate is reversed; and it is ordered, adjudged and decreed, that the legacy payable to Jos.

P. Lovering be paid to him with interest, commencing ten years after the death of the testator, and that the costs of the administrator be paid to him out of the fund, and that the case be remanded to the court of probate for further proceedings.

Hovey *versus* Woodward.

Under a statute of 1786, the Legislature of Massachusetts granted, by a lottery, a large number of lots in fifty townships of land in Maine. Among other necessary proceedings the Act required a plan of each township, with the number of the lot drawn and of the ticket which drew it, to be inserted in a book, which should be authenticated by the signatures and seals of the managers. — *Held*, that a copy of their proceedings, showing no such authentication, is not sufficient evidence to maintain a title under the Act.

This result is not varied by the fact that, in the public offices where the documents should be kept, no higher evidence of title to any lot under the Act, can be found than that of the original, from which such copy was taken.

Although it may appear of record that an occupant of land obtained title to an undivided part of it through a succession of owners, the earliest of whom, in his conveyance, recited that the title was derived, under the lottery Act, such occupant is not estopped by such recital in his title deed, unless it appear, by the *legal testimony*, that a title to the land was acquired under the lottery Act, and that the occupant claims absolutely under that title.

On Exceptions from *Nisi Prius*, Howard, J. presiding.

An Act of Massachusetts was passed in 1786, authorizing the sale, by lottery, of fifty townships of land, including township number sixteen. It appointed five managers of the lottery, of whom Rufus Putnam was one.

The fourth section of the Act required them to lay down in a book, and number the townships and lots, and to return to the Secretary of State such book with its plans and with a list of the prize lots, and of the tickets by which they were drawn; and "to sign the book, and annex their seals to their names respectively." The fifth section provided that the Secretary "shall enter and register in the same book, against the number of the ticket and of its prize lot, the name of the pro-

prietor of the ticket, with the place of his abode and his addition.

The third section provided that such registry should enure and operate to all intents and purposes as a grant of the lots, &c., and that an attested copy of such registry should be evidence of title.

This is an action of trespass, founded upon the Revised Statute, chap. 129, sect. 7 and 8, for cutting trees upon lot number ten, in said township number sixteen.

The plaintiff claims title by inheritance from his father, Ivory Hovey, to one undivided fifteenth of said lot number ten, containing 320 acres, and contends that the lot was drawn in the lottery by his said father and Jonathan Hamilton and John Lord. To prove that fact, he introduced a paper purporting to be a copy of a plan of township No. 16, divided into lots. The copy was taken from a book in the Land Office of Massachusetts. Subjoined to it are the words "Township No. 16, * * Attest Rufus Putnam." Upon its margin is written, "lot No. 10, 320 acres, number of ticket drawn against, 40," and against the lot under the head of "Proprietors' names, addition and place of abode," was written "Messrs. Jonathan Hamilton, Ivory Hovey and John Lord of Berwick in the County of York, Merchants."

It had not upon it the seals of either of the managers, nor the name or signature of either, except that of Putnam as above stated.

The Land Agent, in 1848, appended to it a certificate, signed by him, that the paper was a true copy of the original plan returned by Rufus Putnam, surveyor; and another certificate that it "is a true copy, as found in the record book, who drew lots in the land lottery, as laid down in said book, returned by the managers of the land lottery, under the third section of the Act of 9th Nov. 1786, which book contains the registry of the names of the proprietors of tickets in township 16, made by the Secretary of the Commonwealth, pursuant to the 5th section of said Act."

It was proved, that by virtue of a Resolve of the State, all

the books, plans and papers pertaining to the lottery lands, had been deposited by the Secretary with the Land Agent.

The plaintiff introduced the deposition of the Land Agent, George W. Coffin, Esq., taken by commission upon written interrogatories.

The Judge instructed the jury *that* they should examine the copy, and determine from inspection whether it purported to be a copy as required by the 3d and 5th sections of the Act of 1786, which were read to them; — *that* it was essential to the validity of the document that the book containing the original, should have been signed and sealed by the managers; and *that* the columns in the margin should have been made and certified by the Secretary of State.

The plaintiff requested instruction to the jury that, if satisfied that there existed in the archives of Massachusetts, no other records than those produced, of the proceedings and attestations by the managers and of the registry by the Secretary of State, they might consider the evidence before them sufficient to establish the plaintiff's claim. This instruction was refused.

The plaintiff requested instruction to the jury that, as Rufus Putnam, one of the managers, had attested the copy of the plan, they might after the lapse of more than sixty years, infer that all the other requisites to establish the title in the plaintiff's father, were duly complied with.

The Judge instructed the jury that, though the plaintiff, after so great a lapse of time, might not be held to prove that the managers were sworn, or to prove the formal accuracy of each minute particular in their proceedings, it was necessary for him to prove that the managers *did act*, and that that proof must be by some record, vouched by the managers and by the Secretary of State.

It appeared by a series of recorded deeds, used in evidence, that the defendant is a part owner of the lot in controversy, (No. 10,) and that his title is deduced from John Lord, under a deed which recites that the said lot No 10 was drawn, in the lottery, by said Lord.

The plaintiff thereupon requested instruction to the jury that, if the only evidence, which can be found upon the subject in the archives of the Commonwealth of Massachusetts, showed the lot to have been drawn by said Lord jointly with said Hovey and Hamilton, the defendant, by his title deeds, would be estopped to deny the title of said Hovey, the father of the plaintiff.

This instruction was refused, and the jury were instructed *that* the defendant, and his grantees, were not necessarily to be considered as claiming under the lottery Act; — *that*, before the defendant could be estopped by the recital in his title deed, it must appear that there were *some* proceedings under that Act, and especially that there was a plan or book to which the signatures and seals of the managers and the signature of the Secretary were affixed; — and *that* the defendant claimed absolutely under such proceedings.

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

Herbert, for the plaintiff.

To uphold the rulings at the trial would be disastrous to a large number of our citizens. Tens and perhaps hundreds of thousands of acres are held under the lottery title. No evidence can be found upon which to sustain their claims, other than what we have introduced in this case. But we apprehend there is no ground for alarm. For the document we produced sufficiently shows a compliance with the calls of the lottery-statute.

There is upon the document, a registry of the number and contents of the lot, the number of the ticket against which it was drawn, and the names and residence of the plaintiff's ancestor and two other men, as "proprietors." As it was the Secretary's duty to make just such a registry, the registry offered must be presumed to have been made by him. But moreover, the land agent's certificate alleges that it was "made by the Secretary of the Commonwealth." And, as to those matters, the land agent is a certifying officer, having the records in his possession and control. 1 Greenl. Ev. sect. 485 and 507; Statute of U. S. of March 27th, 1804. So much

of the Judge's charge as required the jury to find the official attestation by the *Secretary*, was therefore, erroneous.

There is, then, no deficiency in the document, except it be as to the signatures and seals of the *managers*.

The doings of the managers and their plan now before us, are more than sixty years old. The instruction, requested by the plaintiff, that after so long a period, it might be inferred that all the proceedings were rightfully executed, should have been given. At any rate, the attestation by Putnam, being a part of the requirement, might be the basis of such an inference. *Pitts* v. *Temple*, 2 Mass. 538; *Stockbridge* v. *West Stockbridge*, 12 Mass. 400; *Proprietors of Monumoi Great Beach* v. *Rogers*, 1 Mass. 160; *Copp* v. *Lamb*, 12 Maine, 312; *Crooker* v. *Pendleton*, 23 Maine, 339; *Freeman* v. *Thayer*, 33 Maine, 76.

The statute of 1786 does not prescribe an attested copy as the *only* evidence. The Judge should have left it to the jury to say whether or not they were satisfied, from the evidence before them, that the plaintiff 's father and others drew the lot, and produced the ticket to the Secretary within six months, and had it registered. Those acts would have passed the title. See sect. 3.

The requested instruction relative to the estoppel should also have been given. If a man is in possession of land, of which a deed to him is recorded, the presumption is, that he claims under the deed.

The jury might have found that the defendant made title under the very lottery ticket under which the plaintiff claims. He would, then, have been estopped to contest the plaintiff 's title. 1 Greenl. Ev. sect. 23 and 24; *Ford* v. *Gray*, 1 Salk. 285; *Trevillian* v. *Lane*, 1 Salk. 276; Comyn's Dig. title Estoppel, 13; Co. Litt. 352, (a); *Penrose* v. *Griffith*, 4 Binney, 231.

The ruling was too broad, that before such an estoppel could apply, it should be shown that there were some proceedings under the Act, and especially that there was a plan or book to which the signatures and seals of the managers and the sig-

nature of the Secretary were affixed. So also was the ruling that the plaintiff was bound to show that the defendant absolutely claimed under the Lottery Act.

It would have been sufficient to instruct the jury that they must be satisfied he claimed or held under the lottery proceedings.

Robinson, for the defendant.

SHEPLEY, C. J. — The plaintiff as an heir at law of Ivory Hovey, deceased, claims to be the owner of an undivided part of lot numbered ten in township numbered sixteen in the middle division of the lottery lands. The action is founded upon the statute, chap. 129, sect. 8.

The only evidence produced at the trial, of the title of the deceased to any portion of that lot, was a copy of a plan of that township as surveyed and lotted by Rufus Putnam, and attested by his signature, with the numbers of the tickets, by which the lots were drawn, and the names of the proprietors entered in columns upon it.

The Act, passed on Nov. 9, 1786, authorizing the sale of fifty townships of land by lottery, prescribed the acts to be performed to convey titles to the prize lots to the holders of the prize tickets.

By the fourth section managers were appointed, who were required to "lay down in a book, and number the townships and lots as aforesaid," to publish an account of the numbers and prizes, and to "return to the Secretary the book and plans aforesaid of the said townships and lots together with an account and list of the numbers and prizes drawn by the respective numbers in opposite columns, fairly entered therein, and sign the same book and annex their seals to their names respectively."

The fifth section provides, that the Secretary of the State "shall enter and register in the book so to be returned to him by the managers, against the number of such tickets, and the prize lot it may have drawn, the name of such proprietor," when the proprietor shall have produced the ticket to him.

The third section provides, that "such registry shall enure and operate to all intents and purposes as a grant of the same lots respectively, on behalf of the Commonwealth, to the proprietor or proprietors of the tickets so drawing the same, without any other or further deed or writing whatever; and an attested copy of such registry shall be sufficient evidence of the party's title to the same."

The copy of the document produced does not exhibit any such authentication by the managers or any one of them of the book containing the numbers of the lots and tickets; nor any evidence of an entry or registry by the Secretary of the names of the owners of the prize lots in such book.

There is therefore no copy produced of the document required by the statute, to operate as a grant of the lot.

It is insisted in argument, that the document, a copy of which is presented, is the only evidence of title, which the owners of lottery lands can produce; and, that to refuse to regard it as sufficient, will deprive them of the means of establishing their titles.

If even such a result were to follow from the exclusion of the testimony, the Court could not receive as conclusive evidence of title, a document unauthorized by law. That would be an assumption of power to establish a title to real estate by any testimony, which it should please to regard as sufficient. If such inability to establish a title to lottery land should be found to exist, which is not anticipated, it might become necessary, that the legislature should determine, what should be sufficient evidence of title from the State of Massachusetts.

It is insisted further, that the defendant is estopped to deny, that Ivory Hovey, sen'r, was the owner of one third part of the lot.

The only foundation on which this position can rest is, that the heirs of John Lord on October 13, 1830, conveyed one third part of the lot to Andrew Peters, describing it as lot No. 10, in township No. 16, in the middle division of the lottery lands, originally drawn by John Lord. Peters

conveyed the same to Nicholas Little and others on April 5, 1833, and they conveyed the same to the defendant on Nov. 13, 1842.

There is no recital, statement or admission in any one of these conveyances, that Hovey was an owner of any part of the lot. By denying the title of Hovey the defendant is not obliged to contradict or to deny any fact stated in his own conveyance or in those, from which his title was derived. Nor was Hovey or any one of his heirs a party to any of these conveyances; and estoppels must be mutual. There is, therefore, no foundation for the position.

It is not necessary to consider whether the admission or exclusion of testimony or the instructions in relation to damages were correct, for the plaintiff could not have been aggrieved by them.

The motion to set aside the verdict cannot prevail, for the plaintiff exhibited no legal evidence of title in himself.

Exceptions and motion overruled, and judgment on the verdict.

LANGLEY *& al. versus* BARTLETT *& al.*

When a note, payable on time, is given for the amount of a note then overdue against the same maker, no principle of law is violated by an agreement of the parties, that the old note should be held by the payee, as collateral to the new one.

The extension of the pay-day is a sufficient consideration to uphold the new note.

So the taking from the payee a written stipulation to cancel the old note upon the payment of the new one, is a sufficient consideration.

ON REPORT from *Nisi Prius*, HOWARD, J. presiding.

Robinson, for the plaintiffs.

Herbert, for the defendants.

HOWARD, J., orally. — This is assumpsit on two notes of hand. It appears that these defendants, several years ago,

gave to the plaintiffs two notes, one on demand and the other upon time, and secured the same by mortgage. Partial payments were made upon them. After they had become overdue, the notes, now in suit, were given for the balance due on the old notes. At the time the new notes were made, the old notes were not given up, nor has the mortgage ever been discharged. At the making of the new notes, however, the plaintiffs gave to the defendants a paper setting forth, that they held the old notes as collateral security for the new ones, and agreeing, that when the new notes were paid, they would cancel and surrender the old ones and discharge the mortgage.

In this State, the taking a negotiable promissory note for an old one, is *prima facie* evidence of payment. But instead of being considered paid, the old note by agreement of parties may be held as collateral; and that fact may be proved by parol.

The parties in this case, undoubtedly, had their object in this agreeement. It may have been a benefit to all of them; and there is no reason why such an agreement should be annulled. It is contended, that there was no consideration for the new notes, inasmuch as the old ones, for which they were given, have been continued in force. But the extension of a pay-day is a sufficient consideration. The new notes were given on four and five months, although the old ones were then overdue. The old notes could not be collected until the new ones became payable. Besides, the debtors took at the time a promise in writing to surrender the old notes upon condition, which was also a sufficient consideration, a promise for a promise.

Defendants defaulted.

Ames *versus* Swett.

A mechanic, who has labored upon a vessel, having been employed, not by the owner, but by a person, who had contracted with the owner to do the work for a specified price, cannot enforce a lien upon the vessel by an action against the *owner*.

If he have such a lien, his remedy is by attaching the vessel, in a suit against his *employer*.

On Facts agreed.

Assumpsit, for labor in calking a vessel.

The defendant built and owned a barque. He contracted with one Tribou to do the calking. Tribou hired the plaintiff to calk. The plaintiff charged his labor to Tribou, who, on account of some disagreement as to the mode of payment, left the bill unsettled. The plaintiff, claiming a lien upon the vessel, brought this suit and seasonably attached the barque.

Tuck, for the plaintiff.

Woodman, for the defendant.

Wells, J. — The contract under which the plaintiff performed the labor upon the vessel, was not made with the defendant, but with one Silas K. Tribou, who had agreed with the defendant to calk the vessel for a certain sum. The plaintiff labored for Tribou against whom, he had a right of action for his services. There was no privity of contract between the plaintiff and defendant.

But it is contended, that the action is maintainable for the purpose of enforcing the lien, which the plaintiff claims to have upon the vessel. It is unnecessary to decide the question, whether the plaintiff, a sub-contractor, has any lien upon the vessel, for if he has, his remedy would be to bring an action against his employer and attach the vessel. The statute does not authorize him to sue the owner of the vessel, with whom he has not made any contract express or implied. Tribou was not the agent of the defendant, but acted for himself in hiring the plaintiff, to whom he is debtor for whatever may be due. *Plaintiff nonsuit.*

Note. — See the case of *Doe* v. *Monson & Trustee*, 33 Maine, 430.

BEAN, *Complainant, versus* HINMAN.

In a complaint for flowing land by a mill-dam owned by the respondent, it is no defence, that his ownership had ceased prior to the instituting of the complaint.

The statute does not authorize a recovery for damage done by flowing more than three years before the complaint.

For damage done within three years before commencing the suit, and before the owner had ceased to own the dam, he is responsible.

ON REPORT from *Nisi Prius.*

COMPLAINT, under the Statute, for flowing land by means of the respondent's mill-dam. The defence was, that several months prior to the instituting of the complaint, he had sold and conveyed the dam to others, who immediately entered into the use and occupation of it.

Herbert, for the complainant.

Robinson, for the respondent, cited 17 Pick. 70.

WELLS, J., orally. — The first question presented is, whether the respondent is liable at all, having parted with his ownership, before the process was commenced, and others being in possession and flowing the land. Each owner must be held liable for all such damage occasioned by him, unless there is a limitation in the Statute of Flowage.

Section 5, chap. 126, R. S. provides, that a person injured, may obtain compensation by complaint, &c., but no compensation shall be awarded for any damages, sustained more than three years before the institution of the complaint. There is therefore, a limitation as to time, but in no part of the statute is there a limitation as to the person against whom the process lies. The statute does not exempt a person, merely because he is not the present owner.

The respondent is therefore liable to such damage, and only such, as accrued during his ownership, but not extending back beyond thee years from the commencement of the suit.

SWETT, *complainant*, *versus* STUBBS.

In a bastardy process, in order to authorize the admission of the complainant as a witness, it is not indispensable that she make her complaint before a magistrate prior to the birth of the child.

ON EXCEPTIONS from *Nisi Prius*, WELLS, J. presiding.

THIS was a process under the bastardy Act, transferred to this Court, the Judge of the District Court having been of counsel in the case.

The complaint and accusation were made three days after the birth of the child.

A witness testified that, while in travail, about one hour before the birth of the child, the complainant said the child was the respondent's.

The complainant was then offered as a witness. She was objected to as not competent, or if so, not admissible in the present stage of the case. She was, however, admitted.

A verdict was found against the respondent, and he excepted.

WELLS, J., orally. — The question is whether the complainant was properly admitted as a witness.

It is contended, not that the process is irregular, but that the complainant, in such a case, cannot be admitted to testify, unless, *prior to the birth of the child*, she make her complaint before the magistrate.

In R. S. chap. 13, sect. 8, there is some appearance of support for such an argument. It is there provided that, "when the complainant, having made said accusation and been examined on oath, as before mentioned, and being put upon the discovery of the truth respecting the same accusation, at the time of her travail, shall thereupon accuse the same man with being the father of the child of which she is about to be delivered, and shall continue constant in such accusation, and shall prosecute, &c., she shall be a witness in the trial of the cause."

In marshaling the acts to be performed, in order to render the complainant competent to testify, the complaint is, in the order of language, laid as an anterior act. The statute does not itself expressly provide that it shall be an antecedent act.

The argument is based merely on the collocation of the words, which specify the steps necessary to be taken. But that section is to be construed in connection with the other parts of the statute.

In sect. 1, it is provided in what manner any woman, being pregnant with a child, which if born alive may be a bastard, or who "*has been delivered*" of a bastard child, may proceed to complain before a magistrate.

Section 7 provides that, before trial, the complainant shall file a declaration. The statute points out what her declaration must contain, what facts are necessary to set forth particularly, and it nowhere provides that she shall allege that the accusation was made prior to the birth. She is not bound to prove any thing that it is not necessary to allege.

Exceptions overruled.

Peters, for the respondent.

Woodman, for the complainant.

INHABITANTS OF SCHOOL DISTRICT IN TREMONT, *petitioners for a mandamus, versus* CLARK, *Treasurer.*

To an application for a mandamus to the treasurer of a town to issue his warrant of distress against the collector of taxes for neglecting to collect a school district tax, it is no defence that there were illegalities in the assessment.

The only subject of inquiry in such a case, is whether the warrant to the collector was issued by assessors legally qualified.

HOWARD, J., orally. — This is an application for a mandamus to the treasurer of the town of Tremont to issue a warrant of distress against the collector for neglecting to collect a tax assessed upon the district for the building of a school-

house. It is presented to us by virtue of sect. 111, chap. 14, R. S. and sect. 33, chap. 17, R. S. It is alleged that a portion of the tax has been collected and paid over to the treasurer, and that the balance is unpaid. Clark answers, admitting that all the proceedings have been had that are alleged, but further says he has been advised and believes that the assessment was illegal, and prays the judgment of the Court thereon.

The treasurer has the power to issue such a warrant, and in some cases it becomes his duty. The collector, having a warrant from competent authority, was bound to proceed under it. With the anterior proceedings he had no concern. An officer appointed to collect the public revenue must, *ex necessitate rei*, obey his warrant, and he will be protected in so doing. He holds in his hands the sinews of government, and neither his fears that individuals may be injured, nor his doubts about the validity of anterior proceedings, will excuse him. If individuals are injured they have their remedy at law, or they may see fit to waive any injury they have received. The collector has no judicial power. He is only to know whether his warrant proceeds from competent authority. If so, he must fulfil it as he is commanded.

We do not now decide, nor is it necessary to examine, whether the anterior proceedings in assessing the tax were correct or not.

Mandamus to issue.

Herbert, for the petitioners.

Drinkwater, for the respondent.

WASHINGTON PARTRIDGE *& al. versus* PATTEN *& al.*

By the covenants, in a deed of land, "that the grantor will never make any claim to the land, and that he will warrant and defend the same free from all incumbrances by him made," he is not estopped to claim the land under a title *subsequently acquired* by him. — WELLS, J. dissenting, and referring to his opinion as published in the case of *Pike* v. *Galvin*, 30 Maine, 539.

ON FACTS AGREED.

PETITION FOR PARTITION.

Heath, for the petitioner.

Woodman, for the respondent.

The opinion of a majority of the Court was given by

SHEPLEY, C. J. — It appears by the agreed statement, *that* John Partridge formerly owned the lot of land, one fifth part of which is now claimed by the petitioner and by the respondents; —

that Thomas Partridge, a son and heir of John by inheritance, became the owner of one fifth part of that lot, and died seized thereof during the year 1824; —

that the petitioner, a son of Thomas, became seized of that fifth part, and, on April 12, 1841, conveyed by a deed of release containing the covenants hereafter named, the whole lot to Lewis W. Conner, who conveyed one half of it to each of the respondents; —

and, *that* Mary Treat, one of the children and heirs of John Partridge, conveyed the one fifth part now in controversy to the petitioner in the month of October, 1841.

The question presented for decision is, whether the petitioner is estopped by the covenants contained in his deed to Conner to assert a title to the fifth part subsequently purchased by him of Mary Treat.

There are but two covenants in that deed; the first is, that of non-claim in the same words as the covenant in the deed considered in the case of *Pike* v. *Galvin*, 29 Maine, 183, and 30 Maine, 539, with an addition of the immaterial words "or their appurtenances."

The reasons were assigned in that case for the decision, that the vendor was not by such a covenant estopped to assert a title subsequently acquired.

The other covenant of the petitioner is in these words: — "that I will warrant and defend the same from all incumbrances so far as made by me, but not otherwise."

It does not appear, that the petitioner had caused the land described to be in any manner incumbered. That covenant

does not assert, that the petitioner had any valid title to the lot; nor does it make an engagement to warrant or defend the title against any one not claiming under an incumbrance made by the vendor.

It was stated in the case of *Pike* v. *Galvin*, that when a deed of conveyance contains no warranty of the title, an after acquired title will not enure or be transferred to the vendee; nor will the vendor be estopped to assert a title subsequently acquired, unless by doing so, he is obliged to deny or contradict some fact alleged in his former conveyance.

The petitioner in this case does not deny or contradict any fact alleged in his conveyance to Conner, by asserting his title acquired from Mary Treat.

Wells, J. I cannot concur in the opinion, for the reasons given by me in the case of *Pike* v. *Galvin*, 30 Maine, 539.

Ordered by the Court, that partition be made as prayed for.

Sellers *versus* Carpenter.

In order to the introduction of secondary evidence to prove the contents of a document, alleged to have been lost, it is, *as a general rule*, necessary to show that search has been made among the papers of the person, to whom belonged the custody of the document.

On Report from *Nisi Prius*, Wells, J. presiding.

Dower.

Shepley, C. J. — The death of the husband and his seizin during coverture are not disputed.

The defence is, that the demandant united with her husband in making a conveyance in mortgage of the premises on June 15, 1824, to Jeremiah Wardwell, and thereby relinquished her right of dower. She denies that her signature to that deed is genuine.

The tenant did not produce such a deed, but attempted to prove its existence, its execution, its loss, and its contents.

The existence of such a deed purporting to be signed by the husband and wife and to be witnessed by Charles Hutchins is satisfactorily proved. Hutchins has since deceased; and the genuineness of his signature as a witness to the deed is proved.

The testimony of Robert Wardwell one of the executors of Jeremiah Wardwell shows, that he carried the mortgage deed in the month of March, 1831, to McIntire's store in North Castine, where a sale at auction was made of the notes secured by it to Fayette Baker. He testifies, that he has never seen it since. That he has made at different times diligent search for it among his papers and those of the testator, which were in his custody alone, and could not find it. That he has caused search to be made by the other executor without success. Baker testifies, that he did not take it, when the notes were purchased by him, and that he never saw it. No assignment was made of it to Baker by the executors; but they made an assignment of it on July 30, 1831, to Howard and Hall, and at that time Hall and Baker applied to the executors to obtain the deed without success. It is admitted, that the store occupied by McIntire was subsequently burnt, but not till after he had removed from it. It does not appear, that any papers were there lost.

Peletiah Hutchins testifies, that Robert Wardwell told him in 1845, that he did not know where the deed was, unless Hall had got it.

The declarations of Dunbar, that he had written to Hall, and if he had got the letter, the deed was now in ashes, are not legal testimony.

To prove the loss of a document so as to permit proof of its contents to be introduced, the general rule as stated by Mr. Starkie is, that "it must be shown, that a *bona fide* and diligent search has been made for it in vain, where it was likely to be found." 1 Stark. Ev. 336, ed. by Metcalf. The rule, as more carefully stated by Mr. Greenleaf is, that "the party is

expected to show, that he has in good faith exhausted in a reasonable degree all the sources of information and means of discovery, which the nature of the case would naturally suggest, and which were accessible to him." 1 Greenl. Ev. § 558.

Howard and Hall appear to be the persons, who should have the rightful possession of that deed. It was assigned to them. It may be true, that the Wardwells never saw it after it was at McIntire's store, and that neither Hall nor Baker had it, when it was assigned to Howard and Hall, and also true that Howard and Hall, or one of them, afterward obtained it from McIntire or from some other person present at that store who retained it until after the assignment of it was made.

It would seem, that the nature of the case would suggest, that inquiry should be made for it of the persons, who would be legally entitled to possess it, and may now be in possession of it, and yet all the testimony introduced to prove its loss may be true.

There is nothing in the testimony considered together, which renders it highly improbable, that the deed is now in the possession of Howard or Hall, who are entitled to its custody. The decided cases generally require, that search should be made among the papers of the person legally entitled to the custody of the document.

The testimony does not exhibit legal and satisfactory proof, that the deed has been lost, and the secondary evidence is not legally admissible. *Tenant defaulted.*

H. Williams, for the demandant.

C. J. Abbott, for the tenant.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF WALDO,

1851.

PRESENT:

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

WEEKS *versus* ELLIOTT.

Upon a verbal agreement between A, B and C, that a note due from B to A shall be paid by C at a future day, the promise of C to pay accordingly, is but executory, and does not of itself operate a payment of the note.

Upon such an agreement, if the promise of C be that he will make the payment in services, (the promise being of an entirety,) it cannot be claimed, as against the holder, that any part of the note is paid by the performance of only a part of the services.

Whether it is the right of a party, after the jury has once retired with the cause, to request new instructions to them from the Court, *quere*.

ON EXCEPTIONS from the District Court, RICE, J.

ASSUMPSIT by the payee, who is an attorney-at-law, against the maker of two promissory notes.

To prove payment, the defendant introduced a witness who

testified *that* he, the witness, was indebted to the defendant in the sum of $28,50 upon two small due-bills; — *that* the plaintiff, defendant and witness were together, when the plaintiff verbally promised the defendant to allow him that amount, and take his pay therefor from the witness in services as a deputy sheriff; — *that* the witness afterwards credited the plaintiff on book account for the $28,50 and performed for him services, as a deputy sheriff, for a greater amount, which he charged to him; — *that*, several months afterwards, the defendant gave up the two due-bills to the witness; — and *that*, at a subsequent time, the plaintiff said that the notes against the defendant were paid, and that the defendant owed him nothing, and promised to cancel the notes and leave them with Mr. Abbott for the witness to take.

The $28,50 was never indorsed upon the notes, nor charged by the plaintiff to the witness, and no settlement was ever made between them.

The Judge instructed the jury, "that if the plaintiff made an agreement, as testified to by the witness, which was not carried into effect at the time, that agreement was executory; and unless it was, afterwards executed, and the amount of the witness's note to the defendant allowed or indorsed by the plaintiff on the notes in suit, it is not to be considered as a payment." After the jury had retired, and, not agreeing, had returned into Court for some explanation, the counsel for the defendant requested the Judge to instruct the jury, "that if the plaintiff and the defendant, and the witness agreed, when together, that the plaintiff should allow in payment on the defendant's notes, twenty-eight dollars and fifty cents, and take that amount in *services* of the witness, that operated *at that time*, as payment of that sum, whether it was then indorsed or not; or, if not at that time, that it did so as fast as the witness performed any services for the plaintiff."

The Judge refused to give these instructions, and the defendant excepted.

Davis, for the defendant, submitted without argument.

W. G. Crosby, for plaintiff.

1. The agreement, if any such was made, to allow defendant $28,50 on the note in suit, and to take pay for that amount of the witness in services, was without consideration, and therefore not binding upon plaintiff.

2. The agreement of the witness to pay that sum, if he made any such, constituted no consideration, it being only a verbal promise to pay the debt of another; plaintiff could not have enforced the performance of that agreement. It would have been different, had the due-bills against the witness been transferred to plaintiff, or had defendant so bound himself, that he could not have maintained an action against witness, upon them. Had he brought a suit upon them, witness could not have set up in defence the agreement on his part to pay the amount due on them to plaintiff. An agreement to pay is not payment. The whole contract then, as it regards all the parties to it, was without consideration.

The Judge, therefore, did not err in declining to instruct the jury, that the "agreement" operated as payment of defendant's notes, at the time it was entered into.

If the "agreement" did not operate as payment, did the services of the witness so operate as fast as performed? Such is the doctrine of defendant, as expressed in the second branch of his request.

They did not so operate for the reason that the agreement was for an *entire* sum. Nothing less than payment of the entire sum would be performance on the part of the witness, or of defendant, who was a party to the agreement, and entitled to the benefits resulting from a full performance. Plaintiff was under no obligation to accept part in lieu of the whole. Compliance with the request would have substituted for the original agreement, one entirely different in its terms and operation. The Judge, therefore, did not err in declining to comply with this portion of defendant's request.

The contract in this case, if any such was made, was executory; it was not binding until executed.

To execute it, it was necessary that witness should have performed the service for plaintiff in *payment* of defendant's notes, — and that plaintiff should have received them as such. The testimony as reported is, *that* plaintiff was an attorney-at-law; *that* witness was a deputy sheriff; *that* he rendered services for plaintiff to an indefinite amount, exceeding the sum of $28,50; — *that* no application of any of those services has ever been made to the payment of the notes in suit; — *that* plaintiff and witness have never had any settlement of the same; — and *that* the amount was never indorsed on defendant's note. There was no proof that plaintiff has ever done any act by which the indebtedness of defendant has been transferred to witness. Nor does there appear to have been any act on the part of defendant, affirmatory of the contract, until several months after this suit was brought, when he gave up to the witness the due-bills which he held against him.

At the time this suit was brought, then, the contract remained wholly unexecuted by all the parties to it; and therefore did not operate as payment in whole or in part of the notes in suit.

WELLS, J., orally. — In these exceptions, we are to look only at the instructions given and the instructions refused.

The Judge instructed the jury *that* if the agreement, as testified to, was made, and if it was not executed at that time by an allowance on the notes in suit, it was not then a payment; — and *that*, unless the plaintiff, after the official services were rendered by the witness, had allowed or indorsed the amount upon the note, the services did not constitute a payment.

If the agreement was that the plaintiff should receive the witness' promise, as mere collateral to the notes in suit, and not to be effective as a payment, till the services should have been performed, it did not operate as a payment.

So, if the promise of the witness was merely to pay the debt of the defendant, it was void by the statute of frauds, and could not discharge the note.

It may however be said, that it was neither a collateral promise, nor a promise to pay the debt of another, but that it was a promise by the witness to pay his own debt; and to pay it to the plaintiff, instead of the defendant. But there was no assignment of the due-bills, by the defendant to the plaintiff, with a promise by the debtor to pay to the plaintiff. The plaintiff could maintain no suit against the witness. The instruction given was therefore correct.

At most, the promise by the witness was merely executory. The instruction requested, (that the jury should consider the $28,50 as paid at the time of the promise,) was therefore rightfully refused.

Again, the defendant requested instruction that the services, *so fast as performed*, operated a payment *pro tanto*. But the agreement was *in solido*, an entirety. It did not contemplate piecemeal payments, nor compel the plaintiff to divide up his debt and receive it from time to time in parts. This requested instruction could not properly have been given.

In offering this opinion, the Court do not intend to be considered as establishing the right of a party to request instruction, after the jury has once retired with the case.

WEED *& al. versus* LERMOND, *Administrator.*

Although it is proper for an administrator to charge himself for the amount at which debts, due to the intestate, were appraised, such charge is not conclusive of his liability for that amount.

An administrator is not authorized to take such debts to his own use at the appraisal, nor bound to account for them at the appraisal. His responsibility is that of reasonable diligence in the collection of them.

Berry *versus* Elisha H. Hall.

In a suit by the indorsee of a negotiable promissory note against the maker, the indorsee is a competent witness for the plaintiff.

On Exceptions from the District Court, Rice, J.

Assumpsit by the indorsee against the alleged promissor of a note payable to Charles V. Poor or order. The note was produced. It was *signed* by John H. Hall, and the defendant had written his name upon the *back* of it. Directly above the defendant's name was that of Charles V. Poor. The defendant had not been notified as indorser. The plaintiff proposed to prove, that, though the defendant's name was not on the *face*, but was on the *back* of the note, yet that, when writing it, he intended to sign as a *promisor*, and not as *indorser*. For that purpose, he offered the deposition of Charles V. Poor. The deposition was made a part of the case. It shows that in the original arrangement, it was agreed, that Mr. Poor was to have a note with the defendant's name upon it.

The defendant objected to the introduction of the deposition to the jury, alleging, that the deponent was interested, and that it was not competent to change, by parol evidence, the relations of the parties to a negotiable note. The deposition was excluded; and there being no other evidence on that point, a nonsuit was ordered.

To the exclusion of the deposition the plaintiff excepted.

Dickerson, for the plaintiff.

Williamson, for the defendant.

Shepley, C. J., orally. — The deposition was offered by the *plaintiff*.

The deponent's liability upon his indorsement could not be defeated by a verdict for the plaintiff. He was not, therefore, interested in favor of the plaintiff, and the deposition was admissible.

The plaintiff also contended, that parol evidence is not receivable to change the relation of parties to a negotiable note.

A consideration of that question is unnecessary, because the deposition, which is made a part of the case, contains nothing which can tend to show, that the defendant intended to sign as a promisor. It only proves, that his name was to be upon the paper; and its exclusion was, therefore rightfully ordered.

When one places his name upon the back of an *unnegotiable* note, the law presumes him to be a *promisor.*

When he places it upon the back of a *negotiable* note, the law presumes, that he intended to be an *indorser.*

Nonsuit confirmed.

BERRY *versus* STAPLES *& al.*

A constable has authority to serve an execution, issued upon judgment when not more than one hundred dollars was recovered as damage, although the damage and cost, taken collectively, amount to more than that sum.

ON EXCEPTIONS from *Nisi Prius,* WELLS, J.

DEBT on a poor debtor's relief bond.

An execution had issued against the principal defendants on a judgment for $100 damage and four dollars thirty-five cents cost.

It was placed for collection in the hands of a constable, who thereupon took the bond upon which this suit is brought. The defendants requested instruction to the jury that the constable had no authority to serve an execution, wherein the sum to be collected is more than $100, and that, therefore, the action is not maintainable. That instruction was refused, and the defendant excepted.

C. F. Hill, for the defendants.

Palmer, for the plaintiff.

SHEPLEY, C. J., orally.—The R. S. chap. 104, sect. 34, provide, that "a constable shall have authority to serve any *writ or precept,* in any personal action, where the damage sued

for and demanded shall not exceed one hundred dollars." An execution is embraced within the term "*precept.*" This appears from sect. 35 which prescribes, that before serving any "*writ or execution,*" the constable shall give bond. He may therefore serve an execution wherein the damage recovered was not more than $100, although if the cost be added, the amount to be collected shall be more than that sum, and such has always been the understanding of the profession.

Exceptions overruled.

WHITE *versus* MEANS AND DEAN, *his trustee.*

One summoned as a trustee, and not having yet disclosed or been defaulted, is admissible as a witness for the defendant.

ON REPORT from *Nisi Prius*, WELLS, J. presiding.

ASSUMPSIT.

Dean, the supposed trustee, at a stage of the case, when he had neither disclosed or been defaulted, made an affidavit for the principal defendant, which is by consent to be received, if he was admissible as a witness. The plaintiff resisted its admissibility, but the Judge received it. The question of its admissibility is now submitted to the Court.

Hubbard, for the plaintiff, suggested, that Dean was a party of record to the suit; *Adams* v. *Rowe*, 10 Maine, 89; and, that such parties can in no case be witnesses. *Commonwealth* v. *Marsh*, 10 Pick. 57; *Nason* v. *Thatcher*, 8 Mass. 398; *Foss* v. *Whiting*, 16 Mass. 118.

WELLS, J., orally. — It is true that a party of record cannot be a witness. But that rule does not extend to a trustee, situated as Dean was. If he was inadmissible, he would be so equally, whether offered by the plaintiff or by the defendant, and it would be in the power of a plaintiff always to exclude a witness, who happened to be indebted to the defendant, by merely summoning him as trustee.

Dean was not a litigant; he had no interest in the event of the suit, and under the conditional agreement of the parties, his affidavit was rightfully received.

ROBERTS *versus* O'CONNER.

In a suit to recover a penalty for selling intoxicating liquors, incurred under the fifth section of the Act of 1846, chap. 205, the fact that the defendant made the sale as the servant of another person, constitutes no defence.

In such an action, originated before a justice of the peace, no appeal lies from the District Court to this Court.

ON REPORT from *Nisi Prius*, WELLS, J. presiding.

DEBT, to recover a penalty for the unlawful sale of spirituous liquor. The action is founded upon the 5th section of the Act of 1846, chap. 205. It was appealed from a justice of the peace to the District Court, and thence to this Court.

It was admitted by the defendant *that* he delivered the liquor and received the pay for it; — *that* he was not licensed to sell such liquor; — and *that* the quantity was less than the revenue laws of the United States prescribed for importation into this country. It is also admitted by the plaintiff, *that* the store, in which the liquor was kept and sold, was the property of one Elliott; — *that* the liquor and other goods therein were his property; *that* the defendant was the hired servant of Elliott, who had, for some time previous, employed and paid him by the month, for tending the store; *that* the liquor was sold and the pay therefor received by the defendant as the agent, and for the benefit of Elliott. It was admitted that Elliott had no license to sell such liquors.

The case was submitted to the Court.

W. Davis, for the plaintiff.

N. Abbott, for the defendant.

HOWARD, J., orally — The first section of the Act provides, that no person shall be allowed "by himself, his clerk, servant

or agent, directly or indirectly to sell any wine" or other specified liquors, with some exceptions not applicable to this case.

The fifth section imposes a penalty upon any person, who "by himself, his clerk, servant or agent" shall make such sales.

The sixth section gives an action of debt, in the name of any person, to recover such penalty.

It is not denied that the sale made by the defendant was unlawful, but the defence set up is that he made it, not on his own account, but merely as the servant of another person; in other words, that another person gave authority to the defendant to do an unlawful act. But no person had the right to give such authority, and it can furnish to the defendant no protection.

It is also urged in defence that the fifth section gives no right of action against one who sold merely as the servant of another. And the argument is, that the thirteenth section provides that money received by an agent may be recovered back, if he had notice that the sale was in violation of law.

Between those sections there is no conflict. This is not an action to recover back any money received by an agent. It is merely to enforce a penalty; and for the maintenance of such an action, the facts admitted in this case, are sufficient.

But a question arises whether the action is righfully before this Court.

The seventh section authorizes an appeal to the District Court. That appeal was taken. But no further appeal is given by the law. The case is therefore wrongfully here, and must be dismissed. The plaintiff may look to the District Court for judgment. *Appeal dismissed.*

STATE *versus* DORR.

Where, upon an exchange of personal property, one of the parties falsely and fraudulently pretends that the property, which he is parting with, belongs to himself and is unincumbered, and at the same time affirms that he will warrant it against incumbrances, an indictment may be sustained against him, if the false pretence, and not the warranty, was the inducement which operated upon the other party to make the exchange.

In an indictment for such an offence, it is not necessary to allege that the property parted with by the *defendant*, was of any value.

ON EXCEPTIONS from the District Court, RICE, J.

INDICTMENT, for obtaining the horse of one Clark by false and fraudulent pretences.

The government proved that the defendant exchanged his mare, for Clark's horse, and that upon the exchange the defendant represented to Clark that the mare was his property, and that there was no claim of any person upon her; and that he also said he would warrant her to be free and clear of all incumbrances.

The government further proved that the defendant had previously mortgaged the mare to one Holmes, to secure a note which was then unpaid; and that the mortgage was undischarged.

The defendant's counsel requested the Judge to instruct the jury that the language used by the defendant in asserting the ownership of the mare to be in him, was not such a false pretence or false token as is contemplated by the statute, and was therefore insufficient to sustain the indictment. The Court declined to give that instruction, but instructed the jury that if in making the exchange, Clark was induced to part with his horse on the ground of the defendant's warranty, the indictment could not be sustained, but that, if the inducement which determined Clark to make the exchange consisted in the defendant's pretending that the mare was his, the defendant's property, and was free from all incumbrances, and if that pretence was false, and by the defendant known to be false, and was made designedly, and with intent to defraud Clark of

his horse, and if Clark was thereby defrauded of his horse, the indictment was sustained.

The verdict was guilty. The defendant excepted, and afterwards, at the same term, moved in arrest of judgment; —

1. Because the indictment does not sufficiently set forth any offence; —

2. Because it does not allege that the mare given by the defendant in exchange for the horse was of any value.

Dickerson, for the defendant.

The evidence is insufficient to support the indictment; —

1. Because the language of the prisoner amounts only to a warranty of title, which is no more injurious to the public than a false warranty of quality or soundness. In either case the vendee may be induced to part with his property on account of the false assertion or affirmation. Every man is presumed to warrant the title of an article of personal property sold by him. Neither offence is a public one. The remedy in both cases is a civil one, by an action for breach of warranty, or for deceit.

It has been held that a false representation that an unsound horse is sound, is not indictable.

2. A naked lie is not indictable. *Lambert* v. *the People*, 9 Cow. 606; *Commonwealth* v. *Warren*. 6 Mass. 75; 2 Russell on Crimes, 265, 268, 1375, 1378.

In *Cross* v. *Peters*, 1 Greenl. 389, it is held that an affirmation of this kind is a mere lie, and something else must be connected with it, to make it indictable.

To the same point, is a recent case decided by Lord Ellenborough.

In Roscoe's Crim. Ev. 441, the same principle is asserted.

In this case there was no artifice on the part of the defendant to obtain the property. He merely asserted what the law always implies upon a sale; that the property belongs to the vendor.

Tallman, Attorney General, for the State.

Wells, J. — This indictment is founded upon the statute,

chap. 161, sect. 1, which is similar to that of 1821, chap. 13. The case of *State* v. *Mills*, 17 Maine, 211, very nearly resembles the one under consideration, and it cannot be distinguished in principle from that case.

There does not appear to be any just ground of objection on the part of the defendant to the instructions, which were given to the jury. Nor is there perceived in the indictment any defect, which would justify an arrest of the judgment. As it was not necessary to *prove* the value of the defendant's mare, the law did not require it to be stated.

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

HATHAWAY *versus* STONE *& al.*

A discharge-certificate, issued by two justices of the peace and quorum, that a debtor, (who had been arrested on execution and given a debtor's relief-bond,) had taken the poor debtor's oath, is not sufficient proof, that the debtor had performed the condition of the bond, unless such certificate specify the date of the execution and the amount of the judgment on which it was issued.

Neither is the record of the proceedings of such justices sufficient proof of the performance of the condition of such a bond, unless it specify the date of the execution and the amount of the judgment on which it was issued.

Where, by reason of poverty, the debtor was unable to make any payment upon the execution, and he in fact took the poor debtor's oath prior to any breach of the bond, no judgment upon the bond can be recovered by the obligee.

Neither, in a suit on such a bond, can the defendants recover costs, unless the condition of the bond has been performed.

DEBT upon a six months relief-bond, given by a debtor with sureties. The defence was, that the debtor had performed one of the alternative conditions of the bond by taking the poor debtor's oath.

To establish this defence, the defendants relied upon a discharge-certificate, given by two justices of the peace and quorum, and also upon said justices' record of their proceedings.

The execution, the bond, the citation, the discharge-certificate and the record of the justices, together with certain depositions taken by the defendants to prove the debtor's poverty, were all submitted to the Court for an adjudication upon legal principles.

Williamson, for the plaintiff.

G. W. Crosby, for the defendants.

SHEPLEY, C. J., orally. — The question is, whether a performance of the condition of the bond has been proved by the documentary evidence. The *certificate of discharge*, given by the two justices of the peace and of the quorum, is not in the statute form. The statute requires, that a certificate of discharge shall state at what Court the judgment was recovered, and specify the amount of the judgment. In each of these particulars the certificate is deficient. It fails therefore to prove a performance of the condition of the bond.

The *record* of the justices is also deficient of the allegations which it ought to contain, as to the Court, and the amount of the judgment. These particulars are necessary, in order to show that the execution, recovered by the plaintiff, is the same on which the oath was taken. The *record*, then, fails to make out a defence.

The papers to which we have been referred, show, that upon *some* execution in favor of the plaintiff against this debtor, the poor debtor's oath was taken.

If *that* execution was the *same* upon which the bond now in suit was given, the debtor is entitled to the benefit of the Act of 1848.

The parties named are the same; the date of the execution is found in the *record*, the date of the judgment is found in the *certificate*, and the description of the Court is found both in the *citation* and in the *certificate*. But the *record* tends to show the Court to have been a different one.

The amount of the judgment is given in neither of the documents. In view of all the documents we think that,

on the whole, the evidence preponderates in favor of the identity of the execution.

The depositions prove the debtor to be poor, and therefore, that no damage has accrued to the plaintiff from the non-performance of the condition. The papers also show, that the oath was taken before the breach.

For the foregoing reasons, the plaintiff is not entitled to recover, and the debtor, not having performed the condition of the bond, can have no judgment for cost.

Palmer *versus* Dougherty.

In trespass *quare*, if the defendant plead not guilty to the whole trespass alleged, with or without a brief statement, the plaintiff has no occasion to make a new assignment.

When land is conveyed as bounded by a street, represented on a plan, but not yet made, the soil of the contemplated street, though owned by the grantor, does not pass by the conveyance.

But if the grant be bounded merely by a highway, it conveys the fee to the central line of the way.

In a conveyance of house lots, upon a street, not yet made or accepted, but existing only upon a plan, the words "*with a reserve of the street*" may be construed as words of grant, when such was the obvious meaning of the parties.

Tenants in common may join or sever in personal actions for injuries to their land.

On Report of legal questions, transferred from the District Court, Rice, J. presiding.

Trespass *quare clausum fregit.*

Charles street and James street in Belfast were laid out across some unoccupied land. They were marked upon a plan, but have not been made or accepted. The land belonged to David and James Miller, who laid it into house lots. By division deeds, James conveyed to David these house lots, "with a reserve" of the two streets. David, by his will, devised the house lots to his daughter, Mrs. Hodgdon. The

residue of his estate he devised to his four children, in equal undivided parts.

Mrs. Hodgdon conveyed two of the house lots lying opposite to each other on James street, bounding each of them by the street.

The purchasers, Howes and Blodgett, each built a house on his own side of the street, and claimed that the title of each extended to the centre line of the street.

The defendant was employed by Howes and also by Blodgett, to take gravel from the street. For taking that gravel, this action is brought, alleging a breaking and entering into land in Belfast, owned in common by the plaintiff and others.

The plaintiff had purchased all the right in the street which belonged, under the residuary devise in the will, to one of the heirs of said James.

The general issue was pleaded by the defendant with brief statement, justifying as the servant of Howes, also as servant of Blodgett; also alleging soil and freehold in Howes and Blodgett; also in the plaintiff jointly with Howes and Blodgett; also denying all title in the plaintiff to the soil.

The defendant thereupon objected to the plaintiff's right of recovering; —

1. Because the plaintiff having declared generally for a trespass, upon land in Belfast, without describing any particular close, and the defendant having pleaded soil and freehold, and proved a freehold in the persons, under whom he justified, in some part of the town, it became plaintiff's duty to make a new assignment, in which he should set out with greater particularity the close in which the trespass was committed, and having failed to do so, his action was gone.

2. Because the plaintiff had neither actual nor constructive possession of the *locus in quo* at the time he commenced his action.

3. Because the plaintiff took nothing by his deed from the heir of James Miller, who, in his lifetime, had conveyed

all his interest to David Miller; the terms, "with the reserve of two streets," contained in said last deed, being terms of grant and not of reservation, and if that language amounts to or is to be construed as a reservation, the defendant is tenant in common with the plaintiff. For the deeds from Mrs. Hodgdon to Blodgett and Howes conveyed a title to the centre of James street, on each side; the terms "to" "by" and "on" not being terms of exclusion, when used in describing boundaries on roads, streets, rivers, &c.

4. The deed from the heir of James Miller to plaintiff is void on the ground of maintenance.

By agreement, the defendant's objections, thus taken, were reported to this Court for a legal adjudication.

N. Abbott, for the defendant.

1. The declaration alleged a trespass upon land in Belfast. The defendant justified under Howes and also under Blodgett, and proved that each of them owned land in Belfast. It was therefore necessary that the plaintiff should new assign and designate the land upon which the alleged trespass was committed. Story's Plead. 569; *Ellet* v. *Pullen*, 7 Halsted, 357.

2. Possession, actual or constructive, is necessary for the support of trespass *quare clausum fregit.* 8 Mass. 415; 2 Fairf. 73; 22 Maine, 452. The case shows that Howes and Blodgett had been four or five months in possession, and does not show that any party, under whom the plaintiff claims, ever entered or disturbed that possession. The action is, therefore, unsustainable.

3. The deed from James to David Miller conveyed the street. The words, "with a reserve of the two streets," were words of grant, not of reservation to the grantor. That this was the purpose, is perfectly plain.

In the construction of a deed, a word inadvertently omitted may be supplied as the sense requires. 4 Greenl. 429.

Words in a deed are to be taken most forcibly against the grantor. 21 Maine, 69.

If a deed can enure in different ways, the grantee may take it in the way which shall be most to his advantage. 8 Johns. 393; 16 Johns. 172.

An exception in a deed shall be taken most favorably to the grantee; and if it be not set down or described with certainty, the grantee shall have the benefit, which may arise from such defect. 3 Johns. 370—375.

A deed of *house lots* in our villages and towns should not be construed to exclude the streets adjoining them, except upon the clearest language. 18 Maine, 77, 78; 3 Kent's Com. 433.

If the streets were excepted out of James Miller's deed to David Miller, then James and David, after the sale, remained tenants in common of the streets, until they sold; and after they sold, their grantees became tenants in common; for a reservation in a deed, from one tenant in common to another tenant in common, leaves the reserved part common property still. Hence the plaintiff and defendant (or those under whom defendant justifies) are tenants in common of the *locus in quo;* and one tenant in common cannot maintain trespass *quare clausum* against his co-tenant. 10 Pick. 250; 13 Maine, 25.

It may be contended that Blodgett and Howes are excluded from James street by the terms of their deeds, and that Mrs. Hodgdon was excluded from said street, by the terms of David Miller's will; that *by, to* and *from* are words of *exclusion;* but this is not true, when applied to *streets* and *streams.* It is only true when applied to ponds and lakes. 18 Maine, 76; 3 Kent's Com. 433, 434.

If the language, in James Miller's deed to David, amounts to a reservation, it was not intended as a *reservation* of the *soil,* but only a reservation of an easement for public use. Where a grantor excepts and reserves all *roads* and *streets* on the premises, he does not intend to reserve the soil, but only the *public rights.*

The plaintiff's deed under which he claims is void on the

ground of maintenance. 1 Russell on Crimes, 145; 6 Mass. 421; 7 Mass. 77, 78; 11 Mass. 554.

Palmer, for the plaintiff.

HOWARD, J. — According to technical rules of pleading, a new assignment, in actions of trespass *quare clausum fregit* was necessary only where the defendant pleaded soil and freehold, or some other special plea in bar. But where he pleads the general issue of not guilty, to the whole trespass alleged, with or without a brief statement under the provisions of the statute, the plaintiff has no occasion to make a new assignment, but may give evidence of any act of trespass covered by his declaration. 1 Saund. 299, note 6; R. S. chap. 115, sect. 18.

Where land is conveyed according to a plan taken, the courses, distances and lines there delineated, are regarded, in legal construction, as the description, by which the limits of the grant are to be ascertained. *Proprietors of Kennebec Purchase* v. *Tiffany*, 1 Maine, 219; *Thomas* v. *Patten*, 13 Maine, 329; *Davis* v. *Rainsford*, 17 Mass. 207.

When land is conveyed as bounded by a street, represented on a plan, but not made, the soil of the contemplated street, though owned by the grantor, does not pass by the conveyance. *Southerland* v. *Jackson*, 30 Maine, 462. But if he bound the grant by a highway, generally, it will carry the fee to the centre of the way, if his title extended so far. *Stevens* v. *Whistler*, 11 East, 51; Com. Dig. Chimin A. 2; 3 Kent's Com. 433; *Johnson* v. *Anderson*, 18 Maine, 76.

David and James Miller, for the purpose of effecting a division of certain lands in Belfast village, owned by them as tenants in common, executed mutual releases of the same date. The former releasing all his right to the lands west of Congress street, and the latter releasing, with other lands, "the following parcels of lands in Belfast, bounded as follows, lying easterly on Congress street, and northerly of the White and Mansfield lots, containing twelve house lots, of a quarter of an acre each, more or less, *with the reserve of the two streets*

contemplated by a plan made by M. Sleeper, Esq. Charles and James streets had been projected on the plan, but had never been made, and to those the language of the deed must have been applied.

It was manifestly the intention of James to release his interest in the lots, and the adjoining land delineated on the plan as the streets. The expressions "with the reserve," &c., do not import a reservation to the grantor or releasor, but are used as descriptive of the premises conveyed. By this conveyance David became sole seized of the house lots and the soil of the contemplated streets. He subsequently devised to Margaret Hodgdon, (under grantees of whom the defendant justifies the alleged trespass,) the house lots, bounding them by those contemplated streets. By that devise, upon the principles stated, the fee in the streets did not pass. But by a subsequent clause in the will, he gave the *remainder of his* "*estate,*" after payment of his just debts and expenses, to his four children, or their heirs, to be divided equally, with an exception not material to this case. This operated as a devise of the realty. *Barry* v. *Edgeworth*, 2 P. Wms. 523, note 1; *Rideout* v. *Paine*, 3 Atk. 486, note 1; *Barnes* v. *Patch*, 8 Ves. 604; *Wall* v. *Langlands*, 14 East, 370; *Pearson* v. *Housel*, 17 Johns. 281; *Pickering* v. *Langdon*, 22 Maine, 413; *Godfrey* v. *Humphrey*, 18 Pick. 537; *Kellogg* v. *Blair*, 6 Metc. 322; 4 Kent's Com. 535; *Holdfast* v. *Martin*, 1 T. R. 411; *Morgan* v. *Morgan*, 6 Barn. & Cress. 512.

By this devise, James, as one of the children, became seized in fee of one undivided quarter of the land on which the contemplated streets had been projected, as represented on the plan. Afterwards he released by deed of quitclaim all this interest to the plaintiff. R. S. chap. 91, sect. 8.

The argument, that this conveyance is void for *maintenance*, is not supported by the facts or the evidence. "Maintenance is commonly taken in an ill sense, and, in general, seemeth to signify an unlawful taking in hand, or upholding of quarrels or sides, to the disturbance or hindrance of common right." Hawk. P. C. ¶ 1, chap. 83, sect. 1.

Tenants in common may join or sever in personal actions for injuries to the land. R. S. chap. 129, sect. 17.

According to the agreement the defendant is to be defaulted.

HARDY *versus* SPROWL.

Where there are unadjusted claims between the several part owners of a vessel, growing out of the employment of the joint property, no action lies by one against the other for contribution toward any particular expense, or for a share of any particular item of profit.

No action by one part owner against another, relative to such expenses or profits, can be sustained, except such as shall adjust all their respective claims together.

If no other mode can be agreed upon, the remedy is by action of account.

ON REPORT from *Nisi Prius*, WELLS, J. presiding.

ASSUMPSIT by the owner of five-eighths of a schooner against the owner of the other three-eighths, to recover three eighths of sums paid by the plaintiff for towage and for protest.

Abbott and *Hubbard*, for the plaintiff.

Dickerson, for the defendant.

SHEPLEY, C. J., orally. — Can one part owner pay a particular bill, due from the vessel, and immediately maintain suit for a contribution against the other part owners? If *one* can adopt such a measure, so can the *others;* and if such suits may be maintained for expenses, so they may be for profits at the end of each trip; and thus the result might be a continued series of vexatious litigations, without having any tendency to adjust the general accounts between the parties. We think the law does not authorize suits of such a character.

No action by one part owner against another, growing out of such expenses and profits, can be sustained, except such as shall adjust all their respective claims together.

If no other mode can be agreed upon, the remedy is by ac-

tion of account. This is no new principle. It has often been announced. *Sturtevant* v. *Smith*, 29 Maine, 387; *Pingree* v. *McGuire*, 30 Maine, 508. *Nonsuit.*

RANKIN *versus* SHERWOOD.

Upon the failure of any bank of this State to pay its bills on demand, the private property of each shareholder, to the amount of his stock, is liable to be levied upon the execution, recovered against the bank.

But, for the purpose of levying any such private property, the judgment must have been recovered while the bank had a legal existence.

A judgment recovered against the bank, after its charter had been revoked, is erroneous.

Any stockholder whose property has been levied by execution upon such a judgment, is so far a party as to enable him to institute a writ of error, to reverse it.

The decisions in the cases of *Whitman* v. *Cox*, 26 Maine, 335, and *Merrill* v. *Suffolk Bank*, 31 Maine, 57, are not in conflict.

WRIT OF ERROR, brought by a stockholder in the Frankfort Bank, to reverse a judgment recovered against the bank by the defendant in error.

The property of the plaintiff in error had been levied to satisfy the judgment.

The error assigned was, that "the original writ in the action in which said judgment was rendered, was sued out, and the judgment was rendered therein against said President, Directors and Company of the bank, after its charter had been revoked by an Act of the Legislature of the State of Maine; and there was then in existence at the time of the rendition of said judgment, no such corporation as the President, Directors and Company of the Frankfort Bank, against which judgment could be lawfully rendered."

Hubbard, for the plaintiff in error, referred to the case *Merrill* v. *Suffolk Bank*, 31 Maine, 57, as overruling the case of *Whitman* v. *Cox*, 26 Maine, 335, and as being decisive.

W. Kelly, as *amicus curiæ*, presented the following suggestions: —

In *Whitman* v. *Cox*, the Court decided, *that* Whitman, who was a stockholder, and whose property had been attached, was not *a party* to the original suit, nor the *legal representative* of any party; — *that* for that reason, he could not maintain a writ of error to reverse the judgment; and *that* therefore, as to him, the Court would treat the judgment as a nullity.

The Court were then considering the very judgment, now under examination; and the decision in *Whitman* v. *Cox* would seem to be a legal absurdity, if placed on any other basis.

The plaintiff's counsel is in error, when urging that the Court, in deciding the case of *Merrill* v. *Suffolk Bank*, overruled the decision which they had made in *Whitman* v. *Cox*.

There must be parties to a writ of error as well as to an action of trover or assumpsit. None but a party to the suit or his legal representative can maintain a writ of error.

Merrill, the plaintiff in that suit, was the surviving receiver of the bank, and was, *ex officio*, its administrator and representative. No legal process could be supported in the name of the bank, it being entirely defunct. But any and all legal processes could be maintained by and in the name of the receivers, *ex necessitate*.

It is of some importance to preserve a decorum and propriety in legal proceedings. If this process had been brought in the name of the receivers, it would be maintainable without doing violence to any established legal principles, but in its present position it seems to be without precedent.

Shepley, C. J. — It has been decided, that the Act of April 16, 1841, repealing the charter of the Frankfort Bank, destroyed its capacity to sue or to be sued. *Read* v. *Frankfort Bank*, 23 Maine, 318; *Whitman* v. *Cox*, 26 Maine, 335; *Merrill* v. *Suffolk Bank*, 31 Maine, 57.

Any judgment rendered against it since that time must be erroneous.

There is no inconsistency between the two last named cases. By the first of them it was decided, that a stockholder, whose property had been *attached*, did not thereby become a party to the suit.

This was not denied in the latter case, while it decided, that one not by the common law a party to the suit, was by statute made a privy to it by a *levy* made upon his land to satisfy the judgment recovered, and that as such privy he might maintain a writ of error to reverse it.

In the present case, the defendant in error has been defaulted. The effect of that default is to admit the matters alleged in the writ of *scire facias* to be true. In that writ it is alleged, that the plaintiff in error was a stockholder, and that his estate had been "taken and set off on said judgment and execution." And this brings the case within the principle decided in *Merrill* v. *Suffolk Bank*.

Judgment reversed.

THE INHABITANTS OF THE COUNTY OF WALDO *versus* JOEL MOORE *& als.*

A written petition to the County Commissioners for the establishment of a county road, gives them jurisdiction in the ulterior proceedings which may be had under such petition.

When the county has incurred expense by the proceedings upon such a petition, the prayer of which is denied, the county is entitled to an adjudication by the County Commissioners, that the same be repaid by the petitioners.

In order to the maintenance of a suit by the county upon such an adjudication, the record ought to show *to whom and by whom*, it was adjudged by the commissioners that the amount recovered should be paid.

In a suit by the county upon such an adjudication, if the record do not show to whom the money was to be paid, or if the declaration do not specially set forth the facts upon which they claim to have been entitled to it, the suit cannot be sustained.

Waldo *v.* Moore.

Although exceptions from the District Court may have been sustained, yet if it appear, that there are no facts in the case to be settled by a jury, such final judgment may be entered by this Court as the principles of law require.

On Exceptions from the District Court, Rice, J.

Debt. The plaintiffs allege that by the consideration of the County Commissioners, they recovered judgment against the defendants for the sum of $25,08, cost, as by the record thereof appears. The defendants plead "*nul tiel record.*"

The plaintiffs introduced the records of the County Commissioners, by which it appears, that in the matter of Joel Moore and others, petitioners for a county road in Prospect and Belfast, the Commissioners adjudged, "Prayer of petitioners denied, as per report on file," and ordered that the costs arising from the petition and the proceedings thereon, taxed at $25,08, be paid by the petitioners forthwith.

The Judge ruled, that the record was sufficient, until set aside on *certiorari*, to prove the issue for the plaintiffs. To that ruling the defendants excepted.

Williamson, for the defendants.

No power is given by the statute to maintain an action in the name of the *county*. If any process would lie, it should be in the name of the *Treasurer*, as the money is to be paid into the County Treasury. Revised Statutes, chap. 99, sect. 12.

The county is not a party within the meaning of the statute. Rev. Stat. chap. 25, sect. 7 and 39.

But the parties thus entitled to *debt*, are individuals claiming damages of counties, towns, or individuals by locating roads or ways.

The record is defective and insufficient to support the action. It should show preliminary proceedings, as by Rev. Stat. chap. 25, sect. 2, p. 193.

It must show that defendants were petitioners. The record does not even name the defendants. Nor does it show to whom the costs should have been paid, or who is to recover them.

Costs can arise only between parties litigant. These peti-

tioners for the highway were not litigants. They acted only for the public, as do petitioners to the Legislature for some public enactment. No cost, *as cost*, can be adjudged against them. The statute speaks nothing of *cost*, but only of expenses. If the County Commissioners assumed to allow cost, they transcended their authority, and their judgment is but a nullity.

Further, the costs or expenses have never been taxed.

If a suit could be sustained for costs, it could be only after reasonable notice of the assessment. Sect. 12; 8 Greenl. 207.

It may in reply be said that the judgment is valid, until reversed on *certiorari*. But that position is wholly unsustainable. *Chase* v. *Hathaway*, 14 Mass. 222; *Hall* v. *Williams*, 6 Pick. 232.

The County Commissioners' Court is created by statute, and is of limited jurisdiction; its powers being subject to a literal construction.

Hence if County Commissioners exceed their authority in assessing a tax, their proceedings are merely void. *Philbrick* v. *Kennebec*, 7 Maine, 196.

So if a Judge of Probate, in matter within his jurisdiction, omit to order notice, proceedings are void. *Smith* v. *Rice*, 11 Mass. 507.

See opinion of JACKSON, J., in same case, p. 513, 514; *Chase* v. *Hathaway*, 14 Mass. 222; *Hall* v. *Williams*, 6 Pick. 232.

Codman, for the plaintiffs.

At the trial, only one point was raised. Nothing but that is now open for discussion. That was, whether the judgment of the County Commissioners was or was not valid, till set aside on *certiorari*. That point has been fully decided.

The correctness or incorrectness of the judgment cannot be reached in this suit. 3 Fairf. 235; 15 Maine, 73; 22 Maine, 128.

SHEPLEY, C. J. — This is an action of debt containing a

declaration upon a judgment rendered by the County Commissioners of this county in favor of the plaintiffs and against the defendants, as by the record thereof appears.

The subject matter, upon which the order was made, appears to have been a petition of certain persons for a county road in Belfast and Prospect. This is sufficient to show, that the Commissioners had jurisdiction of it. The record states, that the prayer of the petitioners was denied. In such cases the Commissioners are authorized by statute chap. 99, sect. 12, to "order the petitioners to pay into the county treasury all expenses incurred by the county."

This language may be sufficient to show, that the county having incurred the expenses would be entitled to have a judgment rendered in its favor to recover them. That is not the question now presented. The question is, whether they have in fact obtained one and do now present a record of it in proof of that fact.

In the record presented the name of the plaintiffs is not found; nor is there any reference to any document on file, from which it can be ascertained, that they were a party to that judgment or order. There is no adjudication to whom payment should be made.

The form of a judgment is not usually material. One can take advantage of its informality only by writ of error. But it must exhibit a party, in whose favor as well as one against whom, it is rendered. When it does not, the clerk cannot by inspection determine, in whose favor the execution or other precept should issue. There will be a legal question remaining undecided, who is entitled to claim it; and it may be one of doubt and difficulty. The law does not submit the decision of it to the clerk or to any other ministerial or executive officer.

If the judgment be for debt, or damages, or costs, the party, to whom the money is due, must be designated in the execution, or the officer, to whom it is directed, will not be informed, to whom he is to make payment.

Although the plaintiffs might have been legally entitled to

have a judgment rendered in their favor, the record does not show, that they have obtained or become a party to such a judgment. It fails to do so; and they therefore fail to establish the issue, which they have joined. If the order were in other respects sufficiently formal and regular it might be true also, that an action of debt might be maintained upon it by the plaintiffs by virtue of the statute chap. 99, sect. 21, with a special declaration setting forth the order of the Commissioners, and that the plaintiffs were by law entitled to the money ordered to be paid accompanied by other suitable averments. Such a declaration would present the question as yet undecided, whether the plaintiffs were by law entitled to the money. The present declaration presents that question as already decided by a competent tribunal.

In the case of *Hardy* v. *Call*, 16 Mass. 530, a judgment appeared to have been rendered against an administrator for costs "in his said capacity of administrator." A writ of *sci. fa.* recited a judgment "against the goods and estate of the intestate in the hands of Call." To this there was a plea of no such record, and joinder. The decision was, that the issue was not proved. It was also stated, that an action of debt might have been supported upon that judgment by a suitable declaration.

The exceptions are sustained.

The case being before this Court for decision and no question of fact being presented for decision by a jury, the decision of this Court is that a nonsuit be entered.

Walker *versus* Davis *& al.*

The indorsee of a note, negotiated to him before its pay-day, in the regular course of business, and without knowledge on his part of any fact, by which it might have been defeated in a suit between prior parties to it, cannot be affected by such a fact, if it existed.

In a suit by such indorsee upon the note, evidence to prove such a fact is therefore inadmissible.

If there be no evidence of the time or circumstances of the indorsement, or of knowledge by the indorsee of any infirmity in the note, the presumption of law is, that the indorsement was made prior to the pay-day, and in the regular course of business, and without knowledge on the part of the indorsee, that the note was subject to any pre-existing equities.

On Exceptions from the District Court, Rice, J.

Assumpsit.

The plaintiff, as indorsee held two small notes, payable to bearer, one of them being against William Davis, the other against Aaron Davis, the father of William. William guarantied the payment of the note against his father, and judgment in favor of the plaintiff was recovered against him for the amount of both notes. This judgment with its interest and cost, amounted to about $117, and was paid as early as February, 1849, to Hiram O. Alden, Esq., one of the plaintiff's attorneys. The note against Aaron Davis was originally for $29.

In August, 1848, Mr. Alden and his co-partner, Mr. Crosby, recovered judgment of $59,39, damage, against Aaron Davis, upon that note, and upon certain money counts.

Upon this judgment, a note of $22,28 was given in May, 1849, signed by said William and Aaron, and payable to Alden & Crosby, or order. It was indorsed to the plaintiff, and this suit is founded upon it.

A witness for the defendant testified that he paid to Mr. Alden the $117, upon the first judgment; and that Mr. Alden said that that judgment included both the note against William and the guarantied note against Aaron. It was then proposed to prove by the witness, what further Mr. Alden then said as to the appropriation of the money. This was proposed

for the purpose of showing that the whole of the last judgment (that which Alden & Crosby had recovered,) as well as the first judgment had been fully paid.

The evidence was objected to, and the Judge excluded it.

The verdict was for the plaintiff, and to that exclusion of the evidence, the defendant excepted.

Williamson, for the defendant.

Mr. Alden was acting as attorney to the plaintiff, and within the scope of his authority. His declarations were therefore admissible. They were also admissible as a part of the transaction. 1 Greenl. Ev. sect. 108—113; 2 Stark. Ev. 43 and 60; 13 Maine, 386.

G. W. Crosby, for the plaintiff.

WELLS, J., orally. — Evidence was offered to prove that the note was given without consideration. Was that evidence admissible?

It is a rule of law, that the indorsee of a note, negotiated to him before its pay-day, in the regular course of business, and without knowledge on his part of any facts or equities by which it might have been defeated in a suit between former parties to it, cannot be affected by such facts or equities.

In a suit by such an indorsee upon the note, evidence to prove such facts or equities, is therefore inadmissible.

In this case there is no evidence as to the time when, nor of the circumstances under which, it was negotiated to the plaintiff.

In such a case, the presumption of law is, that it was negotiated before the pay-day, and in the regular course of business. Neither is it shown that the plaintiff had a knowledge that the note was given without consideration; and such knowledge is not to be presumed. The evidence offered was therefore properly excluded.

The declarations of Mr. Alden, proposed to be given in evidence, were made when he received the money for the first judgment, as early as *February*, 1849. But the note in suit

was not made till *May*, 1849. It is not perceived that his declarations, made prior to the inception of the note, could impair the rights of an innocent indorsee.

Exceptions overruled.

BARTLETT *versus* MAYO, *Administratrix.*

A party may introduce a paper, drawn up in the handwriting of the other party, though not signed by him, with a view to connect it with other evidence, to establish a disputed fact.

There is no presumption in law that an *unnegotiable* note, of the same amount of a pre-existing book debt, was taken *as payment* of the debt.

In an action upon such book debt, proof that *such* a note was given to the plaintiff for the same amount, is not of itself a defence.

In such an action, if it appear, that such a note was given, it is not necessary that the plaintiff produce the note or account for its loss.

The recovery and payment of a judgment upon the account would bar an action upon the note.

ON EXCEPTIONS from the District Court, RICE, J.

ASSUMPSIT on an account for seaman's wages. It was proved that the services had been rendered by the plaintiff to the defendant's intestate; and that on a settlement made Jan'y 5, 1847, the intestate paid the plaintiff some money, and either signed or intended to sign an unnegotiable note for the balance, $98,00.

The defendant introduced a receipt signed by the plaintiff of that date, in full for his wages.

The plaintiff offered a paper marked A, in the form of a note of the same date, payable to himself for $98, in the handwriting of the intestate, but it had no signature; and contended, that that was the note given to him for the balance of his wages, and, that through inadvertence, it was handed to him by the intestate unsigned. The paper was objected to; but was admitted in evidence.

The Judge instructed the jury, *that* if the intestate, at the time of the settlement, gave the plaintiff his note *not negotiable*, such note would not extinguish the original cause of

action, unless paid; *that* in such case, the plaintiff could recover on the original account, without producing the note, or accounting for it at the trial; *that* a recovery in this action would bar any action by the plaintiff on such note; and, *that* if the intestate by accident, as was assumed, omitted to sign the note which was supposed by the parties to have been given, the original account would remain unpaid, and the plaintiff might maintain an action upon it.

The jury returned a verdict for the plaintiff for $110,60.

To the foregoing rulings and instructions the defendant excepted.

M. C. Blake, for the defendant.

The first point made in the exceptions, relates to the admission of the paper marked "A."

This paper was not signed, and there was no evidence to connect it with the settlement or note referred to in the case, except the fact of the handwriting. It does not follow from the handwriting that the deceased intended to sign it; and the legal inference from the fact of its not being signed, is adverse to any such conclusion. It might have been intended for the signature of another person.

It may be said its admission was proper for the explanation of some other matter. But there was no proof to connect it with any matter requiring explanation.

There also was error, in the instructions given to the jury.

It is unquestionably competent for parties to contract that the giving of a note, not negotiable, should of itself operate as an extinguishment of the prior indebtedness. The intention of the parties should govern, and the jury should be allowed to infer this intention "from the testimony and the circumstances of the case." 2 Greenl. Ev. sect. 521; 9 Pick. 52; 9 Johns. 310.

The instruction that it was not necessary to produce or account, at the trial, for such a note, asserts a principle, which does not appear to have been settled by this Court, and it is believed the weight of authority as well as sound reason is opposed to it. The cases of *Dutton M. and S. Fund* v.

Kendrick, 12 Maine, 381, and *Edmunds* v. *Caldwell*, 15 Maine, 340, were unlike this, because there the notes were produced at the trial. I ask leave to cite Story on Prom. Notes, sect. 106; *Page* v. *Page*, 15 Pick. 368; *Martindale* v. *Follet*, 1 N. H. 95; 20 Verm. 449; 3 Cow. 303; 4 Bing. 273.

W. H. Codman, for the plaintiff.

Shepley, C. J., orally.—The paper A, was in the handwriting of the intestate. For that reason, the Judge had no authority to exclude it. He could not foresee what connection it might have with other facts which the plaintiff might prove.

The principal reliance of the defendants however, is, that there was error in the instruction to the jury, that if a note was given, and was an unnegotiable one, it was not necessary for the plaintiff to produce it at the trial or to account for its loss.

But there is no presumption in law, that such a note is payment of a pre-existing debt. A plaintiff may always recover upon proving his claim, unless some defence be shown. In this case the defendant exhibited the plaintiff's receipt. But it is well settled, that a receipt is explainable and controllable by parole testimony. Such testimony is for the consideration of the jury. If the supposed note should hereafter be prosecuted, a recovery upon it would be barred by the recovery in this suit, accompanied by payment of the judgment. The production of the note was therefore unnecessary. *Exceptions overruled.*

CASE

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF PENOBSCOT,

1851.

PRESENT:

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

MILLER, *in equity, versus* WHITTIER,
JONES,
PERKINS, *and*
WENDELL AND WIFE.

In proceedings in equity, all persons in interest, and within the jurisdiction, and capable of being parties, must be made parties before the final decree.

Even at the hearing upon bill, answer and proof, a person in interest, who has never appeared or been cited to appear, may, *upon motion*, and without a supplemental bill, be summoned in and made a party.

The terms upon which such motion will be granted, may be adjudged in a subsequent stage of the proceedings.

BILL IN EQUITY. The bill is sufficiently set forth in the report of the case, 32 Maine, 203.

After the disallowance of the demurrers as there ordered, 32 Maine, 210, answers were filed by Whittier and Jones, and evidence was introduced by them and by the plaintiff.

The counsel for the plaintiff, at the hearing, moved the Court for leave to amend the bill by inserting, as a defendant, the name of Mrs. Wendell, and for leave to summon her in as a party.

The substance of the answers and the effect of them in connection with the proofs, are sufficiently exhibited in the opinion of the Court.

Rowe & Bartlett, counsel for the plaintiff.

Cutting and *J. A. Peters*, for the defendants, Whittier and Jones.

HOWARD, J. — The plaintiff alleges that the defendant Whittier holds the property in controversy, in trust for him. Whittier does not admit the trust, nor expressly deny it, but admits that there were "certain verbal agreements and understandings, that if Perkins and Wendell should do certain things, which they agreed to do, they were to receive their share of the profits;" and submits whether the facts stated, constitute him trustee. The plaintiff has acquired the interest of Perkins and Wendell, and seeks the execution of the supposed trust, and a specific performance of the agreement of November 17, 1845, between Whittier and I. P. Wendell & Co.; Perkins having before that time conveyed to Wendell, who transacted business in the name of I. P. Wendell & Co. The original purchase was made with funds, furnished principally, if not wholly, by Perkins and Wendell, but the conveyance was made by Patten, on August 3, 1836, directly to Whittier, by whom, or through whose agency, the purchase was effected.

The business relations between Perkins and Wendell, and Whittier, appear to have been conducted in mutual confidence, and without the usual evidence and securities in such transac-

tions. The extent and character of their respective interests do not appear by any writing, or agreement distinctly proved. Whittier managed the property, improving, mortgaging, and selling portions of it, transmitting, at times, the proceeds to Perkins and Wendell, and corresponding with them in reference to his proceedings; and yet the precise interests and relations of the parties in respect to the property, were not stated, and are not shown. Whether Whittier was trustee of Perkins and Wendell, or their agent having an interest, or with power to sell and convey the estate, it might be somewhat difficult to determine from the evidence. But the agreement of November 17, 1845, renders such determination of less importance. Whatever may have been the true position of the parties prior to that time, they were then at liberty to adjust and establish their rights and interests by agreement. If Whittier had been trustee, as the plaintiff charges, it was then competent for him and the *cestui que trust* to modify, change, or terminate the trust. In that agreement the prior claims of the parties appear to have been intentionally merged.

The case, then, is resolved into the mere consideration, whether the plaintiff is entitled to a decree under the agreement. He alleges "his willingness, and offers specifically to perform and do, on his part, whatever said I. P. Wendell & Co., his grantors, should do and perform in and by said agreement, and whatever the Court shall order and direct him to do in the premises;" but does not allege performance.

Whittier alleges that "he has done and performed and fulfilled all and singular, according to his best skill and judgment, his agreements and stipulations, in that agreement, and as agent from that time till now, has devoted his whole time and attention to the business of said concern, and in all things acted in good faith, and he denies all allegations in the bill to the contrary." He denies "that he has ever refused, absolutely, to convey, deliver, or account to even the plaintiff, as alleged in the bill. But he has always been desirous that I. P. Wendell & Co., or their assignee, should perform the agree-

ment on their part, which he alleges is not done." He asserts that he has never been called upon for a settlement, and to account, and that he has often requested them to arrange the subject of the contract, but without success, owing to their negligence. He denies that he has threatened to sell and dispose of the property without accounting, but "since the plaintiff has commenced, in manner aforesaid, this suit, he is now disposed to place himself on, and defend his just, legal, and equitable right." He further states that he does not consider the whole property named in the agreement, "so much an object to him, as it would be to have I. P. Wendell & Co., or the complainant, comply with, and honorably fulfil said agreement."

The omission by the plaintiff, or his assignors, to perform, does not appear to have been materially injurious to the defendants. Indeed, Whittier has waived their performance of the agreement, by continuing to act as agent under it, and charging his disbursements, liabilities and compensation for services.

While the plaintiff seeks a decree for specific performance of the agreement, it is in reference to such portions only, of the property described, as remain unsold, and not disposed of by Whittier, and "the transfer and delivery of all the moneys and securities, if any, taken in payment of the same, and an account of the income and profits made out of said estate real and personal." He thus ratifies the *bona fide* sales and conveyances by Whittier, and presents his claims in the most favorable light for the defendants. A specific performance of the contract, thus qualified, would not seem to be injurious or distasteful to either, but in accordance with the best interests and wishes of both parties, and may be decreed.

The evidence does not sustain the charge of fraud, on the part of Whittier or Jones. The mortgage from Whittier to Smith, of a portion of the estate, was known to I. P. Wendell & Co. and was neither disapproved nor repudiated; and his authority to make the conveyance, is not denied in the bill. *Qui tacet consentire videtur*, was a maxim of the civil law

and here the conveyance was expressly recognized in the agreement. The assignment of this mortgage to Jones, and the subsequent arrangement, and conveyance from Whittier to him, and his obligation given back to Mrs. Whittier to convey to her upon the payment of $500, appear to have been *bona fide* and for a valuable consideration. The whole constitutes a mortgage, of which the equity of redemption will be in the plaintiff by the decree subject to the equitable claims of Mrs. Whittier. The other conveyances by Whittier to Jones, stated in the bill, appear to have been made to secure alleged amounts due Jones on account for means received and used by Whittier in carrying on and managing the estate, as agent for the plaintiff and his assignors. The equities of redemption in these mortgages will be in like manner in the plaintiff. Jones will be entitled to payment of the amounts proved before a master, and found to be due him on the several mortgages, on an adjustment of his claims and the accounts for rents and profits. He will then be required to convey to the plaintiff, in the language of the bill, "all real estate which has come into his hands by such conveyances, and to deliver possession thereof, and of all the personal estate which has come into his hands, or so much of both as remains unsold, and to render an account of the parts sold of the income, and to pay over the moneys and securities received therefor, or that may on such accounting appear to be due to the plaintiff."

In proceedings in equity all persons in interest, and within the jurisdiction, and capable of being parties, must be made such, before a decree. The interest of Mrs. Whittier is shown, and she may be made a party to the suit, on such terms as may be adjudged reasonable, upon the motion of the plaintiff before us.

When the proper parties are before the Court, a master will be appointed to state an account with Whittier, since Nov. 17, 1845, exhibiting the sums due to him, by the contract, and the claims he justly has against the estate, for services and expenditures; what property, securities and means, in-

cluding rents and profits he has received from it; the conveyances made, and the amounts received and receivable therefrom. Also to state the amounts due, *bona fide*, to Jones, on the several mortgages, and the rents, profits and income received by him from the property. And to state the amount originally secured to Mrs. Whittier, by the mortgage to Smith, and the sum justly due to her on that account.

Upon the coming in of the master's report, the Court will be enabled to adjust the rights of all interested, and to draw up and enter the proper decretal order.

The bill will be dismissed, as to Ann E. Wendell, Perkins, and Isaac P. Wendell, without costs.

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF YORK,

1852.

PRESENT:

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

STATE, *by complt. and warrant for search, versus* SPIRITUOUS LIQUOR and STILLMAN GURNEY, *as supposed keeper.*

To obtain a forfeiture of intoxicating or spirituous liquors under the Act, "for the suppression of drinking houses and tippling shops, it is necessary to be averred in the complaint and proved on the trial, that the liquors were intended for sale in the city or town, in which they were kept or deposited.

THESE proceedings are under the Act of 1851, entitled "An Act for the suppression of drinking houses and tippling shops."

Three persons, voters in the town of Saco, complained on oath to the Judge of the Municipal Court as follows: — "that they have reason to believe and do believe, that Stillman

Gurney, of Saco, now has and keeps spirituous and intoxicating liquors, intended for sale, by him, said Stillman Gurney, deposited in the shop, situated in said Saco, occupied by him, said Stillman Gurney; said Stillman Gurney not being appointed by the selectmen of said Saco as the agent thereof, to sell therein, spirits, wines, or other intoxicating liquors; whereby said liquors have become forfeited to be destroyed, and said Stillman Gurney has forfeited the sum of twenty dollars, to the use of said Saco, and costs of prosecution.

Upon that complaint, a warrant was issued on the 17th of Nov. 1851, requiring, that the officer should enter in the daytime, the shop situated in said Saco, occupied by him, said Stillman Gurney, and named in said complaint, and search there for the same, and if such liquors be found therein to seize and safely keep the same until final action and decision be had on said complaint, and that he should summon said Gurney forthwith to appear at said Court to be holden at the Municipal Court Room in Saco, on the eighteenth day of November, instant, at ten o'clock in the forenoon, to show cause if any he have, why said liquors should not be declared forfeited and be destroyed, and he be adjudged and held to pay a fine of twenty dollars to the use aforesaid, and costs of prosecution.

Upon that warrant, the officer returned as follows: — By virtue of the within warrant, on the seventeenth day of November, A. D. 1851, I entered in the day time the shop situated in Saco in said county, occupied by Stillman Gurney within named, and there searched for, found and seized the following spirituous and intoxicating liquors and now have the same in my custody and keeping: — to wit, two and one-half pints of Gin. Two Gallons American Gin. Three quarts and one pint of Rum. Two quarts of Cherry Rum. Three quarts and one pint of American Brandy, and fourteen quarts and three-fourths of a quart of New England Rum. And the said Stillman Gurney being known by me to be the owner or keeper of said liquors, I summoned him forthwith to appear before the Judge of the Municipal Court for said town of Saco

on the eighteenth day of November, instant, at ten o'clock in the forenoon, to show cause if any he have, why said liquors should not be declared forfeited, and be destroyed, and he be adjudged and held to pay a fine of twenty dollars and costs of prosecution.

The said Gurney demurred generally to the complaint and warrant. The demurrer was overruled in the District Court; and the case is brought to this Court on exceptions taken by said Gurney.

J. Shepley and *Hayes*, for Gurney.

By the provisions of the statute on which this process is founded, a respondent is almost necessarily restricted in his defence to some defects in the proceedings. The process is summary. Property of any value may be destroyed with no proof, except an *ex parte* complaint, and the return of some irresponsible officer. The respondent may not be confronted by witnesses; no proof is required that his possession of the property is illegal; the means of showing his possession to be legal are excluded; and the respondent may suddenly find himself deprived of all his estate, and that he is a convicted and committed criminal, without the examination of a single witness against him. In such a process, the government should at least be held to a strict and exact compliance with the statute requisitions.

By the second section of the Act, it is necessary that the complaint allege the liquors to be *intended for sale in some place in the town or city* where the complaint is made. This complaint contains no such allegation. The Act does not prohibit a person to keep such liquors; but only to keep them with intent to *sell* them, and to sell them *there*. He may keep them for his own use, or exportation to another country, or for sale in another State or another town.

It does not appear, from the complaint, that Gurney was not authorized to sell in the adjoining or some other town. The agent for selling in one town may keep his liquors chiefly in another. The possibility of such a case is indicated by the 12th section of the statute.

The counsel also presented many other grounds of defence. But as the foregoing was the only one, passed upon by the Court, the other points are omitted here.

Tallman, Attorney General, for the State.

HOWARD, J. — There is no averment in the complaint that the spirituous and intoxicating liquors, in question, were intended for sale in the town where they were kept and deposited. The want of such averment has been held to be fatal. *State* v. *spirituous and intoxicating liquors*, claimed by Robinson. The doctrines of that case, so far as applicable to this, are decisive. See 33 Maine, on a subsequent page.

Exceptions sustained, proceedings quashed, and judgment for restoration of the liquors.

LINSCOTT *& al., in equity, versus* BUCK *& al.*

Courts of Equity look to the *substance* rather than to the *forms* of a contract, and aim to discover and execute the *intentions* of the parties.

In equity, contracts for the sale of land are not considered merely as executory, but are treated as if executed. The purchaser is regarded as owning the land, and the vendor as owning the purchase money, and as seized of the land, in trust for the purchaser.

Such a trust attaches to the land, and binds every one claiming through the vendor, *with notice*.

Neglect to pay at a stipulated pay-day will not, of itself, produce a forfeiture, if the creditor has not considered the time as of the essence of the contract.

The receiving of a payment, after the pay-day had expired, is a waiver up to that time, of any forfeiture incurred by the mere delay of payment.

D. Goodenow and *Appleton*, for the plaintiffs.

Kimball, for the defendants.

HOWARD, J. — The defendant Buck contracted, by bond dated October 27, 1845, to convey to the plaintiffs, "by a good and sufficient deed," the land described in the bill, on payment of a certain sum. One third of the amount was

payable then, one third on the first day of June following, and the remaining third in six months from the day last mentioned. The bond was under seal and the penal sum was double the amount of the purchase money. For the last two payments, the plaintiffs gave their joint notes on interest. They made the first and second payments when due, with the exception of interest on the second; but the note last payable, and the interest on both notes, remained wholly unpaid until March 23, 1850. Then they paid the interest due on both notes, and received a writing signed by Buck, referring to the bond, and stating that, "although the conditions are broken, and I am absolved from any obligation, I shall take no advantage of that, if the remainder due is speedily paid, but give a deed according to the conditions of said bond, and which title I think must be unquestionable."

On April 19, 1850, one Lewis, in behalf of the plaintiffs, paid two fifths of the unpaid note to Buck, and he indorsed the payment upon the note and still retains it. On the 7th of September following, Buck conveyed the premises to James Leavitt, one of the other defendants, for a consideration exceeding twice the amount due on the note of the plaintiffs, without notice to them, and without any demand on them for the payment of the balance due on their note, and without any knowledge, on their part, that such conveyance was contemplated.

About November 10, 1850, the plaintiffs tendered to Buck the balance due upon their note, which he declined to accept. Failing to obtain a deed, they instituted this suit, on March 8, 1851, to compel a specific performance of the contract, averring readiness to pay and perform.

These facts are substantially alleged in the bill, admitted in the answers, and supported by proof.

By the contract of March 23, 1850, Buck waived all prior right to insist upon a forfeiture by the plaintiffs, and they were relieved from the effect of a want of strict compliance, to that date. No advantage was to be taken, no forfeiture claimed, "if the remainder due is speedily paid." If Buck

had intended, that payment should be made within a definite time, he could then have fixed that time; and if he designed to insist upon a strict compliance, at a particular date, he should have so expressed it in the writing then given; or, at least, should have informed the plaintiffs, before conveying to another, with what *speed* they should proceed in order to secure the benefits of the contract, according to his construction of the instrument he had given to extend the time of payment. The evidence of conversations between the parties at the time of executing it, were not admissible to control the plain, unambiguous language of that instrument.

By receiving a payment on April 19, 1850, of a part of the amount due, and indorsing it upon the note, Buck abandoned all supposed intention of insisting upon a forfeiture at that date, and gave further time, in effect, for payment of the remainder. There is evidence, that when Lewis made this payment for the plaintiffs, and appeared to be acting for them, he sent a message to Buck, that "Linscott, (one of the plaintiffs) intended to pay the rest of the money soon, and that he need not be any ways afraid; if Mr. Linscott did not pay the money, he would see that he had it himself, and that he wished Dr. Buck not to give any deed until he saw him, or let him, Dr. Lewis, know it." To this message the witness could not state the reply of Buck distinctly, but thinks he said that he would see Lewis, or let him know before he gave a deed. It is evident, however, that he did not then insist on immediate payment, and that time was not then treated as of the essence of the contract. He does not pretend, in his answer, that time was essential, or that he gave any notice, or intimation, that he should claim prompt payment or a forfeiture.

While Buck, in his answer, admits a tender, in November, 1850, of the amount due, he states, as an objection, that the plaintiffs did not tender any thing for making and executing a deed; and that they did not demand a deed at that time. But it appears in proof that the plaintiffs, in October, 1850, made a tender of paper money, and demanded a deed; but

that tender being objected to as insufficient, the tender in November was made in legal coin, as admitted. The object of both tenders could not have been misunderstood; it was to obtain a deed of the land. And if any tender was necessary, under the circumstances, which is not assumed or admitted, none would seem to have been required for making and executing a deed from the vendor, under the contract.

It cannot impair the rights of the plaintiffs, that they may have been apprehensive that the vendor could not be compelled to convey to them, or that they imputed no blame to him. Nor is it material to this case, to inquire into the value of the property, or the amount received from it, by the plaintiffs, for timber sold, or for profits.

Buck, in his answer, states his belief, (founded on an uncertain message, from an unknown source, and on the statements of "credible witnesses" whose names he does not give,) "that the plaintiffs could not make out the remainder of the money, in payment of the second note, and therefore did not expect to have the land."

This statement in the answer is not responsive to the bill, and is not evidence. But if it had been responsive, it could not aid the defence. The belief of a party may affect his conduct and satisfy his conscience, but it cannot justify an invasion of the rights of others. The credulity of the defendant cannot excuse a violation of his contract with the plaintiffs. He cannot successfully assume in defence, that time was material to the contract, when the evidence and his answer, show that it was not essential; and not so regarded by him when he made the conveyance.

James Leavitt was a purchaser with notice of the rights and claims of the plaintiffs to the land. He then conveyed it to his sister, Sarah Ann Leavitt, the other defendant, who purchased with like notice. Both of these grantees, if they now claimed title, would hold subject to the equities between Buck and the plaintiffs. But the evidence discloses the further fact that, since the filing of the bill, Sarah Ann Leavitt has recon-

veyed the land to Buck, though upon what terms or consideration, does not appear.

Courts of equity look to the substance more than to the forms of agreements, and aim to discover and execute the intentions of the parties. In law, contracts for the sale of land are considered as executory agreements, not attaching to the land, and for the violation of which, damages, only, are recoverable. But in equity such contracts are treated as if they had been executed. The purchaser is regarded as owner of the land, and the vendor as owner of the purchase money, and as seized in trust for the purchaser. The trust attaches to the land so as to bind every one claiming through the vendor with notice.

We do not perceive that Buck suffered any loss, or inconvenience not contemplated, prior to his conveyance to Leavitt; if any has arisen since, it cannot be attributed to the plaintiffs. Having received from the plaintiffs four fifths of the purchase money, and being now owner of the land, he is in a position to fulfil his contract, upon payment to him of the amount remaining due under it; and having failed to offer any substantial reason for not fulfilling it, a decree for specific performance will be entered, in accordance with the prayer of the plaintiffs.

As the estate is now in Buck, neither James Leavitt, nor Sarah Leavitt, can have any ground on which to contest a decree for specific performance. Having purchased with notice, and under circumstances indicating a design to take advantage of the necessities of the plaintiffs, and to acquire the property on favorable terms, regardless of their rights, they will both be enjoined against claiming the land through their conveyances from the other defendant.

Each of the three defendants is chargeable with costs.

Gooch *versus* Gooch.

A watch, which the testator has been in the habit of carrying with his person, does not pass by a bequest of his wearing apparel;" nor by a bequest of his "household furniture."

Trover for a gold watch.

E. E. Bourne, for the plaintiff.

Dane, for the defendant.

Wells, J., orally. — The plaintiff claims title under a will. The testator devised to him certain real estate and also bequeathed to him his "wearing apparel." If the watch belongs to the plaintiff it must have been given by being included in the words "wearing apparel." It appears that the testator purchased the watch a few years before his death, and generally used it, by carrying it upon his person. Words used in wills are to be taken in their common and ordinary sense. The ordinary meaning of wearing apparel is vesture, garments, dress; that which is worn by or appropriated to the person. Ornaments, may be so connected and used with the wearing apparel, as to belong to it. There are implements, such as pencils and penknives, carried about the person, but not connected with the wearing apparel. These are not to be considered as clothing. To which class does a watch belong? It may not properly be called an implement, for it is used merely to look at. Neither is it used as clothing or vesture. In its use, it more nearly resembles the pencil or penknife. The Court are of opinion, that the watch did not pass under the phrase "wearing apparel."

It is contended that the watch was given to the *defendant* under the clause of the will, bequeathing to her the "household furniture, and other articles for family use." "Household furniture" means those things provided for, and appropriated to uses in the house; as a clock, &c. A watch, kept hung up for use in the house, might be considered as belonging to it. There may be articles, which are sometimes used in the house, but are carried out by day and brought in at

night. These articles would not have such a fixedness as to be considered household furniture.

Considering that the watch was used principally upon the testator's person, we do not think it is to be viewed as any part of the household furniture.

Neither is it to be deemed "an article for family use." That phrase may be properly limited to articles for use or consumption in the family. Such was not the watch.

We hold, therefore, that the watch was not given to the defendant. *Judgment was entered according to an agreement of the parties.*

STATE *versus* LANE *& al.*

In *Scire Facias*, upon a recognizance to the State, in a prosecution for crime, the Court, in order to discover what crime is charged, can look only to the recitals in the recognizance.

The Court cannot assume, that acts, which may be consistent with innocence, and are not charged to be in violation of law, are criminal, merely by reason of their being so denominated by the magistrate.

A complaint merely charging "the crime of having sold a quantity of spirituous liquors," charges no offence.

SCIRE FACIAS against the sureties in a recognizance taken before the Judge of the municipal court of the town of Saco, in a prosecution against one Jeremiah Gordon.

After oyer of the recognizance, the defendants demurred generally to the declaration.

The recognizance was taken on the seventh day of Oct. 1851. The condition of it was "that, whereas said Jeremiah Gordon has been brought before me, by virtue of a warrant duly issued by me, upon the complaint, on oath, of John H. Gowen of said Saco, charging him, said Jeremiah Gordon, with the crime of having sold at Saco, in said county of York, on the twenty-eighth day of September, now last past, a quantity of spirituous liquors therein, to wit: One glass of Brandy to one Moses Leighton of said Saco, and the said Jeremiah Gordon having pleaded not guilty to said complaint,

but having been by me found guilty of the same, and been sentenced by me to forfeit and pay the sum of ten dollars to said town of Saco, where said Jeremiah Gordon resides, for the use of the poor; and costs of the prosecution, taxed at four dollars and twenty-six cents, and that he stand committed until the same be paid. And the said Jeremiah Gordon having claimed an appeal from said sentence and judgment to the next District Court for the Western District, to be held at Alfred within and for the county of York, on the third Monday of October next; — Now, therefore, if said Jeremiah Gordon shall appear at the Court aforesaid, and prosecute his said appeal, and pay all costs, fines and penalties that may be awarded against him upon a final disposition of the aforesaid complaint, then this recognizance shall be void; otherwise remain in full force and virtue. "Frederic Greene, Judge."

J. Shepley and *Hayes*, in support of the demurrer.

The recognizance is void: —

1. It contains no description of any offence. R. S. chap. 171, sect. 30; *State* v. *Godfrey*, 24 Maine, 233, 234; *State* v. *Corson*, 1 Fairf. 476.

2. It does not show when the judgment on the complaint was rendered, and consequently it does not show that it was taken within twenty-four hours after judgment. Stat. of 1851, chap. 211, sect. 6.

3. It does not appear by the recognizance that the bond required by the statute was given, which was necessary, by the provisions of the statute, before the appeal could be allowed. Stat. of 1851, ch. 211, § 6.

4. The recognizance is void for *duress*, having been required and taken as a condition of allowing to the accused, in a criminal prosecution, the right to a trial by jury, and by virtue of an unconstitutional statute provision. Const. of Maine, Art. 1, § 6; *Johnson's case*, 1 Greenl. 230; Stat. of 1784, concerning justices of the peace, § 3; Stat. of 1821, ch. 76, § 3; R. S. ch. 170, § 8; 22 Pick. 14; R. S. chap. 169, § 7, 10; Stat. of 1851, chap. 211, § 6; 4 Blackstone's Com. 350.

5. The provisions of the statute requiring the recognizance are also void, because repugnant to the 9th section of article 1 of the Constitution of Maine, which provides that "excessive bail shall not be required."

Tallman, Attorney General, for the State.

HOWARD J. — It does not appear by the recognizance that the magistrate, by whom it was taken, had authority to receive it. His jurisdiction cannot be presumed, nor can such as he assumed be upheld; for in fact, the recognizance does not contain a sufficient description of any offence cognizable by him, or known to the law.

The charge against the accused, as stated in the recognizance to which we must look, and beyond which we cannot go for a description of the offence, is "the crime of having sold at Saco in said county of York, on the twenty-eighth day of September, now last past, a quantity of spirituous liquors therein: — to wit, one glass of brandy, to one Moses Leighton of said Saco." But it is not alleged, that the accused was not within the exception of the first and second sections of the Act, under which the complaint was preferred, or that the sale was in violation of the provisions of that Act, or of any law. He may have been appointed an agent for the town, and may have sold the spirituous liquors to be used for medical and mechanical purposes only, and the allegation in the complaint against him, as recited in the recognizance, may have been proved, without his incurring a penalty. We cannot assume, that acts which are consistent with innocence, and not alleged to be in violation of law are criminal, because they are so denominated by the magistrate, and when the facts necessary to constitute the crime are not stated. Stat. 1851, chap. 211, sect. 1, 2, 3, 4; R. S. chap. 171, sect. 30.

We are satisfied, for the reasons suggested, that the declaration is bad, and this conclusion renders the consideration of other positions, taken at the argument unnecessary.

Judgment for defendants, with costs.

STATE, *in Scire Facias, versus* SUHUR *& al.*

A recognizance taken on the Lord's day, "between the midnight preceding and the sunsetting of the same day," to prosecute an appeal in a criminal proseeution, is unauthorized and void.

SCIRE FACIAS against the sureties of one John Gurney, upon a recognizance taken before the Judge of the Municipal Court of the town of Saco.

It was agreed, *that* the recognizance was entered into at three o'clock in the afternoon of the twentieth day of July, 1851, the same being Lord's day; and *that* it was so entered into for the purpose of securing to said John Gurney, an appeal from a sentence, imposed upon him at five o'clock in the afternoon of Saturday, the nineteenth day of said July, for having sold spirituous liquors in violation of the statute of 1851.

If the action is not sustainable, a nonsuit with costs is to be entered.

Tallman, Attorney General, for the State.

J. Shepley and *Hayes*, for the defendant.

The recognizance is void, because taken on the Lord's day. *Towle* v. *Larrabee*, 26 Maine, 464; *Pattee* v. *Greely*, 13 Metc. 284; 26 Maine, 74; Stat. of 1851, chap. 211, sect. 6; *Story* v. *Elliot*, 8 Cowen, 27; *Chapman* v. *the State*, 5 Blackf. 11; 2 Bibb, 589; 3 Gilman, 368; *Boist* v. *Griffin*, 5 Wendell, 84; *Cock* v. *Bunn*, 6 Johns. 326; *Goseviller's case*, 3 Pennsylvania, 200; 2 Hill, 375; 20 Wend. 205; *Browne* v. *Wellington*, 1 Sandf. Law Rep. 664; *Thayer* v. *Felt*, 4 Pick. 354.

WELLS, J., orally. —

It appears that the defendant was convicted on Saturday, and that he appealed, and within twenty-four hours afterwards, and on the Lord's day, entered into this recognizance to prosecute his appeal.

The Act of 1851, sect. 6, provides that if the recognizance and bonds, mentioned therein, shall not be given within

twenty-four hours after the judgment, the appeal shall not be allowed. What did the Legislature intend by this provision? Is it to be inferred, that if the twenty-four hours run into the Lord's day, the recognizance may be taken on that day? It is well known that, from the establishment of the government, laws have been passed, directing when certain acts shall be done, without specifying that they should not be done on the Sabbath; and yet, when a secular act is to be done, the understanding has always been, that it is to be done on a secular, and not on a sacred day.

The Act of 1821, chap. 76, sec. 3, directs that an appeal may be made from a judgment of a justice of the peace, but says nothing about the time, when the appeal shall be made. So the law provides that executions may be issued after the expiration of twenty-four hours from the rendition of the judgment. It was never supposed that an execution could rightfully be sued out on the Lord's day. The same rule should be applied to appeals. The reason is, that secular business should be performed on secular days. The Revised Statutes, chap. 116, sect. 9, in relation to appeals from the judgment of a justice of the peace, provides that Sundays are not to be included, in the twenty-four hours allowed for an appeal. But, without this exception, the same would have been implied. The exception adds nothing to the construction of the statute. In criminal cases, where the party may appeal, the inference is that he must do it on a secular day.

But there is another view to be taken of this case. The taking of the recognizance is purely a matter of contract between the defendants and the State, to prosecute the appeal. This Court has decided that a contract, made on the Lord's day, between individuals is not valid. And there is no reason why the same rule should not be applied to a contract made between the State and individuals. We do not mean to say that criminal process may not be served on Sunday; that question we do not intend upon this occasion to decide.

Nonsuit.

GOODWIN *versus* SAWYER *& al.*

A continued occupation of land for twenty years gives title to the occupant, unless such occupation be shown to have been in subserviency to title in another.

Such occupation, to give title, need not be personal. It may be by agent or tenant.

ON EXCEPTIONS from *Nisi Prius*, TENNEY, J.

WRIT OF ENTRY.

The material facts, as found by the jury upon the evidence, were as follows: —

Mrs. Mary Wingate occupied the land from the year 1814 to 1835; viz, from 1814 to 1825, personally and from that time to 1835, by her son Edmund Wingate, as tenant under her. In 1835, she conveyed it to William Wingate under whom the demandant claims.

In 1821, Joseph Woodman, the father of Mrs. Wingate, mortgaged the land to John Holmes, and Holmes, in 1823, assigned the mortgage to Joseph Woodman, jr. But the case does not show, that the tenants have in any way connected themselves with that mortgage.

The instructions to the jury were, *that* if the persons, occupying the land after 1825, held in submission to the claim of Mrs. Wingate, their occupation was not a disseizin; *that* such a holding could not give title as against her; and, that the mortgage, unless followed by possession under it, would not impair the right acquired by the occupation of Mrs. Wingate. Verdict for demandant. Exceptions by tenants.

Wilkinson and *Tapley*, for the tenants.

The demandant must recover upon the strength of his own title. He had none, except under Mrs. Wingate. And she had none except by possession. The land belonged to Joseph Woodman. It does not appear, that she disseized him. Her occupation may have been by his permission. The case then fails to show that she ever acquired title. *Tilton* v. *Hunter*, 24 Maine, 32; *Bates* v. *Newcomb* 14 Pick. 227; *Coburn* v.

Hollis, 3 Metc. 125; *Little* v. *Libbey*, 2 Dane, 25; 4 Mass. 418; 8 Wend. 440; 6 Johns. 197; 16 Johns. 293.

Eastman and *Chisholm*, for the demandant.

TENNEY, J. — The possession of Mary Wingate of the premises described in the demandant's writ, from 1814 to 1825, was *prima facie* evidence of title in her. The occupation of Edmund Wingate afterwards, according to the evidence and the finding of the jury under the instructions, which are not subject to legal objection, did not take away this title. The right of entry remained in her till her conveyance of the land, if she was in fact at all out of possession, and existed in the demandant at the time of the commencement of this action, which can be maintained by R. S. chap. 145, sect. 11, unless the defence shall prevail.

The facts, adduced by the tenants, show no title in Joseph Woodman or those who had any interest in the mortgage from him to John Holmes. *Exceptions overruled.*

Judgment on the verdict.

COLE *versus* COLE, *Administratrix.*

Offers made by a party, in a negotiation for a compromise, are not receivable in evidence against him. But his statement of the facts pertaining to the subject matter of the negotiation may be proved, though it was made during the negotiation.

The previous declarations of a plaintiff, that he supposed he should have to commence a suit against the defendant for the benefit of a third person, and that if such third person should bring a suit, he should not object to it, will not preclude the plaintiff from using such third person as a witness, in a suit brought against such defendant, unless it be proved that the suit is in fact for the benefit of the witness, or that the witness will have some legal right in the avails of the suit, should the plaintiff recover, or that he will be injuriously affected if the defendant recover.

ASSUMPSIT, on account annexed and on the money counts, for $6554,81.

Pleas, limitation.

The plaintiff, in support of his claim, and to repel the allegations of the pleas, read some documentary evidence.

The defendant called Joseph W. Leland, Esq. who testified that at the request of the defendant he went to New York to adjust with the plaintiff three distinct matters, which he specified; that he mentioned his purpose to the plaintiff, who said he was very glad, and that every thing might be arranged.

The plaintiff's counsel then objected to the giving the further conversation in evidence, because made merely by way of negotiation and compromise. The objection was overruled; and the witness proceeded to state what representations the plaintiff made of the facts relative to the matters which the witness had purposed to adjust.

He further testified as follows, "the plaintiff then said there is but one thing more; Mr. John F. Scamman has had to pay large sums of money for Daniel, [the intestate,] and Mr. Scamman claims that he should be paid some portion of this debt; and I, [the plaintiff,] have written to the administratrix that Mr. Scamman had no legal claim against the estate, but that she, for the estate, ought to allow Mr. Scamman $1200."

The witness then testified to some subsequent statements made by the plaintiff, as follows. "He remarked that he had seen Mr. Scamman, who claimed a much larger amount, and was not disposed to relinquish any very large portion of his claim; and he supposed that he, [the plaintiff,] should have to commence a suit for the benefit of Mr. Scamman, against the estate, and that if Mr. Scamman should choose to commence a suit, he should not forbid it."

He also testified, that Scamman afterwards brought a suit against the plaintiff, and the plaintiff then brought this suit against the administratrix.

The plaintiff then called Scamman as a witness, who was objected to by the defendant on the ground, that (as proved by Mr. Leland's testimony,) the plaintiff had stated Mr. Scamman to be interested in the event of the suit. The objection was sustained, and Mr. Scamman was precluded from testify-

ing. The question of his admissibility, and also the question of the admissibility of the plaintiff's declarations as stated by Mr. Leland, are now presented to the Court for decision.

J. Shepley, for the planitiff, as to the evidence of Leland, cited 1 Greenl. Ev. sect. 192, and cases there cited, and 2 Stark. Ev. 22, and notes, (Ed in 2 vols. by Metc. I. & G.) He also contended, that the testimony of Leland, even if rightfully admitted, did not show that Scamman had any interest in the event of the suit. To disqualify a man from being a witness on the ground of interest, he must have a direct and legal interest in the event of the suit.

The plaintiff was of opinion, that Mr. Scamman's remedy was through him, and thought he *should have to bring a suit*, from the avails of which Mr. Scamman might derive a benefit, or that Mr. Scamman might bring one in his name. This does not show, that this suit was so brought; it does not show, that Mr. Scamman would necessarily be benefited by a recovery in this suit, or would suffer a loss by its failure. The remedy of Mr. Scamman is against the plaintiff. And besides, Mr. Leland says, that Mr. Scamman sued the plaintiff, who in fact was the party liable to him, and that the plaintiff then sued the estate. Mr. Leland says, that the plaintiff spoke of what might take place at a future time, but nothing to show, that Mr. Scamman has, or that the plaintiff said he had, any interest in the event of this suit.

D. Goodenow, for the defendant.

Shepley, C. J. — The first question presented for decision is, whether the testimony of Joseph W. Leland, a witness, for the defendant, was properly admitted.

The witness stated, that he, as the attorney of the defendant, called upon the plaintiff "for the purpose of arranging and settling three distinct matters."

He did not state, that the plaintiff offered to receive any particular sum as a compromise, although he did state, that the plaintiff named the amount due to him. Nor did he state, that the conversation was confidential, or entered upon with-

out prejudice to the rights of the plaintiff, if no settlement should be effected.

The conversation as related by the witness does not appear to have been commenced for the purpose of endeavoring to make a compromise of disputed claims, or that an offer or offers might be made to purchase peace, but for the purpose of ascertaining the claims really existing and justly due from one party to the other, that they might be fairly adjusted. The conversation as related could not have been excluded by any well established rule of evidence.

The next question arises from the exclusion of John F. Scamman as a witness for the plaintiff. He could only be excluded upon proof made by the plaintiff's declarations, that he was interested in the event of the suit.

Those declarations prove, that Scamman alleged, that he ought to be paid out of the proceeds of the estates conveyed to the plaintiff, and by him sold through the agency of the defendant's intestate, certain sums paid by him on account of that intestate; that the plaintiff insisted upon having Scamman's claim adjusted, if a settlement was effected; and that he said, he supposed he should have to commence a suit for the benefit of Scamman.

This suit had not then been commenced. No declaration of the plaintiff was made, or could be made, that this suit was commenced for the benefit of Scamman. There is no proof that it is prosecuted for his benefit, or that he has any interest in it.

It appears that Scamman commenced a suit against the plaintiff to enforce his claim, before the plaintiff commenced this suit. While there is proof by the plaintiff's declarations, that Scamman claimed to be remunerated from the proceeds of the sales of the real estate sought to be recovered in this suit, and that he professed to have an interest in them, there is no satisfactory proof that he is actually asserting that claim by this suit in the name of the plaintiff.

If the plaintiff should recover those proceeds in this action, it does not appear that Scamman's claim to any portion of

them would be established or rendered more available at law or in equity in consequence of such recovery. Nor does it appear, if the plaintiff should entirely fail in this suit, that Scamman's claim would in any manner be affected by the result.

It may be, that Scamman is so situated, that he may appear desirous of having the plaintiff recover, hoping that it may induce him to be more favorable to the allowance of his claim; if so, it may affect his credit, while it does not show, that he is legally interested in the event of the suit. His testimony should have been received.

The case is to stand for trial.

DOLLOFF *versus* STIMPSON.

A motion to set aside a verdict, on proof, that a juror was related to one of the parties, cannot prevail, if, at the opening of the case to the jury, the party making the motion, was present and knew of the disqualification, and did not object to the juror.

The motion will not be aided by proof that the party making it was, at the time of the trial, ignorant of the law creating the disqualification.

HOWARD, J., orally. — A verdict in this case was rendered for the *defendant.*

A motion to set it aside has been made by the *plaintiff* for the reason that one of the jurors who tried the case, was a nephew of the *plaintiff.* This fact was known to the plaintiff, but not to the defendant, at the time of the trial.

By R. S. chap. 1, sect 3, a juror thus related to either of the parties is disqualified from acting, unless by the express consent of the parties interested. *Hardy* v. *Sprowle,* 32 Maine, 310. In that case it was decided, that such a juror could not sit, except by consent. There the motion was made by the party who was not related to the juror.

The R. S. sect. 65, provides, that the Court, on motion of either party in a suit, may examine on oath any person called as a juror whether he is related to either party; and if it

shall appear, that he does not stand indifferent in the cause, another juror shall be called and placed in his stead for the trial of the case.

The 69th section provides, that if a party knows of any objection to a juror, in season to propose it before trial, and omits so to do, he shall not afterwards be allowed to make the same objection, unless by leave of Court for special reasons. In this case the plaintiff knew the fact of the relationship of the juror before and during the trial of the cause. It is said, that the plaintiff was not in Court at the commencement of the trial. But the statute does not require the objection to be made at the commencement of the trial. It appears, that the defendant was in Court when the case was opened to the jury. The objection could then have been seasonably made. But the plaintiff omitted to do it, and it is too late to make the suggestion after verdict.

It is argued, that the plaintiff did not know what the law was. The maxim is a sound one in the administration of justice, that ignorance of the law furnishes no excuse.

Motion overruled.

Wilkinson and *Tapley*, for the plaintiff.

M. Emery, for the defendant.

WENTWORTH *versus* THE SANFORD MANUFACTURING COMPANY.

A right by prescription to flow land to a given height, by means of a mill dam, cannot be sustained, unless the flowing had caused damage to the owner of the land.

Whether a prescriptive right to flow land to a given height, can be proved, in order to reduce the damage occasioned by the dam, when elevated above that height; *quere*.

D. Goodenow and *N. D. Appleton*, for the complainant.

Eastman, for the defendant.

TENNEY, J. orally. — This is a complaint under the statute

to recover for flowing the complainant's land by means of a mill dam.

The defendants pleaded the general issue, and also that on the first day of September, 1845, and from that time to the present, they have had and still have good right to erect and maintain the dam at the height it has been raised by them, and to flow the land, to the extent they have been flowed by means thereof, without the payment of damages. The jury returned a verdict in favor of the complainant upon the general issue. And, to questions propounded to them, they answered, that the respondents and those under whom they claim, had flowed the land continuously for more than twenty years before the date of this complaint; but that it was not proved that during that period they had flowed so high as they have flowed by the present dam.

Commissioners were appointed to assess the damage. At the hearing before the commissioners, the counsel for the respondents moved that they receive testimony as to the difference between the height of their dam as it has been since Sept. 1845, and the height at which it had been kept up continuously for more than twenty years previous to that time; and also that the commissioners in their estimation of the damages, will consider and report, what portion of the same was occasioned by the increase in the height of the dam erected in 1845, over and above its height, as it had been kept up and maintained for more than twenty years previous to that time; and also, what proportion of the damage was occasioned by reason of the dam being made *tighter* than it had been for more than twenty years previously. This motion was overruled by the commissioners, and they assessed the damage, and made their report, and stated that they did not receive any testimony in relation to, nor take into consideration, any damage done by flowing the land, prior to September 15, 1845, nor prior to building the dam in September, 1845; and that the damages awarded, were done to the complainant by flowing his land, by means of the dam; and that they had not

undertaken to ascertain whether the dam is, or is not, *higher* or *tighter* than any previous one.

The respondents except to the report of the commissioners. And the question now is, whether the commissioners have conducted legally in their estimation of the damage. It is a well settled principle, that the owner of land flowed by means of a dam erected for the use of a water mill, cannot maintain an action against the person who erects and keeps up the dam, unless he has sustained damages by reason of such flowing. It appears in this case, that the complainant's land had been flowed for more than twenty years before the new dam was erected in 1845. But it does not appear that he had sustained damages by the flowing for each year during that time.

The respondents could not have acquired a prescriptive right to flow the complainant's land, without the payment of damages, unless the latter had suffered injury or sustained damages, by such flowing. The complainant could not have maintained an action for the flowing, without proof that he had sustained damages.

We do not therefore perceive that the complainant can be restricted from recovering all the damage sustained from the whole elevation of the dam. *Exceptions overruled.*

SIMPSON *& al. versus* BOWDEN.

The law will not raise an *implied* contract, conferring authority to do an act, when there existed no legal right to make an *express* contract, authorizing such an act.

Of the right to waive the tortious character of an act and to maintain suit upon an implied contract for the act.

Reversioners, entitled to land only upon the determination of a life estate, have no right to authorize the cutting, (during the life estate,) of trees standing upon the land.

ON EXCEPTIONS from *Nisi Prius*, HOWARD, J. presiding.

ASSUMPSIT.

The evidence for the plaintiffs tended to show, *that* one G. S. was tenant for life of a lot of land, on which trees were growing, and that the plaintiffs were the reversioners, entitled to the land upon the determination of that life tenancy; *that* the defendant cut trees upon the lot and of some of them made wood for his house and repairs upon his vessel; *that* the acts of the defendant were done in the day time, and were continued for many days; *that* the tenant for life residing upon the lot, and the plaintiffs residing within a few rods from it had full opportunity to see the cutting and the hauling away of the timber; and also *that* since those acts the life estate had been determined by the death of the tenant.

Upon this evidence, the defendant contended, that an action in this form, (assumpsit,) could not be maintained, and thereupon the Judge ordered a nonsuit, to which order the plaintiffs excepted.

E. E. Bourne, to show that *assumpsit* is maintainable upon the evidence, presented the following considerations: —

1. From the openness with which the cutting and hauling were done, and from the plaintiffs' opportunities of seeing the operation, the jury might have inferred, that the plaintiffs had knowledge of the defendant's acts, and from that knowledge, without prohibition or objection made by them, it was fairly deducible by the jury, that the plaintiffs assented; and from such assent, the law would imply a promise. *Foster* v. *Dixfield,* 18 Maine, 380.

2. The growing timber belonged to the inheritance.

The life tenant had no rights in it. The plaintiffs therefore, being the reversioners, might have maintained trespass against the defendant for taking it away. And if so, they might waive the tort and sue in *assumpsit. Frothingham* v. *McCusick,* 24 Maine, 403; *Stowell* v. *Pike,* 2 Maine, 387.

3. By the death of the life tenant, the defendant's acts were purged of tort, making *assumpsit* the proper form of action.

4. The acts proved did not constitute a trespass within the provision of the R. S. chap. 119, sect. 10, which has essen-

tially modified the common law definition of trespass; inasmuch as it is there made requisite to allege and to prove, that the act, amounting to trespass, was *without the consent of the owner*. But the very bringing of this suit in assumpsit negatives the want of such assent.

5. All authorities maintain that, when the defendant has sold or had the benefit of the property, the tort may be waived. Reports passim.

The using the timber for fuel and for repair of the vessel were equivalent to a sale. *Lightly* v. *Couston*, 1 Taunt. 112.

6. Tort can be waived and assumpsit maintained in all cases where the defendant is not injured by it. *Hill* v. *Davis*, 3 N. H. 384; *Webster* v. *Drinkwater*, 5 Greenl. 319; *Chaney* v. *Yeaton*, 1 N. H. 154; *Linden* v. *Hooper*, Cowper, 414; 6 T. R. 695.

7. The position, that a tort cannot be waived, is in opposition to a sound public policy, and opposed to the first principles of the Christian religion, which is a part of the common law. It is inconsistent with the spirit of the age and of the tenor of our legislation, that forms of law should prevail, in opposition to justice.

The maxim that no one shall take advantage of his own wrong is a salutary one, and ought to be rigidly adhered to.

J. Shepley and *Hayes*, for the defendant.

TENNEY, J., orally. — There in no evidence of any express contract between the parties for the purchase of the timber, and the case shows a wrongful taking of it.

The plaintiffs contend, that they may waive the tort and maintain their action, as on an implied contract.

It may be a nice question to determine precisely where the line is to be drawn, between cases in which a party may waive a tort and bring an action of *assumpsit*, and where he is not permitted to do this. The Court do not deem it necessary for the decision of this case, to consider that question.

The law will not *imply* a contract, where an *express* con-

tract is proved. Nor will the law *imply* a contract in a case where the parties cannot legally make an *express* contract.

The plaintiffs had no present interest in the land where the defendant cut and converted the timber. They could not legally contract for the severance and sale of the timber there standing. The parties being legally incapable of entering into an *express* contract of that character, the law cannot *imply* one. *Nonsuit confirmed.*

LITTLEFIELD, *appellant, versus* ASA W. COLE *& ux.*

Of the powers of the Court of Probate, in relation to testamentary trusts.

A testamentary trustee had it in charge by the will to appropriate the income of the estate to the widow of the testator, as she should "require" for the support of herself and children. *Held,* that it is not within the jurisdiction of the Court of Probate to direct what amount the trustee should appropriate for such support.

ELIAB LITTLEFIELD died in March, 1845, leaving a wife and four children. By his will, after giving to his wife (Mrs. Cole, one of the appellees) his homestead for life, and also his household furniture, he bequeathed to her the entire income of his whole estate for her own and her childrens' support; and appointed the appellant *trustee* with directions to hold the whole of his property, (not given to his wife,) in trust for his wife and children, and farther required the trustee to pay over to his said wife the income from the estate as she should require for the support of herself and children, her receipt being his voucher.

Mrs. Cole, with her husband, presented to the Judge of Probate a petition, setting forth that the trustee accepted the trust, and had received large incomes from the estate, and, that he has refused to pay over to her so much of the income as she requires for the support of herself and children; and praying that the trustee may be ordered to pay over to Mrs. Cole such sum for arrearages from the income of the estate

as justly belongs to her, and the income in future or such part thereof as he, the Judge of Probate, might deem just and reasonable.

Upon the hearing before the Judge of Probate, the trustee contended that it is by the will confided wholly to him to adjudge what portion of the income should be appropriated to the support of the family, and that he has appropriated for that purpose all which it was suitable he should do; and that the Court of Probate has no jurisdiction upon the petition.

The Judge however decreed that the trustee should pay to Mrs. Cole, for her support and that of the children, seven hundred dollars in equal quarter yearly payments until the further order of the Court.

From this decree, the trustee appealed.

D. Goodenow, for the appellant.

N. D. Appleton, for the appellees.

By the provisions of the statute, chap. 111, sect. 12, the Probate Court has concurrent jurisdiction with the S. J. Court *in hearing and determining, in equity, all matters* relating to testamentary trusts. The power is expressly conferred, and is without limitation.

That section confers certain specific powers upon the Supreme Judicial Court and upon the Judges of Probate, and authorizes them respectively to give such directions, as the case may require, for managing and disposing of the trust fund, subject to any provisions contained in the will. The object of the complaint in this case, was to obtain directions from the Judge of Probate, as to the proper disposition of the income of the estate in the hands of the trustee, and it is the identical case contemplated by that section. If not provided for in that section, the power is clearly given in sect. 13.

The sections are of recent enactment. They were not contained in the statute of 1821, and are intended to confer powers, not before possessed by the Probate Courts, but which might be highly useful for them to have in cases like this.

The Court, after consultation, decided that the Probate

Court had not jurisdiction of the matter presented in the complaint, and ordered that the decree be reversed.

STATE *versus* STRAW *& al.*

An omission by the Judge to give the instruction which counsel, in addressing the jury, may have contended for, furnishes no ground for exceptions unless the Judge was requested to give such instruction.

In a criminal prosecution for a riot, it is no defence that two persons only were engaged in the illegal physical act, if a third person was, at the time, aiding and abetting them by his presence.

ON EXCEPTIONS from the District Court, COLE, J.

Indictment for a riot against two defendants, charging that they with others, armed with clubs, &c., unlawfully, riotously, violently and tumultuously assembled themselves together and broke down and demolished a dwellinghouse, to the terror, &c.

The testimony tended to prove, that two persons only were engaged in the physical act charged, but that a third person was aiding and abetting them by his presence. The defendants contended, that in order to prove a riot, it was necessary for the government to show, that three persons were engaged in some illegal physical act.

The Judge instructed the jury, that if two were engaged in the illegal act and the third was there aiding and abetting by his presence, it was sufficient. To that ruling the defendants excepted, the verdict being against them.

Bourne and *Dana*, for the defendants.

"It must be proved, that three persons, at least, were engaged in the *unlawful assembly* and *assault*, otherwise defendants must be acquitted, for unless committed by three or more, it can be no riot." Archbold's Crim. Prac. 699 and 707.

"If three or more, lawfully assembled and quarreling, fall on one of their company, no riot. But if they fall on a stranger, they thereby begin an unlawful assembly, and their concurrence is evidence of an evil intention, *in them that concur*, so that

it is a riot in *them that act, and no more.*" 2 Salk. 594 and 595.

These cases plainly imply the necessity of action in at least three.

Three were present, but no riot, unless there be evidence of *their action.*

"When three or more persons together and in a violent or tumultuous manner commit an unlawful act, or together do a lawful act in an unlawful, violent or tumultuous manner, to the disturbance of others, they are guilty of a riot." Statute of Iowa.

Common Law as to what is necessary to constitute a riot is abrogated by the Stat. chap. 159, sect. 3, page 682.

The Statute describes a riot; this overrides all other description.

"When three or more persons together and in a violent or tumultuous manner, commit an unlawful act, or together do a lawful act in an unlawful, violent or tumultuous manner, to the disturbance of others," it is a riot.

"All words and phrases shall be construed according to the common and approved usage of our language." R. S. chap. 1, sect. 3, clause 1.

Criminal statutes are to be construed strictly.

The word "*together*" does not relate to the assembling, but to the act done.

"Engaged," means active in the work.

To be engaged in a fight, a battle, a conspiracy, or in any work or job, means *doing* something in it.

Lord Holt says, in a case there referred to, "if a statute inflicts a penalty on one who does so and so, it shall not be extended to one aiding and assisting." 6 Dane, 650.

To support an indictment for a riot, the defendants must be *active* in doing or countenancing an unlawful act, or standing ready to support such act." *Pennsylvania* v. *Craig*, Addison, 190.

The instruction that, if defendant was aiding and abetting *by his presence*, it was sufficient, is clearly erroneous.

It is not said if he was present, *aiding and abetting*, but that the *presence only* was the aiding and abetting; that is, that his presence was the only instrumentality.

If mere presence alone was sufficient, then any one, even the magistrate, present for the purpose of quelling, or any one looking on, a child, an insane person, even those terrified, would be guilty.

At common law, all who abet in a crime, whether present or absent, are criminal; but *presence* is no more guilt than *absence.*

Tallman, Attorney General, and *Drew*, County Attorney, for the State.

SHEPLEY, C. J., orally. —

It was contended at the trial by the defendants that, to prove a riot, it was necessary for the government to show that three persons were engaged in some illegal physical act; and the counsel have now argued as if this question was raised upon the exceptions. But what counsel contended for, is no ground for exceptions. The Court must first be requested to charge upon the point made, and if the request is refused, exceptions may be taken. The instructions which the Judge gave to the jury, and the legal effect of them, are the only questions which can now be raised upon these exceptions. The jury were instructed that if two were engaged in the illegal act, and the third was there, aiding and abetting by his presence, it was sufficient. It is insisted that by the common law and by statute, a riot cannot be committed unless three persons were engaged in it, and doing some unlawful act. The Court are not satisfied that such is the rule at common law. By the common law, where three persons are together for a common, unlawful purpose, and acting in concert, it is not necessary, to constitute a riot, that all should do some physical act. It is enough, if two, or perhaps one, does the unlawful deed, if the other be aiding, assisting and abetting. He becomes an actor by aiding and abetting. Suppose one actually pulls down a building, while the other two stand

by to watch and keep others off, they become participators in the act.

But it is argued that by the R. S. chap. 159, sect. 3, it is required that at least three persons should be present, committing some unlawful act, to constitute the offence, and that a person cannot be considered as committing an unlawful act, who does nothing to accomplish it. But if two persons pull down a house, and a third stands by to protect them, he commits an unlawful act. The common law defines what an unlawful act is. By that, all who aid, assist and abet, are held to do what the others do.

But it is said that it does not follow that the third person was aiding and abetting, because he was present.

Whether the third person was aiding and abetting, was a question for the jury, and it was fully submitted to them by the instruction. *Exceptions overruled.*

CASES

IN THE

SUPREME JUDICIAL COURT,

FOR THE

COUNTY OF CUMBERLAND,

1852.

PRESENT:

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

PRESTON *& al. versus* DREW.

It is competent for the State, by legislative enactment, operating prospectively, to determine that articles, injurious to the public health or morals, shall not constitute property.

If it should so conclude in relation to spirituous or intoxicating drinks, when designed to be used as a beverage, the conclusion would be justified by the experience and history of man, and would furnish no occasion to complain that any provision of the constitution had been violated.

The Act of 1851, "for the suppression of drinking-houses and tippling-shops," though it provides for the seizure and forfeiture of such liquors when designed for sale, does not enact that no property can be acquired in them when not designed for unlawful sale; but on the contrary, recognizes them as subjects of property, when kept for certain purposes.

The prohibition to sell such liquors does not prevent the acquisition of pro-

perty in them, or the transport of them through the State, when not designed for unlawful sale.

The general intent and avowed purpose of the Act would not be infringed by a construction which should allow the maintenance of actions, except for such liquors as were liable to seizure and forfeiture, and intended for unlawful sale.

The attaching of such a construction to legislative language, so clear and unequivocal, if within the province of the judiciary department, is perhaps very near to the outward boundary of its power.

If such a construction should be applied, it would, of course, remove the statute prohibition from all actions brought for liquors, except those proved to have been intended for unlawful sale.

Without such a construction, the statute prohibition is inoperative, as to actions for any liquors, except those proved to have been intended for unlawful sale, because as to other liquors the prohibition is violative of the State Constitution.

On Report from *Nisi Prius*, Howard, J. presiding.

Replevin for eight barrels of rum and for the casks, in which it was contained.

Plea, *non cepit*, with brief statement, justifying the taking by the defendant, as an officer, under a warrant, issued by virtue of the statute of 1851, chap. 211, "for the suppression of drinking-houses and tippling-shops." The plaintiffs reside in Massachusetts. The rum was sent by them to Brunswick, in this county, where it was stored for safe keeping, and it was there seized by the defendant.

One of the enactments of the statute is, that "No action of any kind shall be had or maintained in any court for the recovery or possession of intoxicating or spirituous liquors, or the value thereof."

Relying upon that enactment, the defendant moved for a nonsuit, which, for the purpose of bringing the subject before the whole Court, was ordered *pro forma*. If, upon these facts, the action is maintainable, a new trial is to be granted.

Orr, for the plaintiffs.

Fox, for the defendant.

Shepley, C. J. — The action is replevin of eight barrels of rum. A nonsuit was ordered, *pro forma*, by the presiding

Judge, that the question might be presented for deliberative consideration, whether the action can be maintained.

There is no proof presented by the report of the case, that the rum was liable to seizure and forfeiture, or that there was any intention to sell it, in violation of any law of the State.

If the action can be sustained, it must be maintained "for the recovery or possession of intoxicating or spirituous liquors."

It is provided by the sixteenth section of the Act approved on June 21, 1851, that "No action of any kind shall be maintained in any court in this State, either in whole or in part, for intoxicating or spirituous liquors sold in any other State or country, whatever; nor shall any action of any kind be had or maintained in any court in this State, for the recovery or possession of intoxicating or spirituous liquors, or the value thereof."

Among the rights secured to the people of this State by their Constitution, is that of "acquiring, possessing, and protecting property." Art. 1, sec. 1. The nineteenth section of the same article provides, "That every person, for an injury done him in his person, reputation, property, or immunities, shall have remedy by due course of law."

When a person is deprived of the possession of his property without lawful authority or right, he is injured in his property. The State, by its legislative enactments, operating prospectively, may determine that articles injurious to the public health or morals, shall not constitute property, within its jurisdiction. It may come to the conclusion that spirituous liquors, when used as beverage, are productive of a great variety of ills and evils to the people, both in their individual and in their associate relations; that the least use of them for such a purpose is injurious, and suited to produce, by a greater use, serious injury to the comfort, morals, and health; that the common use of them for such a purpose operates to diminish the productiveness of labor; to injure the health; to impose upon the people additional and unnecessary burdens; to produce waste of time and of property; to introduce disorder and

disobedience to law; to disturb the peace, and to multiply crimes of every grade. Such conclusions would be justified by the experience and history of man. If a legislature should declare that no person should acquire any property in them, for such a purpose, there would be no occasion for complaint that it had violated any provision of the constitution.

The act now under consideration should receive such a construction, so far as it may be possible consistently with established rules of law, as will carry into effect the declared design of its enactment, "The suppression of drinking-houses and tippling-shops." The first section prohibits the manufacture or sale of such liquors, except as therein after provided. The second section authorizes the appointment of an agent, in any town or city, to sell such liquors "to be used for medicinal and mechanical purposes." The other sections of the Act appear to have been framed to carry these provisions fully into effect; to prevent a violation of them, and to punish persons found to have been guilty of their violation.

While the Act provides for the seizure and forfeiture of the liquors designed for sale, in violation of its provisions, no positive enactment is found that no person shall acquire any property in them. Nor is there any language capable of receiving such a construction as would forbid it. The prohibition to sell them cannot prevent any person from acquiring and possessing them for his own use without any intention to sell them. Nor can it prevent their transport from one town or city to another, or through the State, when there is no intention to make sale of them. There is nothing found in the Act indicative of an intention to prevent their being property, when thus possessed or used. On the contrary, the Act authorizes them to be legally sold and used for certain purposes, and therefore to be the subject of property for such purposes. If they cannot be the subject of property, the town or city agents can have no property in them, nor can they or the towns or cities, by any action, obtain redress for their lawless and wanton destruction.

It is, however, insisted in argument, that a person, by the

common law, can no more acquire property in spirituous and intoxicating liquors, than he can in obscene publications and prints. There is a clear and marked distinction between them. Such liquors may be applied to useful purposes. This is admitted in the Act, by its authorizing their sale for medicinal or mechanical purposes. It is their misuse or abuse alone which occasions the mischief. Obscene publications and prints are in their very nature corrupting, and productive only of evil. They are incapable of any use which is not corrupting and injurious to the moral sense.

Such liquors are also alleged to be a common nuisance, and as such liable to destruction. There is nothing which can be regarded as a nuisance, when considered by itself alone, and separate from its use. It is the improper use or employment of a thing which causes it to become a nuisance. It would be not a little absurd to declare that to be a nuisance, and as such liable to be abated and destroyed, which the Act allows to be sold and purchased as an article useful for medicinal and mechanical purposes.

The Court cannot decide by an application of the rules of the common law, or by the provisions of the Act, that property cannot be acquired in spirituous and intoxicating liquors. The language of the Act, which declares that no action shall be maintained for the recovery or possession of such liquors or their value, is without limitation; and, by a literal construction, it would deprive one who has purchased them of a town or city agent, for allowable purposes, of the right to maintain an action to recover them or their value from a person who had taken them from his possession without any right or authority, or who had wantonly destroyed them. It would also deprive the town and city agents of all right to maintain an action for the recovery of such liquors which had been purchased by them, for sale according to the provisions of the Act, and which had been unlawfully taken from them or destroyed. It would also deprive a person of all remedy for the protection of such property by action, when procured for his private use and not intended for sale; and when he was carry-

ing it through the State without any intention of sale in this State. Can one conclude that an intelligent legislature could have intended to hold out such temptations for the lawless subtraction or destruction of private property? The results are too extraordinary and unjust to allow an intelligent and considerate mind to believe that they could have been foreseen and approved.

The general language must therefore be restricted so as to accomplish the general intent and declared purpose of the Act without producing such results, or the provision, now under consideration, must be pronounced to be a plain violation of the provisions of the constitution, and void. The general intent and declared purpose of the Act would in no degree be infringed by regarding the general language to be so limited as to forbid the maintenance of any action for the recovery or possession of such liquors or their value, which were liable to seizure and forfeiture, or intended for sale in violation of the provisions of the Act.

It may be said, that a court of justice is not authorized to introduce by construction such a limitation; that it savors more of legislation than of construction. It may be so; and if the Court may not introduce any such limitation without encroaching upon the forbidden province of another department of the government, it cannot omit its duty to declare that provision to be in violation of the provisions of the constitution, and void.

Nonsuit set aside and a new trial granted.

THE STATE *versus* CERTAIN SPIRITUOUS AND INTOXICATING LIQUORS; ROBINSON, CLAIMANT.

To obtain a forfeiture of intoxicating or spirituous liquors under the Act "for the suppression of drinking-houses and tippling-shops," it is necessary to be distinctly averred in the complaint, and proved on the trial, that the liquors were intended for sale in the city or town, in which they were kept or deposited, and by some person not authorized to sell the same in such city or town, under the provisions of the Act.

It is not, however, necessary to aver or prove that they were intended for sale in the shop, or other building, wherein they were kept or deposited.

The requirement of the constitution in reference to search-warrants, that "A special designation of the place to be searched" shall be made, is not answered by words, which, if used in a conveyance, would not convey it, and which would not confine the search to one building or place.

Under that constitutional provision, an article to be searched for, may, in the warrant, be described simply by its generic name, if it be destitute of any peculiar and known marks or qualities, by which, in the description, it can be distinguished from other articles of the same general name.

Thus, a warrant for the search of "spirituous or intoxicating liquors," will not be considered unauthorized, for the want of a sufficient designation of the thing to be searched for.

The officer's return, which omits to state how long the liquors had been advertised, or that the notice posted contained the number or any description of the packages, is too defective to authorize a decree of forfeiture based upon it.

Legal proof that the liquors were kept for sale by the owner or keeper of them, is an essential prerequisite to a decree of forfeiture, (where a claimant appears,) and to the imposition of a fine. Neither the affidavit contained in the complaint, nor the recitals in the warrant, nor the officer's return, can be taken as evidence upon that point.

When the complaint names no person as the owner, keeper or claimant of the liquors, the swearing of the jury in the form as of a criminal trial, is irregular. The finding that the defendant is guilty, would be merely void, there being no issue upon which it could rest.

ON EXCEPTIONS from the District Court, EMERY, J. presiding.

A complaint was made on the 25th of November, 1851, to the Municipal Court of Portland, by three voters of that city, setting forth that they had reason to believe, and did believe, that at said Portland, on, &c., spirituous and intoxicating liquors were and still are kept and deposited and in-

tended for sale, by a person unknown to the complainants, of said Portland; said person unknown not being authorized to sell the same in said Portland, under the provisions of the Act, entitled, "An Act for the suppression of drinking-houses and tippling-shops," in a certain building, situated on Plum street, called a shed, in said Portland, whereby said liquors have become forfeited to be destroyed.

Wherefore the complainants pray, that due process may be issued to search said shed, where said liquors are believed to be deposited, and if there found, that the same may be seized and safely kept until final action and decision be had thereon.

On the same day a warrant upon that complaint was issued by the Municipal Court, directed to the constable, requiring him to enter, in the daytime, the shed before named, and therein search for said liquors, and, if there found, to seize and safely keep the same until final action and decision be had on said complaint.

Upon that warrant the constable returned upon the same day, as follows: — "I have entered the shed situated in Portland on Plum street, being the same premises described in the written warrant, and have there made search for spirituous and intoxicating liquors, and have found and seized in said shed one cask of Madeira wine, marked B.; do. marked H. S. L. L. A. L.; 2 half casks do., ullage; 2 casks sweet wine, ullage, marked U. D. C. [G]; 2 casks port-wine, ullage, marked a key, C. & A.; 1 cask of Sicily wine, ullage, marked C. O. L. L. J.; 1 cask Otard brandy, and 89 half-pint glass bottles of ale; said liquors being spirituous and intoxicating, and now hold them in my custody until final action is had thereon.

"I have this [same] day advertised the above-described liquors by posting up a notice, in the entry of the Old State House, of the seizure and custody of the same, and by notifying all persons claiming said liquor or part thereof, that they may appear before said Court, and be heard in support of their claim and right to the same, and by leaving a copy of said advertisement with the Judge of the Municipal Court."

Record of the Municipal Court. At a Municipal Court, for

the city of Portland, holden 28th February, 1852: — [Then the complaint is recited.]

And now such liquors as are described in the warrant issued on said complaint are found and seized by the officer, and have by said officer been advertised agreeably to the provisions of the statute in such case made and provided. Richard R. Robinson, of said Portland, appears and claims the property described and seized; and the said Robinson claims the same as imported liquor contained in the original packages, and that they were not kept or deposited, and intended for sale in violation of law.

And now it not appearing to the Court that said liquors are or were, at the time of the seizure thereof, the property of any city or town in said State, and purchased for sale by the agent thereof for medicinal and mechanical purposes, or that the same were of foreign production, imported under the laws of the United States in accordance therewith, nor that said liquors were not intended for sale in said Portland by a person not authorized to sell the same therein, —

It is therefore considered and declared by the Court, that said liquors be and are declared forfeited and ordered to be destroyed; and Joseph M. Thompson is appointed to witness the destruction thereof.

And said Robinson appeals to the District Court for the Western District, to be holden at Portland within and for said county, on the first Tuesday of March next, and gives bond to said State with sureties in the sum of two hundred dollars, to prosecute said appeal and pay all fines and costs which may be awarded against him.

The appeal was duly entered in the District Court. And the defendant's counsel there moved that the prosecution be dismissed, for the reason that the complaint was insufficient, because it was not alleged in the complaint that the liquors were intended for sale in the place where they were kept and deposited, or in any specific place, or in the city or county where the complaint was made; and also for the reason that it did not appear that the court below had jurisdiction, or that

the property had been advertised, or the notice given, required by the statute.

The jury were impanneled in the usual manner in which they are impanneled in criminal trials, and directed if they found the defendant guilty to say so, and if they found him not guilty to say so, and no more. The counsel for claimant objected to this form of impanneling the jury, and contended that the issue of guilty or not guilty was not the proper issue to be presented to the jury. No other plea was put in by the claimant, than the written claim and answer filed in the Municipal Court, and set forth in the record which makes part of the case.

It was admitted by the claimant and on the part of the government, that the liquors seized were the property of said Robinson. The government introduced evidence to prove that the liquors described in the return were seized in the place described in the warrant, to wit, the shed in Plum street; but there was no evidence that the liquors were intended for sale in the place where they were seized, or where they were kept and deposited.

Counsel for defendant contended, that the evidence showed that the liquors seized were deposited for storage, and were not intended or offered for sale. Counsel for government contended, that the evidence tended to show that the liquors were intended for sale by defendant, though not in the shed.

The counsel for the claimant requested the Court to give the following instructions: "That the provision in the eleventh section of the Act, entitled an 'Act for the suppression of drinking-houses and tippling-shops,' which provides that if the owner or keeper of the liquor seized fails to appear, or unless he can show by positive proof that said liquors are of foreign production, &c., the liquor shall be declared forfeited, &c., and the owner or keeper shall pay a fine of twenty dollars, &c., is unconstitutional; that the provision, in said eleventh section, that the custom-house certificates of importation and proofs of marks on the casks or packages corresponding thereto, shall not be received as evidence that the liquors con-

tained in said packages are those actually imported therein, is repugnant to the laws of the United States, and is also unconstitutional; that the provisions in said section, which create a forfeiture or impose a penalty upon oath or affirmation not made in the presence of the defendant, and without requiring the production of any witnesses against him, are unconstitutional and void; that the eleventh section of said Act is unconstitutional; that the provision in the thirteenth section, imposing additional penalties upon a party for claiming his constitutional right of appeal from a tribunal, where he cannot have a trial by jury, to a court in which he may have the same, is unconstitutional; that it should be alleged in the complaint and proved at the trial, that the liquors were intended for sale in the place where the search is made; that it should be averred in the complaint, and proved at the trial, that the liquors were intended for sale by the person with whom they are alleged to be kept and deposited."

The Court declined to give the instructions requested, but did instruct the jury, that it was not necessary to aver or prove that the liquors were intended for sale in the place where they were kept or deposited, or in any particular place, but that they might inquire whether they were or not intended for sale by the defendant.

The jury returned a verdict of guilty.

Counsel for the defendant moved that the verdict be set aside, for the reason that it was not responsive to any plea in the case, and that it was not a finding upon any question properly presented or submitted to them; but the Court overruled the motion. To the foregoing rulings and instructions the said Robinson excepted, and his exceptions were allowed.

G. F. Shepley, for the claimant.

Tallman, Attorney General, for the State.

SHEPLEY, C. J. — The proceedings in the District Court are presented by a bill of exceptions. The complaint and warrant issued by the Municipal Court, with the returns of

the officer thereon, are made a part of the case. For a disposition of the case, it would not be necessary to consider all the objections and requests for instructions made at the trial. Several questions, which are presented, may be expected to arise frequently upon proceedings instituted by virtue of the Act approved June 2, 1851; and it may be desirable to have a decision upon them, that a correct practice may be established.

1. The District Judge correctly considered that the complaint did not contain any averment, that the liquors were intended for sale in the city of Portland, or at any particular place; and he instructed the jury "that it was not necessary to aver or prove, that the liquors were intended for sale in the place where they were kept or deposited, or in any particular place." By a transposition and use of the language contained in the eleventh section, which authorizes a complaint to be made, the averments required will be clearly perceived to be, "That spirituous or intoxicating liquors are kept or deposited and intended for sale" "in any store, shop, warehouse or other building or place in said city or town," "by a person not authorized to sell the same in said city or town, under the provisions of this Act."

The complaint should therefore contain a distinct averment that the liquors are intended for sale in the city, town or place, in which they are kept or deposited. A literal construction of the language would seem to require an averment that they were intended for sale in the store, shop, warehouse, building, or place, where they are kept or deposited. But a construction should not be made, which would have the effect to permit such evasions of the provisions of the Act, as would prevent the accomplishment of its declared design, if the language will admit any other fair interpretation. The construction insisted upon in argument, would be likely to have such an effect, — for it would not be difficult for a person to keep liquor in a shop in which it was not intended that it should be sold, while it was intended that it should be sold in an adjoining shop, or in one near it, to which it might be carried

in small quantities as required for sale without subjecting that which composed the fountain for supply to seizure and forfeiture. By another transposition and use of the language, the sense in which it was probably intended to be used, will be exhibited. "That spirituous or intoxicating liquors are kept or deposited and intended for sale" "in said city or town," "in any store, shop, warehouse, or other building or place."

It is not, therefore, necessary to aver in the complaint, that the liquors are intended for sale in the shop or other building in which they are kept or deposited.

2. The language used in the complaint, as descriptive of the place of deposit, is recited in the warrant. It is described as "a certain building situated in Plum street, called a shed;" and the officer is commanded to enter and search "the shed before named."

There might be several sheds situated on that street, and the officer would be authorized to search any one of them, and all of them would therefore be liable to search. If the command had been to search a certain building situated in Fore street, called a shop, all the shops situated on that street might have been subjected to search.

The constitution declares that "no warrant to search any place, or seize any person or thing shall issue without a special designation of the place to be searched, and the person or thing to be seized. When a designation so limited and special, as to distinguish the place or thing from all others of the like kind, cannot well be made, it should not be required. There can be no difficulty experienced in practice, if such a designation of the place be required as would, if used in a conveyance, be sufficient to describe and convey it. That cannot be considered as a special designation of the place, which, if used in a conveyance, would not convey it, and which would not confine the search to one building or place. The complaint and warrant were, therefore, defective, and the search was unauthorized.

It is insisted in argument, that there is no such special de-

signation of the thing to be searched for and seized, as the provisions of the constitution require; that liquors not intended for sale must be seized by virtue of such a warrant when found in a warehouse or building with those intended for sale; that such has been and must continue to be the effect, when liquors intended for sale, and not intended for sale, are found in the warehouse of a railway or in the hold of a vessel; that to prevent this, a more limited and special designation of the liquors should be required, in conformity to the provisions of the constitution; that the particular kind of liquor should be designated; that a description by the use of generic terms is not a special description.

The question, whether such a general description can be allowed, is not unattended by serious difficulties. It must be admitted that liquors, not intended for sale and not liable to forfeiture, may be seized by virtue of such a warrant, when found in the same building or place in which those intended for sale are deposited. It is difficult to perceive how such a result can be prevented by a more limited or special designation. If the liquors were designated by the use of the terms brandy, rum, gin, whiskey and wine, with a further description of being contained in a hogshead, pipe, barrel, or other cask, and with a limitation of each kind to a particular description of cask or vessel, there might be found other brandy, rum, gin, whiskey and wine, in like casks or vessels, and in the same building or place, and not intended for sale, and which might be seized by virtue of a warrant, in which the liquors to be seized were attempted to be thus more particularly designated. If a warrant should be issued to search for stolen goods, designated as bales of cotton cloth, other bales of cotton cloth of like appearance, and not stolen, might be found in the building or place designated, and be seized.

It has been contended that these difficulties might be avoided, by distinguishing the property to be searched for, from other property of the like kind, by a statement or averment that the property to be searched for was owned by a particular person. It is no part of the description of an article to

state by whom it is owned. The special description required by the constitution, could not have been intended to include an historical account of the article. It may often be found difficult, if not impossible, to describe articles stolen, or liquors intended for sale, so perfectly that they can be easily distinguished by an officer having no previous knowledge of them, from others of a similar kind, not stolen or not intended for sale.

The administration of law is occasionally, and perhaps unavoidably, so imperfect that innocent persons may be subjected to inconvenience and expense by official acts and processes designed for the punishment of the guilty. If liquors not intended for sale, or goods not stolen, should be seized by virtue of such a warrant, the owner would be enabled to procure their restoration, by the adoption of proper measures to accomplish the object. Such a designation of the thing to be seized could not have been intended to be required, as would prevent any effectual search for stolen or other secreted goods. There may be different kinds of spirituous liquors, which, to the eye of an observer, would present the like appearance, and if no warrant to seize them, when thus seen, could be issued without a designation of the particular kind of liquor, it would often be very difficult, if not impossible, to execute the law. If goods or liquors should be required to be designated by marks upon the casks, vessels, boxes, or bags containing them, searches and seizures of them might often be prevented by an obliteration or removal of the marks. If a designation by the species and not by generic terms were required, the difficulties alluded to might not be avoided, for others might be found in the same warehouse or place, of a like species and appearance.

That provision of the constitution was designed to prevent unreasonable searches and seizures, but not to prevent the accomplishment of any useful purpose, by searches and seizures. It could not have been the intention of the framers of the constitution to require a designation of the thing to be searched

for, so special and particular as to prevent the accomplishment of any beneficial purpose by a search-warrant.

The Court is not satisfied that the complaint and warrant ought to be considered as illegally made and issued, because the thing to be searched for was not more specially designated. The Judge of the District Court was not obliged to decide these questions on a motion to dismiss the complaint. If the exceptions were overruled, these matters might be immediately presented for the decision of this Court, by a motion in arrest, and it has been thought best to examine them.

3. The return of the officer made to exhibit the time and manner of advertising the liquors seized, is too defective to authorize a decree of forfeiture based upon it. It does not state how long they had been advertised, or that the notice posted contained the number or any description of the packages.

The twelfth section of the Act requires, "that the liquors should be advertised for two weeks, by posting up a written description of them, containing the number and description of the packages as near as may be." Such a return may authorize a decree of forfeiture, when no claimant appears; but no such decree can properly be made, until it appears that they have been advertised as the Act requires.

4. The jury appear to have been impanneled in form for the trial of a person accused of crime, and they found a verdict of guilty.

The complaint contains no averment that the liquors were deposited or kept by the claimant, or that they were intended for sale by him. His name is not mentioned in it. No person can be put on trial for an offence without any written complaint or charge made against him, that he has committed one. The whole proceedings in this respect were irregular and unauthorized. The verdict appears to have been found without any issue framed, upon which it would rest. There does not appear to have been any finding of the jury, that the liquors were kept or deposited and intended for sale, as alleged

in the complaint, which was the only matter that could have been properly submitted to them.

5. The judgment or decree of the Municipal Court, declaring the liquor to be forfeited, appears to have been made upon such proof only as was exhibited by the complaint and warrant, with the returns of the officer, and upon the absence of any proof of certain facts named in it. This was vacated by the appeal, but as it presents the practical administration of the law, it will be useful to examine it, that the practice may be established.

Certain provisions of the eleventh section of the Act, if considered alone, would seem to authorize a judgment or decree upon inspection of such documents, and upon the absence of proof of the facts stated. The section contains these words: "And the owner or keeper of such liquors shall pay a fine of twenty dollars and costs, or stand committed for thirty days in default of payment, if, in the opinion of the Court, said liquors shall have been kept or deposited for the purposes of sale."

It could not have been the intention to have liquors claimed by any person, adjudged on a trial to be forfeited and destroyed without any legal proof whatever that they were intended for sale. A construction of the Act which authorizes it would allow liquors which had just been purchased of an agent appointed by a city or town, for medicinal or mechanical purposes, to be seized, condemned, and destroyed, upon the affidavit of three persons, being voters, that they had reason to believe, and did believe, that they were kept and intended for sale; for it would not be possible for such a purchaser to procure and introduce on trial, the proof required of him, as a claimant, to obtain their discharge.

The same proof which would, on a trial, be sufficient to authorize a decree that the liquors should be destroyed, appears by the Act to have been regarded as sufficient to authorize a sentence or judgment, that the person who had kept them for sale, should pay a fine of twenty dollars. There is no provision for a distinct and separate trial of the liquors and

of the keeper of them for sale. No such fine can be imposed upon the keeper or owner, until the Court has formed an opinion that the owner or keeper kept them for sale. That opinion must be an official and judicial opinion; and no Court can form such an opinion without proof of the fact, that the liquors were kept for sale by the owner or keeper of them. An affidavit made by three persons, not as testimony on the trial, but for the purpose of obtaining a warrant, that they have good reason to believe, and do believe, that the liquors were intended for sale, does not afford the least legal proof of the fact to be established on trial, that they were intended for sale.

The facts that the liquors were kept or deposited in the city or town, and intended for sale there, must be proved by legal testimony, introduced on trial, to sustain the prosecution.

To allow a fine to be imposed upon a person, without proof from witnesses introduced on trial, would be to permit an open violation of the provisions of the sixth section of the first article of the constitution, which declares, that in all criminal prosecutions, the accused shall have a right "to be confronted by the witnesses against him."

The exceptions are sustained. The proceedings being too defective and irregular to be sustained, are quashed, and the liquors are restored to the claimant.

SCUDDER *& al. versus* DAVIS *& al.*, AND THE LEWISTON WATER POWER COMPANY, *their trustees.*

The provision of R. S. chap. 119, sect. 5, was not intended merely for the benefit of trustees, but may be pleaded in abatement by the principal defendant, in a trustee suit, wherein the only trustees are a corporation aggregate, having their established and usual place of business, and having held their last annual meeting, in a county other than that in which the suit is brought.

ON REPORT from *Nisi Prius*, SHEPLEY, C. J. presiding.

ASSUMPSIT.

The trustees come, and by their disclosures admit indebtedness to the principal defendants.

The principal defendants filed a plea in abatement. This was followed by a replication and a rejoinder, upon which an issue to the county was taken. The ground of the claim to have the writ abated, was, that the suit is brought in the wrong county.

After examining the testimony, the parties, withdrew the case from the jury, and submitted to the Court who are "to enter such judgment as the rights of the parties may require."

J. Goodenow, for the plaintiffs.

T. A. D. Fessenden, for the defendants.

HOWARD, J., orally. — The case is submitted for judgment as the rights of the parties may require. A consideration of the pleadings is therefore unnecessary. The evidence shows that the trustees have their established and usual place of business in the county of Lincoln, and there held their last annual meeting, and for several of the last years have usually held their meetings there.

The statute ch. 119, § 5, is imperative that, upon such facts the action should be brought in that county alone.

The plaintiffs however have contended that this provision of the statute was for the benefit of the trustees only, and may therefore be waived by them. But the language is unambiguous and clear. We have no choice but to give it effect as it reads.

As the action could not rightfully be *commenced* for this county, it cannot be *maintained* here.

Writ abated.

APPENDIX.

YORK, 1850. — HENRY HOLMES, *petitioner for administration de bonis non, on the estate of Jeremiah Smith, appellant from a decree of the Judge of Probate, ex parte.*

IN this case the following facts are proved. Jeremiah Smith died previous to March, 1816. Administration on his estate was granted to his widow, Mercy Smith, March 18, 1816. She returned an inventory of the estate March 17, 1817. Whole amount $326,61.

The administratrix represented the estate insolvent, and a list of claims was returned to the Judge of Probate, by the commissioners amounting to $179,18, on January 3, 1818, at which time she settled her first account crediting the personal estate inventoried, and leaving a balance of $23,97 due her. At the Court of Common Pleas, January term, 1818, the administratrix obtained license to sell real estate to pay the debts; and previous to the sale had her dower assigned. On the 10th December, 1818, she sold the real estate, except the *reversion* of her *dower*, for $37. On the 17th March, 1823, she settled her second account, crediting the amount for which the real estate was sold, and leaving a balance still due to her of $29,09. The widow occupied or leased the land assigned her for dower, till her death, about the year 1846, never having sold the reversion, and not having paid any of the debts due from the estate.

The petitioner being one of the creditors whose claims had been allowed by the commissioners, applied for administration *de bonis non*, so that the remaining real estate of Smith might be sold, and the proceeds distributed. The Judge of Probate refused to grant administration, as more than twenty years had elapsed since the original administration was granted, and the report of commissioners of insolvency was made and accepted.

N. D. Appleton, for the petitioner —

Cited the Stat. of Mass. of 1784, and Statutes of Maine, 1821

chap. 51, sect 20, 25, R. S. chap. 105, sect. 39, *Kempton* v. *Swift*, 2 Metcalf, 70, to show that the first administrator had no authority to sell the reversion, under her license, and that there was no limitation to the power of the Judge of Probate to grant administration *de bonis non.*

TENNEY, J., orally. — The decree of the Judge of Probate must be reversed.

KENNEBEC, 1851. — HINDS *versus* CALEB STEVENS *& als.*
HINDS *versus* CALEB STEVENS *& al.*

ON REPORT from the District Court, RICE, J.

Debt upon relief bonds, given to procure the debtors' discharge from arrest on execution. The appropriate record shows that the plaintiff at the term of the District Court, held on the *first Tuesday of August*, 1848, *being the first day of said month*, recovered a judgment against said C. and G. W. Stevens, jointly.

The execution recites that the judgment was recovered at a Court holden on the first Tuesday of August, 1848, and requires the officer to collect interest on the amount from the 16th day of August, 1848, being the time of the rendition of the judgment. The defendants were arrested on the execution and gave the several bonds now in suit. The bonds each recite that judgment was "obtained" on the first Tuesday of August, 1848. The case was submitted for decision upon a stipulation that, if considered by the Court, that the evidence shows the existence of such a judgment as is recited in the bonds, the defendants are to be defaulted.

Per TENNEY, J. — A default must be entered.

North, for the plaintiff.

Whitmore, for the defendants.

SOMERSET, 1851. — WOOD *versus* ESTES *& trustees.*

THIS is an appeal, between the principal parties, taken from the District Court.

SHEPLEY, C. J. — The appeal brings up the disclosures for adjudication here.

Stewart moves that the case be dismissed, for the alleged reason, that the sureties in the appeal-recognizance are insufficient.

The recognizance was taken before a justice of the peace, under

the general Act of Amendment of 1841, by which ten days may be allowed for the taking of a recognizance in that mode.

PER CURIAM. — The judgment of the justice as to the sufficiency of the sureties is final. The motion is overruled.

PENOBSCOT, 1851. — BLAKE *versus* RUSS.

THIS is a motion by the defendant for a new trial, on the ground, that the verdict was against the evidence. The mover made up what he considered a report of the facts, but did not present it to the plaintiff's counsel, until the day before the commencement of this term. It was objected to, because presented too late.

SHEPLEY, C. J. — The rule on this point has been so often communicated, that it apparently ought to be well understood.

It is that the counsel making the motion should draw up a report of the evidence under the sanction of his professional oath, and sign and place it on file by the middle of vacation, that the opposing council should have the other half of the vacation in which to examine it and, if need be, suggest corrections in a counter report.

ATKINSON *versus* SNOW.

REAL ACTION.

In order to prove the foreclosure of a mortgage which one Dougherty had given to the *demandant*, the *tenant* offered to read from the newspaper the advertisement wherein the demandant had given notice that the condition of the mortgage had been broken, and that he claimed to foreclose. This was objected to by the demandant's counsel, and thereupon the tenant's counsel read it from the records of the registry office.

Afterwards, in argument to the jury, the tenant's counsel read it from the newspaper, the demandant's counsel resisting, but the Judge permitting it. To that permission, exception was taken.

W. G. Crosby, for the demandant.

Godfrey, for the tenant.

HOWARD, J., orally. — The record had been read, and was present for the use of either party. It was the same with the advertisement in the newspaper. It was, therefore, immaterial upon which paper the counsel was looking, when he read the advertisement to the jury. It might have been so done, merely for convenience.

To that convenience the Judge might properly assent. The exception was without foundation, and must be overruled.

THE INHABITANTS OF KIRKLAND *versus* THE INHABITANTS OF BRADFORD.

By the Settlement Act of 1821, a person, resident in a plantation, at the time of its incorporation into a town, thereby gained a settlement, notwithstanding that, within the next preceding period of five years, he had applied for and received supplies as a pauper in the same plantation.

THE *plantation* of Bradford had furnished relief in 1828, to one Cunningham, as a pauper. Afterwards, in 1831, the plantation was incorporated into the town of Bradford, at which time Cunningham had his home within its limits.

In 1844, he fell into distress in the town of Kirkland, where he received supplies as a pauper from the overseers of the poor of that town. This suit is brought to recover for those supplies.

The defence set up was, that Cunningham acquired no settlement in Bradford by having his home there at the time of its incorporation; because, within five years prior to that time, he had received supplies as a pauper. The Judge ruled that, by having his home in Bradford at the time of its incorporation, the pauper acquired a settlement in that town.

To that ruling the defendants excepted.

SHEPLEY, C. J., orally. — The question of the settlement is to be governed by the Act of 1821. The second section provides that "all persons dwelling and having their homes in any unincorporated place at the time when the same shall be incorporated into a town, shall thereby gain a legal settlement therein."

That enactment has no qualification as to supplies previously furnished.

But it is further urged that it is contrary to the current of authorities, that one, while a pauper, can be allowed to acquire a settlement in his own right. If such be the authorities, (and we have now no occasion to examine the question,) it is inapplicable in this case, for it has not appeared that Cunningham was a pauper at the time of the incorporation, though he had been previously.

Exceptions overruled.

BRAINERD AND WIFE *versus* BRACKETT.

IN a suit by one of three persons for a malicious prosecution, instituted by the defendant against the three, it was *Held*: —

1. That the record of the police court, in which the complaint was tried, may be used by the plaintiff as evidence.

2. That declarations of one of the accused persons, not made in the presence of the plaintiff, cannot be used as evidence for the defendant to prove probable cause.

3. That it is not allowable to the defendant for the purpose of proving probable cause, to show that the accused were generally suspected, or were generally believed, to be guilty of the crime charged.

EMERSON *versus* COLLAMORE *& ux.*

ON FACTS AGREED.

WRIT OF ENTRY. — William Hooper was once the proprietor of the land. While he was the owner, it was attached in a suit in the name of *Hollis* Parlin against him. After the attachment, he conveyed the land by a title which has been regularly deduced to the demandant.

In Parlin's suite, a judgment was recovered against Hooper, and the land was duly levied under it.

The defendants deduced title to themselves, under *Horace* Parlin, by his deed dated subsequent to the levy.

It is admitted, (if the evidence of it could be received, when objected to,) that, by mistake, the action was brought in the name of *Hollis*, instead of *Horace* Parlin, and that *Horace* was the real creditor.

SHEPLEY, C. J., orally. — Whether the evidence to show the mistake was or was not admissible, it is not now necessary to decide. If inadmissible, the title is proved to be, not in the demandant, but in *Hollis* Parlin, and there is nothing to show that there is not such a person in full life. If the evidence be admissible, the title was in *Horace* Parlin, under whom the tenants have obtained it. In neither contingency, can the demandants recover.

NORRIS *versus* VINAL.

THE defendant offered two depositions, the captions of which stated, " that the adverse party was notified to attend." Annexed to one of the depositions was an original notification, upon which was a return by an officer; but the caption contained no reference to that notification, which was as follows: —

" Penobscot ss. Oct. 18, 1850.

" I have made search for the within named adverse party, or E. G. Rawson, his attorney, and can find neither within my precinct. I have therefore left a true attested copy of the within for said Rawson at the Bangor House in Bangor, as his last place of abode in my precinct." " J. H. Wilson, Deputy Sheriff."

The plaintiff objected to the depositions, because no legal notice of the taking had been given; and he introduced Mr. Rawson, who testified, that about one month before the date of the officer's return, he settled his bill of board at the Bangor House, and left, removing all his things, with the intention of not returning to that house to live, and went a journey for his health; and did not return until after the caption; that when he did return, he stopped at the Bangor House for a day or two only, as a guest; and that he afterwards boarded at another house in Bangor; that he never intended to abandon his residence in Bangor; that he had no actual notice of the taking of the depositions; that when the notice was served and the depositions taken, he was out of the State.

The objection was overruled and the depositions were read. The plaintiff, (the verdict being against him,) excepted.

Cutting, for the plaintiff.

Washburn, for the defendant.

SHEPLEY, C. J., orally. — The caption of each deposition shows a notice. In neither of them is any reference made to the officer's return on the notification. That return is not, therefore, to be considered as a part of the caption. Neither that return nor the absence of Rawson controls the certificates in the captions.

Exceptions overruled.

GODDARD *versus* HILL.

SMITH owed Kirby. Kirby owed the plaintiff. To discharge his debt to Kirby, Smith delivered to the plaintiff the note now in suit for $1400, the plaintiff knowing that it was made for that purpose, and the plaintiff gave up a note he had against Kirby, but the evidence did not show its amount. The defence is that the note now in suit was given for a larger sum than was due from Smith to Kirby. The defendant offered to prove that when the defendant received the note, he agreed to make the deduction, if the note was too large to pay Kirby's claim against Smith.

Held by the Court, that such testimony could not be admitted, as it would be at variance with the written contract.

The defendant then contended that it was his right to prove a partial failure of consideration and offered to do it. *Held* by the Court,

that the giving up by the plaintiff of the note he held against Kirby, was a sufficient consideration, even though it were of an amount less than the $1400, and the evidence was rejected.

Peters, for the plaintiff.

Blake, for the defendant.

WALDO, 1851. — STATE *versus* JEWELL *& als.*

INDICTMENT for murder.

The case did not involve the decision of any legal question to be reported.

It may, however, be well to present a sketch of the proceeding in the impannelment of the jury, both as a matter of practice and as showing, though to a small extent, the sentiments of the community on the subject of capital punishment.

Thirty-six jurors were called. To each one the oath was administered, to make true answers to such questions as should be asked by the Court or by their order. The questions which the prisoner's counsel then put to most of them were, in substance, whether they had formed or expressed any opinion as to the innocence or guilt of the prisoners, and whether they were conscious of any bias or prejudice against them.

The inquiries then made by the counsel for the State, were in substance, in most of the cases, whether the juror had any conscientious scruples which would prevent him from returning a verdict against the prisoners, if the proof should show them to be guilty; and whether he was related to either of the prisoners.

It was permitted to both parties to ask, in various forms of language, whether the juror was conscious of any such bias or preference as to prevent his acting with impartiality, and whether he had heard, read or conversed upon the subject; together with such connected questions as should elicit the views and feelings of the juror upon the subject matter.

Of the thirty-six, who were thus examined on the *voir dire*, there appeared to be twenty-five who had not formed such an opinion of the innocence or guilt of the prisoners, and who did not entertain such conscientious scruples, as to disqualify them to try the case. Of these, thirteen were challenged peremptorily and the other twelve were sworn as jurors. Three of the twenty-five, were opposed to the law, inflicting capital punishment in any case; but, believing it to be the duty of each citizen to acquiesce in the existing laws of the land, they said they should have no conscientious scruples in returning a verdict of guilty, if such should be the proof.

The remaining eleven were set aside by the Court, four of them having formed opinions as to the guilt of the prisoners; — six of them being conscientiously scrupulous of returning a verdict of guilty, in any case where the death penalty might be inflicted; —

the other merely stating, without offering the ground of his objection, that he could not return a verdict of guilty, in any case, where the punishment might be death.

One of the prisoners was acquitted, the jury finding him to have been insane. The other was convicted of "manslaughter," and sentenced to seven years confinement at hard labor in the State Prison.

Keene, for defendant, moves for an indorser to a writ, and offers a witness to prove that the plaintiff is resident at Chicago.

The witness stated that the plaintiff's wife lived with witness after the plaintiff went off, that she received two letters from her husband, requesting her to come to him at Chicago; and that she went, in December last.

THE COURT ordered that an indorser be furnished by the middle of vacation.

THOMPSON *versus* HINDS.

PETITION for a review, asking for an order of notice upon the adverse party.

PER CURIAM. — An application for a review, on the ground of any alleged facts, must name the witnesses by whom the facts are to be proved, and state what particular facts each witness is expected to testify. This is required, with a view to apprize the respondent as to what may be necessary in the arrangement of his defence.

In this petition, there is no mention of the witnesses expected to be used; and therefore the order of notice cannot be granted.

VINALHAVEN *versus* WASHINGTON.

MOTION by the defendants for a new trial, on the ground that the verdict was against evidence. The defendant's counsel had drawn up a report of the evidence, and was proceeding to read it to the Court.

The opposing counsel objected to it, because not filed by the middle of vacation.

SHEPLEY, C. J. — What is the counsel, making the motion, to do? It is not enough simply to present the motion. It is his duty to enforce it. He is to let the Court and the opposing party know the grounds of it. How shall this be done? The Court have presented the mode. He is to draw up a report, under the sanction of his professional oath, presenting the evidence.

The rule requires that this report be filed by the middle of vacation, in order that the other party, if he thinks it to be incorrect, may place on file a report under the like authentication, so that, from the two reports, the Court, aided also by their own minutes, may ascertain what the evidence was.

This rule has been in force many years, and has been so often acted upon, that we must presume it to be well understood by the profession. Now, to relax this rule and require an opposing party to meet the case, without the prescribed opportunity of preparation, is to deprive him of a LEGAL right. The rule was devised, not for the mere convenience of the Court, but for the just administration of rights.

A party may voluntarily waive his right. The Court cannot require him to.

In this case, the rule has not been observed, and there must be

Judgment on the verdict.

HASKELL *& al. versus* HAZARD.

OF amending petitions for review.

This was a petition for the review of an action in which the petitioner had been defaulted.

There were three petitioners and they set forth, in the petition, that the default was occasioned by a mistake, and without their fault, and stated the circumstances under which it took place. The petition however, did not mention the names of any witnesses, by whom they expected to prove those circumstances.

On a suggestion that the petition was defective in that respect Webster, for the petitioners, submitted that, though in cases where there had been a trial, and where reliance was had upon newly discovered evidence, it was requisite to set forth the witnesses' names, it is otherwise in cases, where the matter passed, as this did, by default. He also asked leave to amend the petition, by inserting the names.

Abbott, for the respondent, objected to the amendment, for the reasons, —

I. that a supersedeas having been granted, and a bond thereupon filed, the bond would be vacated by the amendment.

II. that the petitioner's position would not be benefited by the amendment, because the bond given was ineffectual.

1. It was given in the penal sum of $1450. — whereas it should have been in the penal sum of $1338,28, that being double the

amount of the damages and costs rendered in the original suit, and the statute, ch. 123, § 8, requiring a bond for that amount.

2. Because there are three petitioners, and the condition of the bond is not that *they* shall pay, &c., but that *two* only of them should pay.

III. Because, though the *petition* is signed by *three*, the *bond* is executed by *two* of them only.

IV. Because the condition of the bond is, that the obligors shall pay the *amount of the bond* with interest, whereas the statute requires a condition that the obligors shall pay the amount of the damage and cost, with interest, in case such should be the judgment of the Court upon the review. It is, therefore, not a statute bond.

To these objections a reply was made by Webster.

After observing that there was an irregularity in addressing the application for the supersedeas, not to the Court but to one of its members, although when directed to the Court, one of them had authority to act upon it; and after further observing that as one of the Court, in granting the supersedeas, had passed upon the suitableness of the bond, there was no occasion to revise his decision, the Court granted leave to amend.

STATE OF MAINE.

IN HOUSE OF REPRESENTATIVES, May 31, 1851.

Ordered, that the following questions be submitted for the opinion of the Supreme Judicial Court.

QUESTION 1st. Has the Legislature constitutional power, after a general representative apportionment has been made, in conformity with the constitution, to alter the Representative Districts so established, until the next general apportionment?

QUESTION 2d. Was it competent for the Legislature of 1850, to incorporate the town of Kennebec in the County of Kennebec, from parts of five different Representative Districts, as established by the last general apportionment, and annex said town to the Representative District of Readfield and Fayette, so as to give the inhabitants of said town of Kennebec the right to vote in the election of representatives to the Legislature, with the inhabitants of Readfield and Fayette?

OPINION.

The undersigned respectfully present their opinion upon the questions stated in an order of the House of Representatives, bearing date on May 31, 1851.

It is provided by the second section of the fourth article of the constitution, that on or before the 15th day of August, in the year 1821, and "within every subsequent period of at most ten years and at least five," the Legislature shall cause the number of the inhabitants of the State to be ascertained, exclusive of foreigners not naturalized and Indians not taxed; and that "the number of representatives shall, at the several periods of making such enumerations, be fixed and apportioned among the several counties as near as may be according to the number of inhabitants, having regard to the relative increase of population."

When an apportionment of representatives has been made according to these provisions, "among the several counties," it must remain without alteration for five years — for no new enumeration and apportionment can be made within that time, without a violation of that clause of the constitution which provides that the least period for an enumeration shall be five years.

Provision is made by the third section of the same article, for an election, by the inhabitants of the towns and organized plantations of each county, of the representatives assigned to that county by the apportionment; those having less than fifteen hundred inhabitants are to be classed into districts having that number, "and so as not to divide towns." This number is to be increased or diminished, if found to be too large or too small to apportion all the representatives

assigned to any county among the towns and plantations of that county. The Legislature may at each apportionment authorize a town or plantation not entitled to elect a representative, to elect one for such portion of the time as shall be equal to its portion of representation.

The constitution then declares, that "the right of representation so established shall not be altered until the next general apportionment." This language cannot be considered applicable to the preceding clause only. It has reference to the "right of representation" granted by that section, and established by virtue of its provisions, irrespective of the manner in which it has been established. It is so explicit and decisive, that the undersigned cannot hesitate to answer the first question in the negative.

The second question assumes that the town of Kennebec was incorporated "from parts of five different representative districts, as established by the last general apportionment," and annexed "to the representative district of Readfield and Fayette, so as to give the inhabitants of said town of Kennebec the right to vote in the election of representative, with the inhabitants of Readfield and Fayette." The question is understood to assume, also, that there were inhabitants entitled to vote, residing on those parts of the different districts which were incorporated as the town of Kennebec. Thus understood, the answer to the second question is also in the negative.

The transfer of territory, and of inhabitants residing upon it and entitled to vote, from one representative district to another, is an alteration of a right of representation in both of those districts before the next general apportionment.

If such an alteration could be constitutionally made without any general apportionment, political parties having majorities in both branches of the Legislature at different times, might, by the incorporation of new towns, by the division of existing towns, and by the alteration of town and plantation lines, contribute essentially to the continuance of their power, and thus introduce mischiefs which were intended to be prevented by those sections of the constitution.

The right of the Legislature to incorporate a town composed of parts of several other towns is not intended to be denied or questioned. If not done at the time of a general apportionment, provision may be made that such inhabitants as are entitled to vote for a representative shall remain united to their respective districts for the election of a representative, until the next general apportionment.

ETHER SHEPLEY,
JOHN S. TENNEY,
SAMUEL WELLS,
JOSEPH HOWARD.

To the House of Representatives of the State of Maine.

CHARGE TO THE GRAND JURY.

At the Waldo County session, 1851, two persons were indicted for murder. Vide ante p. 583. C. J. Shepley has kindly consented to the publication of the interesting charge made by him to the Grand Jury upon that occasion.

Gentlemen of the Grand Jury: —

You may be called in the discharge of your official duties to investigate the circumstances, under which a fellow citizen has been killed, while alleged to have been assisting an officer in the discharge of his official duties. The occasion therefore is not unsuitable, if it does not require, that the principles should be stated, by which men should be governed, when required by the laws of the country, in which they dwell, to do an act or to refrain from doing it.

Obedience to established law is the principle, upon which alone our civil and religious freedom can be maintained.

Much has recently been spoken and written respecting the duty of obedience to human laws, and there has been much of vague statement and of involved and of inconclusive argument, affording no very definite or clear rules easy of comprehension by a whole people, and fitted for application to the common concerns of life. And yet it is believed, that men unlearned in the law and unqualified for legal investigations or for intricate and difficult processes of reasoning, were not intended to be left without rules for their government, which could be readily comprehended and applied.

The offence alluded to is reported to have been committed while resisting the execution of a judgment rendered by a judicial tribunal.

When a judgment is obtained by one person against another by a regular and legal course of judicial proceedings, and the person, against whom it has been obtained, considers it to have been illegally or unjustly obtained, he cannot be permitted to offer the least resistance to the execution of it. If the judgment has been obtained against him by false testimony, or by any accident, negligence, or oversight on his own part, it is not the less binding and operative upon him, until he obtains relief from it in the manner prescribed by law; and while it remains in force the least resistance to its execution is unauthorised and illegal, and is liable to be punished in the same manner, that it would be, if the judgment had been rendered without the occurrence of any accident, neglect, or false testimony.

If this were not the rule of law and of duty, every man would be at liberty to resist the regular and constituted administration and execution of the laws; to do that which seemed right in his own eyes; and there would be no security for person or property without resort to an armed force. Our present form of government could exist no longer for any beneficial purpose.

A person may believe, that an act of the legislature is unauthorised by the constitution of the State or of the United States, and the inquiry is presented, whether he should obey it. It will be his first duty to ascertain, if possible, whether there is good reason to believe that his opinion is a correct one. After obtaining the best information within his power, should he continue to be of the same opinion, he may assume the responsibility, disregard the enactment, and abide

the consequences. But he must not offer the least forcible resistance to the execution of the law esteemed to be unconstitutional, even when it acts directly upon his own person or property, nor incite or encourage others to do so. He must quietly permit it to operate upon his person or property in the same manner, as he should do, if there were no doubt, that it was a constitutional and valid enactment, and submit to its effect, until by a regular course of legal proceedings he can obtain the decision of a judicial tribunal provided for that purpose, and thus, if the act be decided to be unconstitutional, obtain redress for any injury to his person, property, or rights, occasioned by the enforcement of the unconstitutional enactment.

He may not under any circumstances resort to force himself or incite others to do so, to prevent the execution of the law by a regular judgment or otherwise by officers appointed for that purpose, although it may finally prove to have been unconstitutional and void.

To allow him to do so would be to permit every man to be the final judge of the constitutionality and validity of the laws, to disturb the public peace by resisting them, and to introduce disorder, violence, and the shedding of blood, upon the judgment and according to the will and pleasure of every man in the community.

The rule of duty is plain. A man may disregard a law, which he believes to be a violation of the constitution and abide the consequences upon his person or property; but he must not offer the least resistance to the regular execution of such a law or incite others to do so, however severely it may act upon his person, property, or rights. He must seek for redress through a regular course of legal proceedings.

A person may believe, that an act of a legislative body legally passed in accordance with the provisions of the constitution, by which it is governed, is contrary to the laws of God. The inquiry is then presented respecting his duty to obey it.

His first duty is to ascertain, whether the act is clearly and directly opposed to the divine law. When this has been ascertained clearly, as when for example such an act should require him to hate and to kill his enemy, while the divine law declares, thou shalt love thine enemies and shalt not kill, the human law is to be disobeyed, and the divine law obeyed. The person is not at liberty to obey the human law. When no commandment or precept in the revealed will of God can be found, which if written under the human law would be clearly opposed to it, it is the duty of the citizen to obey the human law.

It may be, as it has often been, contended that, although no precept of the divine law clearly opposed to the human law can be found, a person may ascertain certain rules and principles resulting from the whole revealed will of God, and may conclude, that these rules and principles are opposed to a law of the country, and that he is therefore authorized and required to disobey it.

The reasoning, on which this position is based, is unsound; and the position itself is unauthorized by the divine commandments and precepts.

Few persons could be found, who would agree upon all the rules and principles resulting from the whole of the revealed will of God.

Such rules and principles would be different when presented by those, who were more or less highly endowed with intellectual power, and by those whose minds were more or less highly cultivated and trained to profound, elaborate, and intricate courses of investigation and deduction; and by those who were more or less under the guidance of a correct moral sense and religious influence, and who were more or less perfectly instructed in the divine precepts. These rules and principles might be as numerous and various as the degrees of mental power, of mental cultivation, and of correct moral and religious instruction.

It could not have been the intention of the divine Instructer to leave men in such a condition, that when called upon to obey the laws of their country, there should be found no certain rule of conduct prescribed by Him, applicable alike to all persons, and so clearly made known that all persons of common capacity, who could read, or comprehend what was read by others, could understand and act upon it. It must have been His intention to communicate a common and plain rule for all classes of persons, or there would be no common and plain rule of duty.

When therefore a person can find no direct and palpable conflict between a divine and human law, he is not at liberty to enter upon an elaborate course of investigation and inquiry, whether a rule cannot be deduced by his scriptural studies and mental operations, as resulting from the whole of the divine precepts, which rule will be in conflict with human laws, and to act upon this rule of his own making.

Rules and principles thus deduced are not of God. They are the workmanship of man. To pursue such a course is to set up a rule often elaborated from his own pride of intellect and of cultivation, or from self-will, or ignorance, or fanaticism, in place of the divine will, and to make it the foundation of a wilful opposition to the regularly established laws of the country.

It is not intended to deny that such rules may be useful, and may be used to determine the moral duties of man, when those duties are not plainly prescribed by divine or human laws.

When one is required and obliged to disobey a human law, because it is opposed to the plain letter and declaration of the divine law, is he therefore authorized to oppose by force the execution of the human law? Certainly not. It is his duty to disobey calmly and quietly, without the least attempt to resist, or otherwise to oppose the execution of the human law by the officers appointed to execute it. He is simply to disobey it, and to abide the consequences of his disobedience, whatever they may be, without any attempt by force or violence or by inciting others to use it, to prevent the full effect of the penalty, imposed by the human law for its violation, being inflicted upon his person or property.

The duty is plainly inculcated in the scriptures not to oppose by force or violence the laws of an existing government irrespective of their character. It is one's duty to follow the example of Daniel and refuse to worship Darius, and to follow his example also by submitting to go into the den of lions without any attempt by force or violence to prevent the execution of the law upon himself.

This is not a fit occasion to consider under what circumstances a person may by the divine law be permitted to overthrow an existing government by revolution, and these remarks are not applicable to such a question. Nor are they intended to question the right of every citizen to discuss with entire freedom the character of existing laws, and to show, that they permit or encourage moral misconduct, and that they are otherwise unwise or inexpedient, and that they ought to be altered or repealed.

Some persons attempt to justify their disobedience of human laws by asserting, that they cannot in conscience obey them.

The present occasion is not an appropriate one to consider whether conscience may not be the best guide for the determination of man's moral duties, where the revealed will of God respecting them is not and cannot be known.

It may be safely asserted, that conscience is not to be relied upon as affording a correct or safe rule of duty for a people, to whom the will of God has been made known.

The revealed will of God constitutes the rule of right and wrong. There can be nothing right, which is opposed to it; nothing wrong, which is in accordance with it.

Man's conscience during all his past history has been frequently and greatly opposed to it.

Men's consciences differ according as their moral and religious and mental instruction has been more or less correct and thorough.

The divine will, as plainly revealed and made known in the scriptures, has, in the manner already stated, determined man's duty respecting obedience and disobedience of human laws. It is the only perfect rule of duty. No man can be assured, that his own conscience does afford a perfect rule. He, that would substitute for the divine will the conscience of man, or his own conscience, would in effect cast away the christian religion as a rule of duty and unite himself with those who may have no better or safer guide than conscience, often blunted by the indulgence of pride, passion, self-will, and self-interest, darkened by erroneous and prevailing opinions and instructions, and blinded by superstition and fanaticism. He, that would do this, knoweth not what manner of spirit he is of, or he would not attempt to thrust aside the revealed will of God as a rule of duty and to set up his own conscience in its place. It is but an exhibition of self-conceit and of revolting presumption for any man favored with a revelation of the divine will to present his own conscience as affording a more correct and infallible rule of duty than the revealed will of God; or to question the sufficiency of the divine precepts and to attempt to supply their defects by a voice within him.

It is not intended to deny that the conscience of man was given to aid him in the discharge of his moral duties; or that it should be used for that purpose. It should however occupy its proper position of a monitor to man, to walk in the right ways of the Lord, and it should not exalt itself to the position of a revelator of the divine will. When it attempts to do this, it displaces that revealed will, and usually becomes the revelator of the self-will and perversity of man.

THE insertion of the following article, which was first published in Livingston's Biographical Sketches of Eminent American Lawyers, now living, and with which the Reporter is permitted to enrich this volume, will, it is believed, be highly gratifying to the legal profession of Maine, and to the public.

HON. NATHAN WESTON, LL. D.,

LATE

CHIEF JUSTICE

OF

MAINE.

THE subject of this memoir was born in that part of Hallowell which now constitutes the city of Augusta, in July, 1782. He was the fourth in descent from John Weston, who emigrated from Buckinghamshire, in England, twenty years after the landing of the Pilgrim Fathers at Plymouth, and finally settled at Reading, Massachusetts, about twelve miles from Boston. The family were distinguished for their piety, and somewhat remarkable for longevity.

His father was an enterprising, active man, of varied experience through a long life. After a campaign or two, in the old French war, prior to the capture of Quebec, he emigrated to Maine, which then contained a small and scattered population. Before the Revolution he was the owner of Abicadassit Point, on Kennebec River, where he resided, engaging principally in commerce, and sometimes obtaining masts for the king's ships, from the fine timber then to be found on Eastern River, a branch of the Kennebec. Near the close of the Revolutionary War he removed to what is now Augusta. He was, at one period, a public man, and in successive years a member of the House, Senate, and Council of Massachusetts. In 1781 he married the mother of the chief-justice. She was the daughter of Samuel Bancroft, Esq., of Reading, and sister of the late Dr. Bancroft. With her, although his third wife, he lived fifty years. She had previously married Mr. Cheever, of Salem, where she lived eight years, until his decease. Two children of this marriage survived, one of whom was the father of Dr. Cheever, of New-York.

Of her first husband she was accustomed to relate an anecdote, which it may not be improper to introduce for its historical interest. Prior to the battle of Lexington, Gov. Gage had sent a small force

to seize certain military stores which had been collected at Salem. The citizens were apprised of the movement, and determined to resist it. While they were removing the plank from a bridge, over which the detachment had to pass, Mr. Cheever received a slight wound from the bayonet of a British soldier, who was at once thrown into the stream by the citizens. The force having no orders, probably to proceed to extremities, retreated, without effecting their object. There is little doubt that the first blood shed in the drama of the Revolution, flowed from the veins of Mr. Cheever.

Judge Weston's mother had a strong and cultivated mind; her father was the leading man in his town, which he represented many years in the General Court during the stirring scenes which preceded the Revolution, voting and exerting an influence uniformly on the patriotic side. She delighted her children with reminiscences of her early days; the state of society in ante-revolutionary times, the reverence which was felt for the clergy; their conversation and bearing, when visiting at her father's; the strictness of his household; their consecration of the Sabbath; the uniformity with which he discharged the duty of family prayer, reading the scriptures and religious instruction, in which his colored servants participated, as equally interested in the hopes and promises of the gospel. The savor of the Puritan influence of an earlier day still pervaded the community; they were not inattentive to their secular interests, but their highest hopes were centered in a future state of existence. The opening mind of the daughter was early imbued with these influences; she became a professor of religion in her youth — she felt its power; and understood what it was, morally and intellectually. With the Bible, the sure word of God, the only acknowledged touchstone of Protestant faith, she was most familiar. From the time she learned to read, she never failed each year to read it through in course. The subject nearest her heart she endeavored to impress with a mother's devotion, upon the minds of her children. She was, besides, a general reader of all interesting books, to which she could find access. Many valuable and standard works were, under her direction, read in the family, and became topics of conversation. Judge Weston ascribes his thirst for knowledge, and his aspirations in his literary and professional career, very much to the influence of his mother.

The common schools, in the village where he resided, were sometimes kept by a master who had received a classical education; and he had made some progress in a preparation for college, before Hallowell Academy was open for instruction. When that took place, he attended there, under the tuition of its learned and talented preceptor, Samuel Moody. His industry, quickness of apprehension, and great proficiency, won for him the esteem of his instructor, who continued ever after his steady friend. In 1808, they were both members of the Massachusetts legislature. At the first session his pupil made his maiden speech, which was well received by the house, and spoken of as indicative of no ordinary talent. The countenance of his worthy preceptor was radiant with delight, and he declared to a friend that he was never more highly gratified.

Mr. Weston entered Dartmouth College, and, in 1803, received its

honors. While there, he maintained a high rank among his fellow-students, devoting to general reading such portions of his time as were not necessary to a thorough proficiency in the classics. All who knew him, while resident there, speak of him with interest. Three or four years after his graduation, in the presence of a number of gentlemen at Governor Sullivan's table, in Boston, the late President Wheelock boasted of him, as a son of Dartmouth, of great promise, which the governor took pleasure in communicating to his father, then a member of his council.

He selected for his future career the profession of the law, and entered, in Boston, the office of George Blake, Esq., Attorney of the United States for the district of Massachusetts. The attractions of the city did not seduce him from application to study. He was an assiduous attendant upon the courts, when in session, which were the forensic arena of many distinguished jurists. Among others were Parsons, afterwards chief justice ; Dexter, who had been in both houses of Congress, and in the cabinet of the elder Adams ; Sullivan and Gore, each of whom was subsequently elevated to the governor's chair in Massachusetts ; and the elegant and brilliant Otis, at that time the delight and favorite of the city.

Unless Virginia may be excepted, Massachusetts had been decidedly, from the commencement of the Revolution, the leading State in the Union. She had furnished a large number of the prominent public men of the day. These had clustered in and about Boston, the cradle of the Revolution. Politics, as a science, the formation and establishment of institutions which were to affect the destiny of an empire, rising rapidly to greatness, trained and exercised the first minds on subjects of deep interest to the happiness of mankind. Many of these, while a student, Mr. Weston had opportunity to see and hear. Their conversation, as well as their public displays, was highly instructive and improving. His inquisitive mind derived knowledge from the eye and the ear, which the most devoted student cannot acquire in the closet. He always regarded the privileges thus afforded him, as having had a favorable effect upon the expansion of his powers.

Mr. Blake had acquired a handsome fortune, which enabled him to live elegantly. He was a man of fashion, and, having a keen relish for the pleasures of society, was little inclined to the severer labors of his profession, either by study or otherwise. He was a man of sense, a fine *belles-lettres* scholar, distinguished for the amenity of his manners and his remarkable colloquial powers. He was received with pleasure everywhere ; and visited occasionally Washington, Philadelphia and New York, mingling much in society, and well advised in all the passing topics of the day. Whatever he acquired, he communicated in the most interesting and happy manner. He acquitted himself respectably, in the court-house, in the discharge of his official and professional duties ; but in all important causes chose to invoke the aid of Mr. Dexter. Together, they could not be surpassed by any professional array that could be brought against them.

The vast aid which a student now derives from American reports, and other legal publications of a high order, did not then exist.

Nothing of this kind was to be found, except Dallas' Reports of three or four volumes, and one or two which had been published in Connecticut. The student was expected to read Coke Littleton, Sheppard's Touchstone, Plowden, and Saunders, among the more ancient, and most of the modern English Reports then published. Bacon's Abridgment was much read by students; but Mr. Blake, under the advice of Judge Lowell, an eminent jurist of his day, preferred the Digest of Baron Comyn. His pleader, in that publication, which is unrivalled for method and clearness, was studied by Mr. Weston with profound attention. He thus became a proficient in the art and mystery of special pleading; at this day, of less practical consequence, but not without its use, as a discipline of the mind in the analysis and elucidation of legal principles. But the most elegant and attractive work, at that period, on English law, was Blackstone's Commentaries. It was so great a favorite with Mr. Blake, that he never failed to give it an annual reading. He recommended the same course to his pupil. This advice he followed for many years, and, as he says, with great advantage.

Mr. Blake, who had become much attached to his pupil, and appreciated his talents and acquirements, upon his admission to the bar, in July, 1806, proposed favorable terms of partnership in business, which he urged him to accept. This, Mr. Weston declined, choosing to push his fortunes in Maine.

He first opened an office in Augusta, but was, in a few months, persuaded by friends in that part of the country to remove to New Gloucester, in the county of Cumberland. He there resided three years, in full and varied practice. The bar of that county were learned and respectable, with whom, in the court-house in Portland, he had the benefit of an active professional training.

In June, 1809, he married Miss Cony, daughter of the late Judge Cony, an elegant and beautiful woman, who still survives to cheer and embellish his evening of life. This connection, among other reasons, induced him, in March, 1810, to return to Augusta, where he still resides.

In 1811 he accepted the office of chief justice of the Court of Common Pleas for the second eastern circuit of Massachusetts. This office he held until the separation of Maine from that commonwealth. He was, when appointed, but twenty-nine years of age, probably the youngest man who had received a judicial office in New England. It was soon perceived that he was placed in a position for which he was eminently qualified. His readiness, impartiality, courtesy, and dignity were highly appreciated by the bar and the public. Upon the erection of Maine into a separate State, he was, in June, 1820, elevated to the bench of the Supreme Court.

In 1825 he was, by the nearly unanimous vote of the members of the Legislature, without distinction of party, nominated for the office of governor. Retaining, however, a predilection for the judicial department, he declined the proffered honor.

Upon the retirement of Chief Justice Mellen, in 1834, he was appointed his successor. He presided in the Supreme Court seven years, which had become the limitation of the tenure of judicial

office, and finally retired from the bench in October, 1841, having discharged the duties of a judge, without interruption, for thirty years. In the enjoyment of uniform health, he was never, during that long period, detained from duty a single day by indisposition.

At *nisi prius*, his legal learning and varied experience, always ready for use, enabled him to rule promptly upon all the legal points raised. He was patient, cool and attentive in causes to be submitted to a jury, preserving, through long and protracted trials, the most unruffled equanimity. In his charges to the jury, the bearing of complicated facts was exhibited in a manner so methodical and lucid, as to be readily appreciated by the least disciplined mind. The haze of professional subtility was dissipated; light was evolved from obscurity; and the path of justice and equity rendered luminous and clear.

The law of real estate in England, derived originally from the feudal system, although reduced to a science under the lead of the old lawyers of the Norman school, had been involved in great complication. It was covered with a web of legal subtility, to be understood and handled only by the initiated. Although somewhat simplified by English legislation, it still remains a system, rather for the benefit of the noble and wealthy, in their family settlements, than for the community generally.

But we are much indebted to English jurists for the elucidation of the law of personal property and personal rights, which have become of paramount consequence by the vast increase of wealth arising from commerce and manufactures. During the long administration of Lord Mansfield, he found the principles of the common law sufficiently elastic and expansive to be applied happily to the new order of things. Judge Weston sympathized more strongly with minds of this class, than with those who feared to travel, except *per vias antiquas*. He respected the principle, *stare decisis*, when it became a rule of property, or of commercial necessity and convenience; but when decisions, or technical principles, were invoked to defeat the claims of justice, it was not easy to persuade him that he was bound to yield to their authority. It was then that the elements of the law, with which his mind and memory had become imbued, became of vast practical use and application. The principles of the common law, many of which were embodied in Latin maxims of great point and significance, in his skilful hand proved broad enough to relieve him from the pressure of technical views, limited to too narrow a field.

Of his labors in the solution of legal questions, brought before the whole court, the first twenty volumes of the Maine Reports remain an enduring monument. His judicial style, clear, terse and elegant, would not suffer in the comparison with the most finished opinions to be found in the American Reports. It is impossible to misunderstand his meaning, which stands out with a prominence that can neither be mystified nor perverted. If precedent was wanting, he was guided by the analogies of the law and the great principles of justice. Many of his opinions are not less distinguished for their elevated moral tone than for their sound legal logic.

He was not opinionated. While a question was pending, his mind was open to conviction. He sought light wherever it could be found;

but when his judgment settled upon thorough research and mature consideration, he maintained it with undeviating firmness.

The honorary degree of doctor of laws was conferred upon him by Dartmouth, Bowdoin, and Waterville colleges.

In the cause of education he has ever taken a deep and active interest; and as one of the oldest trustees in each board of the two colleges of Maine, has exerted an influence upon the welfare of those institutions that could not have been spared.

It would not be easy to find a man who possesses a greater amount of general information than Chief Justice Weston. He is as profound in theology, which has always been one of his favorite studies, as he is learned in the law; while he seems to be as familiar with every department of science and literature, as if his life had been spent in pursuits of this class, instead of the investigation and application of legal principles. His insatiable thirst for knowledge has been constantly gratified and stimulated by new acquisitions; while an iron constitution, which has shown itself proof against any amount of intellectual exertion, has enabled him to push his researches, without interruption, to the present hour. What he thus acquires seems always at perfect command. There is no confusion in his knowledge. His mind is like a well-ordered cabinet, where everything is skilfully arranged and available; where every shell, and gem, and fossil, and mineral, is within reach, either for ornament or illustration.

His memory is very remarkable; it is, perhaps, one of the secrets of his strength, as it certainly forms a considerable source of the fascination of his conversation. He is a man of vivid impressions. What he hears and what he reads, no less than what he sees, seems to be daguerreotyped upon his mind, never to fade. He has a clear conception of the stirring events which have taken place within the last fifty years, in both hemispheres, as if they had passed under his own eye. Persons distinguished in our own history, now long dead, with whom he has had intercourse, are as distinctly remembered as if he had parted with them but yesterday. Racy anecdotes, illustrative of their characters and of their times, and therefore matters of general interest, are told by him with all the freshness of a recent occurrence. As with an enchanter's wand, he raises the curtain, and exhibits past events, making them, like well-executed tableaux, to stand out as present realities. It is on such occasions that the regret is often repeated, that he does not employ his gifted pen in delineating interesting reminiscences, which will otherwise die with him.

As an extemporaneous speaker, he stands deservedly high. His manner is calm, deliberate, dignified, graceful and impressive. The same classic elegance and chasteness of language which belong to his written opinions, also characterize his extemporaneous addresses. It was a common remark, that his language could not be improved, but was ready for the press just as it fell from his lips. Perhaps he cannot be said to be an eloquent man, in the common acceptation of the term. He ordinarily lacks excitement. His discourse, like a deep stream, flows, perhaps, too smoothly. Yet this very calmness,

which is habitual with him, renders an occasional burst of excitement vastly more impressive. The fire is there, though it may slumber. The writer remembers one occasion when, under the influence of strong emotion, he spoke for two hours, with a sustained and thrilling and masterly eloquence that he has never seen surpassed. The smoothly flowing stream had become a torrent, that swept on with a resistless momentum. He was so early placed upon the bench, that his career at the bar was necessarily short; yet it was sufficient to show, that had he allowed his mind to develop itself thoroughly in this channel, instead of casting it in a judicial mould, he would have obtained an enviable eminence as an advocate. He was cool, cautious and ready; presenting the strongest points of his client's cause in the most winning and advantageous aspects; and defending, with admirable skill, those which were more assailable. No man could parry better than he, the force of an adverse authority, or show greater ingenuity in discriminating his case from the one cited against him.

The writer would do injustice to the subject of this sketch, did he neglect to speak particularly of those social qualities, which constitute one of the most attractive features of his character. He shines in the department of domestic and social life. It is in the unreserved intercourse, which mutual love and esteem produces, that the charm of his conversation is felt by both young and old. It is here that his real amiability of disposition finds full play. With a lively and cultivated imagination; a ready, genial wit, which pleases all without wounding any; quickness at repartee; an inexhaustible fund of anecdote, relating to matters and things and persons, within his own recollection; great general information and power of graphic delineation; all united with the manners and bearing of a thorough gentleman, render him at once the ornament, as well as the favorite of social life. An evening spent with him, when he is in one of his best colloquial moods, is an event to be remembered.

Chief Justice Weston is now, at the age of three-score years and ten, in possession of full bodily and mental vigor; with an eye as keen and as full of fire as in his younger days. After a term of active service, unusually long, he is quietly enjoying, in easy circumstances, the evening of life. Yet, though retired from business pursuits, he is still actively engaged in the acquisition of useful knowledge, and in keeping up with the progress of the age; performing, as a matter of recreation, an amount of study and reading, that many younger men would regard as no inconsiderable labor. From the "loopholes of retreat" he looks with eager interest upon the panorama of this moving world, allowing no item of general interest in any part of the globe to escape him.

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2. When such a return has not been recorded until the *third* ensuing term, a writ of *certiorari* will be granted, with a view to quash the whole proceedings. *Ib.*
3. The granting of a writ of *certiorari* is at the discretion of the Court. *Dyer* v. *Lowell and Hamblet*, 260.
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Waldo v. *Moore*, 511.

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1. A continued occupation of land for twenty years gives title to the occupant, unless such occupation be shown to have been in subserviency to title in another. *Goodwin* v. *Sawyer*, 541.
2. Such occupation, to give title, need not be personal. It may be by agent or tenant. *Ib.*
3. A right by prescription to flow land to a given height, by means of a mill-dam, cannot be sustained, unless the flowing had caused damage to the owner of the land. *Wentworth* v. *Sanford Man. Co.*, 547.
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2. The appointment of an administrator to be guardian of minor children, interested in the estate, does not furnish any legal inference that he had been previously discharged from the administratorship. *Ib.*
3. The lapse of twenty years furnishes a legal presumption that a debt, though secured by a mortgage of land, has been paid. *Sweetser* v. *Lowell*, 446.
4. Parol proof is receivable for the purpose of rebutting such a presumption. *Ib.*
5. A deed has no effect till its delivery. The date is *prima facie* evidence, that it was then delivered. But the actual time of delivery may be proved by parol. *Ib.*

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1. In view of all the parts of an unsealed contract, signed as agent by one having authority so to sign, the agent will not be bound by it, if it be apparent that the intention was to make it the contract of the principal and not of the agent. *Rogers* v. *March*, 106.
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